**UNIVERSITY OF BALTIMORE LAW FORUM**

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## LETTER FROM THE EDITOR-IN-CHIEF

Dear Reader:

The *University of Baltimore Law Forum*'s Editorial Board and Staff is excited to present you with the second and final issue of the 2023-2024 academic year. Through our array of publications, *Law Forum* has provided our readers with unrivaled legal analysis and insight into matters concerning Maryland since 1970. In this body of work, *Law Forum* proudly rises to the occasion.

We begin Volume 54.2 with a foreword by Dean Ronald Weich reflecting on his time at the University of Baltimore School of Law as its Dean for 12 years, and with his commendation of this publication. Next, Volume 54.2 welcomes an article by Lawrence Greenberg, Esq., and Brice Baker, Esq., providing background into noneconomic damage caps and a call to abolish Maryland's noneconomic damage cap. This article also includes an appendix to noneconomic damage caps in all fifty states and the District of Columbia.

Issue 2 welcomes two insightful student comments. First, Sara von Stein illustrates the dire situation in U.S. immigration courts, making the case that the Maryland Constitution guarantees a right to counsel in deportation proceedings and why the General Assembly must pass legislation guaranteeing such. Then, Alexandra R. Mitchell explores the shortcomings in Maryland's healthcare system and how Maryland can make its healthcare system more equitable through an arbitration model similar to the federal No Surprises Act. Finally, Volume 54.2 concludes with five recent development pieces highlighting some of the Supreme Court of Maryland's most important rulings this year and conveying their impact on Maryland's legal community. For more work from this year's staff, please visit ublawforum.com to read some of our Hot Topic pieces.

As my time as Editor-in-Chief concludes, I want to personally thank *Law Forum*'s staff for your ardor in establishing a cohesive publication system and bettering the *Forum* experience. I have enjoyed working alongside each member of *Law Forum* Volume 54 to achieve our goals and look forward to seeing your future impact on the legal profession. I want to offer personal gratitude to Cristiana Saballos, whose meticulous editing guaranteed an impeccable end product, and Victoria Garner, for her thoughtful counsel throughout the year towards a more equitable journal. I also want to thank Mustafa Salameh, who graciously edited both of these letters for Volume 54. Last, I am excited to welcome Kristopher Vicencio, Esq., as one of *Law Forum*'s faculty advisors.

On behalf of the *University of Baltimore Law Forum*, we thank you, our subscribers and readers, for your lasting support and interest in our publication. We hope you enjoyed this volume.

Sincerely,
Ali Mahdi
Editor-in-Chief
University of Baltimore Law Forum, Volume 54, Issue 2

Member, National Conference of Law Reviews

**UNIVERSITY OF BALTIMORE LAW FORUM**

**VOLUME 54 SPRING 2024 ISSUE TWO**

**FOREWORD**



**ARTICLE**



**COMMENTS**



**RECENT DEVELOPMENTS**

## FOREWORD

# THE BENCH, THE BAR, AND BALTIMORE LAW

**By: Dean Ronald Weich***

I would like to thank the editors of the *University of Baltimore Law Forum* for inviting me to provide a foreword to the Spring 2024 issue. This is a welcome opportunity for me to reflect on the special relationship between our law school and the surrounding legal community, including the unique role of the *Law Forum*.

In the summer of 2024, I will conclude my 12th and final year as Dean of the University of Baltimore School of Law. I arrived at the law school as a stranger to both legal academia and the Maryland legal community. I had practiced law for many years down the road in our Nation's capital, but the D.C. and Maryland legal universes are separated by much more than the 40 miles between the Washington Monument on the National Mall and the original Washington Monument in Mount Vernon Place. I soon came to see that Maryland has a distinct legal culture, a fascinating legal history, and a proud bench and bar of its own.

I also came to understand the central role of the University of Baltimore School of Law in the Maryland legal community. UB[1] is one of only two law schools in Maryland. In contrast, six law schools jockey for position in Washington, D.C., and cities such as Boston, Chicago, and New York are similarly crowded with numerous law schools. It is an accident of history that both Maryland law schools are located in Baltimore City, but there is enough "turf" in Maryland for both schools to thrive.

I see UB as Maryland's "hometown" law school. The University of Maryland Frances King Carey School of Law is a fine institution with which UB often collaborates, but Maryland Law seeks to position itself as more of a national law school, one whose graduates gravitate toward D.C. and federal

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* Ronald Weich has been dean of the University of Baltimore School of Law since 2012. Previously he served as an assistant attorney general in the U.S. Department of Justice, as chief counsel to Senators Harry Reid and Edward M. Kennedy, and as a partner in the law firm Zuckerman Spaeder LLP.

[1] The University of Baltimore recently rebranded itself as "UBalt," but most Maryland lawyers, especially those who graduated from the school, refer to it by its longtime moniker "UB." Thus, Professor Byron Warnken was "Mr. UB" not "Mr. UBalt." After spending 12 years among proud UB alumni, I'll stick with "UB" or "UB Law" in this essay.

practice. In contrast, more than two-thirds of UB Law students are from Maryland, approximately 95% of them take the Maryland bar, and three out of four UB Law graduates practice law in Maryland after admission to the bar.

As a result, UB-educated lawyers are omnipresent in the local legal landscape. More than a third of the state court judges and half of the elected state's attorneys in Maryland are UB Law graduates. Many Maryland law firms are led by and populated with UB Law graduates, as are the general-counsel offices of many companies headquartered in Maryland. Prominent UB Law alumni can also be found in the Maryland General Assembly and in various state and local government agencies, in both elected office and senior staff roles.

UB Law alumni are especially influential within the local bar associations as well. This year, the Presidents and Presidents-Elect of the Maryland State Bar Association, the Baltimore City Bar Association, the Baltimore County Bar Association, and the Maryland Association for Justice are all University of Baltimore School of Law graduates.[2]

UB Law's alumni network in Maryland extends beyond the Baltimore region. UB's presence is felt throughout the State, including in the less populated counties on the Eastern Shore and the western panhandle. When I speak at local bar association meetings, I always ask the UB Law graduates to identify themselves. In the outer counties, almost all attendees raise their hands.

UB Law's substantial presence in the Maryland legal market offers great advantages to current students, as our alumni assist in the education of UB Law students in many ways. These alumni serve as adjunct professors, moot court coaches, externship supervisors, and career mentors, among other roles. Our school boasts impressive employment outcomes, in part because UB alumni are delighted to help the next generation of UB lawyers enter the profession. Alumni loyalty is one ingredient of the "secret sauce" that makes our law school successful. Over 90 percent of UB Law 2022 graduates were employed ten months after graduation, and UB Law's alumni network played no small part in this accomplishment.

The pipeline from UB Law to the Maryland legal community is most evident in the frequency with which UB Law graduates obtain coveted judicial clerkships. More than a quarter of all UB graduates start their legal

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[2] The University of Baltimore School of Law alumni in these roles are: MSBA President Jason DeLoach and President-Elect Rafael J. Santini; Baltimore City Bar Association President James W. Motsay and President-Elect Teresa Epps Cummings; Baltimore County Bar Association President Lisa Y. Settles and President-Elect Sondra M. Douglas; Maryland Association for Justice President David A. Muncy and President-Elect Gwen-Marie Davis.

careers as judicial law clerks, many for judges who themselves graduated from UB Law. I receive heartwarming feedback from judges about the performance of their UB Law clerks, who often outshine clerks from "fancier" law schools. These clerkships are an excellent springboard into the profession because the work is challenging, the perspective is valuable, and the judges typically become lifelong mentors to their clerks.

The fact that UB Law is one of only two law schools in Maryland also gives our school an important voice on key legal policy issues in our state. The two Maryland law deans serve as *ex officio* members of various committees, including the judicial task force that recommended Maryland's adoption of the Uniform Bar Exam and the Advisory Board for the Baltimore City Inspector General. I also chaired the search committees that recommended the three most recent appointees to the U.S. Bankruptcy Court in the District of Maryland, two of whom were UB Law graduates.[3] Furthermore, UB Law housed the Maryland Access to Justice Commission as the commission transitioned from a judicial branch agency to an independent advocacy organization.

Another robust connection between our law school and the Maryland legal community exists because of the work of our nationally renowned law clinics. UB Law's clinics represent a wide range of vulnerable populations across the state, while clinic professors and students work to improve the administration of justice in their respective fields. For example, The Bob Parsons Veterans Advocacy Clinic played a key role in the establishment of veterans' treatment dockets in the district court in Baltimore City District Court and several Maryland counties. Other clinics receive referrals from Maryland-based legal service providers and partner with these providers on public-interest initiatives.

UB Law's academic centers are similarly positioned to influence statewide policies. The Sayra and Neil Meyerhoff Center for Families, Children and the Courts is working to address injustices associated with the foster-care system in Maryland, while the UB Law Center on Criminal Justice Reform is a key voice on state and local justice initiatives.

Finally, I point with pride to this publication, the *University of Baltimore Law Forum*, as a shining example of the deep relationship between our law school and the Maryland legal community. *Law Forum* was founded in 1970 when the law school only offered a part-time evening program. Even before the school was accredited by the American Bar Association, however,

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[3] The two most recent UB graduates appointed to the U.S. Bankruptcy Court are Lori Simpson and Maria Chavez-Ruark. Notably, former *Law Forum* editor A. David Copperthite serves as a federal magistrate.

UB students and faculty recognized the need for a publication – literally a forum – devoted to developments in Maryland law.

Over the years, *Law Forum* articles have highlighted and sometimes led to statutory developments in Annapolis. The publication has tracked the evolution of case law in trial and appellate courts across Maryland and explained doctrinal idiosyncrasies in Maryland law.[4] Contributors have included UB professors, UB students, and leading Maryland practitioners, many of whom are UB alumni. *Law Forum* has boldly addressed cutting-edge issues in our state arising from new technologies, as well as controversies concerning criminal justice and election law.[5]

Commendably, the *Law Forum* editors have sought to preserve Maryland's legal history, even when that history is shameful. In 2023, *Law Forum* hosted a symposium on the struggles of Maryland's early Black lawyers, including Edward Garrison Draper, who was denied admission to the Maryland bar in 1857 solely because of the color of his skin.[6] Chief Justice of the Supreme Court of Maryland, Matthew Fader, attended that symposium and led his Court to grant Mr. Draper posthumous admission to the Maryland bar in a ceremony attended by *Law Forum* editors.

Law reviews from other schools are notorious for publishing highly theoretical scholarship that is rarely read. In contrast, judges and lawyers across this state have told me that *Law Forum* is indispensable reading for Maryland practitioners. For that reason, the *Law Forum* is frequently cited as authority in legal briefs and judicial opinions.

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[4] *See, e.g.,* Timothy Capurso, *How Judges Judge: Theories on Judicial Decision Making*, 29 U.BALT L.F. 5 (1998); *see* T.W. Lapin, "*In the Matter of a Murdered Person…" The Qur'an 2:178*, 6 U.BALT. L.F. 14 (1976); *see* Richard Perry, *Relative Preference, Emotional Attachments, and the Best Interest of the Child in Need of Assistance*, 50 U.BALT. L.F. 83 (2020).

[5] *See* Dana M. Levitz & Ephraim R. Siff, *The Selection and Election of Circuit Judges in Maryland: A Time for Change*, 40 U.BALT. L.F. 39 (2009); *see* Kelli L. Cover, Comment, *Baltimore City Schools Need Many Things — A Personal Police Force Is Not One of Them,* 48 U. BALT. L.F. 69 (2018); *see* Michael Berman, *The Duty to Preserve ESI (Its Trigger, Scope, and Limit) & The Spoliation Doctrine in Maryland State Courts*, 45 U.BALT. L.F. 129 (2015).

[6] Inspiration for this symposium came from an article which *Law Forum* published in 2022. *See* John G. Browning, *To Fight the Battle, First You Need Warriors: Edward Garrison Draper, Everett Waring, and the Quest for Maryland's First Black Lawyer*, 53 U.BALT. L.F. 1 (2022).

Accordingly, I am grateful for the dedication and hard work of *Law Forum* editors to maintain *Law Forum's* stellar reputation across the state.

* * *

It has been my honor to serve as dean of the University of Baltimore School of Law. Shortly after I arrived, we opened the John and Frances Angelos Law Center, with keynote addresses by then-Vice President Biden, U.S. Supreme Court Justice Elena Kagan, and legendary Maryland Chief Judge Robert M. Bell. In the years that followed, leading national legal figures such as U.S. House of Representatives Speaker Nancy Pelosi and U.S. Attorney General Eric Holder visited the school. But as the state's "hometown" law school, our commencement speakers have most often been leaders of the Maryland legal community, including Chief Judge Mary Ellen Barbera, Maryland Attorney General Brian Frosh, Judge Andre Davis of the U.S. Court of Appeals for the Fourth Circuit, Baltimore City Solicitor Ebony Thompson, and Baltimore City First Lady Catherine O'Malley. This year, Maryland Comptroller Brooke Lierman will address the graduates.

Throughout my years as dean, we have surmounted serious challenges related to enrollment, finances, and, of course, the global pandemic. Local and national tragedies such as the deaths in police custody of Freddie Gray and George Floyd, and the attempt to disrupt the peaceful transfer of presidential power in 2021, have shaken our faith in American institutions. At the same time, such events inspired UB students to learn how to use the law to defend and improve those institutions.

I am proud to leave my successor with a legal institution that is healthy, stable, and highly regarded across the state and beyond. As the University of Baltimore School of Law enters its second century, this institution remains a pillar of the Maryland legal community. The *University of Baltimore Law Forum* greatly contributes to that success.

## ARTICLE

# JUSTICE DENIED: A CALL TO ABOLISH NONECONOMIC DAMAGES CAP IN MARYLAND

**By: Lawrence S. Greenberg[*] and Brice M. Baker[**]**

The history of noneconomic damages caps in Maryland is a contentious saga within the broader landscape of tort law.[1] Advocates argue that such caps are essential for maintaining economic stability, preventing excessive awards, and ensuring affordable insurance, especially in fields like healthcare and automobile insurance.[2] On the contrary, opponents assert that these caps undermine justice, disproportionately affect the most vulnerable, and place an arbitrary limit on the value of intangible losses.[3] Since 1986, Maryland has imposed a statutory cap on noneconomic damages in tort

[*] **Lawrence "Larry" S. Greenberg**, **Esq.** is the owner and managing partner of the Greenberg Law Offices, a graduate of the University of Baltimore School of Law 1994 graduate, an adjunct professor at UB Law where he teaches Trial Advocacy, and is the chair of UB Law's Dean's Development Circle. Larry has been fighting for justice for those who have been injured at the hands of others for nearly 30 years and focuses his practice on serious personal injury, police brutality, civil rights violations, medical malpractice, and criminal law. Larry is a former president of the Maryland Association for Justice (MAJ) and is still active in the organization protecting Maryland citizens' rights. Larry sends his sincere thanks to the entire staff of *Law Forum*, co-author Brice Baker, and members of the Maryland Association for Justice for their assistance in completing this article. It takes a village to implement changes to a broken system. Larry would like to dedicate this article to his family for providing him support over the years, especially his father, who taught him how to be the voice for those individuals who need the most help.

[**] **Brice M. Baker, Esq.** is an Associate at the Greenberg Law Offices, a graduate of the University of Baltimore School of Law class of 2023, and a Law Forum alumna. Brice focuses her practice on fighting for those who have suffered from serious personal injuries and ensuring the rights of criminal defendants. Brice thanks the entire staff of *Law Forum* for their assistance in editing this article, especially Alexandra Mitchell, Ali Mahdi, Yakira Price, and Anastacia Topaltzas. She expresses her gratitude to her co-author and mentor, Lawrence Greenberg, who has always given her the opportunity to make a difference and have her voice heard. Brice gives her greatest appreciation to her parents, Beth and Lynden Litus, Jr. who have always empowered her to stand up for what is just. She dedicates this article to all of those who have been injured not only by another person's negligence, but by the civil justice system in Maryland which prevents them from seeking full justice.

[1] Nick Stern, *Maryland Attorneys, Clients Grapple With Noneconomic Damages Cap*, DAILY REC. (June 14, 2021), https://thedailyrecord.com/2021/06/14/md-attorneys-clients-grapple-with-noneconomic-damages-cap/.

[2] *Id.*

[3] Katherine Hubbard, Note, *Breaking the Myths: Pain and Suffering Damage Caps*, 64 St. Louis U. L.J. 308 (2020).

claims for personal injuries.[4] This piece delves into the intricate history of noneconomic damages caps and presents a compelling case for their abolition.

## I. A BRIEF OVERVIEW OF MARYLAND'S CAP ON NONECONOMIC DAMAGES

One of the goals of the American legal system is to protect communities.[5] Whether the focus is on the criminal or civil justice systems, attorneys strive to make their communities safer places to live, work, and raise families.[6] While the American civil justice system intends to effectively hold people and corporations accountable for their actions financially, Maryland is one of eleven states that places a cap on noneconomic damages.[7] This cap limits an injured victim's ability to obtain justice and allows a law limiting a victim's recourse to persist.[8]

In an action for personal injury, the law allows jurors to award damages to victims injured by someone else's negligence.[9] In most personal injury cases, jurors can award economic and noneconomic damages.[10] Economic damages refer to loss of earnings and medical expenses.[11] Economic damages are quantifiable monetary losses incurred by the injured victim and often have health insurance liens attached.[12] Therefore, the victim would not be fully compensated even if a jury awarded them enough money to cover their economic losses.[13]

While noneconomic damages are not as easily quantifiable or explainable to juries as economic damages, noneconomic damages are a

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[4] MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b) (West 1986).
[5] U.S. Dep't of Just, Strategic Plan Strategic Goal 2: Keep Our Country Safe, Objective 2.6: Protect Vulnerable Communities, https://www.justice.gov/doj/doj-strategic-plan/objective-26-protect-vulnerable-communities.
[6] *Id.*
[7] Danis Alexis Ryskamp, *The Current State of State Damage Caps*, EXPERT INST. (Apr. 27, 2022), https://www.expertinstitute.com/resources/insights/state-state-damage-caps/.
[8] *See generally* Lisa M. Ruda, *Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs*, 44 CASE WESTERN L. REV. 197, (1993) ("[N]oneconomic damages have the potential to affect women significantly since claims for noneconomic damages are often brought by and associated with women").
[9] MD. CODE ANN., CTS. & JUD. PROC. § 11-108.
[10] *See id.* §§ 11-108-11-109.
[11] *Id.* § 11-109(a)(1).
[12] Eugene Doherty, *Priority of the Subrogation Interest in the Insured's Personal Injury Recovery,* 80 ILL. BAR J. 224, 224 (1992).
[13] *Id.*

critical step in restoring justice to a victim.[14] Noneconomic damages include pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury.[15] In an action for wrongful death, noneconomic damages include mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education, or other noneconomic damages authorized under the statute.[16] Noneconomic damages do not include punitive damages.[17] Proponents of tort reforms find noneconomic damage an easy target due to their "abstract nature."[18]

Since 1986, Maryland's cap on noneconomic damages has increased incrementally, and beginning on October 1, 1995, the noneconomic damages systematically increase $15,000 on October 1 of each year.[19] The increased amount applies to causes of action arising between October 1 of that year and September 30 of the following year.[20] The cap applies in a personal injury action to each direct victim of tortious conduct and all persons who claim injury by or through that victim.[21] In a wrongful death action in which there are two or more claimants or beneficiaries, an award for noneconomic damages may not exceed 150% of the limitation established under Md. Code Ann., Cts. & Jud. Proc. § 11-108 (b)(2)(ii) ("Section 11-108 (b)(2)").[22]

In a wrongful death action in which there are multiple claimants or beneficiaries: if the jury awards an amount for noneconomic damages exceeding limitations established under § 11-108 (b)(2),[23] then the court must reduce each individual award of a primary claimant proportionately to the total award of all the primary claimants so that the total award to all claimants or beneficiaries conforms to the limitation.[24] The court may also reduce a secondary claimant's award to zero dollars.[25] Alternatively, if the amount of noneconomic damages for the primary claimants does not exceed the

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[14] *Ending the Confusion: Economic, Non-Economic, and Punitive Damages*, AM. COLL. OF SURGEONS, www.facs.org/advocacy/federal- legislation/liability/guide- to- liability- reform /ending-the-confusion/ (last visited Jan 16, 2023).
[15] MD. CODE ANN., CTS. & JUD. PROC. § 11-108(a)(2)(i)(1). *See* Hubbard, *supra* note 3, at 290.
[16] MD. CODE ANN., CTS. & JUD. PROC., § 11-108(a)(2)(i)(2).
[17] *Id.* § 11-108(a)(2)(ii).
[18] *See* Hubbard, *supra* note 3, at 290.
[19] MD. CODE ANN., CTS. & JUD. PROC., § 11-108(b)(1)-(2)(ii); *but see infra,* Section II.C.
[20] *Id.* § 11-108(b)(2)(ii).
[21] *Id.* § 11-108(b)(3)(1).
[22] MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b)(2).
[23] *Id.* § 11-108(b)(2).
[24] *Id.* § 11-108(d)(2)(ii)(1)(A).
[25] *Id.* § 11-108(b)(2)(ii).

limitation under Section 11-108 (b)(2), or if there is no award to a primary claimant, then any award entered is to the primary claimant directed by the verdict.[26] As to secondary claimants, each individual award will be proportionately reduced to the total award of all of the secondary claimants so that the total award to all claimants or beneficiaries conforms to the limitation.[27]

Another issue arising from the cap on noneconomic damages involves the application of the cap and the lack of transparency in the jury system.[28] Courts do not need to inform juries about damage caps imposed under the law.[29] Nonetheless, if the jury awards an amount for noneconomic damages that exceeds the limitation established under the section, the court shall reduce the amount to conform to the limitation.[30] Therefore, the legal system contradicts its own goals by allowing jurors to deliberate for days or weeks over the damages value of the case, only to have judges cast aside jury's decision when a judge seemingly and arbitrarily reduces the recovery after jurors leave the courthouse. This opaque process allows insurance companies to promote a tort reform agenda without acknowledging that payouts are limited by the cap.

## II. HISTORICAL BACKGROUND

### *A. Origins and Early Implementation of Noneconomic Damage Caps*

The concept of imposing limits on noneconomic damages in the U.S. gained momentum in the latter part of the 20th century under ominous auspices cast by insurance companies seeking to curb escalating healthcare costs, malpractice insurance premiums, and large jury awards.[31] A desire to address perceived issues of unpredictability, inconsistency, and excessive financial burdens placed on insurance companies and healthcare providers motivated the noneconomic damage cap movement.[32] Soon after, the alleged

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[26] *Id.* § 11-108 (d)(2)(ii)(2)(A).
[27] *Id.* § 11-108 (d)(2)(ii)(2)(B).
[28] *See generally* John Campbell et al., *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, 95 Wash. U.L. REV. 1, 3 (2017).
[29] CTS. & JUD. PROC. § 11-108 (d)(1).
[30] *Id.* § 11-108 (d)(2)(i).
[31] Mara Kent, *The Common-Law History of Non-Economic Damages in Breach of Contract Actions Versus Willful Breach of Contract Actions*, 11 TEX. WESLEYAN L. REV. 481, 492-95 (2005).
[32] Laurin E. Nutt, *Where Do We Go from Here? The Future of Caps on Noneconomic Medical Malpractice Damages in Georgia*, 28 GA. ST. U.L. REV. 1339, 1341, 1358 (2013).

medical malpractice crisis that emerged in the 1970s and 1980s became a catalyst for creating these caps in Maryland.[33]

Prior to the COVID-19 Pandemic, Maryland underwent three instances of dramatically increased insurance premiums.[34] The first reported crisis of significance occurred in the 1970s when Maryland's primary medical malpractice carrier, St. Paul Fire and Marine Insurance Company of Minnesota, withdrew from Maryland after the State Insurance Commissioner refused to increase premiums by 48 percent.[35] Fearing that this increase would cause premiums across the market to skyrocket, the Maryland General Assembly created the Medical Mutual Liability Insurance Society of Maryland ("Medical Mutual") and required claimants to file medical malpractice claims with the arbitration office in lieu of the circuit court.[36]

After several years of stability, insurance premiums were once again on the rise in the mid-1980s. In response, the Maryland General Assembly enacted the 1986 cap on noneconomic damages.[37] Originally, lawmakers limited the bill to medical malpractice claims, but the General Assembly later amended the bill to apply to all personal injury actions.[38] The cap intended to "assure the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public."[39] Simply put, the cap's wanted to reduce premiums.

Insurance premiums began to increase again in the early 2000s.[40] This time, the General Assembly responded by creating a separate cap for medical malpractice claims.[41] For medical malpractice actions, the 2004 statute limited noneconomic damages to $650,000 and established a $15,000 annual escalator to the cap beginning on January 1, 2009.[42] The statute also reduced the cap for wrongful death claims arising out of a medical injury to 125 percent of the noneconomic damages cap if there were more than one

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[33] M. King Hill, III & Katherine D. Williams, *State Laws Limiting Liability for Noneconomic Damages: How Courts Have Dealt with the Related Legal and Medical Issues in Asbestos Personal Injury Cases*, 27 U. BALT. L. REV. 317, 317-20 (1998).
[34] *See* MD. OFF. OF THE GOVERNOR, GOVERNOR'S TASK FORCE ON MEDICAL MALPRACTICE AND HEALTH CARE ACCESS: FINAL REPORT 7 (2004).
[35] *Id.*
[36] *Id.*
[37] 1986 Md. Laws, ch. 639. (codified at MD. CODE ANN., CTS. & JUD. PROC. § 11-108(2)(i) (West 2005)).
[38] Dixon v. Ford Motor Co., 433 Md. 137, 159, 70 A.3d 328, 341 (2013).
[39] Murphy v. Edmonds, 325 Md. 342, 369, 601 A.2d 102, 115 (1992).
[40] *The American Insurance Market, the World's Number One Market*, ATLAS MAG. (Nov. 5, 2023. 10:46 AM), .
[41] MD. CODE. ANN., CTS. & JUD. PROC. §3-2A-09.
[42] *Id.*

wrongful death beneficiary, regardless of the number of claims, claimants, plaintiffs, beneficiaries, or defendants.[43]

American health and automobile insurance rates skyrocketed after the COVID-19 pandemic arrived in the U.S.[44] A recent U.S. government consumer price index release noted that the price of car insurance rose 17 to 19 percent between July 2022 and July 2023.[45] Insurance experts indicate that the main factors leading to these rate increases include higher costs associated with driving, increased vehicles on the road, drastic increases in auto thefts, weather damage leading to car damage, and increased costs of vehicle maintenance and repair.[46] This increase is the largest annual jump in forty-seven years.[47] Yet, other automobile insurance companies claim the exorbitant increase in premiums is related to inflation, supply chain costs,[48] increased car prices, repair and medical costs.[49] Another segment of automobile insurance companies point to independent factors like location, driving record, or external financial trends for these rate hikes.[50]

Health insurance premiums have also increased significantly over the last few years.[51] The average individual health insurance premium increased 7% in 2023, and the average family premium increased 22% since 2018 and 47% since 2013.[52] Historically, medical premiums have increased at a faster pace than general inflation. In September 2022, the Maryland Insurance Administration approved the almost 7% premium rate increase.[53] Ultimately, markets predict health insurance costs

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[43] *See id.*

[44] Ishira Shrivatsa, *The Impact of the Covid-19 Pandemic on Health Insurers*, FED. RSRV. BANK CHI.: CHI. FED. LTR, NO. 471 (Sept. 2022), https://www.chicagofed.org/publications/chicago-fed-letter/2022/471.

