IN THE COURT OF APPEALS OF MARYLAND

Case No. 35

September Term, 2014

ESTELLA ESPINA, *et al.*,

Appellants

v.

STEVEN JACKSON, *et al.*,

Appellees

On Writ of Certiorari from the
Court of Special Appeals

BRIEF OF AMICI CURIAE ACLU OF MARYLAND, PUBLIC JUSTICE CENTER, AND CAUCUS OF AFRICAN AMERICAN LEADERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Sir Edward Coke, *The Selected Writings and Speeches of Sir Edward Coke* (Steve Sheppard ed., 2003) Vol 2---------- 6

Stephen J. Shapiro, *Suits Against State Officials for Damages for Violations of Constitutional Rights: Comparing Maryland and Federal Law*, 23 U. Balt. L. Rev. 423 (1994) ---------- 15

T. Hunter Jefferson, Note, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions Against State Governments*, 50 Vand. L. Rev. 1525 (1997)---------- 14

Thomas R. Phillips, *Constitutional Right to A Remedy*, 78 N.Y.U. L. Rev. 1309 (2003) - 8

William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions As Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986)------ 13

William Sharp McKechnie, *Magna Carta—A Commentary on the Great Charter of King John with an Historical Introduction* (2d ed. 1914) ---------- 5

The American Civil Liberties Union of Maryland, the Public Justice Center, and the Caucus of African-American Leaders respectfully submit this brief, as *amici curiae*, to address the important jurisprudential issues presented in this appeal, specifically whether Maryland's Constitution operates to ensure that victims of unconstitutional police misconduct can obtain a full remedy for the harms they suffer.

INTEREST OF AMICI

The **American Civil Liberties Union of Maryland** is the state affiliate of the American Civil Liberties Union ("ACLU"), a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1931, the ACLU of Maryland, which is comprised of approximately 14,000 members throughout the state, has appeared before various courts and administrative bodies in numerous civil rights cases against the government or government officials, both as direct counsel and as *amicus curiae*. The issue before the Court is of vital interest to the ACLU of Maryland, as it frequently represents individuals whose rights have been violated by police and regularly brings litigation seeking damages for violations of state constitutional rights on a variety of issues. The ACLU of Maryland has also previously appeared before this Court as *amicus curiae* seeking to preserve the ability of plaintiffs to obtain redress and recover damages for violations of state constitutional rights. *See, e.g.*, *Prince George's Cnty. v. Longtin*, 419 Md. 450 (2011); *Houghton v. Forrest*, 412 Md. 578 (2010); *Lee v. Cline*, 384 Md. 245 (2004); *DiPino v. Davis*, 354 Md. 18 (1999); *Ashton v. Brown*, 339 Md. 70 (1995). Accordingly, whether a municipality is exempt from providing victims of unconstitutional conduct a full remedy for the harms they suffer is of substantial concern to the ACLU and its members.

The **Public Justice Center** (PJC), a non-profit civil rights and anti-poverty legal services organization founded in 1985, has a longstanding commitment to ensuring enforcement of the rights guaranteed by the Maryland Constitution to the fullest extent. The PJC has fought to protect Marylanders' constitutional rights through its Appellate Advocacy Project, which seeks to improve the representation of indigent and

disadvantaged persons and their interests before state and federal appellate courts. The Appellate Advocacy Project has submitted numerous *amicus curiae* briefs before this Court defending individuals against the unconstitutional actions of government officials and entities. *See, e.g.*, *Prince George's Cnty. v. Longtin*, 419 Md. 450 (2011); *Lee v. Cline*, 384 Md. 245 (2004); *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604 (2002). The PJC has an interest in this case because it impacts the extent to which individuals across Maryland can hold government officials accountable for violations of fundamental constitutional guarantees.

The Caucus of African American Leaders (CAAL) is a consortium of African American Leaders whose membership includes organizations ranging from the NAACP to the Black Chamber of Commerce. The CAAL is a community-based organization that addresses issues that adversely impact the African-American community in the State of Maryland. It collaborates with civil rights and civil liberties organizations on issues of social justice and has worked on cases involving alleged police misconduct and racial injustice. The CAALs' particular interest in this case is the rule it creates for all other instances of civil rights violations.

Amici incorporate by reference the Statement of the Case, Questions Presented, and Statement of Facts as set forth in the Appellants' brief.

SUMMARY OF ARGUMENT

At the core of this case is one question: Is the promise of "justice and right" in Article 19 of the Maryland Constitution—drawn from the Magna Carta itself—real or illusory for those whose fundamental rights are violated by the government?

For centuries, the right to obtain redress when wronged has been recognized as a core protection against abuses of power. Over time, this principle—drafted at the time of the Magna Carta, explained by Sir Edward Coke, and then adopted by the framers of Maryland's Declaration of Rights—has been adapted to the challenges and struggles of each era. And with each era has come a more robust, expansive, and nuanced understanding of what this promise means.

The Espina family's case presents this struggle to protect against abuses of power through a contemporary lens: the excesses of police, and the vulnerability of those who seek to hold police accountable when the government not only fails to do so itself but instead defends the abuses in court.

The Maryland Declaration of Rights and the promise of enforcement of those rights through Article 19 cannot permit the outcome reached by the lower courts in this case. That this promise was so important to our framers that they wrote it into our state constitution reflects Maryland's longstanding protections for constitutional rights. This Court has repeatedly reaffirmed this commitment by recognizing rights and remedies under state constitutional law that extend beyond those available in federal courts, and by insisting that governments be accountable for the constitutional injuries committed by those who act on the government's behalf.

Rather than departing from this tradition by affirming the ruling of the Court of Special Appeals, this Court should, consistent with principles of statutory construction, recognize and give effect to the full text of Article 19's promise of a remedy, "freely without sale, fully without denial, and speedily without delay," language which to date has been largely ignored by Maryland courts. In so doing, this Court will ensure that meaningful remedies are available to those who suffer the most egregious constitutional violations, and that the promise of redress for those whose rights are violated is not a hollow one.

Impairing a constitutional remedy necessarily impairs the associated right, not just for the person injured by the constitutional violation, but for all who rely on the constitution's protections. Here, the government has employed a police officer who, in the scope of his employment, maliciously beat and killed an unarmed man; has declined to criminally prosecute him or even to terminate his employment; and has not only denied that he has done anything wrong, but instead has provided him with a legal defense that has thrown the entire weight of government behind him. Despite all the barriers to winning police abuse cases, a jury found that the officer maliciously took Mr. Espina's life in violation of the Constitution and valued that harm in millions. Against this

backdrop, for the government to be held responsible for just a tiny fraction of this amount sends a clear, and profoundly unjust, message to wronged and wrongdoers alike: that even the courts cannot hold the government responsible when police take a human life.

ARGUMENT

I. THE HISTORICAL UNDERPINNINGS OF ARTICLE 19 ESTABLISH ITS SIGNIFICANCE AS THE PEOPLE'S CHECK AGAINST ABUSES OF GOVERNMENTAL POWER.

It is by now well-established that Article 19 of the Maryland Declaration of Rights, as drafted by colonial framers of the Maryland Constitution, derives from Sir Edward Coke's interpretation of Chapter 29 of the Magna Carta of 1225.[1] *See, e.g., Piselli v. 75th Street Med.*, 371 Md. 188, 204-05 (2002) (describing origins of Article 19). Throughout this history, the provisions at issue have been informed by struggles to protect against abuses of power that denied individual rights. The unifying theme of the Article's history has been the battle for real justice in the courts, and the need to ensure that those who lack power will not be shortchanged when confronting the powerful.

In modern history, Maryland courts have recognized that Article 19 "generally protects two interrelated rights: (1) a right to a remedy for an injury to one's person or property; [and] (2) a right of access to the courts." *Piselli,* 371 Md. at 205. But the text of Article 19 does more than describe the mere *existence* of the right to a remedy. It also describes how such remedies shall be enforced: "freely without sale, fully without any denial, and speedily without delay." These modifiers were important enough that the Maryland Framers included them word for word, and they deserve more attention than they have been given in cases to date. The context from which they evolved provides

[1] Chapter 29 of the 1225 Magna Carta combined Chapters 39 and 40 of the 1215 Magna Carta. *See* Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declaration of Rights of Virginia, Maryland, and Delaware*, 33 Rutgers L.J. 929, 1002 (2002). Both Article 19 (formerly Article 17) and Article 24 (formerly Article 21) of the Maryland Declaration of Rights derive from the same chapter of Magna Carta, and courts have sometimes improperly conflated one with the other, treating Article 19 as some sort of enhanced due process guarantee. *Id.* at 1001-02.

valuable insights about what they add to Article 19 and its promise of appropriate remedies for violations of constitutional rights.

A. The Barons, King John, and the Magna Carta

Before the Magna Carta, there were virtually no checks on the power of the King of England, nor remedies for abuses of that power. During his reign in the early 13th century, King John I abused this absolute power relentlessly. He seized barons' assets arbitrarily for his own ventures, charged exorbitant fees selectively against some barons but not others, and operated the royal courts on a fee scale that gave advantages to expensive writs, providing them speedier, and often more favorable, "justice." *See, e.g.,* David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1199 (1992). Barons who resisted excessive fines saw their family members taken hostage and their lands confiscated. William Sharp McKechnie, *Magna Carta—A Commentary on the Great Charter of King John with an Historical Introduction* 441-45 (2d ed. 1914).

Over time, and amid other conflicts, tensions between the King and barons in Northern England mounted. Eventually, the abuses became so egregious that the barons who opposed the King organized in rebellion against him, seizing London. *See, e.g.*, *id.* at 31-36. Weakened from other defeats, the King agreed to negotiations. The result was the Magna Carta, in which the King agreed to limits on his power and that of his successors in exchange for the barons' loyalty. *Id*. at 40.

Among these provisions was the precursor language to Article 19: "To no one will we sell, to no one will we refuse or delay, right or justice." Magna Carta of 1215, Ch. 40, http://www.constitution.org/eng/magnacar.htm; *see also* Schuman, *Remedy*, *supra*, at 1199. This provision targeted the King's interference with the right of access to the courts through the sale of writs, which "invited abuse[.]" David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 Or. L. Rev. 35, 38 (1986).

Notably, even though the charter grew out of the complaints of feudal barons who were not in the King's favor—hardly the most disenfranchised—its text offered broader proposals for reform and, over time, its protections were extended to all subjects. *See*

Roscoe Pound, *Preface* to Thomas Woods Stevens, *Magna Carta: A Pageant Drama* 18 (1930) (noting that, while obtained by barons, Magna Carta was "applicable to like grievances in any time and place"). Eventually, the Magna Carta came to represent a check on abuses of power, tyranny, and unjust exercise of power. *Id.*

B. Sir Coke and King James

Perhaps more than any other writings, Sir Edward Coke's explication of the Magna Carta contributed to the charter's significance as the foundation of modern governments and understanding of rights.