[45] NATALIA CAMPISI, *CAR INSURANCE RATES SKYROCKET 17.8%—WHY IS THIS HAPPENING AND WHAT CAN YOU DO?,* FORBES, HTTPS://WWW.FORBES.COM/ADVISOR/CAR- INSURANCE/CAR- INSURANCE- COSTS- RISE/#:~:TEXT=MORE%20DRIVERS%20ON%20THE%20ROAD,2.5%25%20COMPARED%20TO%20MAY%202022 (DEC. 22, 2023, 4:55 AM).

[46] *Id.*

[47] Elizabeth Buchwald, *Car Insurance Rates Just had Their Biggest Annual Jump in 47 years. This is Why*, CNN (Sept. 13, 2023, 3:33 PM), https://www.cnn.com/2023/09/13/business/inflation-car-insurance-rate-increases.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Jennifer Williams-Alvarez, *Surge in Health-Insurance Costs Pose Next Challenge for Finance Chiefs*, W.S.J. (Oct. 16 2023, 5:30 AM EST), https://www.wsj.com/articles/surge-in-health-insurance-costs-pose-next-challenge-for-finance-chiefs-bd25e25d.

[52] *2023 Employer Health Benefits Survey*, KFF (October 18, 2023), https://www.kff.org/report-section/ehbs-2023-section-1-cost-of-health-insurance/.

[53] MD. INS. ADMIN., MARYLAND INSURANCE ADMINISTRATION APPROVES 2023 AFFORDABLE CARE ACT PREMIUM RATES (2022).

themselves will increase around 6.5 percent this year and cause strains throughout the economy for employers and employees alike.[54] Despite the increased premiums passed on to the public, during the first six months of 2023, the seven largest for-profit health insurers alone made more than $40 billion in profits on revenues that exceeded two-thirds of a trillion dollars.[55]

Multiple domestic private auto insurance companies also experienced a large surge in premiums at the beginning of 2023.[56] State Farm, one of the nation's largest insurance companies, achieved a 22.2% growth in premiums — marking the second-largest year-over-year increase in private auto direct premiums written among the top 10 automobile insurers in the US.[57] Progressive Insurance experienced the largest year-over-year increase in direct premiums among the top 10 automobile insurers, with a 25.2% growth rate.[58] Further, Allstate, USAA, and American Family Insurance witnessed double-digit increases in private auto direct premiums written, with growth rates at 10.2%, 15.6%, and 12.6% respectively.[59]

Based on the data, the insurance industry's allegation that jury verdicts are the basis for increased premiums is misleading. A review of insurance data from Americans for Insurance Reform and the Consumer Federation of America indicates that placing caps on damages in tort cases does not lower insurance premiums.[60] States lacking restrictions on tort law recovery have similar insurance rates to states that placed harsh restrictions on victims' rights and because liability insurance crises are

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[54] Williams-Alvarez, *supra* note 51 ("Health-insurance costs, which are among the largest expenses for many U.S. companies, are projected to rise around 6.5% for 2023, according to consulting firm Mercer.").

[55] Wendell Potter, *First Half of 2023: 7 Big Health Insurers Pulled in $683 Billion in Revenues – Largely Through Taxpayer-Supported Programs and the Pharmacy Supply Chain*, HEALTH CARE UNCOVERED (Sept. 6, 2023), https://wendellpotter.substack.com/p/first-half-of-2023-7-big-health-insurers. Wendell Potter is a former insurance executive for Cigna and a preeminent voice in health care discourse. Wendell Potter, *The health care scare*, WASH. POST. (Aug. 6, 2020), https://www.washingtonpost.com/outlook/2020/08/06/health-insurance-canada-lie/.

[56] Mika Pangilinan, *State Farm, Progressive, GEICO – The Results Are in For Q1 2023*, INS. BUS. (June 28, 2023), https://www.insurancebusinessmag.com/us/news/auto-motor/state-farm-progressive-geico--the-results-are-in-for-q1-2023-450825.aspx.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] LIMITING LAWSUITS ("TORT REFORM") WILL NOT LOWER INSURANCE PREMIUMS – 2024 UPDATE 1 (N.Y.L. SCH.: CTR. FOR JUST. & DEMOCRACY, 2024), https://centerjd.org/system/files/InsuranceBackgrounder2024F.pdf. [hereinafter CJD 2024 UPDATE].

driven by factors other than "tort law cost explosions," as insurance companies claim, their "tort reform" remedy always fails.[61]

There is no data supporting the industry's assertion that insurance companies need damage caps to remain profitable, or that limiting lawsuits will lower premiums.[62] In fact, the American Insurance Association has said that "the insurance industry never promised that tort reform would achieve specific premium savings."[63] Victor Schwartz, then General Counsel of the American Tort Reform Association said, "[m]any tort reform advocates do not contend that restricting litigation will lower insurance rates, and 'I've never said that in 30 years.'"[64]

New York Law School's Center for Justice and Democracy reviewed multiple studies related to caps on damages in tort cases involving medical malpractice.[65] These studied confirmed that neither the payment of claims nor the existence of caps indicated a rise in premium costs.[66] The study reviewed a report by the Americans for Insurance Reform stating that "rates rose or fell in sync with the insurance 'cycle,' dictated by the state of the economy and insurance industry profitability, including gains or losses experienced by the insurance industry's bond and stock market investments."[67] Americans for Insurance Reform's 2016 report found that during the last hard market period from 2002 to 2006, states that enacted caps on damages saw a 22.7% decrease in pure premiums compared to a 29.5% decrease in states that did not have a noneconomic damages cap.[68] The report also noted that between 1975 and 1988, when California became the first state in the nation to adopt damages caps, doctors' premiums rose by 450%, faster

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[61] *See*, *e.g.*, JOANNE DOROSHOW ET AL., INVENTING SOCIAL INFLATION 2023 2-5 (2023), https://centerjd.org/content/inventing-social-inflation-2023; J. ROBERT HUNTER ET AL., HOW THE CASH RICH INSURANCE INDUSTRY FAKES CRISES AND INVENTS SOCIAL INFLATION 36 (2020), https://centerjd.org/system/files/Master2020InsuranceReportF10.pdf; J. ROBERT HUNTER & JOANNE DOROSHOW, PREMIUM DECEIT 2016: THE FAILURE OF "TORT REFORM" TO CUT INSURANCE PRICES 2 (2016), https://www.centerjd.org/system/files/MasterPremiumDeceit2016F4.pdf; J. ROBERT HUNTER & JOANNE DOROSHOW, STUDY: PREMIUM DECEIT: THE FAILURE OF "TORT REFORM" TO CUT INSURANCE PRICES 2 (2002), http://centerjd.org/system/files/PremiumDeceit.pdf.

[62] *See* CJD 2024 UPDATE, *supra* note 60.

[63] JOANNE DOROSHOW, INDUSTRY INSIDERS ADMIT – AND HISTORY SHOWS: TORT REFORM WILL NOT LOWER INSURANCE RATES 1 (2003), https://centerjd.org/air/pr/Quotes.pdf.

[64] *Id.*

[65] *Id. See also* CJD 2024 UPDATE, *supra* note 60.

[66] EMILY GOTTLIEB & JOANNE DOROSHOW, BRIEFING BOOK: MEDICAL MALPRACTICE: BY THE NUMBERS 57-58 (2023).

[67] *Id.* at 57.

[68] *Id.* at 58.

than the national rate.[69] The report concluded that the data did not indicate that caps on damages resulted in lower premiums.[70]

### *B. Legal Challenges to the Cap*

On appeal in the Supreme Court of Maryland during the September 1990 term,[71] in the *Murphy v. Edmonds* case, defendants alleged that the cap on noneconomic damages violated the Equal Protection Clause of the Fourteenth Amendment.[72] Under the Equal Protection Clause, "[n]o State shall deny to any person within its jurisdiction the equal protection of the laws."[73] The assurance of equal treatment is also guaranteed by the due process requirement contained in Article 24 of the Maryland Constitution's Declaration of Rights ("Art. 24").[74] Since the two clauses are similar, the United States Supreme Court jurisprudence is applicable to Art. 24.[75]

In *Murphy*, the court held that "a legislative cap of $350,000 upon the amount of noneconomic damages which can be awarded to a tort plaintiff does not implicate such an important 'right' as to trigger any enhanced scrutiny."[76] Instead, "the statute represents the type of economic regulation which has regularly been reviewed under the traditional rational basis test by this court and by the Supreme Court."[77] Applying the "rational basis test," the court held that the cap did not violate the Equal Protection Clause:

> The General Assembly's objective in enacting the cap was to assure the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public. This is obviously a legitimate legislative objective. A cap on noneconomic damages may lead to greater ease in calculating premiums, thus making the market more attractive to insurers, and ultimately may lead

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[69] *Id.* at 59.
[70] *Id.*
[71] *Id.* This article refers to Maryland's highest court as the Supreme Court of Maryland. Until a ballot referendum changed the court's name, Maryland's highest court was called the Court of Appeals of Maryland. CBS Balt. Staff, *The Court of Appeals of Maryland is now the Supreme Court of Maryland*, CBS NEWS (Dec. 13, 2022, 10:53 A.M.),https://www.cbsnews.com/baltimore/news/the-court-of-appeals-of-maryland-is-now-the-supreme-court-of-maryland/. Similarly, the Appellate Court of Maryland used to be called the Maryland Court of Special Appeals.
[72] Murphy v. Edmonds, 325 Md. 342, 349, 601 A.2d 103, 105 (1992).
[73] U.S. CONST. amend. XIV, § 1.
[74] Att'y Gen. of Md. v. Waldron, 289 Md. 683, 704, 426 A.2d 929, 940–41 (1981).
[75] *Murphy*, 325 Md. at 354, 601 A.2d at 108.
[76] *Id.* at 362, 601 A.2d at 111.
[77] *Id.*

> to reduced premiums, making insurance more affordable for individuals and organizations performing needed services. The cap, therefore, is reasonably related to a legitimate legislative objective.[78]

Several years later, in 2009, the court revisited Maryland's noneconomic damage cap.[79] In *DRD Pool Serv. v. Freed*, the Supreme Court of Maryland considered another equal protection argument to the cap.[80] Here, the court relied on *stare decisis* and noted the *Murphy* and *Oaks* decisions. [81] The court stated that "[m]erely arguing that the majority was wrong in *Murphy* is not sufficient grounds to abrogate the principles of stare decisis. . . . Unlike *Townsend*, there has been no evidence or persuasive arguments put forth that our decision in *Murphy* was clearly wrong or contrary to established principles."[82] The court ultimately held that the claimants "ha[d] not shown a significant change in the underlying facts and circumstances."[83]

In the 2013 *Dixon v. Ford Motor Co.* case, the Supreme Court of Maryland analyzed the wrongful death cap on noneconomic damages under Section 11-108.[84] In a wrongful death action, damages may be awarded to the beneficiaries proportioned to the injury resulting from the wrongful death. The amount recovered shall be divided among the beneficiaries in shares directed by the verdict.[85]

In *Dixon*, the claimants argued that the cap unfairly discriminated against larger families with multiple wrongful death beneficiaries compared to smaller families because each beneficiary in a larger family would receive proportionately less money simply because they are part of a larger family.[86] While the court stated that the "legislative approach" was a rational one because "[i]t is evident that the Legislature was well aware of the various options that had been presented and the pros and cons of each, and it reached a compromise,"[87] the court did not provide a full analysis nor base its opinion on any factual support of the benefits of the cap — like in *Murphy*.

Recently, the Appellate Court of Maryland considered whether the cap on noneconomic damages for personal injury and wrongful death actions arising out of a medical injury contained in Section 3-2A-09 of Md. Cts. &

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[78] *Id.* at 369-70, 601 A.2d at 115.
[79] *See* DRD Pool Serv., Inc. v. Freed, 416 Md. 46, 5 A.3d 45 (2009).
[80] *See id.*
[81] *Id.* at 63, 5 A.3d at 55.
[82] *Id.* at 69, 5 A.3d at 59.
[83] *Id.* at 69, 5 A.3d at 59.
[84] Dixon v. Ford Motor Co., 433 Md. 137, 70 A.3d 328 (2013).
[85] *Id.* at 164, 70 A.3d at 343.
[86] *Id.*
[87] *Id.* at 168-69, 70 A.3d at 347.

Jud. Pro. Art. violated the Equal Protection Clause of the Fourteenth Amendment and Article 24 of Maryland's Declaration of Rights.[88] The plaintiffs in *Burks v. Allen* argued that Section 3-2A-09 discriminates against the most severely injured and denies them full compensation without any justification and that the less severely injured receive full compensation for their injuries.[89] Additionally, the plaintiffs argued that the discriminatory scheme was more than just a mere economic regulation but rather a blatant refusal to acknowledge the intensity of the pain and suffering experienced by the most severely and permanently injured and constituted a limitation of the offending healthcare provider's liability for inflicting this pain and suffering.[90] Like in *Dixon*, the *Burks* plaintiffs argued that Section 3-2A-09(b)(ii)(2) creates an additional discriminatory scheme against larger families and asserted that the cap on noneconomic damages must be struck down because the cap could not survive rational basis scrutiny.[91] However, the Appellate Court of Maryland held that it did not have the authority to reexamine the cap's constitutionality as it was bound by the state high court's precedent.[92]

### *C. Legislative Challenges to the Cap*

In recent years, lawmakers have introduced legislation that would raise the cap on noneconomic damages in personal injury and wrongful death cases to provide more just compensation for people's pain and suffering.[93] In 2024, the Maryland General Assembly filed two bills aimed at repealing Maryland's statutory limitations on noneconomic damages in civil actions.[94] Though Senate Bill 538's proposed repeal was removed during the legislative process, the bill was modified to propose a $1.75 million cap, nearly doubled the current cap.[95] Senate Bill 538 also proposed a yearly increase to the cap of $20,000 per year.[96] Though this bill is a decent first step, true justice will not be served until Maryland abolishes the noneconomic damages cap.

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[88] Burks v. Allen, 238 Md. App. 418, 423, 192 A.3d 847, 850 (2018).
[89] *Id.* at 474, 192 A.3d at 880.
[90] *Id.* at 474-75, 192 A.3d at 880.
[91] *Id.* at 475, 192 A.3d at 880.
[92] *Id.*
[93] *See* H.D. 862, 2023 Legis., 445th Gen. Assemb. (Md. 2023); *see* H.D. 83, 2024 Legis., 446th Gen. Assemb. (Md. 2024); *see* S. 538, 2024 Legis., 446th Gen. Assemb. (Md. 2024).
[94] H.D. 83; S. 538.
[95] S. 538. *See infra* Appendix (showing Maryland's current noneconomic damage caps).
[96] *Id.* As of the submission of this article, both House Bill 83 and Senate Bill 538, have not passed both chambers and been signed into law. While the proposed legislation does not apply to medical malpractice or cases filed against state and local governments, if it passes, Marylanders will achieve greater justice following horrific injury.

### *D. Overview of Caps on Noneconomic Damages Across the United States*

The implementation of caps on noneconomic damages varies across states and reflects the decentralized nature of the American legal system.[97] Some states opted for a blanket cap applicable to all types of personal injury cases while others tailored their approach to medical malpractice specifically.[98] Caps were often set at a fixed amount or tied to inflation, and some states established different limits for different types of claimants, such as patients versus healthcare providers.[99]

Maryland is not the only state with a cap on the amount of noneconomic damages a litigant can recover.[100] However, many states have determined that these types of restrictions on damages are unconstitutional or have opted to entirely avoid the use of these caps.[101] In personal injury cases, such as automobile crashes, slip and fall, and product liability, forty-two states do not have a cap on the amount of noneconomic damages an injured plaintiff can recover.[102] In medical malpractice cases, while the majority of states do not limit the amount of damages an injured patient can recover, Maryland and other states do.[103] Thirteen states found, either through litigation or legislation, that caps, in some form, are unconstitutional.[104]

## III. CRITICISMS OF NONECONOMIC DAMAGE CAPS

### A. *The Right to a Jury Trial Is Violated by Imposing Caps on Noneconomic Damages*

The right to a civil jury trial traces back as far as Ancient Greece.[105] When Sir William Blackstone opined that the "[t]he impartial administration of justice" required and needed the right to a jury trial, English common law

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[97] Ryskamp, *supra* note 7.
[98] *Id.*
[99] *See generally, Caps on Damages*, AM. MED. ASS'N ADVOC. RES. CTR. (2017),https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/premium/arc/caps-on-damages0.pdf.
[100] *See generally infra* Appendix.
[101] *See generally infra* Appendix. Courts in states such as Illinois, Georgia, and New Hampshire have found noneconomic damage caps as unconstitutional.
[102] Bryan Driscoll, *Personal Injury Lawsuit Guide 2024*, FORBES ADVISOR (July 25, 2023, 11:01 AM), https://www.forbes.com/advisor/legal/personal-injury/personal-injury-lawsuit/; *see generally infra* Appendix.
[103] *See generally infra* Appendix.
[104] *See generally infra* Appendix.
[105] Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 6 (1993).

informally recognized the right to a civil jury trial.[106] Without the right to a jury, trials would be left solely up to judges and would lead "frequently [to] an involuntary bias towards those of their own rank and dignity."[107] As James Madison stated, trial by jury in civil cases "is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[108] In the United States, the U.S. Constitution's Seventh Amendment preserves the right to trial by jury.[109] However, the Seventh Amendment does not apply to the states.[110] Nonetheless, nearly every state has chosen to include a provision in their constitution preserving the right to trial by jury in a civil trial.[111]

Across the nation, litigants have challenged caps on noneconomic damages as violative of the litigants' constitutional right to a trial by jury.[112] Georgia's Constitution's right to trial by jury provision was undermined by imposed caps on noneconomic damages.[113] The Supreme Court of Georgia clarified this contradiction by explaining that one of the roles of a jury, as the finder of fact, is determining the amount of damages a plaintiff is entitled to receive.[114] Accordingly, the right to a trial by jury must also include the right to have the jury render a verdict on the amount of damages a plaintiff is owed.[115] The court held that "[t]he very existence of caps, in any amount, is violative of the right to trial by jury."[116]

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[106] *Blackstone's Commentaries on the Laws of England*, *Book the Third-Chapter the Twenty-Third: Of the Trial by Jury*, 379 YALE L. SCH.: THE AVALON PROJECT (1768), https://avalon.law.yale.edu/18th_century/blackstone_bk3ch23.asp.

[107] *Id.*

[108] *The Papers of James Madison*, UNIV. OF CHI. PRESS, https://press- pubs.uchicago.edu/founders/documents/v1ch14s50.html (last visited Feb. 11, 2024).

[109] U.S. CONST. amend. VII.

[110] Andrew Cohen & Suja Thomas, *Is There Any Way to Resuscitate the Seventh Amendment Right to Jury Trial?,* BRENNAN CTR. FOR JUST. (Nov. 28, 2022), https://www.brennancenter.org/our-work/analysis-opinion/there-any-way-resuscitate-seventh-amendment-right-jury-trial.

[111] Renée Lettow Lerner & Suja Thomas, *The Seventh Amendment Common Interpretation,* NAT'L CONST. CTR., https://constitutioncenter.org/the- constitution/amendments/amendment-vii/interpretations/125 (last visited Mar. 3, 2024).

[112] *See* Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 738-39 (2010).

[113] *Atlanta Oculoplastic Surgery, P.C.*, 286 Ga. at 733. (referencing the state of Georgia's Constitution that states "[t]he right to a trial by jury shall remain inviolate", which was determined to apply to cases with a right to a jury trial at common law). *See* GA. CONST. art. I, § I para. XI.; *c.f.* MD. CONST. DEC. OF RTS., art. 23 (2022 amendment) (showing that Maryland's Declaration of Rights preserves the jury trial right similarly to the Georgia Constitution) ("The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of $25,000 shall be inviolably preserved.").

[114] *Atlanta Oculoplastic Surgery, P.C.*, 286 Ga. at 734.

[115] *Id.* (citing Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998)).

[116] *Atlanta Oculoplastic Surgery, P.C.*, 286 Ga. at 736.

The Missouri Constitution's jury trial provision is similar to that of Georgia's Constitution.[117] Like the Supreme Court of Georgia, the Supreme Court of Missouri holds that the amount of damages a plaintiff is entitled to is a part of the jury's fact-finding role.[118] Because the statutory cap applies across the board without taking into consideration the individualized facts of the case, it curtails the jury's damages determination.[119] Therefore, this "hostile legislation" violates the right to a jury trial protected by the Missouri Constitution.[120] Many state courts, including Washington, Oregon, Alabama, and Florida, rendered similar holdings.[121] Maryland should be the next state to follow suit.

### *B. Issues With Caps on Noneconomic Damages*

The American Tort Reform Association ("ATRA") states that the problem with noneconomic damages is that there is minimal guidance given to jurors when assessing these damages and, due to the "highly charged environment of personal injury trials," awards can be "excessive."[122] ATRA argues that Noneconomic damages should be limited to a total of $250,000 across the board.[123]

In contrast, Maryland attorneys David Muncy[124] and former Maryland Association for Justice President George Tolley [125] have spoken out against these caps.[126] Muncy opposes these caps because the caps "

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[117] MO. CONST. art. I § 22(a), GA. CONST. art. I, § I para. XI, *See generally* Thomas Jean o'Neill, *The Right to Trial by Jury in a Civil Action*, 35 MO. L. REV. 43 (1970).

[118] *Compare* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 637-38 (2012) ("the right of trial by jury as heretofore enjoyed shall remain inviolate . . . .") *and Atlanta Oculoplastic Surgery, P.C.,* 286 Ga. at 733 ("[T]he right to a trial by jury shall remain inviolate.").

[119] *Watts*, 376 S.W.3d at 640.

[120] *Id.*

[121] *Id.* at 640-41 (citing Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 652 (1989); Lakin v. Senco Prods., Inc., 329 Ore. 62, 71-73 (1999); Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 159-60 (1991); Smith v. Dep't of Ins., 507 So. 2d 1080, 1089 (1987)).

[122] *Noneconomic Damage Reform,* AM. TORT REFORM ASSOC., https://www.atra.org/issue/noneconomic-damages-reform/ (last visited Mar. 3, 2024).

[123] *Id.*

[124] *See Leadership*, MD. ASS'N FOR JUST. (MAJ), https://www.mdforjustice.com/?pg=board (providing that Muncy is the current president of the Maryland Association for Justice).

[125] *See George S. Tolley, III*, SUPER LAWYERS, https://profiles.superlawyers.com/maryland/timonium/lawyer/george-s-tolley-iii/2b956f43-6c95-40a3-82f0-806e2f4d4bc6.html (last visited Mar. 3, 2024) (providing that Tolley served as president of the Maryland Association for Justice in the 2012-2013 term).

[126] Nick Stern, *Maryland Attorneys, Client Grapple with Non-Economic Damages Cap,* THE DAILY RECORD (June 14, 2021), https://thedailyrecord.com/2021/06/14/md- attorneys- clients-grapple-with-noneconomic-damages-cap/.

penalize[] people with the worst injuries."[127] Tolley asserts that "[t]he only people who are made whole are people with relatively minimal injuries" since courts will not "arbitrarily cut down" their damages.[128] These caps prevent those with long-lasting and permanent injuries from seeking full justice.[129] Injured parties who may not need constant medical care — but will forevermore live painful lives — will be prohibited from receiving damages adequately reflecting their future life-long pain and suffering.[130]

For example, an eighteen-year-old man is injured in Maryland. Actual estimates suggest that the injured man will live for approximately 56.84 more years.[131] Assuming the 2023 damage cap of $935,000 applies, the injured man will only be compensated approximately $45 per day for his lifelong pain and suffering, no matter how much it worsens as he grows older. This per diem damage award rate is not even the equivalent of working a minimum-wage job in Maryland.[132] However, unlike a person at a minimum wage job paying more than $45, the injured man did not sign up for his lifelong injuries, pain, and suffering. The injured man did not choose to have his entire life upended because of someone else's negligent act. And lastly, he did not choose this form of "compensation" which could never provide him peace and justice for the remainder of his life.