During his illustrious legal career, Sir Coke famously battled the absolutist monarchy of King James I. *See, e.g.*, Jonathan M. Hoffman, *By the Course of Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or. L. Rev. 1279, 1288 (1995). It was this power struggle that informed Coke's writings and explication of the Magna Carta. Sir Coke's central thesis was that the King could not strip Englishmen of their rights at common law and as grounded in the Magna Carta. *Id*. His frustration with the courts of his day was that, while purporting to provide remedies for wrongs, the promises of justice and fairness were illusory, particularly as against the King and those in his favor.[2]

In his second Institutes, published shortly after his death, Sir Coke formulated the predecessor language to Maryland's Article 19:

> And therefore every Subject of this Realme, for injury done to him in goods, in lands, or in person, by any other Subject, be he Ecclesiasticall, or Temporall, Free or Bond, Man or Woman, Old or Young, or be he outlawed, excommunicated, or any other without exception, *may take his remedy by the course of the Law, and have justice and right for the injury done him, freely without sale, fully without any deniall, and speedily without delay*.

2 Sir Edward Coke, *The Selected Writings and Speeches of Sir Edward Coke* 870 (Steve Sheppard ed., 2003) (emphasis added; spelling and Latin trans. in original),

[2] For example, King James would attempt to halt trials to "consult" with the judges. *See, e.g.*, Catherine Drinker Bowen, *The Lion and the Throne* 352 (1957).

http://oll.libertyfund.org/titles/912. Sir Coke's formulation thus elaborated significantly on the original language of the Magna Carta. Sir Coke further wrote, in explanation, that: "Justice must have three qualities, it must be Free, because nothing is more iniquitous than saleable justice; full, because justice ought not to limp; and speedy, because delay is in effect a denial." *Id*.

Each phrase Sir Coke used to describe how remedies should be administered refers to a specific grievance Coke had during his career. Justice should be had "freely without sale" because corruption was rampant in the English courts of the day. *See e.g.*, Bowen, *supra* n. 2, at 425-33 (detailing the impeachment of philosopher and Minister of State Sir Francis Bacon for corruption charges). Justice must be had "speedily without delay" because the King had attempted to halt proceedings in order to essentially instruct the judges on how to rule. *Id.* at 351-55 (detailing King James' desire to influence judicial opinions before trial by halting proceedings for consultation with his Attorney General). Most critically for the issues raised in this case, justice must be had "fully without any denial" because the King, in allowing appeals to Chancery courts after rulings, had obstructed judgments from being collected. *Id.* at 360-62 (describing King James' obstruction of common law judgment denying successful plaintiff his right).

C. The Colonists, the Crown, and Parliament

That the Maryland framers adopted Sir Coke's language is unsurprising, given his influence in shaping how colonists, and specifically, Marylanders, understood protections for individual rights against abuses of government. *See, e.g.*, Schuman, *Remedy*, *supra*, at 1199 (noting that Sir Coke's "influential commentary on Magna Carta was among the most frequently read legal texts in colonial America."). The drafters of early state constitutions were well aware of Sir Coke's struggles and his efforts to protect against abuses of power that deprived litigants of their rights in courts. *See e.g.*, Hoffman, *supra*, at 1296-97 ("The abuses which propelled Coke into battle against the royal prerogative … closely paralleled those which the colonists suffered over a century later. Like Coke, leading colonial lawyers felt that the integrity of their courts was threatened

by improper political pressure."). They regarded Sir Coke as an influential and significant legal authority in two key respects.

First, they relied on Sir Coke's scholarship to explain and justify why the acts of the King and Parliament in the colonies were unlawful abuses of power that could not and should not be tolerated. The colonists used the principles originally laid out by Sir Coke to argue for limits to the power of the King and of Parliament. Although Sir Coke's writings, like the Magna Carta itself, were largely a reaction to abuses of the Crown, the colonists' concerns were with Parliament and the Crown, and they applied the writings more broadly. *See, e.g.,* Thomas R. Phillips, *Constitutional Right to A Remedy*, 78 N.Y.U. L. Rev. 1309, 1323 (2003) ("Unlike Coke and Blackstone, the rebellious American colonists saw both the Crown and Parliament as oppressors.")

Perhaps nothing reflects this reliance on Sir Coke's teachings as clearly as Maryland's rebellion against The Stamp Act of 1765. The Act, which required materials in the colonies ranging from court documents to magazines to be printed on stamped paper produced in England, was the object of much protest as an illegal tax upon colonists by the British government. *See generally* Edmond Morgan and Helen Morgan, *The Stamp Act Crisis*: *Prologue to Revolution* (1953). One particularly influential example of such resistance was a pamphlet written by Maryland lawyer Daniel Dulany the Younger, which explicitly drew from Sir Coke's writings, particularly Sir Coke's opinion in Bonham's case, to reject Parliament's authority to tax the colonists directly. *See* Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies, for the Purpose of Raising a Revenue, by Act of Parliament* 4 (1765) ("In the Opinion of a great Lawyer, An act of parliament may be void, and of a great Divine, 'all Men have natural', and freemen Legal rights, which they 'may justly maintain, and no legislative Authority can deprive them of.'") (*quoting* Bonham's case).[3] Dulany's

[3] Bonham's case held that the common law voided acts of Parliament that are "against common right and reason, or repugnant, or impossible to be performed." 1 Sir Edward

treatise was widely hailed across the colonies as the most articulate and reasonable argument in support of the colonists' position. *See* Morgan and Morgan, *supra*, at 75 ("Of these millions of words which the Act provoked and which found their way into print, probably none were more widely read or more universally approved than those of a Maryland lawyer, Daniel Dulany.").[4]

Second, the colonists looked to Sir Coke as an authority on first principles that would ensure that the rights of individuals were protected in the newly-formed governments. Because they lived against the backdrop of both Parliamentary and Executive abuses of power, the colonists seized upon those aspects of Sir Coke's works that delineated principles to guarantee that the rights of individuals would be given full effect and would be meaningful and enforceable in courts.

In fact, Maryland's constitutional framers were the *first* to incorporate Sir Coke's reading of the Magna Carta's promise of the right of access to the courts and to remedies into a state Declaration of Rights. *See* Friedman, *supra* n. 1, at 1002 ("[T]he Maryland drafting committee, in drafting Article 17 of the August 27, 1776 draft of the Maryland Declaration of Rights was paraphrasing Lord Coke's restatement…"). Virginia's draft, from which the Maryland framers pulled, contained no such promise.[5] Thus, the

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Coke, *The Selected Writings and Speeches of Sir Edward Coke* 274 (Steve Sheppard ed., 2003), http://oll.libertyfund.org/titles/912.

[4] Maryland was one of only four colonies (along with Rhode Island, New Hampshire and Delaware) whose courts opened entirely before the Stamp Act was repealed in 1766. Among the patriots who helped to force the courts open was Samuel Chase, signer of the Declaration of Independence, Framer of the Maryland Constitution, and future Associate Justice on the Supreme Court. *See* Richard Walsh and William Lloyd Fox, *Maryland: A History, 1632-1974* 96 (1974).

[5] It has often been reported that Delaware was the first state to include such a provision. *See, e.g.*, Hoffman, *supra*, at 1298, 1307. As catalogued by now-Judge Dan Friedman, this earlier report has been proven incorrect. *See* Friedman, *supra*, at 940-45 (detailing basis for misunderstanding and corrected understanding of chronology).

Maryland framers independently and very consciously elected to include Sir Coke's language in the Maryland Declaration of Rights, laying the foundation for other states to follow. *Id.* at 1002 n. 338 ("[T]he ultimate American parent of this provision is the Maryland August 27, 1776 draft.").

D. Modern-Day Equivalents

As illustrated above, the history of Article 19 reflects an enduring desire to ensure that individuals can turn to the courts for meaningful enforcement of their rights, regardless of their status or the power of their opponents. At the time of the signing of the Magna Carta, this struggle was against the monarchy, by the barons. In Sir Coke's era, it was again a struggle against the abuses of the King, but more broadly framed to extend to all. In the colonies, at the time the language was being introduced into state constitutions, it was against the Crown and Parliament. In each era, the language was understood and used as a protection for meaningful access to courts and their remedies, especially for the powerless.

The Espina family's case reflects this timeless struggle through a contemporary lens, and tests whether the Maryland courts of today will stand by the promises of our Constitution's framers. Their case challenges the excesses and abuses of power by police, as government actors, against individuals and groups that are often the most marginalized, and asks this Court to hold that remedies for such abuses are meaningful, not illusory. The events of the last year in Maryland and across the country have helped raise awareness about the extent to which police abuses persist, the extent to which they are borne disproportionately by marginalized communities of color, and the extent to which the government has fallen short in bringing justice for these wrongs.[6]

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[6] *See, e.g.*, Mark Puente, *Undue Force*, Balt. Sun, Sept. 28, 2014 (documenting scope of police brutality incidents by Baltimore City Police Department), http://data.baltimoresun.com/news/police-settlements/; Frank Serpico, *The Police are Still Out of Control*, Politico, Oct. 23, 2014 (arguing that police excessive force has worsened in recent years and describing racial disparities in experiences of excessive force), http://www.politico.com/magazine/story/2014/10/the-police-are-still-out-of-control-112160.html; Ryan Gabrielson, Ryann Grochowski Jones and Eric Sagara,

From the perspective of many victims of police abuse, the government either completely fails to respond, or responds inadequately. Whether because of bureaucracies, the special protections afforded police officers in the law, or something else, victims of police misconduct rarely see the officer responsible for wrongdoing disciplined or charged criminally. In the instant case, for example, a review of Maryland Judiciary Case Search reveals that, despite the jury's finding that Officer Jackson acted with malice when he took Mr. Espina's life, no criminal charges of any kind were filed against him.[7] Similarly, there is no evidence suggesting that Officer Jackson was ever disciplined or terminated.[8]

As a result, it falls to the victims of unconstitutional police abuses to seek justice through the civil court system. Indeed, such cases are often the primary means by which police are held accountable for violating rights protected by the Constitution.[9]. And,

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Deadly Force, in Black and White, ProPublica, Oct. 10, 2014 (analyzing police-involved killings and finding extreme racial disparities), http://www.propublica.org/article/deadly-force-in-black-and-white; Scott Turow, *Presumed Guilty: You Think You Know Why the Diallo Cops Were Acquitted. Think Again*., Wash. Post, Mar. 5, 2000, at B1 (describing racial inequality in patterns of police abuse); Peter Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 Md. L. Rev. 271 (1994) (chronicling systemic scope of failure of accountability mechanisms responding to police brutality nationally).

[7] Based on search for "Steven Jackson" as a defendant party in Circuit Court in Prince George's Co., last visited Oct. 23, 2014, http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp.