ATRA does not see an issue with this paltry damages award because these caps do not limit what an injured party can recover under economic damages, such as medical expenses and lost wages.[133] While this belief is accurate, ATRA fails to recognize the cost that the victim and their attorneys incur when trying to prove these economic damages.[134] These costs come directly from the victim's settlement or verdict.[135] The costs can be exorbitant, exceeding hundreds of thousands of dollars that the victim will never be able to recover.[136]

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[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Actuarial Life Table,* SSA, https://www.ssa.gov/oact/STATS/table4c6.html (last visited Mar. 3, 2024).
[132] *Maryland at a Glance, Wages,* MARYLAND.GOV, https://msa.maryland.gov/msa/mdmanual/01glance/economy/html/wages.html#:~:text=As%20of%20January%201%2C%202023,%2414.00%20on%20January%201%2C%202024 (last visited Mar. 3, 2024) (providing that the minimum wage in Maryland is $15,00 an hour).
[133] *Noneconomic Damages Reform, supra* note 122.
[134] *See* Stern, *supra* note 1.
[135] *Id.*
[136] *See* Sarah L. Smith, *Torts Have Been Reformed – What About the Healthcare System?*, MD. ASS'N FOR JUST. (Dec. 19, 2023), https://www.mdforjustice.com/?pg=MAJRecentNews&blAction=showEntry&blogEntry=100811.

Therefore, abolishing the cap on Noneconomic damages aligns with the principle of equal protection under the law. All individuals, regardless of their economic status, should have an equal opportunity to receive just compensation for their injuries. The current cap often results in situations unfairly limiting the most severely affected victims in damage recovery.

### *C. There is No Justification for a Cap and Deterrence of Negligent Behavior*

Since the late 1970s, no party has produced concrete evidence of an insurance crisis in Maryland.[137] Despite the early threats of a mass exodus of physicians, no such exodus came to fruition.[138] On the contrary, according to the 2015 State Physician Workforce Data Book, Maryland ranks second in the country for the largest number of active physicians per 100,000 population, fifth in primary care physicians, and tenth in active surgeons.[139] In addition, Maryland saw a 3.8% increase in medical school enrollment from the middle of the crisis in 2004 to 2014.[140] Maryland also ranks thirteenth in the country for the number of medical residents and medical fellows per 100,000 population.[141] On a national scale, damage caps have shown no correlation with physician retention rates in a state.[142]

The National Practitioner Data Bank ("NPDB") demonstrates further evidence that an insurance crisis does not exist today, with a decrease in medical malpractice payouts from 265 in 2006 to 226 in 2016 indicative of such.[143] In addition, NPDB shows payout slightly increased from 85 million in 2006 to 95 million in 2016.[144] These statistics demonstrate that there is significant stability in medical malpractice litigation and payments in

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[137] *See generally* Kevin G. Quinn, *The Health Care Malpractice Claims Statute: Maryland's Response to the Medical Malpractice Crisis*, 10 UNIV. BALT. L. REV. 74 (1980). *But see* Joanne Doroshow & J. Robert Hunter, *Insurance "Crisis" Officially Over*, CTR. FOR JUST. & DEMOCRACY (Feb. 27, 2006), https://www.centerjd.org/air/pr/MMSOFTMARKET.pdf.
[138] *See* Smith, *supra* note 136.
[139] *2015 State Physician Workforce Data Book*, ASS'N OF AM. MED. COLLS. FOR WORKFORCE STUD., 8-9, 12-13, 16-17 (Nov. 2015), https://store.aamc.org/downloadable/download/sample/sample_id/210/.
[140] *Id.* at 33.
[141] *Id.* at 42.
[142] Hubbard, *supra* note 3, at 303 (citing Mayo v. Wis. Injured Patients and Families Comp. Fund, 901 N.W.2d 782, 791 (Wis. App. 2017)).
[143] *See Data Analysis Tool*, NAT'L PRACT. DATA BANK, https://www.npdb.hrsa.gov/analysistool/ (last visited Mar 3. 2024).
[144] *Id. See* Taylor Lincoln, The Medical Malpractice Scapegoat, PUB. CITIZEN 7 (Feb. 28, 2017), https://www.citizen.org/sites/default/files/medical-malpractice-scapegoat-report.pdf, ("the value of medical lawsuit malpractice payments declined by 22 percent.").

Maryland and that there is no reason to believe an insurance crisis exists today nor that a noneconomic damages cap is necessary.

Placing a cap on noneconomic damages undermines the deterrent effect of tort law.[145] If the potential financial consequences for negligence are limited, there is less incentive for individuals and institutions to prioritize safety or adhere to the highest standards of care. By abolishing the cap, the legal system sends a clear message that negligent actions will have significant financial repercussions, thus promoting a safer society.

*D. Alternative to a Cap*

At the end of a trial, if the court determines that the verdict awarded by a jury is excessive, a party can request the court to modify the verdict, either through a remittitur, additur or to grant a new trial.[146] The court has expansive authority to set aside a verdict as contrary to the weight of the evidence.[147] The judge has the authority to reduce the verdict unless the plaintiff is willing to accept a lower sum.[148] If the jury verdict is so grossly excessive that it shocks the court's conscience, the court has the authority to grant a new trial.[149]

While our judicial system relies on citizens sitting in judgment of their fellow citizens, most of the time juries get it right.[150] Juries sit and listen to the evidence, watch each witness, and determine who to believe.[151] Although the judge is not the factfinder, the judge too sits, listens, and watches the trial.[152] The judge can also determine what facts are appropriate under the case's circumstances, and which to bar irrelevant.[153] So, while a remittitur is tailored to the facts of the trial before it, the cap on noneconomic damages is

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[145] Zenon Zabinski & Bernard S. Black, *The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform*, 84 J. HEALTH. ECON. (July 2022), https://doi.org/10.1016/j.jhealeco.2022.102638.

[146] MD. CODE ANN., CTS. & JUD. PROC. § 2-533 (West 1984).

[147] JOHN A. LYNCH, JR. & RICHARD W. BOURNE, MODERN MARYLAND CIVIL PROCEDURE 10-13 (3rd ed. 2016) (citing Snyder v. Cearfoss, 186 Md. 360, 368-69, 46 A.2d 607, 610-11 (1946)).

[148] Banegura v. Taylor, 312 Md. 609, 624, 541 A.2d 969, 976 (1988) (citing Conklin v. Schillinger, 255 Md. 50, 257 A.2d 187 (1969)).

[149] *Banegura,* 312 Md. at 624, 41 A.2d at 976.

[150] *Why Jury Trials are Important to a Democratic Society*, NAT'L JUD. COLL. https://www.judges.org/wp-content/uploads/2020/03/Why-Jury-Trials-are-Important-to-a-Democratic-Society.pdf, (last visited March 13, 2024).

[151] *How Courts Work*, ABA (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect/.

[152] *Id.*

[153] Joseph T. Sneed, *Trial-Court Discretion: Its Exercise by Trial Courts and Its Review by Appellate Courts*, 13 J. APP. PRAC. & PROC. 205-06 (2012).

applied across the board, regardless of the evidence produced.[154] Under the current system, if the jury awards a large amount of noneconomic damages that is not grossly excessive, the court may unfairly reduce damage to the statutory cap.[155]

## IV. CONCLUSION

Legislation placing a statutory cap on noneconomic damages diminishes the jury's role as the factfinder.[156] If the jury determines that a plaintiff's pain and suffering is worth millions upon millions of dollars, current law steps in and caps the award.[157] Unlike the jury, the General Assembly is not in the best position to determine the value of a plaintiff's pain and suffering as it was not privy to the testimony and evidence at trial.[158] The abolition of the cap on damages in Maryland is a crucial step towards ensuring that the legal system prioritizes justice for victims of negligence. By embracing a more equitable approach to compensation, Maryland can lead the way in fostering a legal environment that upholds the principles of fairness, deterrence, and the protection of individual rights. Policymakers have an imperative to reevaluate existing laws and work towards a system that reflects the evolving needs and expectations of society, promoting a just and compassionate legal framework.

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[154] Owens-Illinois, Inc. v. Hunter, 162 Md.App. 385, 415, 416, 875 A.3d 157, 175, 176 (2005).
[155] *See generally id.* at 417
[156] *See supra* Section III.D.
[157] MD. CODE. ANN., CTS. & JUD. PROC. §3-2A-09.
[158] *See supra* Section III.D.

APPENDIX

| State | Current Personal Injury Torts Noneconomic Damages Cap | Current Medical Malpractice Noneconomic Damages Cap |
|---|---|---|
| Alabama | No cap.[159] However, a wrongful death claimant, can solely recover punitive damages.[160] | Found to be unconstitutional.[161] |
| Alaska | The greater of $400,000 or the injured person's life expectancy multiplied by $8,000.[162] The greater of $1,000,000 or the injured person's life expectancy multiplied by $25,000 for cases of serious disfigurement or impairment.[163] | $250,000 or $400,000 for severe impairment.[164] |
| Arizona | Prohibited by state Constitution[165] | Prohibited by state Constitution[166] |
| Arkansas | Prohibited by state Constitution.[167] | Prohibited by state Constitution.[168] |

[159] *See* ALA. CODE §§ 6-11-1 – 6-11-59.
[160] Alabama entirely precludes plaintiffs in wrongful death cases from seeking economic and non-economic damages. *Id.* § 6-11-21(j) (West 1975). The recovery is limited to exclusively punitive damages. *See id.* Alabama is the only state in the United States that has this type of scheme in place. *See Damage Caps in Alabama Personal Injury Lawsuits,* ENJURIS, https://www.enjuris.com/alabama/damage-caps/ (last visited Jan. 16, 2024).
[161] Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 171 (Ala. 1991).
[162] ALASKA STAT. ANN. § 9.17.010(b) (West 1997).
[163] *Id.* § 9.17.010(c).
[164] *Id.* § 9.55.549(d)-(e) (West 2005).
[165] ARIZ. CONST. art. II, § 31 ("No law shall be enacted in this state limiting the amount of damages
to be recovered for causing the death or injury to any person.").
[166] *Id.*
[167] ARK. CONST. art. V, § 32. (". . . no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property . . .").
[168] *Id.*

| | | |
|---|---|---|
| California | None.[169] | $350,000.[170] |
| Colorado | For claims arising on or after January 1, 2024, and before January 1, 2026, the cap is $729,790, unless clear and convincing evidence is presented that the plaintiff deserves additional damages, then $1,459,600.[171] | $300,000.[172] |
| Connecticut | None.[173] | $250,000[174] |
| District of Columbia | None.[175] | None.[176] |
| Delaware | None.[177] | None.[178] |
| Florida | None.[179] | Found to be unconstitutional.[180] |
| Georgia | Found to be unconstitutional.[181] | Found to be unconstitutional.[182] |
| Hawaii | $375,000.[183] | $375,000[184] |
| Idaho | The cap is set to $250,000 and is annually adjusted to reflect inflation and average wages.[185] As of 2023, the | The cap is set to $250,000 and is annually adjusted to reflect inflation and average wages.[187] As of 2023, the |

[169] *See generally* CAL. CIV. CODE §§ 3274 – 3428.
[170] *Id.* § 3333.2(b) (West 2022).
[171] *See* COLO. REV. STAT. ANN. § 13-21-102.5 (West 2019); *see also* DEP'T OF STATE OF COLO., ANNOUNCING THE ADJUSTED LIMITATIONS ON DAMAGES UNDER § 13-21-102.5 FOR THE YEARS 2024-2026 (Feb. 12, 2024), https://www.sos.state.co.us/pubs/info_center/files/damages_new.pdf.
[172] *See id.* § 13-64-302(c) (West 2003).
[173] *See generally* CONN. GEN. STAT. ANN. §§ 52-236 – 52-262.
[174] *See generally id.*
[175] D.C. CODE ANN. §§ 15-101 – 15-914.
[176] *Id.*
[177] DEL. CODE ANN. CTS. & JUD. PROC. V, §§ 8101-8145.
[178] *See generally id.*
[179] *See generally* FLA. STAT. ANN. tit. XLV.
[180] North Broward Hosp. Dist. v. Kalitan, 219 So. 3d 49, 59 (2017).
[181] Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 222 (Ga. 2010).
[182] *Id.*
[183] HAW. REV. STAT. § 663-8.7 (West 1986).
[184] *See id.*
[185] IDAHO CODE ANN. § 6-1603 (West 2003).
[187] IDAHO CODE ANN. § 6-1603 (West 2003).

| | | |
|---|---|---|
| | cap was set at $458,728.65.[186] | cap was set at $458,728.65.[188] |
| Illinois | Ruled unconstitutional.[189] | Ruled unconstitutional.[190] |
| Indiana | None.[191] | $1.8 million, including economic and Noneconomic damages.[192] |
| Iowa | $5 million if the case involves a heavy-duty truck; otherwise, none.[193] | Suits against clinics and individual doctors: $1 million overall; suits against hospitals: $2 million; otherwise, none.[194] |
| Kansas | $350,000[195] | $350,000[196] |
| Kentucky | None.[197] | None.[198] |
| Louisiana | None.[199] | $500,000 overall, not including future medical expenses.[200] |

[186] STATE OF IDAHO, CALCULATIONS - NON-ECONOMIC DAMAGES CAPS (Jul. 1, 2023), https://iic.idaho.gov/wp-content/uploads/2023/07/Benefits-Non-economic-caps-effective-07_01_23.pdf.
[188] CALCULATIONS - NON-ECONOMIC DAMAGES CAPS, *supra* note 186.
[189]. Best v. Taylor Mach. Works, 228 Ill.Dec. 636, 415-16 (1997).
[190] Lebron v. Gottlieb Memorial Hosp., 237 Ill.2d 217, 223 (2010).
[191] IND. CODE ANN. § 34-13-3-4 (2022) (stating that a $700,00 cap exists per claimant only in tort claims against government entities or public employees acting within scope of their employment); IND. CODE ANN. § 34-23-1-2 (2022) (establishing a $300,000 cap for certain wrongful death actions).
[192]. IND. CODE ANN. § 34-18-14-3 (2021).
[193]. S.F. 228, 90th Gen. Assemb., Reg. Sess. (Iowa 2023).
[194] IOWA CODE § 147.136A (2022).
[195] KAN. STAT. § 60-19a02 (2023); *see also* Hillburn v. Enerpipe Ltd., 309 Kan. 1127, 442 P.3d 509 (2019) (holding initially that the $250,000 cap violated the "right to trial by jury").
[196] *Id.*
[197] KY. CONST. § 54 (2019) ("The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.").
[198] *Id.*
[199] LA. STAT. ANN. § 13:5106 (2024) (establishing that there is a $500,000 cap per claimant only in tort claims against local and state entities).
[200] LA. STAT. ANN. § 40:1231.2 (2024); *see also* Allison B. Lewis, *Unreasonable and Imperfect: Constitutionality of the Louisiana Medical Malpractice Act's Limit on Recovery*, 69 LA. L. REV. 417, 424 (2009), (explaining that the Louisiana Supreme Court has held the cap as constitutional)..

| | | |
|---|---|---|
| Maine | None, unless the case involves wrongful death, then $750,000.[201] | None, unless the case involves wrongful death, then $750,000.[202] |
| Maryland | Any cause of action that arose between January 1, 2023 and December 31, 2023, not including wrongful death- $935,000. If the claim involves wrongful death- $1,402,000.[203] | Any cause of action that arose between January 1, 2023 and December 31, 2023, not including wrongful death- $875,000. If the claim involves wrongful death- $1,098,750.[204] |
| Massachusetts | $500,000[205] | $500,000[206] |
| Michigan | $537,900 in product liability cases unless the product caused death or permanent loss of a vital body function, $960,500.[207] | $537,900 unless certain exceptions apply, then $960,500.[208] |
| Minnesota | None.[209] | None.[210] |
| Mississippi | $1,000,000[211] | $500,000[212] |

[201] ME. REV. STAT. ANN. tit. 18-C, § 2-807, sub-§2 (2023).
[202] *Id.*
[203] MD. CODE ANN., CTS. & JUD. PROC. §3–2A–09 (LexisNexis 2023).
[204] *Id.*
[205] MASS. GEN. LAWS ch. 231, § 60H (2024).
[206] *Id.*
[207] MICH. COMP. LAWS § 600.1483 (2024).
[208] *Id. See also* MICH. COMP. LAWS. SERV. § 600.1483 (LexisNexis 2023). If one or more defendant was negligent and caused injuries to the plaintiff, the cap goes from $280,000 to $500,000 if: "(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:(i) Injury to the brain. (ii) Injury to the spinal cord. (b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living. (c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate." *Id.*
[209] E. Curtis Roeder, *Introduction to Minnesota's Tort Reform Act*, WM. MITCHELL L. REV. 277, 301(1987).
[210] *Id.*
[211] MISS. CODE ANN. § 11-1-60 (2024).
[212] *Id.*

| | | |
|---|---|---|
| Missouri | None.[213] | None, unless the case involves wrongful death, then $787,671.[214] |
| Montana | None.[215] | $250,000.[216] |
| Nebraska | None.[217] | Any occurrence that took place after December 31, 2014- $2.250 Million for both economic and non-economic damages.[218] |
| Nevada | None.[219] | $350,000.[220] |
| New Hampshire | Ruled unconstitutional.[221] | Ruled unconstitutional.[222] |
| New Jersey | None.[223] | None.[224] |
| New Mexico | None.[225] | $600,000 for all damages, except medical treatment.[226] |
| New York | None.[227] | None.[228] |

[213] MO. REV. STAT. § 538.210 (2020) (establishing a statutory cap only in medical malpractice actions).
[214] *Id.*
[215] CTR. FOR JUST. & DEMOCRACY, CAPS ON COMPENSATORY DAMAGES: A STATE LAW SUMMARY (AUGUST 2020 UPDATE) 1 (2020), https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary.
[216] MONT. CODE. ANN. § 25-9-411 (2005).
[217] CTR. FOR JUST. & DEMOCRACY, *supra* note 215.
[218] NEB. REV. STAT. ANN. § 44-2825 (West 2014) (explaining that this cap applies to the *entire* damages award, not just non-economic damages).
[219] CTR. FOR JUST. & DEMOCRACY, *supra* note 215.
[220] NEV. REV. STAT. ANN. § 41A.035 (2004). The $350,000 cap is the limit per occurrence or course of treatment, meaning that no matter how many plaintiffs there are, their non-economic damages collectively cannot exceed $350,000. *See id.*
[221] Brannigan v. Usitalo, 134 N.H. 50, 52 (1991).
[222] Carson v. Maurer, 120 N.H. 925, 941-43 (1980).
[223] S. 3343, 220th Leg., 2022-2023 Sess. (N.J. 2022) ("Currently, New Jersey does not have a limit or maximum amount permitted on recovery for noneconomic loss[.]").
[224] *Id.*
[225] *See* Morga v. Fedex Ground Package Sys., Inc., 512 P.3d 774, 789-90, 2022-NMSC-013 (N.M. 2022) (highlighting the lack of cap on injury damage awards).
[226] Siebert v. Okun, 485 P.3d 1265, 1269, 2021-NMSC-016 (N.M. 2021).
[227] N.Y. CONST. art. I, § 16. *See* In re N.Y.C. Asbestos Litig., 32 Misc.3d 161, 166, 168 921 N.Y.S.2d 466, 469-70 (2011) (discussing, in maxim, the lack of noneconomic damages cap in New York).
[228] N.Y. CONST. art. I, § 16 ("The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.").

| | | |
|---|---|---|
| North Carolina | None.[229] | $656,730[230] |
| North Dakota | None.[231] | $500,000.[232] |
| Ohio | $250,000 or three times the plaintiff's economic damages, not to exceed $350,000 per plaintiff and $500,000 per occurrence.[233] | $250,000 or three times the plaintiff's economic damages, not to exceed $350,000 per plaintiff and $500,000 per occurrence.[234] |
| Oklahoma | Ruled unconstitutional.[235] | $300,000. [236] |
| Oregon | Ruled unconstitutional for non-wrongful death cases; in wrongful death cases, the cap is $500,000.[237] | Ruled unconstitutional for non-wrongful death cases; in wrongful death cases, the cap is $500,000.[238] |
| Pennsylvania | None.[239] | None.[240] |
| Rhode Island | None.[241] | None.[242] |
| South Carolina | None.[243] | Not to exceed $350,000 per claimant if against one health institution; not to exceed $1,050,000 per claimant if against multiple health institutions.[244] |

[229] N.C. GEN. STAT. § 90-21.19 (a) (West 2011).
[230] N.C. GEN. STAT. § 90-21.19 (b) (West 2011).
[231] N.D. CENT. CODE § 32-03.2-07 (1987).
[232] N.D. CENT. CODE § 32-42-02 (1995).
[233] OHIO REV. CODE ANN. § 2315.18 (B)(2) (West 2023). *But see* Brandt v. Pompa, 171 Ohio St.3d 693, 693 (2022) (finding the noneconomic damages cap unconstitutional in sexual abuse cases).
[234] OHIO REV. CODE ANN. § 2323.43 (A)(2) (West 2023).
[235] Beason v. I.E. Miller Servs., 441 P.3d 1107, 1109 2019 OK 28, (2019).
[236] OKLA. STAT. ANN. tit. 63, § 1-1708.1F-1(A) (West 2004).
[237] OR. REV. STAT. § 31.710(1) (West 2022). Busch v. McInnis Waste Systems, Inc., 366 Or. 628, 647-48 (2020).
[238] OR. REV. STAT. § 31.710(1) (West 2022). Busch v. McInnis Waste Systems, Inc., 366 Or. 628, 647-48 (2020).
[239] 42 PA. STATE. STAT. AND CONS. STATE § 8528 (West 1980).
[240] 42 PA. STATE. STAT. AND CONS. STATE § 8528 (West 1980).
[241] Andrade v. Perry, 863 A.2d 1272, 1278 (R.I. 2004). Feeney v. Napolitano, 825 A.2d 1, 4 (R.I. 2003).
[242] *Caps on Damages*, at 6, AM. MED. ASS'C., https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/premium/arc/caps-on-damages_0.pdf. [hereinafter "AMA Damages Report"].
[243] S.C. CODE ANN. REGS. § 15-32-220 (West 2005).
[244] S.C. CODE ANN. REGS. § 15-32-220(b-c) (West 2005).

| | | |
|---|---|---|
| South Dakota | None.[245] | $500,000[246] |
| Tennessee | $750,000 or $1,000,000 in cases with catastrophic loss of injury.[247] | $750,000 or $1,000,000 in cases with catastrophic loss of injury.[248] |
| Texas | None.[249] | Suits against doctors or healthcare providers: $250,000.<br>Suits against healthcare facilities: $250,000 per facility, $500,000 total.[250] |
| Utah | $450,000.[251] | $450,000, but if the malpractice resulted in death- no cap applies.[252] |
| Vermont | None.[253] | None.[254] |

[245] Matter of Certif. of Questions of L. from the U.S. Ct. of App's. for the Eighth Circ., 1996 S.D. 10, 183, 185, 544 N.W.2d 183, 186 (1996) *rev'd on other grounds*, Millea v. Erickson, 2014 S.D. 34, 849 N.W.3d 272 (2014).
[246] S.D. CODIFIED LAWS § 21-3-11 (West 2005).
[247] TENN. CODE ANN. § 29-39-102 (West 2012) (Catastrophic loss or injury is defined as one or more of the following: "(1) spinal cord injury resulting in paraplegia or quadriplegia; (2) amputation of two (2) hands, two (2) feet or one (1) of each; (3) third degree burns over forty percent (40%) or more of the body as a whole of third degree burns up to forty percent (40%) or more of the face; or (4) wrongful death of a parent leaving a surviving minor child or children for whom the deceased parent had lawful rights of custody or visitation.").
[248] *Id.*
[249] Luke Metzler & Lawrence Lassiter, *The Damages Caps: "The Most Important Part" of House Bill 4*, 51 Tex. Tech L. Rev. 833, 835 (2019) (citing Lucas v. U.S., 757 S.W.2d 687, (Tex. 1988)).
[250] TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2003).
[251] UTAH CODE ANN. § 57-14-501 (West 2019).
[252] UTAH CODE ANN. § 78B-3-410 (West 2010) *but see* Smith v. U.S., 356 P..3d 1249, 1256-58 (Utah 2015) (holding the cap on noneconomic damages in malpractice suits as unconstitutional in wrongful death suits).
[253] Scott H. Moulton, *50-State Analysis of Liability Damages Cap | 2019*, USLAW NETWORK, 2019, at 41. https://www.uslaw.org/wp-content/uploads/2022/01/2019_50-State-Analysis-of-Liability-Damages-Caps-Compendium.pdf.
[254] *Id.*

| | | |
|---|---|---|
| Virginia | None.[255] | $2.6 million.[256] |
| Washington | None.[257] | None.[258] |
| West Virginia | None.[259] | None.[260] |
| Wisconsin | None.[261] | $750,000[262] |
| Wyoming | Prohibited by state constitution.[263] | Prohibited by state constitution.[264] |

[255] VA. CODE ANN., § 8.01-52 (West 1982) ("The jury or the court, as the case may be, in any such action under § 8.01-50 may award such damages as to it may seem fair and just."). *See* Jan Paul Fruiterman, M.D. and Assocs., P.C. v. Waziri, 2000, 525 S.E.2d 552, 554-55 (Va. 2000) (finding a $655,973.46 noneconomic damages award reasonable due to evidence submitted to the court).

[256] VA. CODE ANN., § 8.01-581.15 (West 2011). This number increases by $50,000 every July 1st; the above number is accurate prior to July 1, 2024. *Id.*

[257] 2023 Wa. Laws ch. 102, § 5.

[258] *Id.*

[259] *See* W. VA. CODE ANN. § 55-7B-8 (West 2015) (setting noneconomic damage caps only in medical malpractice.. *See* MacDonald v. City Hosp., Inc., 227 W.VA. 707, 724 (2011) (walking through the history of noneconomic damages around the country, in which personal injury caps have been marked unconstitutional at times).

[260] W. VA. CODE ANN. § 55-7B-8 (a-b) (West 2015).

[261] Mayo v. Wis. Injured Patients & Fams. Comp. Fund, 383 Wis.2d 1, 17 (2018) ("The $350,000 cap remained in place until we concluded that it was unconstitutional in Ferdon. Following Ferdon, the legislature acted to impose the $750,000 cap on noneconomic damages that is before us. 2005 Wis. Act 183, §§ 1, 7. For all other damages, payment is guaranteed to the injured party for 100 percent of a judgment or settlement.").

[262] WIS. STAT. A.. § 893.55(b) (West 2008). *See Mayo*, 383 Wis.2d at 13-14 (upholding the noneconomic damage cap as constitutional).