[8] *See* Andrea Noble, *Jury Awards $11.5M to Family of Man Killed by Prince George's Police Officer*, Gazette, Mar. 18, 2011 (noting Jackson's continued employment with the Prince George's County Police Department nearly three years after shooting), http://ww2.gazette.net/stories/03182011/prinnew160957_32584.php.

[9] Based on the experience of *amici*, neither disciplinary proceedings nor criminal prosecution are, in practice, functioning mechanisms for police accountability. *See, e.g.,* Davis, *supra* n. 6; Turow, *supra* n. 6; Mark Puente, *Baltimore Police Should Revamp*

while going to court can be trying for anyone, victims of police abuse shoulder unique risks and burdens when they stand up to police, who have unparalleled power even among government employees. Victims challenging police misconduct in court often fear retaliation by officers who have the authority to deprive them of their liberty, the ability to access highly sensitive information contained in law enforcement databases, and the capacity to invoke the machinery of criminal investigative tools against them.

Once in court, by operation of the Local Government Tort Claims Act ("LGTCA"), victims find that the entire weight of government has been thrown behind the police officer and his defense. *See* Md. Code Ann., Cts. & Jud. Proc. Art. § 5-302 (providing for representation by government). In effect, victims are forced to take on not just the officer but also the entire system. They must overcome immunities available to law enforcement and the overwhelming odds that police officers' version of events will be credited over that of victims.[10] And because of the nature of litigation, individuals seeking to vindicate their rights must be in it for the long haul.[11]

Here, the Espina family took on this fight against the government and prevailed despite the odds. The jury that heard their case awarded them a significant remedy in recognition of the egregious harm they suffered and continue to suffer. But they have survived all this only to be told that the government has enacted a law to protect itself from paying what the jury said is owed for a civil rights violation of this magnitude. Now they find that the courts, too, have taken the government's side, dictating that, after

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Misconduct Probes, Audit Says, Balt. Sun, Sept. 20, 2014 (describing findings of audit showing systemic failures of internal affairs).

[10] Police misconduct cases are often extraordinarily difficult to prove, as juries typically credit police. *See, e.g.*, Turow, *supra* n. 6 (noting, in author's experience as a U.S. Assistant Attorney, jurors' reluctance to convict police officers of wrongdoing).

[11] For example, in this case, Mr. Espina was killed more than six years ago, in August 2008. *See Espina v. Prince George's County*, 215 Md. App. 611, 619 (2013), *recons. den.* (Feb. 4, 2014). Tragically, his son has now also died, awaiting justice.

all this, the only remedy the government will provide for the malicious killing of their family member by a police officer is $200,000.

In an era where police killings are disproportionately borne by the most marginalized groups; where the government declines to criminally prosecute police even when they act with malice; where the government supplies the defense and indemnifies police for wrongdoing; and where caps on damages have been established by the very same governments that employ police and are responsible for their training and conduct, the promise of justice in the courts appears increasingly illusory for communities that bear the brunt of police abuse.

Article 19 and its predecessors were written to protect against exactly these kinds of abuses by government. This Court should step in and affirm this bedrock constitutional principle, in the same manner in which it has stood up for the civil rights of Marylanders in other parts of its jurisprudence.

II. THE JURISPRUDENCE OF THIS COURT HAS REPEATEDLY REAFFIRMED THE STATE'S COMMITMENT TO REAL, RATHER THAN ILLUSORY, REMEDIES BY RECOGNIZING PROTECTIONS UNDER THE STATE CONSTITUTION BEYOND THOSE AVAILABLE IN FEDERAL COURTS.

As the federal courts have narrowed the scope of federal constitutional protections and remedies, victims of constitutional violations have increasingly turned to state courts for more robust protection of their rights. Heeding the call, "state courts have taken seriously their obligation as coequal guardians of civil rights and liberties." William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions As Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 548 (1986). This Court, too, has taken such an approach, with real and significant implications for litigants' ability to challenge civil rights violations.

For example, like other state courts, this Court has recognized greater protections in our state's constitutional provisions. *See id.* ("Between 1970 and 1984, state courts, increasingly reluctant to follow the federal lead, have handed down over 250 published opinions holding that the constitutional minimums set by the United States Supreme

Court were insufficient to satisfy the more stringent requirements of state constitutional law.")*;* *see also infra* pp. 14-15. Likewise, this Court has joined other state courts in responding vigorously to the gaps in liability created by the increasing limitations on actions for deprivation of constitutional rights under 42 U.S.C. § 1983 by recognizing a direct cause of action under the provisions of their own constitutions. *See* T. Hunter Jefferson, Note, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions Against State Governments*, 50 Vand. L. Rev. 1525, 1535-40 (1997) (discussing several state court decisions recognizing an independent cause of action arising from a state constitutional violation); *see also infra* pp. 15-16. Additionally, under the earlier decisions of this Court, local governmental officials and entities do not enjoy common law governmental immunity against claims for state constitutional violations; there is no distinction between a government official's individual and official capacity; and local governmental entities are subject to *respondeat superior* liability. *DiPino v. Davis*, 354 Md. 18, 51 (1999).

These holdings, all departures from federal law, have real impacts on litigants challenging civil rights violations. Indeed, they are often outcome-determinative of an individual's ability to bring or recover on a constitutional claim. But their protections, and Article 19's explicit promise of a remedy—which has no federal counterpart—would be severely undermined if governments may cap damages for constitutional violations.