[263] WYO. CONST. ART. X, § 4(a) ("No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person.").

[264] *Id.*

## COMMENT

# LOSS OF LIBERTY WITHOUT COUNSEL: WHY MARYLAND MUST PASS UNIVERSAL REPRESENTATION FOR IMMIGRATION PROCEEDINGS

**By: Sara von Stein***

## I. INTRODUCTION

There are 58,200 removal cases pending in Maryland immigration courts as of September 2023,[1] and only twenty-four judges to adjudicate them.[2] Maryland immigration courts have the thirteenth highest backlog in the country and those in Virginia have the eleventh highest,[3] both states received a second immigration court in 2022.[4] As the number of removal cases increases, so does the need for representation.[5] Yet, many immigrants[6]

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[1] Syracuse Univ., *Immigration Court Backlog,* TRAC IMMIGRATION (last updated Jan. 2024), https://trac.syr.edu/phptools/immigration/backlog/ [https://perma.cc/TTT3-2YLP](select "Maryland" in the "Immigration Court State" column; select "All-2023, Maryland" under "Immigration Court"; select "All-2023, Maryland" under "Nationality").

[2] *See* Balt. Immigr. Ct.*, Baltimore (BAL) Staff Directory*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/baltimore-immigration-court (last updated Oct. 10, 2023); Hyattsville Immigration Court, *Hyattsville (HYA) staff Directory*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/hyattsville-immigration-court (last updated Jan. 2, 2023).

[3] These rankings are accurate as of September 2023. Syracuse Univ., *supra* note 1 (click the arrow below "Immigration Court State" to sort the states from most pending cases to least).

[4] Maryland only had the Baltimore Immigration Court, then added Hyattsville; Virginia had the Arlington Immigration Court, which transferred to Annandale, and added Sterling. These additions accounted for two of the three immigration courts that opened in 2022.
Alissa Zhu, *Push to Clear Massive Immigration Court Backlog Ends up Causing Chaos for Some Maryland clients*, Attorneys Say, BALT. BANNER (Oct. 24, 2022, 6:00 AM), https://www.thebaltimorebanner.com/community/local-news/push-to-clear-massive-immigration-court-backlog-ends-up-causing-chaos-for-some-maryland-clients-attorneys-say-4SPYBHGTFJB7LBOHYIVBHDNLSU/.

[5] *See e.g.*, Karen Berberich & Nina Siulc, *Why Does Representation Matter?*, VERA INST. OF JUST. (Nov. 2018), https://www.vera.org/publications/why-does-representation-matter.

[6] This comment uses "immigrant" throughout to refer to persons who were not born in the United States but are residing in the United States or seeking entry. I do not mean for the

struggle to obtain representation: only 42.4% of individuals in removal proceedings in Maryland were represented in the 2023 fiscal year, down from 49.7% in 2022.[7] In 2023, 23.2% of cases in Maryland resulted in a removal[8] order, down from 71.0% in 2019.[9] When a removal order is executed, an immigrant faces the harshest consequence under immigration law: deportation.[10] Despite the high stakes faced by individuals in the immigration court, the law does not guarantee a right to counsel in removal proceedings, not even for those who cannot afford a lawyer.[11]

This comment will discuss the state of representation in removal proceedings.[12] Section II of this comment will provide background, describing the ways an immigrant can arrive to the immigration court. The section will then examine how federal courts have interpreted immigration law to require or not require representation for immigrants by applying varying levels of due process in removal proceedings. Finally, it will introduce how Maryland state courts have mapped the Due Process Clause and Sixth Amendment's right to counsel in the United States Constitution onto the Maryland Declaration of Rights.

Section III will survey the current unmet need for representation. In addition, this section will consider the consequences of deportation as well as how an individual is more likely to receive a negative outcome in removal proceedings when they are not represented. Section IV will review possible

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word to carry the connotation that the individual intends to remain permanently. I have intentionally chosen not to use the word "noncitizen" because naturalized citizens can be placed in removal proceedings since citizenship status is one finding an immigration judge must make. *See* Immigr. & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984).

[7] Syracuse Univ., *supra* note 1 (select "Percent" under "Time Series"; select "Maryland" in the "Immigration Court State" column; select "All-2023, Maryland" under "Immigration Court"; change the right column to "Represented" and select "Represented"; hover over bars to see percentages).

[8] This comment uses "removal" and "deportation" interchangeably. The Immigration and Nationality Act previously referred to proceedings in the immigration court as "deportation" or "exclusion" proceedings and now refers to them as "removal proceedings" in 8 U.S.C. § 1229a.

[9] Syracuse Univ., *Outcomes of Immigration Court Proceedings,* TRAC IMMIGR. (last updated Jan. 2024), https://trac.syr.edu/phptools/immigration/closure/ [https://perma.cc/3GD6-D5AF] (select "by Fiscal Year" under "Graph"; select "Percent" under Time Series"; select "Maryland" under "Immigration Court State"; select "All-Maryland" under "Custody"; change the "Represented" column to "Outcome (detailed)"; select "Removal Order" under "Outcome"; hover over bars to see percentages).

[10] *See, e.g.,* Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1301 (2011).

[11] *See* 8 U.S.C. § 1229a (2006).

[12] I will discuss issues concerning 8 U.S.C. § 1229a removal proceedings. Bond hearings pursuant to 8 C.F.R. § 1003.19 are beyond the scope of this paper.

solutions that have been enacted to address lack of representation in immigration matters, such as assigning immigration attorneys to public defenders' offices, county-level universal representation programs, and the state-wide bill proposed in Maryland. Section IV will also discuss the limits of each solution.

This comment argues that legislators must pass a bill providing appointed counsel to all individuals in removal proceedings who cannot afford an attorney. This right to counsel is mandated by Articles 21 and 24 of the Maryland Bill of Rights because of the liberty that is at stake in removal proceedings.

## II. TRACING THE DEVELOPMENT OF THE RIGHT TO REPRESENTATION IN REMOVAL PROCEEDINGS

### *A. Overview of Immigration Proceedings*

Unlike civil and criminal courts, the immigration court is not housed within the judicial branch.[13] The immigration court is an administrative court managed by the Executive Office of Immigration Review ("EOIR") and overseen by the Department of Justice ("DOJ") in the executive branch.[14] An undocumented immigrant may be placed into removal proceedings when seeking entry the United States or, if caught by immigration officials near the border while attempting unauthorized entry.[15] Additionally, when an immigrant's application with U.S. Citizenship and Immigration Services ("USCIS") is denied, the aspiring citizen could be placed into removal proceedings.[16] These proceedings can also be initiated when an immigrant living within the United States is arrested by Immigrations and Customs Enforcement ("ICE") or Customs and Border Patrol ("CBP") agents for a violation of immigration law after receiving a referral from local law

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[13] 8 C.F.R. § 1003.0 (2020).

[14] *Observing Immigration Court Hearings Fact Sheet*, U.S. DEP'T JUST., https://www.justice.gov/eoir/observing-immigration-court-hearings#:~:text=The%20Executive%20Office%20for%20Immigration, charged%20with%20violating%20immigration%20law (last updated Dec. 2, 2022).

[15] Em Puhl, *Overview of the Deportation Process,* IMMIGR. LEGAL RES. CTR., 2-3 (Dec. 2018), https://www.ilrc.org/sites/default/files/resources/overview_deport_process- 201812 21.pdf.

[16] *Notice to Appear Policy Memorandum*, U.S. CITIZENSHIP & IMMIGR. SERVS. https://www.uscis.gov/laws-and-policy/other-resources/notice-to-appear-policy-memorandum (last updated Jun. 14, 2021).

enforcement.[17] Certain criminal convictions trigger removability,[18] so ICE may issue a detainer request when a convicted immigrant is set to be released.[19] ICE may either commence removal proceedings or, if the immigrant has a prior removal order, reinstate the removal order and remove the individual without a hearing.[20] Some individuals remain detained throughout their immigration proceedings while others are released.[21] Accessing legal counsel can prove especially challenging for detained individuals, who had consistently lower rates of representation in Maryland than those never detained until 2022.[22]

Individuals who have been detained by immigration enforcement officials may pursue asylum in removal proceedings. There is a specific procedure for individuals entering the United States seeking asylum.[23] If an individual detained upon entry expresses fear of returning to their home country, an asylum officer must perform a credible fear interview ("CFI").[24] In the CFI, the officer will determine whether the immigrant has a significant possibility of establishing asylum.[25] Subsequently, the officer has the discretion to place the individual in removal proceedings without making a determination.[26] If the officer determines that the individual does not have a credible fear, known as making a negative credible fear determination, the individual can request that an immigration judge review the decision.[27] The immigration judge will refer the individual back to the Department of Homeland Security ("DHS") for removal, an Asylum Merits Interview ("AMI"), or to be placed in removal proceedings.[28] If the individual receives

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[17] Puhl, *supra* note 15, at 2-3.

[18] 8 U.S.C. § 1227(a)(2) (2008) (providing criminal grounds for removal applicable to individuals with a legal entry); 8 U.S.C. § 1182(a)(2) (2013) (providing criminal grounds for removal applicable to individuals without a legal entry).

[19] *Priority Enforcement Program*, U.S. DEP'T OF HOMELAND SEC., https://www.ice.gov/pep (last updated July 21, 2022).

[20] *See* 8 C.F.R. § 1241.8(a) (2003).

[21] *See* 8 U.S.C. § 1225 (2009); 8 U.S.C. § 1229a(1) (2006).

[22] Syracuse Univ., *New Proceedings Filed in Immigration Court,* TRAC IMMIGR. https://trac.syr.edu/phptools/immigration/ntanew/ [https://perma.cc/R5A4-PHFU] (last updated Jan. 2024) (select "by Fiscal Year" under "Graph"; select "All cases" under "Case Group"; select "Percent" under "Time Series"; select "Maryland" in the "Immigration Court State" column; select "Detained" in the "Custody" column; select "Represented" in the "Represented" column; hover over bars to see percentages; select "Never-Detained" in the "Custody" column; then "Represented" in the "Represented" column; hover over bars to see percentages) [hereinafter *New Proceedings Filed in Immigration Court*].

[23] 8 C.F.R. § 208.30(b), (d) (2023).

[24] *Id.* § 208.30(d).

[25] 8 U.S.C. § 1225(b)(1)(B)(v).

[26] 8 C.F.R. § 208.30(b).

[27] *Id.* § 208.30(g)(1).

[28] *Id.* § 1208.30(g)(2)(iv)(A)-(B).

a positive determination, an asylum officer will either place the individual in removal proceedings or perform an AMI in an Asylum Office.[29] Previously, all individuals who received a positive determination were placed in removal proceedings.[30] On May 31, 2022, DHS began phasing in the implementation of a new rule[31] under which an individual must undergo an AMI within 45 days of when the individual receives a positive determination.[32] Maryland has not implemented this rule yet, but Northern Virginia and Washington, D.C. have utilized it.[33] The individual may have counsel present during the interview at their own expense, but counsel is not provided for those who are unable to secure representation.[34] If the asylum officer does not grant the individual's asylum application at the AMI, the officer must refer the application to the immigration court, placing the individual in removal proceedings where an immigration judge will adjudicate the individual's asylum claim.[35]

In the immigration court, the individual is akin to a defendant as ICE is to a prosecutor charging the individual with the violation of at least one immigration law.[36] The first hearing in immigration court is a "master calendar" hearing.[37] At a master calendar hearing, the immigration court provides an individual the opportunity to respond to DHS's alleged charges of removability and to assert a defense to deportation.[38] DHS must prove that

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[29] *Id.* § 208.30(f).
[30] *Id.*
[31] Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18086 (Mar. 29, 2022)(to be codified at 8 C.F.R. pts. 208, 212, 235, 1003, 1208, 1235, and 1240); *USCIS Service and Office Locator,* U.S. DEP'T OF HOMELAND SEC., https://egov.uscis.gov/office-locator/#/asyresults/MD/Maryland [https://perma.cc/9XFX-WZUP] (last visited Feb. 28, 2024) (explaining that the Asylum Office for Maryland residents is located in Arlington, Virginia).
[32] 8 C.F.R. § 208.9(a)(1) (2023).
[33] *Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule,* U.S. DEP'T OF HOMELAND SEC., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/fact-sheet-implementation-of-the-credible-fear-and-asylum-processing-interim-final-rule (last updated Oct. 17, 2023). Currently, the rule only applies to immigrants who are detained at one of two detention centers in Texas and then express an intent to reside in one of the following cities: Boston, Los Angeles, Miami, New York, Newark, or San Francisco; *id.*
[34] 8 C.F.R. § 208.9(b).
[35] If the individual has a valid visa, the individual will not be placed in removal proceedings. 8 C.F.R. § 208.14(c)(1), (4) (2022); 8 C.F.R. § 208.14(c)(2) (stating that the officer shall deny the application, indicating no further action).
[36] Puhl, *supra* note 15, at 5.
[37] *Id.*; 8 C.F.R. § 1240.10 (2022); Exec. Off. For Immigr. Rev., *Immigration Court Practice Manual*, DEP'T OF JUST., sec. 4.15(c), https://www.justice.gov/eoir/book/file/1528921/download.
[38] 8 C.F.R. § 1240.10.

the individual has violated an immigration law as charged, and the individual may be deported, although the judge usually waits to decide deportability until the final hearing if the individual has asserted a viable defense to deportation.[39] The individual has the opportunity to challenge a charge of removability at the master hearing.[40] An immigration judge may schedule additional master calendar hearings or may schedule a hearing to provide the individual an opportunity to present a claim for relief from deportation.[41] This final hearing, called an "individual" or "merits" hearing, typically occurs when the immigration judge decides whether the individual can be deported.[42]

### *B. Constitutional Protections in Immigration Law*

The Sixth Amendment guarantees counsel for those who cannot afford it because access to representation is "fundamental . . . to a fair trial."[43] However, individuals in removal proceedings do not have a statutory right to counsel pursuant to federal law.[44] Individuals "have the privilege of being represented, at no expense to the Government."[45] Indigent individuals in removal proceedings also lack the constitutional right to counsel because the Supreme Court has categorized removal proceedings as civil rather than criminal.[46] The categorization of removal proceedings as "civil" is based on the conclusion that deportation is not punitive.[47] Since removal proceedings are civil in nature, the Court has not always extended other Constitutional protections provided for criminal defendants to individuals in removal proceedings.[48]

Additionally, the federal government limits immigrants' rights through its plenary power over "conditions under which [immigrants] are to

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[39] Puhl, *supra* note 15, at 5.
[40] 8 C.F.R. § 1240.10(c).
[41] Puhl, *supra* note 15, at 5.
[42] Id.
[43] Gideon v. Wainwright, 372 U.S. 335, 342 (1963).
[44] 8 U.S.C. § 1229a(b)(4)(A).
[45] Id.
[46] INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . . ." ).
[47] *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("[D]eportation is not a punishment for crime . . . .").
[48] *See id.* at 730 (stating that in receiving a deportation order, the defendant had not "been deprived of life, liberty or property, without due process of law" and therefore the Fourth, Seventh, and Eighth Amendment do not apply); *see also* Abel v. United States, 362 U.S. 217, 237 (1960) ( "[D]eportation proceedings are not subject to the constitutional safeguards for criminal prosecutions.").

be permitted to enter and remain in [the United States]."[49] In 1889, the Supreme Court created the plenary power of Congress and the executive branch over immigration, relying on concepts in sovereignty and the right to self-preservation rather than a power enumerated in the Constitution.[50] The plenary power doctrine generally limits judicial review of immigration decisions and largely excludes immigration law from constitutional due process protections.[51]

Federal courts, however, have chipped away at the plenary power doctrine over time.[52] In 1982, the Supreme Court held that an individual seeking admission to the United States has no constitutional rights, but they gain more constitutional rights as they live in the United States and "develop the ties that go with permanent residence,"[53] such as having family members who are U.S. citizens[54] and various employment opportunities.[55] For example, the Court held that Maria Plasencia, a lawful permanent resident ("LPR"), was entitled to due process in the form of a hearing upon her reentry into the United States because of her status as an LPR.[56] In 1988, the Court of Appeals for the First Circuit concluded that individuals in deportation proceedings "are entitled to due process" such that the proceedings must be fundamentally fair.[57] That same year, the Court of Appeals for the Ninth Circuit held that due process in removal proceedings includes the procedural protections of being represented by the counsel of one's choice at no expense to the government and receiving an opportunity to present evidence on one's own behalf.[58] In 2001, the Court held that the Due Process Clause of the Fifth Amendment[59] applies in immigration enforcement matters when the subject is deprived of individual liberty.[60] In 2016, the Court of Appeals for the Fourth Circuit outlined that due process requires that an immigrant receive notice of the charges against them, be given a hearing, and have a meaningful

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[49] Flemming v. Nestor, 363 U.S. 603, 616 (1960).
[50] The Chinese Exclusion Case, 130 U.S. 581, 608-09 (1889); *see* Nishimura Ekiu v. United States*,* 142 U.S. 651, 659 (1892).
[51] Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power,* 114 MICH. L. REV. FIRST IMPRESSIONS 21, 22-23 (2015).
[52] *Id.* at 23.
[53] Landon v. Plasencia, 459 U.S. 21, 32 (1982).
[54] *See*, *e.g.*, *id.* at 23.
[55] *See, e.g.,* Padilla v. Kentucky, 559 U.S. 356, 359 (2010) (describing Jose Padilla as a lawful permanent resident for over forty years and a veteran).
[56] *Plasencia*, 459 U.S. at 32-33.
[57] Lozada v. I.N.S., 857 F.2d 10, 13 (1st Cir. 1988).
[58] Baires v. I.N.S., 856 F.2d 89, 91 (9th Cir. 1988).
[59] The language of the Due Process Clause of the Fifth Amendment is mirrored and applied to the states in the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1.
[60] Zadvydas v. Davis, 533 U.S. 678, 693-94 (2001).

opportunity to be heard, including having an interpreter present if the immigrant cannot understand the proceedings in English.[61]

In addition to applying due process to some individuals in removal proceedings, one court has interpreted a federal statute to require counsel for certain individuals in removal proceedings. The U.S. District Court for the Central District of California held in 2013 that 29 U.S.C. § 794, the Rehabilitation Act, requires the Attorney General to provide counsel to individuals who are unable to represent themselves in determination or removal proceedings because of a mental defect or disorder.[62] This holding is in the minority however, as most circuits simply follow the statute which says an incompetent person can be represented by a legal representative, relative, or friend.[63]

The law has also recognized the special need for children to be represented.[64] Although a child's right to counsel in immigration proceedings is not mandated by law, it is highly encouraged by the Trafficking Victims Protection Reauthorization Act of 2008.[65] To that end, the Department of Justice decided to provide grants to increase representation for unaccompanied minors ("UACs") in immigration proceedings in 2014, when a surge of UACs entered the United States.[66] Although some scholars argue that the Fifth Amendment requires counsel be appointed to immigrant children facing removal proceedings,[67] as recently as 2019, the Ninth

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[61] United States v. Lopez-Collazo, 824 F.3d 453, 461 (4th Cir. 2016).

[62] *See* Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 U.S. Dist. LEXIS 186258, at *10, *67-68 (C.D. Cal. Apr. 23, 2013).

[63] 8 C.F.R. § 1240.4 (2023); *see, e.g.,* Brue v. Gonzales, 464 F.3d 1227, 1233 (10th Cir. 2006); *see also* Soobrian v. Att'y Gen. of U.S., 388 F. App'x 182, 193 (3d Cir. 2010).

[64] Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282, 2303 (2013).

[65] 8 U.S.C. § 1232(c)(5) (2018) (stating that the U.S. Secretary of Health and Human Services must make great efforts to ensure UACs who are or were detained have counsel).

[66] Press Release, Off. of Pub. Affs., Justice Department and CNCS Announce $1.8 Million in Grants to Enhance Immigration Court Proceedings and Provide Legal Assistance to Unaccompanied Children, U.S. DEP'T OF JUST. (Sept. 12, 2014), https://www.justice.gov/opa/pr/justice-department-and-cncs-announce-18-million-grants-enhance-immigration-court- proceedings; WILLIAM A. KANDEL ET AL., CONG. RSCH. SERV., R43628, UNACCOMPANIED ALIEN CHILDREN: POTENTIAL FACTORS CONTRIBUTING TO RECENT IMMIGRATION 3 (2014) (explaining that "[h]igh violent crime rates, poor economic conditions fueled by relatively low economic growth rates, high poverty rates, and the presence of transnational gangs" are major factors that led to increased migration from El Salvador, Guatemala, and Honduras in 2014, noting that minors from those three countries accounted for most of the increase in 2014).

[67] Andrew Leon Hanna, Note, *A Constitutional Right to Appointed Counsel for the Children of America's Refugee Crisis*, 54 HARV. C.R.-C.L. L. REV. 257, 259-60 (2019).

Circuit[68] declined to determine whether "appointed counsel is constitutionally required for indigent children in removal proceedings."[69]

Some scholars argue that the right to counsel must be extended to immigrants who are in removal proceedings due to a criminal conviction because, in such cases, deportation is a punishment.[70] In 2010, the Supreme Court determined that immigration consequences of criminal convictions are significant enough to warrant the right to effective counsel.[71] In *Padilla v. Kentucky*, the Court held that the Sixth Amendment requires that a criminal defense attorney advise their client whether their plea could lead to deportation.[72] The Court recognized that as 'crimmigration' evolved, new crimmigration laws have "raised the stakes of a noncitizen's criminal conviction."[73] The Immigration Act of 1917 first made certain crimes of moral turpitude a deportable offense.[74] Meanwhile, today, a multitude of convictions mandate automatic deportation and many procedural measures that were forgiving to the immigrant have been eliminated, such as the "Attorney General's authority to grant discretionary relief from deportation."[75] Ultimately, the Court conceded that "deportation is a particularly severe 'penalty.'"[76]

### *C. Constitutional Rights in the Maryland Constitution*

Article 24 of the Declaration of Rights of the Maryland Constitution states that "no [person] ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers."[77] The Supreme Court of Maryland has held that the Equal Protection[78] and Due Process Clauses of the Fourteenth Amendment are

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[68] The Fourth Circuit has not reviewed this issue.
[69] C.J.L.G. v. Barr, 923 F.3d 622, 630 (9th Cir. 2019).
[70] See, e.g., Anita Oritz Maddali, *Padilla v. Kentucky*: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?, 61 AM. U. L. REV. 1, 56 (2011); see also Markowitz, *supra* note 10, at 1359-60.
[71] Madrigal-Estrella v. State, 303 Or. App. 124, 133 (2020) (citing Padilla v. Kentucky, 559 US. 356, 374 (2010)).
[72] *Padilla*, 559 U.S. at 374.
[73] *Id.* at 363.
[74] *Id.* at 362.
[75] *Id.*
[76] *Id.* at 365 (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)(Brewer, J., dissenting)).
[77] MD. CONST. Decl. of Rts., art. 24.
[78] DRD Pool Serv., Inc. v. Freed, 416 Md. 46, 55, 5 A.3d 45, 50 (2010).

embodied in Article 24.[79] While Article 24 guarantees the protection of liberty through substantive and procedural due process,[80] Article 21 of the Declaration of Rights ensures fundamental fairness through the right to counsel in a proceeding that would restrict one's liberty.[81] Article 21 states that "in all criminal prosecutions, every man hath a right . . . to be allowed counsel."[82] The Supreme Court of Maryland has affirmed that the Sixth Amendment right to counsel is embodied in Article 21 of the Maryland Declaration of Rights.[83]

## III. LIBERTY IS AT STAKE WITH INSUFFICIENT RESOURCES FOR REPRESENTATION.

### *A. Individuals Face Higher Rates of Deportation When They Are Not Represented in Removal Proceedings.*

Those without representation in removal proceedings are more likely to be deported.[84] Moreover, lack of representation disproportionately affects more vulnerable individuals, such as women, children, and people with disabilities.[85] Women with children are fourteen times less likely to receive a deportation order when they have counsel.[86] The differences in outcomes due to lack of representation are particularly stark in Maryland.[87] In 2019, 90.7% of unrepresented individuals received a removal order while only 9.3% of represented individuals received one.[88] The rates of removal orders for

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[79] Reese v. Dep't of Health & Mental Hygiene, 177 Md. App. 102, 149, 934 A.2d 1009, 1036 (2007).
[80] Id.
[81] Rutherford v. Rutherford, 296 Md. 347, 358, 464 A.2d 228, 234 (1983).
[82] MD. CONST. Decl. of Rts., art. 21.
[83] Brye v. State, 410 Md. 623, 634, 980 A.2d 435, 441 (2009).
[84] Syracuse Univ., *Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court "Women with Children" Cases*, TRAC IMMIGR. (July 15, 2015), https://trac.syr.edu/immigration/reports/396/ [hereinafter "*Women with Children*"].
[85] Hanna, *supra* note 67, at 288 (stating there is a "severely disproportionate likelihood of failure for unrepresented children"); *Women with Children*, *supra* note 84 ("[F]or cases concluded this far, the odds of being allowed to remain in this country were increased more than fourteen-fold if women and children had representation.").
[86] Angélica Cházaro, *Due Process Deportations*, 98 N.Y.U. L. REV. 407, 458 (2023).
[87] Syracuse Univ., *Details on Deportation Proceedings in Immigration Court,* TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/ntahist/ [https://perma.cc/R7XE-XJZS] (last updated Feb. 2019).
[88] *Id.* To locate the stated percentages, select "Initial Filing" under "Measure"; select "by Fiscal Year" under "Graph Time Scale"; select "Percent" under "Time Series"; select "Maryland" in the "Immigration Court State" column; change the middle drop-down to "Outcome" and select "Removal Order"; in the "Represented" column, select "Represented" or "Not Represented" accordingly; and hover over bars to see percentages.

unrepresented individuals in bordering states of Pennsylvania (86.1%) and Virginia (78.8%) were slightly lower, as well as in other states with high backlogs, such as Texas (89.1%) and New York (74.1%).[89]

Asylum-seekers are roughly three-times as likely to receive asylum when they have counsel.[90] The law does not require representation for asylum seekers, although some scholars argue that due process requires it because of the likely consequences if the respondent does not succeed on their claim.[91] Asylum law exists to protect individuals from human rights abuses in their native countries, specifically those who "suffered past persecution" or have "a well-founded fear of future persecution."[92] Hundreds of thousands of individuals seek asylum in the United States every year, and if their claims are not granted, they could be deported to their death.[93] In Maryland, only 45.8% percent of applicants without representation were granted asylum in the immigration courts in the 2022 fiscal year, while 72.4% of individuals with representation received asylum, for an average grant-rate of 71.1%.[94] Judges deny asylum more often when the individual is unrepresented,[95] leaving individuals with valid claims without asylum.[96] When the consequences of denial are clearly so high, lack of representation has dire consequences.[97]

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[89] *See id.* and accompanying text.