A. This Court has Found Broader Protections in State Constitutional Provisions than Federal Counterparts.

The decisions of this Court have established the prominence of the Maryland Declaration of Rights in ensuring constitutional protections beyond the minimum set by the United States Constitution. While the provisions of the Maryland Constitution are *in pari materia* with their federal analogues, this Court has consistently "recognized that, in many contexts, the protections provided by the Maryland Declaration of Rights are broader than the protections provided by the parallel federal provision." *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 549-51 (2013) (collecting cases).

For example, this Court has interpreted the equal protection guarantee in Article 24 to provide stronger protection than its federal counterpart. *See* Dismas N. Locaria, *Constitutional Law*, 61 Md. L. Rev. 847, 854-60 (2002) (discussing historical development of Maryland's more stringent rational basis review). In *Frankel v. Bd. of Regents of Univ. of Md. Sys.*, the Court rejected a classification for lacking "a *fair and substantial relation* to the object of the regulation," 361 Md. 298 at 316-18 (2000) (emphasis added) (citation and internal quotation marks omitted), a significantly more stringent test than the rational basis review used in federal law, which does not require that the relation be "fair and substantial." *See* Locaria, *supra*, at 853 (discussing federal rational basis review). The Court observed that "[t]he vitality of this State's equal protection doctrine is demonstrated by our decisions which, although applying the deferential standard embodied in the rational basis test, have nevertheless invalidated many legislative classifications which impinged on privileges cherished by our citizens." *Id.* at 315. This Court's jurisprudence offers several other examples of the broader protections provided by the Maryland Declaration of Rights than those furnished by the U.S. Constitution. *See, e.g.*, *Doe*, 430 Md. at 551-53 (*ex post facto* prohibition); *Prince George's Cnty. v. Ray's Used Cars*, 398 Md. 632, 640 n.5 (2007) (takings); *Dua*, 370 Md. at 619-20, 623-30 (due process); *Choi v. State*, 316 Md. 529, 535 n.3 (1989) (self-incrimination privilege).

This Court has also provided a strong remedy for the enforcement of constitutional rights. *See DiPino*, 354 Md. at 51 (cataloguing differences in federal and state constitutional claims); *see also* Stephen J. Shapiro, *Suits Against State Officials for Damages for Violations of Constitutional Rights: Comparing Maryland and Federal Law*, 23 U. Balt. L. Rev. 423, 451 (1994) (detailing circumstances under which a plaintiff would recover under state constitution but not in a § 1983 action); Jefferson, *supra*, at 1534 n.50 (counting Maryland among the states that recognize a direct cause of action under a state constitution). As this Court recently reiterated, "Maryland's constitutional protections require more from public officials and municipalities than § 1983, and the

rules and procedures of applying them are divergent from the federal rules." *Longtin*, 419 Md. at 496.

B. This Court has Refused to Allow Local Governments to Avoid Responsibility for the Wrongdoing of Their Employees.

This Court's *respondeat superior* jurisprudence has similarly required more of local governments than the federal standard.

The Supreme Court has consistently rejected efforts to impose *respondeat superior* liability on municipalities, requiring instead that litigants identify a municipal "policy" or "custom" so as to "ensure[] that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality" or for deprivations resulting from a "relevant practice [that] is so widespread as to have the force of law." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 403–04 (1997) (citing *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 690–91, 694 (1978)). And under the limited circumstances where the Supreme Court has permitted liability "[w]here a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Id.* at 405.[12]

This Court, on the other hand, has adopted an entirely different approach. In stark contrast to the Supreme Court, this Court has imposed *respondeat superior* liability on municipalities, reasoning that "[t]he State is appropriately held answerable for the acts of its officers and employees because it can avoid such misconduct by adequate training and

[12] For example, in order to prevail on a claim of supervisory liability under § 1983, a plaintiff must demonstrate, among other things, that the supervisor had actual or constructive knowledge that a subordinate's conduct presented "a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff" and show "an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff." *Wilkins v. Montgomery*, 751 F.3d 214, 226 (4th Cir. 2014) (citations and internal quotation marks omitted).

supervision and avoid its repetition by discharging or disciplining negligent or incompetent employees." *DiPino*, 354 Md. at 52-53 (citation omitted). Unlike the United States Constitution, the Maryland Constitution thus "impose[s] an *affirmative obligation*" on a municipality "to avoid constitutional violations by its employees" through such training. *Longtin*, 419 Md. at 495 (emphasis added).

This distinction has very real consequences for litigants. For example, *Littleton v. Swonger*, 502 F. App'x 271 (4th Cir. 2012), concerned the use of deadly force by a Prince George's County Police Officer. 502 F. App'x at 272. Prior to trial, the district court had granted summary judgment to Prince George's County on all counts, including the federal and state constitutional claims. *Id.* at 273. The Fourth Circuit subsequently upheld summary judgment on the § 1983 claim, but reversed the district court's grant of summary judgment under the Maryland Constitution. *Id.* at 277-78. Surveying the evidence, the court held that the plaintiffs could not prevail on their § 1983 claim because they relied only on "general assertions about Prince George's County's failure to train and supervise," and "failed to offer any evidence of a county policy or custom, deficient training, or knowledge that Swonger engaged in conduct that posed a risk of constitutional injury." *Id.* The state constitutional claims, however, could proceed because of the availability of *respondeat superior* liability. *Id.* at 278. Thus, while federal constitutional claims require direct responsibility on the part of the government agency, state constitutional claims will lie so long as the individual employee acts within the scope of employment.