[90] John R. Mills et al., *"Death is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361, 362 (2009); *see also Courageous Voice Honoree Shares Her Story of Survival and Strength*, TAHIRIH JUST. CTR. (May 17, 2017), https://www.tahirih.org/news/courageous-voice-honoree-shares-her-story-of-survival-and-strength/ [https://perma.cc/B3U3-DGPE]. Aracely is one example of an asylum seeker who won her case with counsel. Aracely fled to the United States after recovering from being shot in the head by a man from her village who had raped and abused her over the years. *Id.* The Greater DC Tahirih Justice Center provided her with a pro bono attorney who won her asylum. *Id.*

[91] Mills et al., *supra* note 90, at 363.

[92] 8 C.F.R. § 208.13(b) (2023).

[93] U.S. Dep't of State, U.S. Dep't of Homeland Sec., & U.S. Dep't of Health & Hum. Servs., Proposed Refugee Admissions for Fiscal Year 2021: Report to Congress 4 (2021).

[94] Syracuse Univ., *Asylum Decisions*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/asylum/ [https://perma.cc/FR94-TETV] (last updated Jan. 2024) (select "by Fiscal Year" under "Graph Time Scale"; select "Percent" under "Time Series"; change the first column to "Immigration Court State"; select "Maryland" in the first column; select "Not Represented" in the second column; select "Asylum Granted" in the third column; then select "Represented" in the second column and "Asylum Granted" in the third column; hover over bars to see percentages).

[95] Mills et al., *supra* note 90, at 362.

[96] *Id.*

[97] *See, e.g.,* Markowitz, *supra* note 10.

*B. A Negative Outcome in Removal Proceedings Results in Loss of Liberty.*

There is no right to counsel in civil and administrative hearings, such as affirmative asylum interviews or interviews for non-defensive immigration benefits because neither is adversarial in the way that criminal and removal hearings are.[98] Moreover, when the consequences of a civil hearing are punitive, the Supreme Court has recognized that the constitutional protections of criminal hearings apply.[99] Many scholars argue that deportation is punitive, and therefore it should receive the same constitutional protections as a criminal proceeding.[100]

The consequences of a negative outcome in removal proceedings can be grave.[101] Some individuals are separated from their families, leaving children without parents, friends, and livelihoods.[102] For others, removal to one's home country results in "poverty, persecution and even death."[103] The Supreme Court noted in 1945 that deportation is a loss of liberty[104] and more recently determined that the Due Process Clause of the Fifth Amendment applies to immigration proceedings when loss of liberty is at stake.[105]

The stakes in removal proceedings are substantially similar to those in criminal proceedings.[106] Deportation often results in loss of property and life and deprives an individual "of all that makes life worth living."[107] The Sixth Amendment requires counsel to be appointed for indigent individuals accused in criminal cases because representation is "fundamental and essential to a fair trial."[108] Moreover, the Sixth Amendment requires

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[98] *See, e.g.,* 20 C.F.R. § 416.1400(b) (2017) (noting that administrative review of decisions by the Social Security Administration are completed in a "non-adversarial" manner).
[99] Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 318 (2000).
[100] *See, e.g., id.* at 307; *see also* Maddali, *supra* note 70; *see also* Anita Sinha, *A Lineage of Family Separation*, 87 BROOK. L. REV. 445, 492 (2022).
[101] Markowitz, *supra* note 10.
[102] *See, e.g.,* Sinha, *supra* note 100, at 448.
[103] Bridges v. Wixon, 326 U.S. 135, 164 (1945) (Murphy, J., concurring).
[104] *Id.* at 154.
[105] Zadvydas v. Davis, 533 U.S. 678, 693-94 (2001).
[106] Pauw, *supra* note 99, at 313, 325.
[107] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
[108] Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963).

appointment of counsel when a loss of liberty is at stake.[109] Therefore, individuals in removal proceedings should be appointed counsel.[110]

### *C. The Maryland Constitution's Protections of Fairness and Due Process Liberty Interests Should be Extended to Removal Proceedings.*

Article 24 of the Maryland Constitution requires that any loss of liberty be determined through the "judgment of his peers."[111] Since deportation is a loss of liberty, this would imply that immigration proceedings should be tried in front of a jury.[112] The Appellate Court of Maryland has asserted that Article 24 also protects liberty and property interests in substantive and procedural due process[113] and that a liberty interest arises when the discretion of a decisionmaker is limited.[114] Specifically, the Appellate Court stated that "discretionary statutory rights," such as a discretionary waiver of deportability, do not give rise to due process interests.[115] However, Maryland courts have held that Article 24 protects liberty interests in "the relationship of a parent and a child"[116] and the right to marry.[117] Deportation often interferes with the parent-child relationship and the relationship between spouses, ultimately separating families.[118] Therefore, Article 24 protects fundamental rights that are implicated in the consequences of removal proceedings.

Notably, the Supreme Court of Maryland used the due process protections in Article 24 to extend the right to counsel to civil proceedings

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[109] Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (holding that the Sixth Amendment applies when a defendant is sentenced to imprisonment but not when only fined).
[110] *See, e.g.,* Maddali, *supra* note 70, at 55.
[111] MD. CONST. Decl. of Rts., art. 24.
[112] Owens v. State, 399 Md. 388, 418, 924 A.2d 1072, 1089 (2007) (stating that the Appellate Court of Maryland correctly interpreted Article 24 as providing a right to a jury trial). Whether individuals in removal proceedings should have the right to a jury is beyond the scope of this comment.
[113] Reese v. Dep't of Health & Mental Hygiene, 177 Md. App. 102, 149, 934 A.2d 1009, 1036-37 (2007).
[114] *Id.* at 156, 934 A.2d. at 1041 (quoting Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 410 (1971)).
[115] *Reese*, 177 Md. App. at 157, 934 A.2d. at 1041 (citing Smith v. Ashcroft, 295 F.3d 425, 431 (4th Cir. 2002)).
[116] Wagner v. Wagner, 109 Md. App. 1, 23, 25, 674 A.2d 1, 11–13 (1996).
[117] Conaway v. Deane, 401 Md. 219, 296, 932 A.2d 571, 617 (2007) (holding that the fundamental right to marry under Article 24 was limited to male-female couples), opinion extended after remand, (Md. Cir. Ct. 2008), abrogated by Obergefell v. Hodges, 576 U.S. 644 (2015).
[118] *E.g.,* Sinha, *supra* note 100, at 491-92.

when there is a risk of incarceration.[119] The language of Maryland's Sixth Amendment, Article 21, places the right to counsel in "criminal prosecutions," which appears to limit the right to criminal defendants.[120] However, similar to the Supreme Court's holding applying the Due Process Clause when an individual's liberty is at risk,[121] the Supreme Court of Maryland held that deprivation of liberty is a unique circumstance that demands a right to counsel, even in civil proceedings.[122] Because a negative outcome in removal proceedings can result in loss of liberty,[123] Article 24 requires that the right to counsel be extended to removal proceedings.

Moreover, the Supreme Court of Maryland has recognized that the right to counsel embodied in Article 21 is meant to protect individuals from their lack of understanding of the "complexities of the legal system."[124] This is the same impetus for which the U.S. Supreme Court extended the Sixth Amendment to include accurate information regarding immigration consequences.[125] Accordingly, Maryland should extend the right to counsel to removal proceedings to protect individuals from falling prey to the complexities of immigration law.

### *D. The Need for Representation is Not Met with Current Resources.*

Indigent individuals in immigration proceedings can seek counsel through non-profit organizations, law school clinics, and pro bono attorney services.[126] EOIR publishes a list of pro bono legal services,[127] which immigrants often receive when they are detained upon entry or at their first hearing in immigration court.[128] Even though all immigrants in proceedings should be given a list of pro bono resources, judges sometimes forget to inform individuals of their right to an attorney—a right offered at no expense to the government—and "provide lists that are outdated or incorrect." [129] Even if immigrants receive the list of pro bono resources, only some will

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[119] Rutherford v. Rutherford, 296 Md. 347, 348, 464 A.2d 228, 229 (1983).
[120] MD. CONST. Decl. of Rts., art. 21.
[121] Zadvydas v. Davis, 533 U.S. 678, 693-94 (2001).
[122] *Rutherford*, 296 Md. at 361, 464 A.2d at 235-36.
[123] *See* discussion *supra* Section III.B.
[124] Brye v. State, 410 Md. 623, 634, 980 A.2d 435, 441 (2009).
[125] *See* discussion *infra* Section III.E.
[126] Eagly, *supra* note 64, at 2288.
[127] *List of Pro Bono Legal Service Providers*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/file/probonofulllist/download (last updated Oct. 2023); 8 C.F.R. § 1003.61(b) (2015).
[128] *If You Are in Immigration Proceedings,* U.S. DEP'T OF JUST., https://www.justice.gov/eoir/pro-bono-legal-service-providers-if-in-immigration-proceedings (last updated Apr. 1, 2020) ("You should receive a copy . . . . while in immigration court proceedings.").
[129] Mills et al., *supra* note 90.

qualify for the services.[130] Organizations often limit their representation to certain populations, such as detained individuals or individuals residing in certain geographic areas.[131] For example, the Baltimore City program limits representation to those with viable claims of relief.[132] However, even if the individual does not have a claim to stay in the country at the time, without representation, the individual could accept an outcome that harms them in the future if they become eligible for a path to legally stay in the United States—such as accepting deportation instead of pursuing voluntary departure.[133]

Furthermore, such organizations have limited funding and are unable to assist everyone who contacts them, even if the person qualifies for assistance.[134] These small, local programs have limited funding that offers limited representation, leaving many immigrants vulnerable to an unjust deportation.[135] In some areas of the country, even paid representation is difficult to obtain.[136] If an immigrant is unable to obtain pro bono services, representation in removal proceedings averages from $4,000 to $12,000 or more.[137] Therefore, all individuals in removal proceedings need representation.[138]

Fortunately, some jurisdictions have implemented universal representation programs that provide counsel to individuals in immigration proceedings with funding from local government. In 2013, New York City created "the nation's first government-funded legal representation program for detained and non-detained immigrants."[139] The New York Immigrant

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[130] *See* Cházaro, *supra* note 86, at 441.

[131] *See, e.g.*, *Detained Adult Program*, CAP. AREA IMMIGRANTS' RTS. COAL., https://www.caircoalition.org/detained-adult-program-1 (last visited Mar. 1, 2024); *see also, e.g.*, Mayor's Office of Immigrant Affairs, *Safe City Baltimore*, CITY OF BALT., https://mima.baltimorecity.gov/safe-city-baltimore (last visited Mar. 1, 2024) [hereinafter *Safe City Baltimore*].

[132] *Safe City Baltimore*, *supra* note 131.

[133] Susan L. Pilcher, Justice Without a Blindfold: *Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 292 (1997).

[134] *See, e.g.,* Amy Halpern, *How These Teen Immigrants Are Acclimating to Life in Montgomery County*, MOCO 360 (Mar. 28, 2022, 08:41 AM), https://moco360.media/2022/03/28/how-these-teen-immigrants-are-acclimating-to-life-in-montgomery-county/ [https://perma.cc/CN9U-5KCB] (stating that legal service providers are at capacity and not enough attorneys will take cases pro bono in Montgomery County, Maryland).

[135] *See, e.g.,* Mills et al., *supra* note 90.

[136] Baires v. Immigr. & Naturalization Serv., 856 F.2d 89, 93 n.6 (9th Cir. 1988).

[137] *How Much Does an Immigration Lawyer Cost?*, CITIZENPATH (Dec. 29, 2020), https://citizenpath.com/immigration-lawyer-cost/.

[138] *See*, e.g., Careen Shannon, Immigration is Different: *Why Congress Should Guarantee Access to Counsel in All Immigration Matters*, 17 U.D.C. L. REV. 165, 167 (2014).

[139] Speaker Johnson and Council Member Menchaca Announce a $1.6 Million Emergency Allocation to Fund the New York Immigrant Family Unity Project, N.Y.C. COUNCIL (Mar. 28, 2019), https://council.nyc.gov/press/2019/03/28/1724/.

Family Unity Project (NYFIUP) is one of the few universal representation programs that provide services "regardless of relief eligibility."[140] Almost half of the publicly funded deportation defense programs—23 of 50—have been started by the Vera Institute of Justice ("Vera"), including two programs in Maryland.[141] Vera's map shows a third program in Montgomery County, but unfortunately that program no longer exists, exemplifying why more systematic support is necessary.[142] Nonetheless, Montgomery County now provides funding for indigent individuals facing deportation.[143] Vera partnered with the Capital Area Immigrants' Rights (CAIR) Coalition to found universal representation programs in Prince George's County and Baltimore City.[144] CAIR only represents locally detained immigrants.[145] The funding for the Baltimore City program limits representation to those with "viable claims to remain."[146]

While immigrants struggle to obtain representation for removal proceedings, the government is always represented by a DHS attorney—a representation provided at great expense to the government.[147] In this way, removal proceedings closely mirror the adversarial nature of criminal proceedings, in which the government is represented by the state's attorney.[148] In an unfair dichotomy, ICE attorneys who are well-studied in complex immigration law are often confronted with unrepresented

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[140] *New York Immigrant Family Unity Project*, BRONX DEFENDERS, https://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/ (last visited Mar. 1, 2024).

[141] *Advancing Universal Representation Initiative*, VERA INST. OF JUST., https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/advancing-universal-representation-initiative (last visited Mar. 1, 2024).

[142] *Id.*; Email from Joanna Silver, Former Member of Montgomery Cnty. Def. Coal., to Sara von Stein (Jan. 6, 2023, 08:15 EST) (explaining that the group has since disbanded) (on file with author).

[143] *Montgomery County Council Approves Funding for Legal Representation for Residents Facing Deportation Proceedings*, MONTGOMERY CNTY. COUNCIL (May 22, 2018) https://www2.montgomerycountymd.gov/mcgportalapps/Press_Detail.aspx?Item_ID=22169.

[144] *Advancing Universal Representation Initiative*, *supra* note 141 (Select the filter for "SAFE Partner's Only;" Select each dot in Maryland to see the legal service provider).

[145] *Detained Adult Program, supra* note 131; *Detained Unaccompanied Child's Program*, CAP. AREA IMMIGRANTS' RTS. COAL., https://www.caircoalition.org/detained- unaccompanied-childrens-program (last visited Mar. 1, 2024).

[146] *Safe City Baltimore*, *supra* note 131.

[147] *See* Wesley C. Brockway, Comment, *Rationing Justice*: The Need for Appointed Counsel in Removal Proceedings of Unaccompanied Immigrant Children, 88 U. COLO. L. REV. 179, 192, 197 (2017).

[148] Cházaro, *supra* note 86, at 415; *About the Office of the Maryland Attorney General,* MD. ATT'Y GEN., https://www.marylandattorneygeneral.gov/Pages/About.aspx (last visited Mar. 1, 2024) (stating that the Office "conducts criminal prosecutions and appeal").

individuals who are ill-prepared to present an intricate legal argument and respond to adversarial questioning.[149]

From 2001-2012, only 46% of individuals, on average, were represented in new cases filed in immigration courts in Maryland.[150] The percentage of persons represented steadily increased to 72.1% in FY 2016, and has decreased since, hitting a low of 12.2% in FY 2023, demonstrating that the need is being met less and less.[151] There may be fewer people represented because of the growing need: 2022 saw the highest number of new deportation proceedings filed in Maryland since 2001 at 18,840 cases.[152] As the number of immigrants rises, including from other states bussing new arrivals to Maryland, the need for representation will only continue to grow.[153] The current programs providing representation to immigrants are not reaching all of those in need and will reach even fewer as the need grows if systematic funding is not allocated to providing representation.[154]

### *E. Padilla Provides Ancillary Representation for Criminal Immigrants.*

Immigration experts are increasingly housed in the offices of public defenders since *Padilla*.[155] *Padilla* attorneys are necessary because of the complexity of immigration law, and especially law regarding immigration consequences flowing from criminal charges and convictions.[156] The

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[149] *See* Brockway, *supra* note 147, at 197.

[150] *New Proceedings Filed in Immigration Court*, *supra* note 22 (select "by Fiscal Year" under "Graph"; select "All cases" under "Case Group"; select "Percent" under "Time Series"; select "Maryland" in the "Immigration Court State" column; select "All" in the "Custody" column; select "Represented" in the "Represented" column; hover over bars to see percentages).

[151] *Id.*

[152] *Id.* (select "Number" under "Time Series"; select "All" in the "Represented" column).

[153] Kevin Lewis, *Montgomery County Has Housed Over 2,000 Undocumented Migrants Bused from Texas, Arizona*, WJLA.COM (Jan. 4, 2023, 8:48 AM), https://wjla.com/news/local/montgomery-county-housed-thousands-undocumented-migrants-immigrants-bused-maryland-dmv-border-crisis-supreme-court-title-42-immigration-policy-asylum-migrants-mexico-texas-arizona-south-temporary-housing-church-joe-biden-kamala-harris (explaining that Texas and Arizona governors felt their states were unfairly burdened by immigration, so they sent undocumented immigrants out of their states by the busload to major cities in Democratic states such as D.C. and New York; accordingly the sudden influx of immigrants caused a strain on resources in D.C. and the surrounding area, particularly Montgomery County).

[154] *See* Eagly, *supra* note 64, at 2289.

[155] Angie Junck et al., *The Mandate of Padilla*: *How Public Defenders Can and Must Provide Effective Assistance of Counsel to Noncitizen Clients*, 31 CRIM. JUST. 24, 26 (2016).

[156] *See* Eagly, *supra* note 64, at 2294; *see also* 8 U.S.C. § 1101(a)(48)(A) (2023) (explaining that definition of a "conviction" for immigration purposes includes instances when an immigrant was not found guilty of a crime but "admitted sufficient facts to warrant a finding of guilt.").

mandate of *Padilla* helps immigrants accused of a crime from unnecessarily suffering a second "conviction" of deportation.[157] Following *Padilla*, some public defenders' offices keep immigration attorneys on staff to provide "Padilla consultations" to the accused, including in Maryland.[158] Maryland's program began in 2011.[159] The immigration attorneys on staff provide written advisories to the public defenders "and self-help information for clients who likely will be unrepresented in immigration proceedings."[160] Public defenders can assist an accused immigrant with obtaining a criminal conviction that has less harmful immigration consequences, but that immigrant is oftentimes left to face removal proceedings alone.[161] Moreover, the public defense system is already chronically underfunded;[162] therefore, we should not rely on it without further funding and organization to support representation in the immigration court.

### *F. Maryland's Proposed Universal Representation Bill Was Limited to Detained Individuals.*

In 2021, House Bill 114, a "universal representation" Bill, was proposed in the House of the Maryland General Assembly.[163] The bill would have created a fund to provide counsel for Maryland residents who are detained, have a household income no "greater than 50% of the median income," and are in a proceeding where they are subject to removal.[164] Unfortunately, the bill did not pass. The scope of the bill was excessively narrow, however, because it is essential that individuals facing the possibility of deportation be represented regardless of whether they are detained.

Additionally, the bill's language was vague and overly broad, such that it was unclear who would or would not be covered under the bill. It covered individuals in a "judicial or administrative proceeding where [an individual is] subject to removal from the United States."[165] This could be interpreted to include submitting applications for relief to USCIS, in interviews with USCIS, and in affirmative asylum applications and

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[157] *See, e.g.,* Junck, et al., *supra* note 155, at 26-27.
[158] *Id*.
[159] *Id.* at 27.
[160] *Id.*
[161] Padilla v. Kentucky, 559 U.S. 356, 375 (2010).
[162] Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis?*, 57 HASTINGS L.J. 1031, 1039 (2006).
[163] H.D. 114, 444th Gen. Assemb., Reg. Sess. (Md. 2022).
[164] *Id.*
[165] *Id.*

interviews with the local asylum office.[166] In future iterations, the bill should specifically outline which processes will be covered, such as covering all proceedings before an immigration judge.[167]

## IV. SOLUTION

### *A. Maryland's New and Improved Universal Representation Bill.*

Maryland must pass a bill to provide universal representation to indigent individuals in removal proceedings to protect them from excessively complex immigration laws and to protect their liberty interests. Maryland has three existing universal representation programs which have their own goals and priorities.[168] Maryland could implement similar programs in every county; however, for a more streamlined effort, the program should be through the state.

House Bill 114 was insufficient because it was limited to detained persons.[169] The Maryland General Assembly should instead propose a bill that would provide state funding to appoint counsel for all individuals in removal proceedings in immigration courts in Maryland who cannot afford counsel.[170] When an immigrant receives a notice to appear for an immigration court in Maryland, the Public Defender's Office could be notified. Then, an attorney could be assigned based on need much like court-appointed counsel is for criminal defendants.[171]

### *B. Limitation to Universal Representation: The Immigration System Needs Much Reform Beyond Universal Representation.*

When considering universal representation in immigration matters, all the stops along an individual's immigration journey where they may need representation must be considered.[172] In addition to removal proceedings in the immigration courts, immigrants would benefit from representation during

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[166] *See* Shannon, *supra* note 138 (stating that proceedings before USCIS are administrative proceedings).

[167] 8 U.S.C. § 1229a (2006) (removal proceedings); 8 C.F.R. § 1003.19 (2006) (bond proceedings).

[168] *See Advancing Universal Representation Initiative*, *supra* note 141; Cnty. Council for Montgomery Cnty. Md. Res. 19-1285, 2022 Leg. (Md. 2022).

[169] H.B. 114, 444th Gen. Assemb., Reg. Sess. (Md. 2022).

[170] *See, e.g.*, Shannon, *supra* note 138.

[171] *How to Apply for Eligibility for the Public Defender*, MD. CTS., https://mdcourts.gov/district/pdinfo [https://perma.cc/25P8-4C3E] (last visited Mar. 1, 2024).

[172] *See* Cházaro, *supra* note 86, at 416 (stating that the discussion of universal representation generally refers to "representing noncitizens in formal removal proceedings before an immigration judge").

the CFI after crossing the border, in the asylum interview, in the USCIS interview to adjudicate a petition, the visa interview in the consular office abroad, and in bond hearings, to name a few.[173]

Despite the good intentions of universal representation and clear improvement to individual's outcomes in removal proceedings with representation, some scholars criticize the movement.[174] Angélica Cházaro, an immigration and refugee law expert, argues that focusing on universal representation could be harmful to the overall goal of justice in the immigration system.[175] Furthermore, Cházaro argues that efforts would be better spent challenging the "mass deportation regime" that removes many immigrants even before they are allowed a day in court, including policies like the Migrant Protection Protocols.[176] Cházaro emphasizes that universal representation would only provide assistance to those who arrive to the immigration court, and many immigrants are removed outside of the court process.[177] Additionally, Cházaro points out that, even with representation, most immigrants will not qualify for relief due to the shrinking number of forms of relief.[178]

Moreover, immigrants who are able to have their day in court with a lawyer will face an inherently unfair court system: "a judge's gender, a court's location, and the current president have [a significant impact] on the outcomes of a represented immigrant's case."[179] Cházaro also notes that having a female judge increases an individual's chance of success in the immigration court.[180] Vera, the organization that has created many universal representation programs, likewise admits that the current system has challenges including "biased and unaccountable judges."[181] The immigration

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[173] Shannon, *supra* note 138, at 168-69 (suggesting funding for representation in "administrative applications and proceedings before DHS"); Mary Holper, *Taking Liberty Decisions Away From "Imitation" Judges*, 80 MD. L. REV. 1076, 1125 (2021) (recommending court-appointed counsel in custody and bond immigration hearings).

[174] *See generally*, *e.g.,* Cházaro, *supra* note 86.

[175] *Id.* at 411.

[176] *Id.*; *The "Migrant Protection Protocols*," AM. IMMIGR. COUNCIL (Jan. 7, 2022), https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols (explaining that under the Migrant Protection Protocols ("MPP"), also called the "Remain in Mexico" policy, "individuals who arrive[] at the southern border and ask[] for asylum, either at a port of entry or after crossing the border between ports of entry, are given notices to appear in immigration court and sent back to Mexico").

[177] *See* Cházaro, *supra* note 86, at 425-26.

[178] *Id.* at 441.

[179] *Id.* at 439.

[180] *Id.*

[181] *Id.* at 436 n.135 (quoting Policy Brief, *A Federal Defender Service for Immigrants: Why We Need a Universal, Zealous, and Person-Centered Model,* VERA INST. OF JUST. 2 (Feb.

court can hardly avoid political bias in its position within the Department of Justice, subject to the sometimes whimsical decisions of whichever Attorney General the President newly appoints.[182] Some scholars have recommended that the court become an independent Article III court, instead of remaining under the Executive Branch, in efforts to increase competency and fairness.[183] For similar reasons, a group of former immigration judges advocated for the creation of an independent Article I Immigration Court, expounding on the lack of impartiality of the current system due to the court's placement under the thumb of "the nation's chief enforcement officer, the Attorney General."[184]

## V. CONCLUSION

Thousands of Maryland residents face dire consequences in removal proceedings including deprivation of liberty through detention, separation from family, and removal to a country where they will face certain harm.[185] Maryland needs to pass a universal representation bill to protect the liberty interests of all indigent immigrants. Due process requires that the government provide individuals with representation who face the loss of liberty that is deportation.