C. This Court has Limited the Availability of Immunity for Government Officials Who Violate Constitutional Rights.

This Court likewise has sought to ensure the availability of remedies to victims of constitutional violations by limiting immunity for violations of constitutional rights. Under federal law, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

have known." *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998) (citation and internal quotation marks omitted).

Under Maryland law, in contrast, "[p]roof that the official acted in objectively reasonable reliance on existing law, which would exempt an official from liability under § 1983, may be relevant to whether the official committed a violation, but it does not provide an immunity should a violation be found." *DiPino*, 354 Md. at 51. Characterizing Maryland's common law qualified immunity defense as "quite limited," this Court "has consistently held that Maryland common law qualified immunity in tort suits, for public officials performing discretionary acts, has no application in actions based upon alleged violations of state constitutional rights." *Lee v. Cline*, 384 Md. 245, 258 (2004) (emphasis removed). Otherwise, "[t]o accord immunity to the responsible government officials, and leave an individual remediless when his constitutional rights are violated, would be inconsistent with the purpose of the constitutional provisions." *Okwa v. Harper*, 360 Md. 161, 202 (2000) (citation omitted).

In this way, Maryland law provides a remedy where federal law provides none.

D. Application of the LGTCA's Damages Cap to State Constitutional Claims Would Significantly Alter this Landscape, in Violation of the Terms and Promises of Article 19.

The departures from federal analysis to enhance protection for civil rights and liberties under the Maryland Constitution find their anchor in the explicit promise of a full remedy for rights violations embodied in Article 19. Particularly where, as here, protection for fundamental rights against governmental abuse of power hangs in the balance, it furthers "justice and right" for Article 19 to be given full expression by the Court. Given how much stronger state constitutional protections have been and how committed this Court has been to ensure meaningful remedies, it would be entirely inconsistent to impose a damages cap where federal law imposes none.

If allowed to stand, the decisions of the courts below to slash the Espina family's damage award through application of the LGTCA's damages cap would fly in the face of the Maryland courts' march toward strong and independent protection for civil rights

under the Maryland Constitution, and render almost meaningless the explicit promises made by the framers when they enacted Article 19. Henceforth, rather than relying on Maryland courts for their robust enforcement of individual rights, litigants will more likely feel compelled to turn to federal courts due to the ability to recover in full a favorable jury verdict and the availability of attorney's fees under 42 U.S.C. § 1988. Even if plaintiffs continue to file in state court, the inclusion of a § 1983 claim necessary to recover sufficient damages will often result in removal to federal court. Either route may effectively result in dismissal of the suit on immunity or other federal grounds.

Due to the critical differences between federal and state law outlined above, many plaintiffs seeking to vindicate constitutional rights will be placed in the unenviable position of choosing between a forum that offers favorable law but paltry damages, and a forum that provides full damages but a low likelihood of success due to immunity and other doctrines that broadly shield officials from liability. This would effectively deprive litigants of appropriate remedies and would in no way serve the interests of justice. "Maryland's constitutional protections require more from public officials and municipalities than § 1983," *Longtin*, 419 Md. at 496. Such protections will ring hollow if Maryland law does not permit adequate compensation for their loss.

III. TO ENSURE THE VITALITY OF REMEDIES FOR CONSTIUTTIONAL VIOLATIONS, THE TEXT OF ARTICLE 19 GUARANTEEING A REMEDY "FREELY WITHOUT SALE, FULLY WITHOUT ANY DENIAL, AND SPEEDILY WITHOUT DELAY" SHOULD BE GIVEN EFFECT.

By its terms, Article 19 does not just protect against wholesale deprivation of a remedy; it also protects against its impairment. This Court should give meaning to this text to ensure that Article 19's promise is realized for victims of civil rights violations.

A. Principles of Statutory Construction Require Courts to Give Meaning to the Modifying Language, "Fully Without Any Denial," in Article 19.

Article 19 protects a remedy "freely without sale; fully without any denial; and speedily without delay." These modifiers describe characteristics of the remedy that are of constitutional significance and practical importance. But earlier cases have not given them effect, which is inconsistent with principles of statutory construction. *See, e.g., Md.*

Port Adm. v. Brawner Contracting Co., 303 Md. 44, 60 (1985) ("A fundamental rule of statutory construction is that no word, clause, sentence or phrase should be rendered surplusage, superfluous, meaningless, or nugatory"); *In re Wallace W.,* 333 Md. 186, 192 (1993) (citing *Brawner Contracting Co.* at 60); *Holman v. Kelly Catering, Inc.,* 334 Md. 480, 485 (1995); *Sinai Hosp. v. Dep't of Employment,* 309 Md. 28, 40 (1987) (pertinent parts of the legislative language should be read so that "no part of the law [is rendered] surplusage"). Thus, this language should be given meaning, at minimum by (1) acknowledging that a litigant's Article 19 rights are implicated when his or her remedy is incomplete, and (2) by incorporating the modifiers into any analysis of the reasonableness of the infringement or denial. *See Murphy v. Edmonds,* 352 Md. 342, 383 (1992) (Chasanow, J., dissenting) ("I believe Article 19, if nothing else, makes it clear that, in Maryland, the right to a 'remedy . . . fully without any denial' is significant enough to be included in our constitutional guarantees.").