The need in Maryland for representation in the immigration court continues to grow as the backlog in the courts increases and immigrants continue to move to, and be sent to, Maryland.[186] Programs in cities such as Baltimore have shown that the program will work in a small locale such as Maryland, and that systematic funding is necessary to maintain such programs.[187] The programs implemented in three Maryland counties are successfully working with nonprofit organizations to bring representation to

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2021), https://www.vera.org/downloads/publications/a-federal-defender-service-for-immigrants.pdf.

[182] *See Why America Needs an Independent Immigration Court System: Hearing on "For the Rule of Law, an Independent Immigration Court" Before the Subcomm. on Immigr. and Citizenship of the H. Judiciary Comm.*, 117th Cong. (2022) (statement of Greg Chen, Am. Immigr. Laws. Ass'n.) [hereinafter *Independent Immigration Court System*]; *see* also Holper, *supra* note 173, at 1098.

[183] *See, e.g., Independent Immigration Court System, supra* note 182; *see also* Holper, *supra* note 173, at 1081.

[184] Statement of the Round Table of Former Immigration Judges: Hearing on "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts," Before the Subcomm. on Immigr. and Citizenship of the H. Judiciary Comm., 117th Cong. 1 (2020) (statement of former Immigr. Judges and former App. Immigr. Judges of the Bd. of Immigr. Appeals).

[185] *See* discussion *supra* Section III.B.

[186] Syracuse Univ., *supra* note 1; *see supra* text accompanying note 153.

[187] *See supra* discussion p. 24.

immigrants, but qualifying factors largely limit the representation. With the stakes so high in removal proceedings, and just as counsel is provided to all indigent individuals facing criminal prosecution, Maryland must also provide counsel to all indigent immigrants facing removal proceedings.

## COMMENT

# FINANCIAL FRENEMIES: HOW MARYLAND'S RATE-SETTING DISPUTE RESOLUTION MODEL CONTRADICTS THE FEDERAL ARBITRATION MODEL AND CONTINUES TO PIT INSURERS AND PROVIDERS AGAINST EACH OTHER

**By: Alexandra R. Mitchell***

## I. INTRODUCTION

Today is the day! Your water broke and everything is happening so fast, but you are calm because you have packed a "go bag," and your partner has mastered buckling in the car-seat carrier. You have been waiting months to meet your precious baby, and today is the day. You have dreamed of having a natural birth, but your baby has different plans, so the doctors insist on an emergency cesarean-section ("c-section"). You stay calm because you are ready to meet your baby, no matter how they are delivered. Everything goes well and there he is, your beautiful baby boy. The best day of your life is finally here, right? But after a successful, routine c-section, you are met with thousands of dollars in surprise medical bills; now what?

Childbirth is a prominent source of surprise medical bills because it frequently results in hospitalization, and women tend to receive at least some out-of-network care during this time.[1] In 2019, researchers gathered data from private insurance consumers which analyze childbirth delivery expenses.[2] The purpose of this research was to "estimat[e] the frequency and magnitude of surprise bills for deliveries and newborn hospitalizations," as they are a "leading [reason] for hospitalization in the [United States]."[3] The collected data derived from over ninety-five thousand families, of which just

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[1] Kao-Ping Chua et al., *Prevalence and Magnitude of Potential Surprise Bills for Childbirth*, 2 JAMA HEALTH F. 1, 3 (2021).

[2] *Id.* at 1.

[3] *Id.*

over thirty-two thousand reported giving birth via c-section delivery.[4] Twenty percent (approximately 6,500) of the families that delivered via c-section reported receiving at least one surprise medical bill.[5] As of 2021, average cost of a surprise medical bill is $1,825.[6] Thus, it is no surprise that millions of Americans forgo various types of medical treatments because of this unpredictable and hefty cost.[7]

This situation is not unique to childbirth expenses, rather it is prevalent in various emergency care circumstances as well.[8] Between 2019 and 2020, twenty-two percent of Americans reported avoiding medical treatment because of its cost.[9] This reality means that irrespective of whether the treatment is medically necessary, approximately one-in-four Americans skip medical treatment to avoid the cost.[10] Despite health insurance's intended purpose to protect consumers against high costs for unforeseeable medical necessities,[11] Americans still suffer the brunt of insurmountable surprise medical bills.[12] As a result, Maryland, among other states, has imposed consumer protections prohibiting providers from sending consumers surprise medical bills as "balance bills" for outstanding charges their insurance does not cover.[13]

Moreover, existing state protections and new federal regulations impose processes on insurers and providers to resolve disputes regarding outstanding medical bills.[14] Such regulations include standardized payment

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[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Megan Leonhardt, *Nearly 1 in 4 Americans are Skipping Medical Care Because of the Cost*, CNBC: MAKE IT (Mar. 12, 2020, 10:12 AM), https://www.cnbc.com/2020/03/11/nearly-1-in-4-americans-are-skipping-medical-care-because-of-the-cost.html.
[8] Georgie Bierwirth, Comment, *Regulating Balance Billing in the Private Sector: Should the Federal Government Leave Well Enough Alone?*, 71 DEPAUL L. REV. 797, 799-800 (2022).
[9] Leonhardt, *supra* note 7.
[10] *Id.*
[11] *Why Health Insurance is Important*, HEALTHCARE.GOV, https://www.healthcare.gov/why-coverage- is- important/#:~:text=Health%20insurance%20protects%20you%20from%20unexpected%2C%20high%20medical%20costs.&text=The%20amount%20you%20pay%20for,%242%2C000%20of%20covered%20services%20yourself (last visited Apr. 29, 2024).
[12] Leonhardt, *supra* note 7.
[13] *See generally* Jack Hoadley & Kevin Lucia, *Unexpected Charges: What States are Doing About Balance Billing*, CAL. HEALTHCARE FOUND. 2, 6-9 (Apr. 2009), https://www.chcf.org/wp-content/uploads/2017/12/PDF-UnexpectedChargesStatesAndBalanceBilling.pdf.
[14] *See generally* Jack Hoadley et al., *No Surprises Act: A Federal-State Partnership to Protect Consumers from Surprise Medical Bills*, COMMONWEALTH FUND (Oct. 20, 2022), https://www.commonwealthfund.org/publications/fund-reports/2022/oct/no-surprises-act-federal-state-partnership-protect-consumers.

rates and arbitration.[15] The regulations do not penalize consumers, rather, they require insurers and providers to determine how to set reimbursement rates that show how much of the outstanding balance the insurance company will pay to the provider.[16] This scenario naturally creates disputes between these two parties that must be resolved.[17] This comment proposes that Maryland should follow the lead of the federal No Surprises Act of 2022 ("NSA") and adopt its arbitration dispute resolution model.[18]

This comment will discuss the current state and federal laws that impose different balance billing dispute resolution processes and propose solutions to resolve conflicting factors between the two. Section II discusses the scope of protection against balance billing both before and after the enactment of the NSA and describes the two different dispute resolution processes.[19] Section III discusses the disparities between the two dispute resolution processes, including how Maryland's payment standard model contradicts the federal arbitration model.[20] Section IV proposes that Maryland adopt the federal dispute resolution model.[21] Additionally, Section IV argues that adopting the NSA arbitration model would eliminate confusion regarding Maryland's current approach and ultimately simplify the entire process.[22] Furthermore, Section IV addresses the potential pitfalls of the arbitration model.[23] Last, Section V emphasizes the value of compromise between providers and insurers and explains why Maryland should join the majority by implementing arbitration.[24]

## II. HISTORICAL DEVELOPMENT

Despite having private health insurance, patients who receive emergency medical treatment often incur insurmountable surprise medical bills.[25] These surprise medical bills are referred to as "balance bills."[26] Balance bills generally result from two situations: (1) when a patient receives

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[15] *Id.*
[16] *See* Klara Bieniasz, *A Surprise Interpretation of the No Surprises Act*, VILL. L. REV. BLOG (Apr. 5, 2022), https://www.villanovalawreview.com/post/1464-a-surprise-interpretation-of-the-no-surprises-act.
[17] *Id.*
[18] *See infra* Section IV.A.
[19] *See infra* Section II.
[20] *See infra* Section III.
[21] *See infra* Section IV.
[22] *See infra* Section IV.
[23] *See infra* Section IV.C.
[24] *See infra* Section V.
[25] WEN SHEN, CONG. RSCH. SERV., LSB10284, BALANCE BILLING: CURRENT LEGAL LANDSCAPE AND PROPOSED FEDERAL SOLUTIONS 1 (2019).
[26] *Id.*

medical treatment at an out-of-network facility, or (2) when a patient receives medical treatment at an in-network facility, but by an out-of-network provider.[27] In both situations, the patient's insurance company ("insurer") pays an amount equivalent to an in-network charge; then, the health care provider ("provider") sends the patient a bill for the outstanding balance.[28]

While individual states have slowly implemented regulations to combat balance bills, the federal government enacted the No Surprises Act ("NSA") in January 2022, requiring all fifty states to have consumer protection regulations against balance bills.[29] The NSA defers to the existing state laws and affords states with broader regulatory authority.[30] States have the primary responsibility to enforce their existing protections or any they choose to adopt.[31]

Maryland's existing balance billing regulations, supplemented by the newly widened range of regulatory authority afforded by the NSA, serve as consumer protections in the fight against surprise medical bills.[32] Now, in addition to Health Maintenance Organization ("HMO") members, Preferred Provider Organization ("PPO") and self-funded consumers are protected against balance bills for covered emergency health services.[33] Nevertheless, reimbursement disputes still arise between providers and insurers.[34] Consequently, insurers are responsible for paying the outstanding balance.[35] Therefore, the federal government will step in should states fail to substantially enforce protections.[36]

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[27] *Id.*
[28] *Id.*
[29] Hoadley & Lucia, *supra* note 13, at 2; No Surprises Act, 42 U.S.C. § 300gg-111 (2022).
[30] Hoadley et al., *supra* note 14.
[31] *Id.*
[32] *See* MD. CODE ANN., HEALTH-GEN. § 19-219 (West 2023) (explaining that the commission may aggregate or individually establish hospital rates in accordance with the all-payer model contract); MD. CODE ANN., HEALTH-GEN. § 19-710.1(b) (West 2011) (explaining methods for calculating reimbursement rates HMOs must pay for covered services provided by out-of-network providers); MD. CODE ANN., INS. § 15-146 (West 2022) (noting Maryland's conformity to the federal No Surprises Act); MD. CODE ANN., INS. § 14-205.2(b)(1)-(3) (West 2011) (explaining out-of-network on-call and hospital-based physicians may not attempt to collect any money owed to the aforementioned physicians beyond any deductible, co-pay, or co-insurance).
[33] *See* MD. CODE ANN., INS. § 14-205.2(c)-(d) (explaining methods for calculating reimbursement rates PPO insurers must pay for covered services provided by out-of-network on-call and hospital-based physicians).
[34] Bierwirth, *supra* note 8, at 806.
[35] Bieniasz, *supra* note 16.
[36] Hoadley et al., *supra* note 14.

a. *Scope of Protection Against Balance Bills Prior to the No Surprises Act of 2022*

Although states regulated balance billing prior to the enactment of the federal NSA, prior laws limited the scope of protection to regulating HMO plans, not PPO plans.[37] The prior system also prohibited states from regulating self-funded employer health plans, placing such plans outside the scope of balance billing regulations.[38] As of 2021, self-funded insurance plans through their employers covered sixty-four percent of U.S. employees.[39] Consequently, in 2021, state balance billing regulations did not protect nearly two-thirds of U.S. insurance consumers.[40] Therefore, depending on the type of insurance plan purchased (HMO or PPO), balance billing regulations only protected one-third of U.S. insurance consumers.[41]

b. *Scope of Protection Against Balance Bills Following the Enactment of the No Surprises Act of 2022*

Although states continue to regulate surprise medical bills, the NSA expands the states' capacity to do so.[42] Under the NSA, states have broader authority to regulate against balance bills, including regulating self-funded insurance consumers, the federal Employee Retirement Income Security Act of 1974 previously prohibited.[43] As a result, the NSA largely prohibits the possibility for any consumer to receive a surprise medical bill.[44] This consumer benefit, however, creates potential reimbursement disputes

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[37] Hoadley & Lucia, *supra* note 13, at 13. HMO plans are a type of Medicare Advantage Plan that requires patients to get treatment from facilities and providers within the plan's network. *See Health Maintenance Organizations (HMOs)*, MEDICARE.GOV,0 https://www.medicare.gov/sign-upchange-plans/types-of-medicare-health-plans/medicare-advantage-plans/health-maintenance-organization-hmo (last visited Nov. 21, 2022). Contrarily, PPO plans are offered by private insurance companies and are largely unrestrictive—covering in-network and emergency expenses, but patients can also choose to use out-of-network facilities and providers. *See Preferred Provider Organization (PPO)*, MEDICARE.GOV, https://www.medicare.gov/sign-upchange-plans/types-of-medicare-health-plans/preferred-provider-organization-ppo (last visited Nov. 21, 2022).

[38] Hoadley & Lucia, *supra* note 13, at 13.

[39] Preeti Vankar, *Percentage of U.S. Workers Covered by Self-Funded Health Insurance Plans 1999-2022*, STATISTA (Jan. 19, 2023), https://www.statista.com/statistics/985324/self-funded-health-insurance-covered-workers/.

[40] *Id.*; *see generally* Hoadley & Lucia, *supra* note 13, at 13.

[41] Vankar, *supra* note 39; *see generally* Hoadley & Lucia, *supra* note 13, at 13.

[42] Hoadley et al., *supra* note 14.

[43] *Id.* ("The federal Employee Retirement Income Security Act of 1974 ("ERISA") prohibits states from adopting surprise-billing protections for consumers in self-funded plans.").

[44] Bieniasz, *supra* note 16.

between insurers and providers.[45] The NSA creates a default arbitration process for resolving these disputes.[46] A state's incorporation of this Independent Dispute Resolution ("IDR") into its laws is dependent upon the status of the state's regulations.[47]

One purpose of the NSA is to serve as a "gap filler" for holes in existing state-law protections.[48] States with current balance billing regulations that do not include a dispute resolution process may adopt and incorporate the IDR arbitration model.[49] States with no balance billing regulations may adopt the NSA in its entirety, including the IDR model.[50] However, states that currently have balance billing regulations that include an alternative dispute resolution process are not required to adopt the IDR arbitration model.[51] Maryland is one of these exempt states.[52]

c. *Alternative Dispute Resolution: Federal IDR v. Maryland's Approach*

i. The NSA's IDR Arbitration Model

The NSA designed its default dispute resolution process — strict arbitration — for providers and insurers to use when reimbursement disputes arise.[53] Should a reimbursement dispute result from an outstanding medical bill, both the provider and the insurer have thirty days to negotiate an out-of-network reimbursement payment.[54] If the parties fail to reach a voluntary agreement upon the conclusion of the thirty-day negotiation period, the parties can then initiate arbitration.[55] Once arbitration begins, each party (insurer and provider) will submit their best offer to an arbitrator.[56] The arbitrator must then choose either the insurer's or provider's offer; they cannot split the difference.[57]

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[45] *Id.*
[46] Hoadley et al., *supra* note 14.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Hoadley et al., *supra* note 14.
[53] Sarah Jolley, Comment, *Home Run or Strike Out: Can Baseball Arbitration Solve America's Medical Debt Crisis?*, 2022 J. DISP. RESOL. 169, 180 (2022).
[54] *Id.*; Hoadley et al., *supra* note 14.
[55] Hoadley et al., *supra* note 14.
[56] *Id.*
[57] *Id.*

The independent arbitrator will consider several factors during the arbitration while reviewing each party's best offer.[58] Permissible factors to consider include: (1) the qualifying payment amount, also known as the "median in-network rate," (2) information submitted by the insurer and provider, (3) the provider's "training, education, experience, and quality," (4) "patient acuity and complexity of services," (5) market share for either party, (6) the provider's "good faith efforts to join network," and (7) prior contracted rates.[59] Conversely, the independent arbitrator may not consider: (1) "usual and customary or billed charges," or (2) "rates paid in public sector programs, such as Medicare and Medicaid."[60] The seven permissible factors are considerably different from standardized rate-setting models that use the two prohibited factors as key considerations.[61] The purpose of prohibiting such considerations in IDR arbitration is to "strike an acceptable compromise between the wants of providers and insurers."[62] Such a compromise would stop the practice of pitting insurers and providers against each other.[63]

ii. Maryland's Bifurcated Payment Approach: Out-of-Network Facility Costs v. Out-of-Network Provider Costs

Maryland has developed a bifurcated approach to standardize rates when resolving the amount of an outstanding medical bill payment.[64] Depending on whether the outstanding bill is for an out-of-network facility cost or an out-of-network provider cost, the approach for determining the reimbursement rate is different.[65] Maryland's standardized payment approach provides two different reimbursement methods that mimic the two ways consumers may be balance billed.[66]

The first prong of the bifurcated payment standard pertains to systematizing reimbursement rates for out-of-network facility costs.[67] For

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[58] Jolley, *supra* note 53; *see also* Loren Adler et al., *Understanding the No Surprises Act*, BROOKINGS (Feb. 4, 2021), https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2021/02/04/understanding-the-no-surprises-act/.
[59] Hoadley et al., *supra* note 14; *see also* Jolley, *supra* note 53.
[60] Hoadley et al., *supra* note 14.
[61] Jolley, *supra* note 53, at 180.
[62] *Id.*
[63] *See* Hoadley et al., *supra* note 14.
[64] CTR. FOR MEDICARE & MEDICAID SERV., CHART REGARDING APPLICABILITY OF THE FEDERAL INDEPENDENT DISPUTE RESOLUTION PROCESS IN BIFURCATED STATES (2022).
[65] MD. CODE ANN., HEALTH-GEN. § 19-219(c) (West 2023); *id.* § 19-710.1(b) (explaining the rate setting formula for HMOs); MD. CODE ANN., INS. § 14-205.2(a)-(d) (West 2011) (explaining the rate setting formula for PPOs).
[66] HEALTH-GEN. § 19-710.1(b) explaining the rate setting formula for HMOs); INS. § 14-205.2(a)-(d) (explaining the rate setting formula for PPOs).
[67] HEALTH-GEN. § 19-219(c).

years, Maryland has partnered with the Center of Medicare & Medicaid to make health care more affordable.[68] In 1977, Maryland established the *Maryland All Payer System* ("MAPS"), which required public and private insurers to pay the same predetermined rate for any medical services provided in all hospitals.[69] Subsequently, in 2015, Maryland launched its update to MAPS, the *All-Payer Model* ("APM"), which established global budgets for certain Maryland hospitals to "reduce Medicare hospital expenditures and improve quality of care" for Medicare beneficiaries.[70] Therefore, the Health Service Cost Review Commission establishes hospital rates pertaining to the global budget in accordance with the all-payer model agreement.[71]

The second prong of Maryland's bifurcated payment standard pertains to standardizing the reimbursement rates for out-of-network provider costs.[72] In conjunction with the APM, Maryland has additional consumer protections, which include prohibiting out-of-network providers from balance billing HMO members for "covered service."[73] Similar to the APM's capitated reimbursement rates for hospital services, Maryland's health-general code standardizes the reimbursement rate for covered services performed by out-of-network providers.[74] Generally, HMOs calculate payments to out-of-network, non-emergency providers based on the cost of similarly covered services by in-network providers in the same geographic area.[75] Alternatively, HMOs pay for out-of-network emergency care at

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[68] Ctr. for Medicare & Medicaid Servs., *Maryland Total Cost of Care Model*, CMS.GOV, https://innovation.cms.gov/innovation-models/md-tccm (Dec. 20, 2022).

[69] Douglas Holtz-Eakin & Andrew Strohman, *The National Implications of Maryland's All-Payer System*, AM. ACTION F. (Mar. 2, 2020), https://www.americanactionforum.org/research/the-national-implications-of-marylands-all-payer-system/ (noting hospital rates are set by the Maryland Health Services Cost Review Commission) (emphasis added).

[70] *Id.*

[71] HEALTH-GEN. § 19-219(c).

[72] *Id.* § 19-710.1(b) (West 2014) (explaining the rate setting formula for HMOs); MD. CODE ANN., INS. § 14-205.2(a)-(d) (West 2011) (explaining the rate setting formula for PPOs).

[73] Hoadley & Lucia, *supra* note 13, at 8 (quoting MD. CODE ANN., HEALTH GEN. § 19-710(i), (p) (West 2008)). Generally, a "covered service is one authorized under the terms of a contract . . . [e]mergency care and out-of-area urgent care are generally considered covered services." *Id.* (quoting HEALTH-GEN. § 19-710(d)(2)(i)-(iii)).

[74] Hoadley & Lucia, *supra* note 13, at 8.

[75] *Id.* Defined by state statute, Maryland requires that HMOs pay out-of-network providers "no less than the greater of: (A) 125% the average rate the [HMO] paid as of January 1 of the previous calendar year in the same geographic area . . . for the same covered service" to an in-network provider; or "(B) 140% of the rate paid by Medicare . . . for the same covered service to [an in-network] provider in the same geographic area as of August 1, 2008, inflated by the change in the Medicare Economic Index from 2008 to the current year." HEALTH-GEN. § 19-710.1(b)(2)(iii).

trauma centers using "a Medicare-based rate" rather than the average HMO in-network rate.[76]

Although the NSA expanded balance bill protection to previously unprotected PPO members, unlike HMO members, the NSA only protects PPO holders against balance bills for covered emergency care services received at a hospital.[77] Specifically, protection is limited to covered services[78] provided by on-call and hospital-based physicians.[79] An on-call physician is one who "has privileges at a hospital, is required to respond . . . to provide health care services for unassigned patients at the request of the hospital or a hospital emergency department, and is not a hospital-based physician."[80] Moreover, a hospital-based physician is "a physician licensed in the state" or a "group physician practice that includes physicians licensed in the state" that are "under contract to provide health care services to patients at a hospital."[81]

Maryland's insurance code standardizes the reimbursement rate if a dispute between an insurer and provider arises regarding a PPO member's outstanding balance.[82] This rate is determined differently, depending on whether the provider is an on-call physician or a hospital-based physician.[83]

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[76] Hoadley & Lucia, *supra* note 13, at 8. Similar to the general requirements, for trauma care at a trauma center, HMOs must pay out-of-network providers "the greater of: (1) 140% of the rate paid by the Medicare program . . . for the same covered service, to a similarly licensed provider; or (2) The rate as of January 1, 2001 that the [HMO] paid in the same geographic area . . . for the same covered service, to a similarly licensed provider." HEALTH-GEN. § 19-710.1(b)(2)(ii).

[77] *The No Surprises Act: Surprise Billing Protections*, MD. OFF. ATT'Y GEN., https://www.marylandattorneygeneral.gov/Pages/CPD/HEAU/NSA.aspx (last visited February 28, 2024); *see generally* INS. § 14-205.2(b).

[78] MD. CODE ANN., INS. § 14-201(f) (West 2011) (defining covered services as ". . . a health care service that is a covered benefit under a preferred provider insurance policy.").

[79] *Id.* § 14-205.2(a).

[80] *Id.* § 14-201(l).

[81] *Id.* § 14-201(h).

[82] *Id.* § 14-205.2(a)-(d).

[83] *Id.* § 14-205.2(c)-(d). Similar to the HMO standardized reimbursement method, for covered services by an on-call physician at the hospital, a PPO insurer must pay, "no less than the great of: (1) 140% of the average rate the insurer paid for the 12-month period that ends on January 1 of the previous calendar year in the same geographic area . . . for the same covered service, to similarly licensed providers under written contract with the insurer , or (2) the average rate the insurer paid for the 12-month period that ended on January 1, 2010, in the same geographic area, as defined by the Centers for Medicare and Medicaid Services, for the same covered service to a similarly licensed provider not under written contract with the insurer, inflated by the change in the Medicare Economic Index from 2010 to the current year. *Id.* § 14-205.2 (c)(2)(ii)(1)-(2). Furthermore, with respect to covered services by a hospital-based physician, a PPO insurer must pay, "no less than the great of: (1) 140% of the average rate the insurer paid for the 12-month period that ends on January 1 of the previous calendar year in the same geographic area . . . to similarly licensed providers, who

Both emergency rates are determined using price percentages in certain areas.[84] However, the difference lies in the Medicare Index formula.[85]

Rates for covered services by an on-call physician are determined using the average Medicare rate, whereas a year-end Medicare rate is used for hospital-based physicians.[86] However, there is no specified state law to determine reimbursement rates if a PPO member is treated by an out-of-network on-call or hospital-based physician that does not accept PPO benefits.[87] Accordingly, the federal NSA arbitration dispute resolution process is used to determine those reimbursement rates.[88] Simply put, should a PPO member receive covered services at an in-network facility by an out-of-network provider who does not accept PPO benefits, the NSA IDR arbitration process will apply to reimbursement rate disputes.[89] In other words, if a provider does not accept PPO benefits, state law does not govern the covered services received and arbitration applies.[90]

Consequently, Maryland employs different dispute resolution methods for different circumstances which inevitably creates inconsistent results.[91] To combat balance billing, Maryland uses the APM,[92] specified state laws,[93] and NSA arbitration,[94] all of which weigh differently in favor of providers and insurers.[95] Therefore, Maryland's current bifurcated, multi-dimensional model is contrary to the goal of creating uniformity and balance between the wants of providers and insurers.[96]

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are hospital-based physicians, under written contract with the insurer, or (2) the final allowed amount of the insurer for the same covered service for the 12-month period that ended on January 1, 2010, inflated by the change in the Medicare Economic Index to the current year, to the hospital-based physician billing under the same federal tax identification number the hospital-based physician used in calendar year 2009." *Id.* § 14-205.2(d)(2)(ii)(1)-(2).

[84] MD. CODE ANN., INS. § 14-205.2 (c)(2)(ii)(1)-(2), (d)(2)(ii)(1)-(2) (West 2011).

[85] *Id.*

[86] *Id.*

[87] CTR. FOR MEDICARE & MEDICAID SERV., *supra* note 64, at 4.

[88] *Id.* at 1.

[89] *Id.* at 1, 5.

[90] *Id.* at 1.

[91] *See* discussion *supra* Section II.C.

[92] *See* discussion *supra* Section II.C.i.

[93] *See* discussion *supra* Section II.C.ii.

[94] CTR. FOR MEDICARE & MEDICAID SERV., *supra* note 64.

[95] *See* discussion *supra* Section II.C.i-ii.

[96] *See generally,* Jolly, *supra* note 53; Hoadley et al., *supra* note 14, at 12.

## III. ISSUE

### a. *Maryland's Bifurcated Payment Standard Contradicts the No Surprises Act's Arbitration Model, Continuing to Pit Providers and Insurers Against Each Other.*

Maryland's standardized reimbursement rate is favorable to insurers and, as a result, pits insurers against providers.[97] Consequently, providers are highly concerned about insurers manipulating reimbursement rates, regardless of the benefit to consumers.[98] Specifically, providers note that by "setting rates for a specific geographic area, some HMOs look to the lowest rate they paid a single provider in that area," and then use that rate even if it is "significantly less than . . . other providers in the area."[99] Such a practice "may be a factor in driving providers to other markets."[100] This scenario is precisely why the federal arbitration model expressly forbids independent arbitrators from considering "usual and customary or billed charges, and rates paid in public sector programs, such as Medicare and Medicaid."[101]

Although not explicitly stated, the formulaic factors in Maryland's reimbursement standard undeniably contradict the prohibited factors that federal arbitrators cannot consider.[102] Maryland's specified state laws standardize reimbursement rates using a percentage of the "average rate the insurer paid," or the average "inflated by the change in the Medicare Economic Index," for covered services by an in-network provider in the previous calendar year.[103] In a recent report explaining the "Federal-State Partnership" to combat balance billing, researchers noted the contradictory factors between state rate-setting approaches and the federal arbitration model.[104] The report lists Maryland and six other states as having "generally cost-containing" rate-setting approaches.[105]

Both Maryland and California laws determine reimbursement rates by "specifi[cally] consider[ing] . . . in-network rate or Medicare rate," but do not

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[97] Hoadley & Lucia, *supra* note 13, at 9.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] Hoadley et al., *supra* note 14.
[102] *Id.*
[103] MD. CODE ANN., INS. § 14-205.2(c)(2)(ii)(1)-(2), (d)(2)(ii)(1)-(2) (West 2011).
[104] Hoadley et al., *supra* note 14 (explaining the likelihood of state rate-setting approaches having an inflationary impact and what factors those states consider in determining the reimbursement payment amount).
[105] *Id.* (explaining that Maryland, California, Colorado, Michigan, New Mexico, Nevada, and Maine are the seven states that have "generally cost-containing" specified state laws for payment determination for out-of-network provider costs).

specifically consider "billed charges or usual and customary rates."[106] Despite efforts to distinguish the specified considerations in California's rate-setting approach from the federal arbitration model's forbidden factors,[107] the researchers conceded that California's approach is one that is "not allowed in the federal system."[108] Considering the similarities between California and Maryland's rate-setting approach, Maryland's reimbursement rate also relies on key considerations prohibited by the federal system.[109]

Relative to a contradiction, the federal model is a "significant departure" from the rate-setting approach in states such as Maryland.[110] While the federal model cannot consider billed charges and Medicare rates, arbitrators can consider "health plan's [PPO's] historical median in-network rate for similar services."[111] The distinction is an intentional effort to stop pitting the insurers against providers.[112] Maryland's standardized rate-setting model is highly advantageous to insurers and, consequently, damaging to providers.[113] The expectation is that implementing less confrontational factors in the arbitration model will "strike an acceptable compromise between the wants of providers and insurers."[114] Thus, securing a "net win for the consumers [PPO and HMO members]" seems to be the ultimate goal.[115]

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[106] *Id.*

[107] *Id.* (explaining the methodology of California's rate-setting approach, which considers a percent of the Medicare rate or an insurance plan's average in-network rate).

[108] *Id.*

[109] Jack Hoadley & Kevin Lucia, *Are Surprise Billing Payments Likely to Lead to Inflation in Health Spending?*, COMMONWEALTH FUND 1, 3 (Apr. 26, 2021) https://www.commonwealthfund.org/blog/2021/are-surprise-billing-payments-likely-lead-inflation-health-spending [hereinafter *Inflation in Health Spending*] (noting that California's rate-setting approach is one "not allowed in the federal system," but also immediately stating Maryland's rate-setting standard that considers the same forbidden factors but uses different percentages than the California model).

[110] Jolley, *supra* note 53.

[111] *Id.*; Adler et al., *supra* note 58.

[112] Hoadley et al., *supra* note 14 (noting that a "specific payment standard or formula for setting the amount paid or neutral binding arbitration . . . regularly set providers (favoring arbitration) against insurers (favoring a payment standard)." As a result, the "federal law rejects [a] hybrid approach in favor of [IDR]" with "strict guardrails" to serve duel, compromising, goals of "limiting its use and reducing the likelihood of large awards.").

[113] Hoadley & Lucia, *supra* note 13, at 9.

[114] Jolley, *supra* note 53.

[115] *Id.*

## IV. SOLUTION

### a. *Maryland Should Adopt the Federal IDR Arbitration Model*

According to recent reports, a majority of states have adopted or aligned with the NSA arbitration model, and Maryland should too.[116] Regarding state and federal collaboration on implementing the NSA, research shows that "in [a] majority of states [(28)], disputes over determining payments to out-of-network providers will be resolved by the federal [IDR arbitration] system."[117] The remaining twenty-two states have specified state laws that determine payment rates.[118] The twenty-two states with specified state laws determine payment rates through a variety of rate-setting formulas, arbitration models, or hybrid approaches.[119] Additionally, where some specified state laws have a narrowly tailored scope, "payment for services not covered under these laws will go through the federal IDR system."[120]

### b. *Maintaining Autonomy While Aligning with the Federal Independent Dispute Resolution System*

Although the federal law rejects a hybrid approach to setting payment rates, federal law still gives deference to states developing their own duel compromising payment determination process.[121] The strict guardrails of the federal arbitration system promote compromise between providers and insurers.[122] Where insurers want formulas to consider bills charged and customary rates, the federal arbitration system permits consideration of the historical median in-network rate that is friendly to insurers yet not detrimental to providers.[123] The compromise need not stop there. In fact, New York has notably modified specified state laws to *align* with the federal arbitration model.[124]

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[116] Hoadley et al., *supra* note 14.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* Maryland imposes a widely applicable specified state law. *See generally* MD. CODE ANN., INS. § 14-205.2 (West 2011); MD. CODE ANN., HEALTH-GEN. § 19-219 (West 2023). However, if a PPO member receives covered services by an out-of-network on-call or hospital-based physician, and the physician refuses to accept PPO benefits, this would be a service not covered under the specified state law. CTR. FOR MEDICARE & MEDICAID SERV., *supra* note 64. Therefore, the non-covered services would go through the Federal IDR system. *Id.*
[121] Hoadley et al., *supra* note 14.
[122] *See* Hoadley et al., *supra* note 14 and accompanying text.
[123] Jolley, *supra* note 53; *see also* Hoadley et al., *supra* note 14, at 4.
[124] Hoadley et al., *supra* note 14.

New York is one of the twenty-two states that impose specified state laws rather than adopt the NSA and its IDR arbitration system in its entirety.[125] Contrary to Maryland's rate-setting approach, New York utilizes binding arbitration.[126] In an insurance letter by the Department of Financial Services, New York's Health Bureau provides guidance to insurance parties regarding the state's IDR process in Financial Services Law Article 6.[127] Rather than adopt the federal IDR system, New York modified its policies to align with the federal system (i.e., produce an arbitration model that supports and agrees with the federal system) but maintains autonomy in its legislative decision making.[128] In New York's model, "arbitration decisions yielding higher payment amounts will not raise cost sharing (like the federal policy), but lower payments to reduce cost sharing."[129] This model will likely produce more provider-friendly amounts without creating detrimentally inflated results for insurers.[130] Specifically, because the model compromises the wants of providers and insurers[131] while also being "more favorable for consumers than the federal policy,"[132] it promotes a "net win for consumers."[133]

c. *Pitfalls in the Federal IDR Arbitration Model*

There are two major pitfalls in the federal IDR process.[134] As noted by distinguishing factors in the New York arbitration process, the first is that the federal arbitration process may increase insurance spending if arbitration yields payment requirements that would be more than the original in-network amounts for covered services.[135] The second is the future implications of

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[125] *Id.*
[126] N.Y. COMP. CODES R. & REGS. tit. 23, § 400.5 (West 2021) (regarding IDR process, specifically "[r]esponsibilities of health care plans for disputes regarding emergency services and surprise bills.").
[127] *See* Letter, Lisette Johnson, Chief, Health Bureau, *The No Surprise Act, Independent Dispute Resolution Process, and Disclosure or protections from Balance Billing* (Dec. 12, 2021), https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2021_10.
[128] *Id.*
[129] Hoadley et al., *supra* note 14 (citing Lisette Johnson, *supra* note 127). Notably, Johnson's insurance letter summarized that New York "insured's cost-sharing should be calculated based the on issuer's original payment amount and cannot increase based on IDR entity's determination." Johnson, *supra* note 127. Moreover, should the "IDR entity determine that the issuer must pay additional amounts for services rendered," "the issuer would be responsible for paying the additional amount." *Id.*
[130] *See generally* Jolley, *supra* note 53; Hoadley et al., *supra* note 14, at 12.
[131] Jolley, *supra* note 53.
[132] Hoadley et al., *supra* note 14.
[133] Jolley, *supra* note 53, at 180.
[134] *See Inflation in Health Spending*, *supra* note 109; *see* Hoadley et al., *supra* note 14.
[135] *Inflation in Health Spending*, *supra* note 109.

litigation regarding factors arbitrators can consider to determine reimbursement payment rates.[136]

i. Arbitration Can Increase Insurance Spending in Two Ways

Whether the arbitration process equates to higher insurance spending is largely conditioned on what arbitrators determine a reimbursement amount should be and what the insurers are paying for in-network covered services.[137] Where the arbitrator determines a higher reimbursement amount than what the insurer has set as its in-network rate, insurance spending may increase in two ways.[138] First, if the insurer previously paid only the in-network rate, its out-of-network services cost may increase.[139] Second, if providers discover that out-of-network services are more lucrative than in-network services, they will have leverage to negotiate higher in-network rates in future contracts.[140] Nevertheless, these two scenarios depend on the arbitrator determining a reimbursement amount above what the insurer has set as the in-network rate.[141] So long as arbitrators determine reimbursement amounts that are "reasonably close to median in-network rates," these two scenarios can be avoided.[142]

ii. Future Implications of Litigation Can Curtail the Cost-Containment Goals of the NSA

Since the initial passing of the NSA, lawsuits have ensued in efforts to solidify what factors can be considered by arbitrators in the federal IDR process.[143] In September 2021, the U.S. government passed a slew of rules that pertained to surprise billing regulations.[144] One rule specifically stated that arbitrators "must select the proposed payment amount closest to the qualifying payment amount."[145] The qualifying payment amount ("QPA") is the "median rate the insurer would have paid for the service provided by an

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[136] Hoadley et al., *supra* note 14.
[137] *Inflation in Health Spending*, *supra* note 109.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] Hoadley et al., *supra* note 14.
[144] Tex. Med. Ass'n v. U.S. Dep't. of Health & Hum. Servs., 587 F. Supp. 3d 528, 535 (E.D. Tex. 2022).
[145] *Id.* (citing Requirements Related to Surprise Billing, 86 Fed. Reg. 55, 980 (Oct. 7, 2021) (to be codified at 45 C.F.R. pts. 147, 149)).

in-network provider or facility."[146] Because insurers determine their in-network rates, they have the leverage to decide the QPA from the previous year.[147]

The QPA was at the heart of a recent lawsuit ("The Texas Physician's Suit") brought by the Texas Medical Association, which represented over 55,000 physicians.[148] The physicians challenged one of the September rules, arguing that it unequally weighed the QPA factor and made the remaining considerations immaterial.[149] The court held that the rule conflicted with the plain language of the NSA.[150] The NSA states that arbitrators "shall consider" the QPA among other factors.[151] Notably, *shall* is construed as a requirement.[152] However, the NSA "plainly requires arbitrators to consider" the QPA as one factor among many others.[153] There is no express language affording more weight to the QPA as a primary consideration compared to the other factors.[154] The rule misconstrues the language in the NSA by "plac[ing] its thumb on the scale for the QPA."[155] Therefore, the court ruled for the provider and vacated the rule.[156]

This win for providers, however, could severely curtail the federal government's goal of cost-containment.[157] The Texas Physician's suit was appealed, and future decisions will more thoroughly define what arbitrators can consider.[158] This is a critical pitfall; thus, its resolution is important for addressing the arbitration model's overall success.[159] Nevertheless, this decision is less likely to impact inflationary rates if, as explained above, arbitrators determine reimbursement amounts reasonably close to the median in-network rate.[160]

## V. CONCLUSION

Despite providing standardized rates, Maryland's dispute resolution process contradicts the federal model and inadvertently pits insurers against

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[146] *Id.*
[147] *Id.*
[148] *Id.* at 536.
[149] *Id.*
[150] *Tex. Med. Ass'n*, 587 F. Supp. 3d at 540.
[151] *Id.* at 541.
[152] *Id.* (emphasis added).
[153] *Id.*
[154] *Id.*
[155] *Id.* at 542.
[156] *Tex. Med. Ass'n*, 587 F. Supp. 3d at 549.
[157] Hoadley et al., *supra* note 14.
[158] *See generally id.*
[159] *Id.*
[160] *Inflation in Health Spending*, *supra* note 109, at 2.

providers. The federal IDR model — strict arbitration — promotes compromise between insurers and providers by considering historical median in-network rates. This means, of course, giving insurers solid ground to stand on without eliminating providers ability to profit. Similar to the NSA's arbitration model, New York's IDR model took compromise a step further and struck a balance between the wants of insurers and providers. However, New York's model is distinctive in its ability to cap and/or lower cost-sharing. A win-win for insurers, providers, and consumers.

Contrarily, under Maryland's IDR model, insurers have the power to determine contract amounts for in-network rates. Maryland's specified state laws then use a percentage of that amount to determine what insurers will pay out-of-network providers for covered services. This means that the leverage for rate determination rests largely in the hands of insurers. Unless Maryland works to compromise the wants of both providers and insurers, like New York's IDR model, providers may seek other, more favorable markets. Therefore, Maryland should switch from a bifurcated standardized payment process and adopt or align with the NSA IDR arbitration model to resolve reimbursement disputes.

## RECENT DEVELOPMENT

### *BALT. POLICE DEP'T V. OPEN JUST. BALT.: IN MAKING A PUBLIC INTEREST DETERMINATION UNDER THE MPIA, AGENCIES MUST CONSIDER ALL RELEVANT FACTORS BEFORE DENYING A FEE WAIVER.*

**By: Ryan Powelson**

The Supreme Court of Maryland held that the Baltimore Police Department's ("BPD") denial of a fee waiver under the Maryland Public Information Act ("MPIA") was arbitrary and capricious because BPD, in making its public interest determination, failed to consider "all relevant factors." *Balt. Police Dep't v. Open Just. Balt.*, 485 Md. 605, 301 A.3d 201 (2023). If the agency decides a fee waiver would be in the public interest based on a requesting party's ability to pay and "other relevant factors, the waiver request must be granted. *Id* at 650-53, 301 A.3d at 227-28.

Between December 2019 and February 2020, Open Justice Baltimore ("OJB"), a Baltimore-based non-profit, submitted a series of requests for a range of BPD personnel records that spanned all levels of seriousness regarding misconduct and use of force complaints. Throughout their disclosure requests, OJB requested fee waivers in accordance with their interpretation of the MPIA. OJB justified its request on the basis that a public release of the documents sought would benefit the public interest, which was something contemplated by the statute.

After initial talks, BPD neither approved nor denied the fee waiver request but said OJB may not be eligible for a fee waiver. BPD then asked if the organization would consider narrowing the scope of documents sought. OJB declined to do so and clarified that it sought all documents relevant to its search terms, over 13,000 in total, but indicated a willingness to pay certain copying costs. After identifying the relevant records, BPD quoted a fee of $1,431,475.50 to comply with the request. OJB responded to the cost estimate by reiterating its fee waiver request and questioned the number of documents contained within the total. BPD considered OJB's concerns and sent a revised cost estimate of $245,123.00, to which OJB reiterated its desire to waive the fee. Finally, OJB sent a final waiver request highlighting why they believed the release of the records was in the public interest. OJB cited the history of misconduct within BPD, including the Gun Trace Task Force scandal, to highlight the public need for information about the department's inner workings. Ultimately, BPD denied the request.

On March 2, 2020, after BPD failed to respond to the information requests within the timeline demanded by the MPIA, OJB filed a complaint in the

Circuit Court for Baltimore City. The complaint alleged that BPD's decision to deny the fee waiver request was arbitrary and capricious. The circuit court held that OJB's request was not adequately specific about how the public interest would be served by the disclosure. That fact, paired with the volume of records requested by OJB led the court to conclude that BPD's denial of the fee waiver request was not arbitrary and capricious. The court also upheld BPD's refusal to turn over records related to open personnel investigations.

OJB appealed the circuit court's decision to the Appellate Court of Maryland. The Appellate Court or Maryland issued an unreported opinion upholding the denial of open investigation files but overturned the denial of the fee waiver request. BPD then filed a writ of certiorari, which was granted by the Supreme Court of Maryland.

The Supreme Court of Maryland began its analysis by identifying the proper standard of review. *Open Just. Balt.*, 485 Md. at 644, 301 A.3d at 223. Unlike the federal Freedom of Information Act, the MPIA affords agencies discretion in determining if a fee waiver is justified. *Id.* at 658, 301 A.3d at 232. The court reasoned that by giving agencies such discretion, the Maryland General Assembly understood that appeals of fee waiver decisions would be decided under the arbitrary and capricious standard used for such agency decisions. *Id*. The court also held that due to the lack of an appellate procedure within the statutory framework of the MPIA, the circuit court had jurisdiction to hear the appeal as a writ of mandamus action. *Id*. at 646, 301 A.3d 224-25.

The court then turned to the meaning of the statutory language. *Open Just. Balt.*, 485 Md. at 646, 301 A.3d at 224-25. The MPIA states that a custodian agency may grant a fee waiver request if: (1) the applicant files an affidavit of indigency, or (2) if, in light of the applicant's ability to pay and "other relevant factors," the agency finds a fee waiver to be in the public interest. *Id.* at 646, 301 A.3d at 225. The court reasoned that the term "may" in the statutory text provides discretion to determine if the conditions are met. *Id.* at 650, 301 A.3d at 227. In the absence of an affidavit of indigency, BPD has the discretion to determine whether a release is in the public interest based on OJB's ability to pay or "other relevant factors." *Id.* at 651, 301 A.3d at 227-28. The fee must be waived if, based on those criteria, the agency finds the release to serve the public interest. *Id*.

Next, the court applied the arbitrary and capricious standard to the facts of this case. *Open Just. Balt*., 485 Md. at 660, 301 A.3d at 223. BPD argued its denial of OJB's fee waiver request was justified because the public interest served was "too vague[,]" that the requested information would not be illuminating to the public, and that OJB had the ability to pay. *Id.* at 663, 301 A.3d at 235. The court rejected these justifications. *Id.* at 663, 665, 667-68, 301 A.3d 235-36, 237-38. In the court's view, the publicized controversies

surrounding BPD clarify the public interest rationale. *Id.* at 664, 301 A.3d at 225. The court also rejected BPD's claim that the information in the records was redundant to publicly available information, because the requested information would contain previously unavailable investigative findings. *Id.* at 665, 301 A.3d at 226. Finally, the court rejected as unfounded BPD's argument that the necessary redactions would render the files unintelligible. *Id.*

Then, the court addressed BPD's determination that OJB could pay the quoted fee. *Open Just. Balt.*, 485 Md. at 666, 301 A.3d at 236. The court found BPD's reliance on an email exchange in which OJB's counsel indicated the organization's willingness to pay certain copying fees unconvincing. *Id.* at 668, 301 A.3d at 237. That email alone did not support the conclusion that OJB could pay the full fee. *Id*. Although the court found BPD's consideration of its own administrative costs proper, considering BPD's mistaken appraisal of OJB's ability to pay and its failure to consider other factors, the court deemed BPD's denial as arbitrary and capricious. *Id*.

Finally, the court identified what "other relevant factors" were necessary to consider OJB's fee waiver request properly. *Open Just. Balt.*, Md. 485 at 668, 301 A.3d at 238. In the court's view, BPD should have considered at least two factors beyond the ability to pay and contribution to public understanding: (1) whether disclosure would help inform the public about a public controversy, and (2) whether a denial would fuel public scrutiny. *Id*. By failing to consider factors other than OJB's suspected ability to pay and production costs, BPD fell short of its requirement to consider "other relevant factors." *Id*.

For these reasons, the court held that BPD's denial of the fee waiver request was arbitrary and capricious. *Open Just. Balt.*, 285 Md. at 673, 301 A.3d at 241. The court remanded the matter for BPD to reconsider the fee waiver based on the proper factors. *Id*.

The Supreme Court of Maryland's holding directs agencies to weigh broader considerations when granting a fee waiver under the Maryland Public Information Act. By forcing agencies to undertake a more fulsome analysis, the court has increased the likelihood that information relevant to the public interest will be released at no or reduced cost. For law enforcement agencies like the Baltimore City Police Department, which have faced a wave of public criticism in recent years, this new standard can build trust as increased transparency will foster the public's understanding of police operations and hopefully help to improve community relations.

## RECENT DEVELOPMENT

# *BLAKE V. STATE: WHERE AN OFFICER'S UNTRUTHFULNESS WAS IRRELEVANT TO THE ATTORNEY'S STRATEGY, FAILURE TO OBTAIN IMPEACHMENT EVIDENCE DOES NOT AMOUNT TO INEFFECTIVE ASSISTANCE OF COUNSEL.*

**By: Jayna Peterson**

The Supreme Court of Maryland held that William Blake's ("Blake") trial attorney did not provide ineffective assistance of counsel by failing to compel impeachment evidence regarding Baltimore City Police Officer Fabian Laronde ("Officer Laronde" or "Laronde"), as Laronde's account of the search was never disputed, rendering the Internal Affairs Division ("IAD") files unnecessary. *Blake v. State*, 485 Md. 265, 276-77, 296-97, 301 A.3d 1, 7-8, 20 (2023). The court found that Blake failed to demonstrate that his trial attorney's decision to forego obtaining the IAD files was not strategic. *Id.* at 297-98, 303, 301 A.3d at 20. Notwithstanding Blake's unsuccessful argument for deficient performance, the court held that counsel's omission did not substantially affect the trial court's ruling. *Id.* at 294-95, 301 A.3d at 18-19. Further, the court denied Blake's *Brady* violation claim, citing judicial policy to abstain from analyzing constitutional issues when a decision is "unnecessary." *Id.* at 305, 301 A.3d at 24-25.

In July 2012, Officer Laronde observed Blake and Tavon Wilson ("Wilson") engage in what Officer Laronde believed to be the distribution of narcotics, based on Blake and Wilson's history of narcotics distribution in Baltimore City. Suspicious of the activity, Laronde stopped the men and requested an "arrest team" to follow a woman with whom Blake conducted a suspected narcotics transaction. Once the arrest team retrieved narcotics from the woman, Laronde arrested Blake. Despite the absence of drugs during the patdown, Office Laronde became skeptical of Blake's abnormal movements and stride, as Laronde's training and experience indicated that individuals hide drugs "under their testicles." Laronde then conducted a search incident to arrest, asking Blake to squat. Consequently, Officers seized a bag containing heroin from Blake's undergarments.

A Baltimore City grand jury charged Blake with the distribution of heroin and other supplemental charges. In the Circuit Court for Baltimore City, Blake pled not guilty to a specific statement of facts. Later, Blake filed a motion to suppress the heroin, arguing a Fourth Amendment violation for the unreasonable, public nature of a strip search in the street. At the suppression hearing, Officer Laronde testified to the "triangle" position he utilized at the

scene to protect Blake's privacy, putting Blake between the Officer and the car door. Blake's counsel tried to impeach Laronde's credibility by noting that: (1) nobody arrested the alleged buyer; (2) the protective positioning of the search did not safeguard Blake given the time of day and area in which it was conducted; and (3) the State's statement of probable cause omitted statements of the car's tinted windows. The judge ruled in favor of the State. Then, the State filed a motion in limine to preclude the defense's questioning about Officer Laronde's false imprisonment suit, which the court granted. Subsequently, the court found Blake guilty of distribution of heroin.

After a failed direct appeal to the Appellate Court of Maryland, Blake filed multiple post-conviction petitions. The filings alleged ineffective assistance of counsel by Blake's trial attorney for failing to compel production of Officer Laronde's IAD files and a *Brady* violation for the State's withholding of the same information. Specifically, Blake produced various IAD reports and records of an inconsistent statement from a police-involved shooting-turned lawsuit. Blake also raised evidence of alleged misconduct by Officer Laronde during the proceedings.

Additionally, Blake's trial counsel testified that, aside from the State's disclosure of a civil suit against Laronde, he knew of rumors that Officer Laronde had previously committed "inappropriate strip search[es]" and would have used those allegations to Blake's advantage if there were an accompanying lawsuit. Blake's trial attorney never asked the State to produce the IAD records because he assumed the State would not withhold exculpatory evidence. The State countered that Blake's trial attorney's awareness of a related civil suit against Laronde implied reason to further investigate Officer Laronde. Blake contended that he would not have entered his plea had he known the information within the IAD files. The post-conviction court held that Blake failed to prove ineffective assistance of counsel and that his plea waived any right to the IAD files, causing Blake's appeal.

On certification from the Appellate Court of Maryland, the Supreme Court of Maryland considered whether Blake's trial attorney's failure to ask for production of the IAD files constituted ineffective assistance of counsel. *Blake*, 483 Md. at 291-92, 301 A.3d at 16-17. To prove ineffective assistance of counsel, a defendant must demonstrate through a two-prong test that: (1) trial counsel's representation did not meet the accepted professional standards; and (2) the deficient representation was detrimental to the outcome, creating an unjust trial. *Id.* at 292, 301 A.3d at 17 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). A court's objective analysis also requires a showing that such actions were not made for a strategic reason after making investigative inquiries. *Id.* at 293, 301 A.3d at 18. Next, the court must analyze whether Blake sufficiently demonstrated that the State

committed a pre-trial *Brady* violation by withholding information in Laronde's IAD files. *Id.* at 290, 303, 301 A.3d at 16-17.

The court first analyzed *Strickland*'s performance prong. *Blake*, Md. 485 at 295, 301 A.3d at 19. Blake asserted that because his trial counsel had prior knowledge of Officer Laronde's reputation and the disclosed civil suit, it was trial counsel's duty to investigate further, rather than relying on the State. *Id.* The court agreed with the State and found that the record illustrated a reasonable strategy to prioritize precedential arguments on the Fourth Amendment violation, over discrediting Laronde or his facts. *Id.* at 296, 301 A.3d at 19. The court reasoned that if Blake's trial counsel challenged the search based on Laronde's credibility, the State could have corroborated through other witnesses. *Id.* at 297, 301 A.3d at 20. Further, trial counsel's advice to take the plea on mutually accepted facts was proper to preserve appellate rights. *Id.* at 297-98, 301 A.3d at 20.

Moving to the prejudice prong, the Supreme Court of Maryland reviewed the totality of the circumstances to ascertain whether counsel's actions reasonably caused adverse outcomes. *Blake*, 485 Md. at 294, 301 A.3d at 18. Clarifying the admissibility of IAD complaints, the court noted that records are prohibited from being used for impeachment purposes when they are unfounded or not sustained. *Id.* at 300, 301 A.3d at 22. Giving some weight to Blake's argument, the court expressed that evidence of prior bad acts barring conviction is admissible for impeachment purposes only if those allegations are beyond mere speculation. *Id.* at 300-01, 301 A.3d at 22. Further, no prejudice exists based on the outcome of the motion in limine and the absence of Laronde's contradicting statement in the State's records. *Id.* at 301-02, 301 A.3d at 23. Most importantly, the court emphasized that impeaching Laronde would serve no purpose to the defense as Blake never disputed the State's version of events. *Id.* at 302, 301 A.3d at 23. Therefore, the court found that the absence of the IAD files was irrelevant and did not prejudice Blake. *Id.* at 303, 301 A.3d at 23.

Finally, the court declined to rule on whether *Brady* disclosures apply to pretrial proceedings because it is a constitutional issue that need not be determined to come to a resolution at this junction. *Blake*, 485 Md. at 305, 301 A.3d at 25. The court likened the *Brady* materiality standard to the *Strickland* prejudice prong — finding that even in the hypothetical that *Brady* does pertain to pretrial proceedings, Blake would fail to meet the materiality threshold. *Id.*

While access to police records is important, the *Blake* holding represents a situation where impeachment evidence is not imperative to litigation. Moving forward, practitioners should know that when trial strategy did not discredit the State's version of events, failing to acquire IAD files or otherwise investigate potential impeachment evidence will be insufficient for

appeal. Given the prevalence of appeals concerning IAD files, attorneys should advise their clients accordingly.

## RECENT DEVELOPMENT

# *DOE V. CATH. RELIEF SERVS.: "SEX" AND "SEXUAL ORIENTATION" ARE TWO DISTINCT PROTECTED CLASSES UNDER THE MFEPA AND MEPEWA, AND THE GENERAL ASSEMBLY DID NOT INTEND TO MAKE THE TERMS INTERCHANGEABLE.*

**By: Spencer Baldacci**

The Supreme Court of Maryland held that the terms "sex" and "sexual orientation" are to be treated as two distinct protected classes under the Maryland Fair Employment Practices Act ("MFEPA") and its corresponding religious exemption. *Doe v. Cath. Relief Servs.,* 484 Md. 640, 659, 300 A.3d 116, 127(2023). The court also determined that the protected class of "sex" under the Maryland Equal Pay for Equal Work Act ("MEPEWA") does not include "sexual orientation." *Id.* at 662, 300 A.3d at 129. Lastly, the Supreme Court of Maryland established five guiding factors for determining if an employee's duties fall within the religious exemption of MFEPA. *Id.* at 673-74, 300 A.3d at 136-37.

John Doe ("Doe"), a married gay man, was a data analyst with Catholic Relief Services ("CRS"). At a career fair, a CRS representative notified Doe that his husband would qualify for spousal health benefits. Doe's employment duties at CRS involved business functions with CRS's Gateway business and Salesforce platforms. Upon being hired, CRS accepted Doe's same-sex spousal benefits application. However, CRS' human resource department ("HR") later alerted Doe that his husband was not eligible for spousal benefits at CRS and that the enrollment acceptance was in error. HR informed Doe that CRS did not offer benefits to same-sex couples because it conflicted with their Catholic values. CRS then promptly ended Doe's husband's benefits.

After filing a Charge of Discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC"), Doe received a right to sue letter. Doe subsequently filed a complaint against CRS in the United States District Court for the District of Maryland ("U.S. District Court") that included claims under MFEPA and MEPEWA in addition to two federal law claims. The U.S. District Court made rulings regarding the federal law claims made by Doe but sought guidance from the Supreme Court of Maryland for the claims involving MFEPA and MEPEWA. The U.S. District Court certified to the Supreme Court of Maryland three questions of law: (1) does the MFEPA's prohibition of sex discrimination also apply to sexual orientation, (2) does the MEPEWA's prohibition of sex discrimination also apply to

sexual orientation, and (3) what does, "to perform work connected with the activities of the religious entity," mean within the religious entity exemption of the MFEPA? *Doe*, 484 Md. at 676, 300 A.3d at 138.

The court first examined the definition of "sex discrimination" within the MFEPA. *Doe*, 484 Md. at 651, 300 A.3d at 123. The court ruled that sex discrimination under MFEPA does not equate to sexual orientation discrimination. *Id.* at 660, 300 A.3d at 128. In looking at the plain language of the MFEPA, both sex and sexual orientation are prohibited forms of discrimination. *Id.* at 654, 300 A.3d at 125. The court reasoned that the General Assembly amended the statute to include sexual orientation as a prohibited form of discrimination because it was not originally covered under the category of sex discrimination. *Id.* at 657, 300 A.3d at 127. The MFEPA also contains a religious exemption provision which only lists "sexual orientation" and not "sex" as an exemption. *Id.* at 659, 300 A.3d 127. The court found that the General Assembly intended for sex and sexual orientation to be separate protected classes because the General Assembly only added sexual orientation to the religious exemption. *Id.* at 659, 660-61, 300 A.3d at 127-28.

The court then addressed the language in the MEPEWA which only lists "sex" and "gender identity" as protected from pay discrimination. *Doe*, 484 Md. at 661, 300 A.3d at 129. The court found the statute to be unambiguous and decided that only "sex" and "gender identity" are protected classes regarding pay disparity under the MEPEWA. *Id.* at 662, 300 A.3d at 129. The court ruled that "sex" in the context of the MEPEWA referred to someone being either male or female. *Id.* Additionally, the General Assembly amended the MEPEWA in 2016 to define gender identity as, "the gender-related identity, appearance, expression, or behavior of a person, regardless of the person's assigned sex at birth." *Id.* Just like its rationale for MFEPA issue, the court determined that if the General Assembly wanted to include sexual orientation as a protected class, they would have added it during the amendment process. *Id.* at 663, 300 A.3d at 130. The court reasoned that both the MEPEWA and MFEPA were amended in the same General Assembly session — within a few years of each other — and therefore, it is unlikely that the General Assembly "simply forgot to include sexual orientation" in the MEPEWA. *Id.* at 663, 300 A.3d at 130.

In analyzing the language of the MFEPA's religious exemption, the court found that the General Assembly intended to only include employee positions that "directly further the core mission of the religious entity." *Doe*, 484 Md. at 667, 300 A.3d at 132. To make this determination, the court first looked to the plain language of the exemption, which states, "MFEPA's protections do not apply to claims against a religious corporation...with respect to the employment of individuals of a particular religion, sexual orientation, or

gender identity to perform work connected with the activities of the religious entity." *Id.* at 665, 300 A.3d at 131. The court found that the Maryland General Assembly did not intend to include a blanket exemption but tailored the exemption for specific work or employee positions. *Id.*

The Supreme Court of Maryland established five factors to help future courts determine which types of duties fall within the religious exemption as the legislature did not explicitly list examples or guidelines: (1) all relevant information related to the employee's duties, (2) direct duties as those, "that are not one or more steps removed from taking the actions that affect the goals of the entity," (3) the size of the religious entity, (4) that religious entities can have religious and secular missions, and (5) the mission description, services provided, the people who are served, and how the religious entity utilizes its funds. *Doe*, 484 Md. at 673-74, 300 A.3d at 136-37. The court did not decide whether Doe's duties fall within the religious exemption but left it up to the U.S. District Court as that decision was a matter of fact and not law. *Id.* at 675, 300 A.3d at 137.

The dissent, written by Justice Shirley M. Watts, argued that discrimination based on sexual orientation is related to discrimination based on sex and that Doe's duties in his position at CRS did not fall within the religious exemption under the MFEPA. *Doe*, 484 Md. at 677, 300 A.3d at 138. Justice Watts found that sex and sexual orientation are "overlapping" since employers consider sex when discriminating based on sexual orientation. *Id.* at 684-85, 300 A.3d at 143. Justice Watts also argued that the religious exemption "bars claims against religious entities with respect to the hiring (or not hiring) of individuals of a particular sexual orientation," but does not allow religious organizations to hire people and then give them fewer benefits or different treatment because of their sexual orientation. *Id.* at 698, 300 A.3d at 150-51.

Per the court's holding in *Doe*, practitioners must treat "sex" and "sexual orientation" as two unrelated protected classes. Because the MEPEWA does not specifically identify "sexual orientation" as a protected class, clients cannot bring discrimination claims based on sexual orientation under the Act. This delineation seemingly conflicts with federal interpretation of sex discrimination.[1] The court's establishment of a five-factor test to determine whether one's job duties fall within the religious exemption will open up positions to those who would otherwise be discriminated against by religious employers. Should someone have a job with duties that are not considered

[1] In 2020, the U.S. Supreme Court interpreted Title VII of the 1964 Civil Rights Act's ban on sex discrimination as inclusive of discrimination based on sexual orientation. Bostock v. Clayton Cnty., 590 U.S. 644, 662 (2020).

"directly" related to the core mission, a religious entity cannot discriminate against them based on their sexual orientation pursuant to the MFEPA.

## RECENT DEVELOPMENT

# *LLOYD V. NICETA*: MARYLAND LAW PERMITS SPOUSES TO ALLOCATE MARITAL ASSETS BASED ON ADULTERY IN POSTNUPTIAL AGREEMENTS.

**By: Evagevelly Posadas**

The Supreme Court of Maryland held that a postnuptial agreement's lump sum provision conditioned on a spouse engaging in adultery is valid and enforceable under Maryland law. *Lloyd v. Niceta*, 485 Md. 422, 460, 301 A.3d 94, 116 (2023). A penalty contingent on adultery aligns with Maryland's public policy, as reflected in its divorce laws and equitable property distribution. *Id.* at 460, 301 A.3d at 117.

Anna Cristina Niceta ("Niceta") discovered that her husband, Thomas L. Lloyd ("Lloyd"), engaged in an adulterous relationship during their marriage. To rebuild trust in their relationship, Lloyd agreed to a postnuptial agreement (the "Agreement"). The Agreement contained a provision in which Lloyd would pay Niceta five million dollars if he engaged in adultery again. After both parties reviewed the Agreement with their attorneys, Lloyd proposed an additional two million dollars to the lump sum to show his commitment to Niceta, and because Lloyd expected to receive a substantial inheritance soon. The Agreement stated that the lump sum shall be made up from Lloyd's share of the marital assets. After the parties consented to the Agreement, Lloyd committed adultery again and the parties finally ended their marriage.

Niceta filed for divorce in the Circuit Court for Montgomery County, requesting that the court enforce the Agreement. Lloyd argued that the Agreement was unenforceable because the lump sum provision was an "excessive liquidated damage" provision that created an "unenforceable penalty," contrary to Maryland's public policy. The court held that postnuptial agreements may include a lump sum provision to deter adultery. Both parties appealed to the Appellate Court of Maryland, which affirmed the lower court's decision.

Lloyd appealed to the Supreme Court of Maryland, which granted certiorari. The issue before the court was whether a postnuptial agreement may contain a provision that supports a transfer of marital assets between spouses based on one spouse's engagement in adultery.

The court began its analysis by defining "penalties" in the context of marital agreements. *Lloyd*, 485 Md. at 442, 301 A.3d at 106. In *McGeehan*, the court stated that postnuptial agreements commonly contain penalties that restrict spouses' behavior in the marriage. *Id.* at 442, 301 A.3d at 106 (citing *McGeehan v. McGeehan*, 455 Md. 268, 298, 167 A.3d 579, 596-97). The

term "penalties" describes provisions that operate to the disadvantage of a spouse rather than punishing a spouse for breaching a marital agreement. *Lloyd*, 485 Md. at 443, 301 A.3d at 106. In the present case, the Agreement's lump sum provision required Lloyd to surrender assets to Niceta to his disadvantage if he committed adultery, operating as a penalty in the context of marital agreements. *Id.*

The court then briefly reviewed postnuptial agreements and their enforceability in court. *Lloyd*, 485 Md. at 443-44, 301 A.3d at 106-07. Maryland law allows spouses to create an enforceable contract that dictates the marriage's assets. *Id.* at 443, 301 A.3d at 106. A court will not enforce a postnuptial agreement if it is "unconscionable" or contains any "fraud, duress, mistake, or undue influence." *Id.* at 443, 301 A.3d at 107.

The court next addressed whether the lump sum provision in the instant case is an "excessive liquidated damages" provision. *Lloyd*, 485 Md. at 444, 301 A.3d at 107. A liquidated damages provision is considered an unenforceable penalty when it serves to punish the breaching party in a traditional contract. *Id.* at 445, 301 A.3d at 107-08. However, the Agreement was not a traditional contract; instead, it was a marital agreement that arose from Lloyd's infidelity. *Id.* at 445-46, 301 A.3d at 108. The court declined to apply the liquidated damages framework to marital agreements because it would force the court to place a speculative monetary value on the marriage to determine damages. *Id.* at 448, 301 A.3d at 109. Further, parties in divorce proceedings are not entitled to compensatory damages. *Id.* at 447, 301 A.3d at 109.

In addition, applying a liquidated damages analysis would diminish the goals of postnuptial agreements, preventing judicial intervention and deterring repulsive spousal conduct. *Id.* at 448, 450, 301 A.3d at 109, 111. Here, the lump sum provision was meant to hold Lloyd accountable for his behavior to create trust among the marriage or pay the lump sum. *Id.* at 451, 301 A.3d at 111. Applying the liquidated damages framework to the Agreement would prevent Lloyd and Niceta from shaping their marriage and, eventually, their divorce. *Id.*

The court equated the lump sum provision to the transfer of marital assets in a divorce under MD. CODE ANN., FAM. LAW § 8-101(a). *Lloyd*, 486 Md. at 451, 301 A.3d at 111. During a divorce, a court considers equity in dividing marital property. *Id.* at 451-52, 301 A.3d at 111. One of the factors in determining equitable distribution is the circumstances that harmed the marriage. *Id.* at 452, 301 A.3d at 111. The Agreement was based on Lloyd's infidelity, which was a contributing factor to the parties' estrangement. *Id.* at 452, 301 A.3d at 112.

The court also relied on *Laudig*, a Pennsylvania state court decision upholding an agreement requiring a wife to surrender her marital property if

the wife committed adultery. *Id.* at 452, 301 A.3d at 112 (citing *Laudig v. Laudig*, 425 Pa. Super. 228, 236, 624 A.2d 651, 655 (1993)). In *Laudig*, the court reasoned that if spouses can determine property distribution without a reason in an agreement, then conditional distribution should be allowed. *Lloyd*, 485 Md. at 452-53, 301 A.3d at 112 (citing *Laudig*, 425 Pa. Super. at 236, 624 A.2d at 655). Therefore, the present court concluded that spouses may create conditional distributions of marital assets, like the lump sum provision conditioned on Lloyd's infidelity, so long as the provision aligns with Maryland's public policy. *Lloyd*, 485 Md. at 453, 301 A.3d at 112.

Finally, the court reviewed whether Maryland's public policy supports a good faith transfer of marital assets conditioned on adultery. *Lloyd*, 485 Md. at 453, 301 A.3d at 112-13. Due to Maryland's lack of case law regarding postnuptial agreements, the court turned to other jurisdictions to determine the public policy that is applicable to the distribution of assets based on adultery. *Id.* at 454, 301 A.3d at 113. The court found that other jurisdictions invalidated provisions conditioned on adultery because of their no-fault divorce laws. *Id.* at 455, 301 A.3d at 113. However, Maryland has maintained fault-based divorce laws and considers adultery in determining monetary awards. *Id.* at 455, 301 A.3d at 113-14. Maryland's current public policy supports spouses transferring marital assets on the condition of adultery, permitting the Agreement's lump sum provision. *Id.* at 456, A.3d at 114. Furthermore, the court held that the seven-million-dollar transfer was made in good faith because Lloyd, even with legal representation present, proposed and agreed to the two million dollar increase and had the assets to satisfy the provision. *Id.* at 458-59, 301 A.3d at 115-16. Based on these principles, the court upheld the seven-million-dollar lump sum provision. *Id.* at 457, 301 A.3d at 114-115.

In *Lloyd*, the Supreme Court of Maryland concluded that postnuptial agreements with a lump sum provision conditioned on a spouse's adultery are enforceable upon divorce. The court further clarified that penalties in a postnuptial agreement differ from those in a traditional contract. Practitioners should advise their clients that such provisions are valid in a postnuptial agreement, either to their advantage or disadvantage. However, Maryland recently changed its divorce laws to no-fault grounds.[1] With no-fault grounds, Maryland may find itself in a similar situation as its sister states that held penalty provisions contrary to its laws. Practitioners and judges should be mindful of the law change and how this can affect the *Lloyd*

[1] On May 16, 2023, the 2023 Regular Session of the General Assembly approved a statutory amendment that repealed the fault-grounds in Maryland's divorce laws, replacing it with no-fault grounds. The amendment took effect on October 1, 2023. *See* MD. CODE. ANN., FAM. LAW § 7-103 (West 2023).

decision. At the same time, Maryland courts and lawmakers should clarify whether Maryland's new public policy still supports the *Lloyd* decision.

## RECENT DEVELOPMENT

# *WOODLIN V. STATE: THE COURT HAS DISCRETION OVER WHAT FACTORS WILL DETERMINE THE ADMISSIBILITY OF A DEFENDANT'S PRIOR SEXUALLY ASSAULTIVE BEHAVIOR.*

**By: Claire Trudeau**

The Supreme Court of Maryland held that when §10-923 of Maryland's Courts and Judicial Proceedings ("CJP") Article applies to a case, the trial court has discretion over what factors to consider when determining whether prior sexual acts may be admitted into the record. *Woodlin v. State*, 484 Md. 253, 294–95, 298 A.3d 834, 858 (2023). The *Woodlin* court provided non-exhaustive factors that a circuit court may consider when assessing admissibility. *Id.* at 263-64, 298 A.3d at 840. Using these non-exhaustive factors, the court held that the motions judge did not abuse his discretion by admitting Petitioner's prior sexual assault conviction into evidence. *Id.* at 293, 298 A.3d at 857. Finally, the court held that the Petitioner waived his ability to contest the scope of admission as to the prior conviction when he failed to raise the issue at trial. *Id.* at 264, 298 A.3d at 840.

On a stormy September night, Petitioner John Woodlin ("Woodlin"), a man experiencing homelessness, stayed the night at his daughter's home. Woodlin's daughter had three children, one of whom was A.H., a ten-year-old boy. At some point between late that evening and early the next morning, Woodlin went upstairs to find A.H. in his underwear. After briefly play fighting, Woodlin sexually assaulted A.H. During the assault, Woodlin held his hand over A.H.'s mouth to prevent him from calling out for help. Woodlin was later arrested and charged with several sexual offenses.

Prior to trial in the Circuit Court for Wicomico County, the State introduced evidence of Woodlin's 2010 conviction for a third-degree sexual offense under § 10-923. At the evidentiary hearing — over Woodlin's objections — the motions judge determined that the evidence was admissible. Woodlin filed a motion to reconsider in October 2020, which the court denied.

During the trial, Woodlin raised several objections to the admission of his prior conviction; all of which the trial court judge overruled. A jury then convicted Woodlin of several sexual offenses, including abuse of a minor.

Woodlin appealed the admission of his prior conviction to the Appellate Court of Maryland. The court held that while the trial court is required to consider the similarities between multiple instances of sexually assaultive behavior when determining admissibility, the motions judge did not abuse his

discretion by admitting the evidence. Woodlin then sought review by the Supreme Court of Maryland, which granted certiorari.

The Supreme Court of Maryland identified four issues to be addressed on appeal: 1) whether there are certain factors that a circuit court is required to consider under CJP § 10-923(e)(4), 2) how those factors are weighed, 3) whether there was abuse of discretion by the motions judge, and 4) whether the motions judge was required limit the scope of the prior conviction. *Woodlin*, 484 Md. at 263, 298 A.3d at 840.

The Supreme Court of Maryland began its review by explaining that CJP § 10-923 is an exception to the evidentiary rules prohibiting introduction of other crimes or wrongful acts to prove propensity. *Woodlin*, 484 Md. at 267, 298 A.3d at 842. Under this section, a defendant's "sexually assaultive behavior may be admissible", even if the prior behavior does not result in conviction if certain elements are met. *Id.* Under § 10-923, the State must satisfy four elements: 1) the evidence is offered to rebut allegations that the minor victim lied about the sexual assault or to show lack of consent, 2) "the defendant had the opportunity to confront and cross-examine the witness or witnesses testifying" to the sexual assault, 3) the behavior was proven by "clear and convincing evidence", and 4) the danger of undue prejudice does not substantially outweigh the probative value. *Id.* at 268, 298 A.3d at 842. If the circuit court finds all four elements are met, the court may admit the evidence. *Id.*

The court continued its analysis by rejecting the Appellate Court of Maryland's holding regarding what factors the trial court must consider when determining admissibility of prior sexually assaultive behavior. *Id.* at 280, 298 A.3d at 850. The court held that the language of § 10-923 is unambiguous and, if the General Assembly intended to require specific factors when determining admissibility beyond the four already in the statute, the General Assembly would have added such factors to the statute. *Id.* at 279-80, 298 A.3d at 849-50.

Next, the court provided a list of factors that a circuit court may consider when evaluating the probative value of evidence under §10-923(e). *Woodlin*, 484 Md. at 283, 298 A.3d at 851.

The first factor is the similarity of the acts. *Woodlin*, 485 Md. at 284, 298 A.3d at 852. If this issue is raised, the court should evaluate the victim's characteristics and the nature of the defendant's conduct in both cases. *Id.* at 284, 298 A.3d at 852. The next factor considered is the temporal proximity and any intervening circumstances that could explain a gap in the events. *Id.* at 286, 298 A.3d at 853. The less time that has elapsed between the other assaultive behavior and the issue at hand, the more probative the evidence becomes. *Id.* Any intervening circumstance that could explain a gap between the assaults also weighs on the probative value. *Id.* at 286-86, 298 A.3d at

853. The next factor is the frequency of the sexually assaultive behavior. *Id.* at 287, 298 A.3d at 854. The court explained that the higher the frequency, the more probative the evidence. *Id*.

The court then moved onto the factors concerning unfair prejudice, providing two that were deemed as potentially important. *Woodlin*, 484 Md. at 287-89, 298 A.3d at 854-55. The first is whether the previous act will overshadow the crime currently charged, and the second is the jury's knowledge of any previous punishment. *Id.* at 287-88, 298 A.3d 854-55. The rationale for both factors was similar; if a prior act is significantly worse than the one at issue, it could result in a jury determination based on the prior act and not the one at hand. *Id.* at 287-88, 298 A.3d at 854. As to the jury's knowledge of previous punishment, the court explained that whether there was a prior conviction could impact the jury's belief the defendant escaped punishment. *Id.* at 288-89, 298 A.3d at 854-55.

The final list of factors the court noted concerns the admissibility after the elements required by § 10-923(e) are satisfied. *Woodlin*, 484 Md. at 289, 298 A.3d at 855. The court lists two factors: (1) need, and (2) clarity and manner. *Id.* at 289-91, 298 A.3d at 855-56. The court explained that need is a very difficult factor to address. *Id.* at 289-90, 298 A.3d at 855-56. If the State lacks substantial evidence of the assault in question, the State's need for the evidence increases, and so does the probative value of the prior act. *Id.* at 289-90, 298 A.3d at 855. However, so too does the risk that the jury will decide the case based on improper reasoning. *Id.* As to the clarity and manner with which the evidence is presented, both are usually encompassed in other evidentiary rules and are decided based on judicial discretion. *Id.* at 290-91, 298 A.3d at 856.

Finally, the court concluded its analysis by explaining that the motions judge did not abuse his discretion by admitting the evidence of the prior conviction. *Woodlin*, 484 Md. at 293, 298 A.3d at 857. The court explained that motions judge's ruling was "well-supported" and that a reasonable person could have reached the same conclusion. *Id.* The court also agreed with the appellate court's ruling that Woodlin waived his ability to contest the admission of the unredacted transcript after being given ample opportunities to object at trial and failing to do so. *Id.* at 293-94, 298 A.3d at 858.

Given the exceptional discretion the Supreme Court of Maryland gave circuit court judges to determine admissibility, attorneys must ensure that they formulate strong arguments for exclusion or admission of prior sexual acts. Moving forward, this discretion may lower the bar for victims in some cases; however, there is no guarantee that the bar will not be higher in others. The higher bar may then present another reason victims do not come forward, for fear that their word alone is not strong enough against their abuser.