B. To Give the Full Text of Article 19 Its Meaning, Any Reasonableness Analysis Must Be Cumulative and Contextual.

Maryland courts have not been called upon to decide whether limiting the remedy for a constitutional violation by a local government violates Article 19's remedy guarantee. However, in analyzing earlier Article 19 challenges to restrictions on remedies, Maryland courts have generally employed a "reasonableness" analysis. *See, e.g.*, *Jackson v. Dackman,* 422 Md. 357, 380 (2011) ("The issue, under our Article 19 jurisprudence, generally is whether the abolition of the common law remedy and substitution of a statutory remedy was reasonable."). After determining whether a challenged law implicates a right of access to the courts or a right to a remedy, the court has then examined whether the restriction is unreasonable. *See, e.g.*, *Piselli*, 371 Md. at 205-08 (tracing cases).

Such reasonableness analyses should not be viewed in isolation with respect to each individual "restriction" but rather should consider their cumulative effects. Otherwise, the risk is that rights of access and remedies are lost to a "death by a thousand cuts," and the protections of Article 19 are increasingly illusory. Each incremental

restriction may, by itself, appear reasonable enough. But, as restrictions accumulate, they reach a tipping point past which it becomes so difficult for a litigant to obtain redress that the promise of a remedy exists in name only.

Furthermore, any reasonableness analysis should consider context, as well as cumulative impact. Article 19 has particular importance when the "right" at issue is a "fundamental" right, which includes, most importantly, rights arising under the Maryland Declaration of Rights. *See Murphy*, 325 Md. at 366 (comparing legislation abrogating access to the court for causes of action to recover for "certain fundamental rights," including constitutional rights, with "the abolition of some common law causes of action."). Recognition of this special protection for constitutional rights under Article 19 was a key factor in this Court's repeated decisions holding that violators of state constitutional rights are not entitled to common law immunity. *See Ashton v. Brown*, 339 Md. 70, 105 (1995) ("[T]he principle that individual state officials should not be immune from suit for state constitutional violations is bound up with the basic tenet, expressed in Article 19 of the Maryland Declaration of Rights, that a plaintiff injured by unconstitutional state action should have a remedy to redress the wrong."); *Johnson v. Md. State Police*, 331 Md. 285, 298 n.8 (1993).

IV. APPLICATION OF LGTCA CAPS TO SELF-EXECUTING CONSTITITONAL CLAIMS VIOLATES ARTICLE 19 AND IS INCONSISTENT WITH THIS COURT'S ROBUST PROTECTIONS OF CONSTITUTIONAL RIGHTS.

A. Unlike Common Law Claims, Constitutional Rights Cannot be Abrogated by Statute.

For the legislature to impair remedies for violations of self-executing constitutional rights presents a different set of issues than for it to limit remedies involving common law torts between private parties, or even common law torts against the State. While the General Assembly has authority to modify or even eliminate certain non-constitutional common law rights, *see Murphy,* 325 Md. at 362, it has long been established that the General Assembly cannot legislate so as to eliminate or restrict fundamental constitutional rights and remedies. *See, e.g., Marbury v. Madison,* 5 U.S.

137, 177 (1803); *State v. Cobourn*, 169 Md. 110, 179 A. 512, 513 (1935). Thus, although this Court has, in some instances, permitted the limiting of remedies involving common law torts between private parties in the face of Article 19 challenges, *see, e.g., Murphy*, 352 Md. at 365-67 (no Article 19 violation for application of damages cap in Md. Code Ann., Cts. & Jud. Proc. Art. § 11-808 to personal injury claim); *DRD Pool Serv. v. Freed*, 416 Md. 46 (2010) (same); *but see Jackson*, 422 Md. at 381 (finding Article 19 violation for "totally inadequate and unreasonable" remedy), such cases are not controlling here.[13]

Applying the LGTCA damages cap to self-executing constitutional claims would be a tipping point in the jurisprudence regarding the availability of remedies for constitutional violations.

B. Impairing the Remedy Impairs the Right.

Rather than merely "substituting" one remedy for another, *see, e.g.*, *Jackson*, 422 Md. at 380, the LGTCA damages cap plainly deprives victims of constitutional wrongdoing whose damages exceed the cap of a significant part of the remedy without any commensurate benefit. This type of "inadequate" substitution violates Article 19's promise of a remedy, s*ee id*. at 382 (finding no remedy "when no adequate remedy is substituted"), and certainly its promise of a remedy "fully without any denial."

This Court has acknowledged that a litigant's remedies for constitutional violations are "impaired" when he or she is denied some of the damages assessed as

[13] In *Gooslin v. Maryland*, 132 Md. App. 290 (2000) the Court of Specials Appeals' refusal to find a violation of Article 19 through operation of the Maryland Tort Claims Act ("MTCA") damages cap was squarely grounded in the MTCA's limited waiver of sovereign immunity, without which litigants would be essentially without any remedy. *See id.* at 295-96 (characterizing MTCA cap as limited waiver of sovereign immunity up to value of damages cap in tort case against state arising from automobile accident). No such benefit is conferred upon victims by the LGTCA. Rather, the LGTCA operates to throw the full force of the government behind the victim's opponent by requiring local governments to provide their defense and then limiting how much victims may recover.

being due compensation for the harm, even if *some* recovery remains possible.[14] For example, in *Longtin*, while expressly declining to decide whether the LGTCA damages cap applied to constitutional claims, in analyzing the impact of the damages cap's retroactive effect, the Court stated:

> Here, the trier of fact has determined that the plaintiff suffered injuries and deserved compensation in amount that was many multiples of the amount allowed under the statutory damages cap. Application of a damages cap deprives a person of compensation, just as abrogating a cause of action does.

Longtin, 419 Md. at 487. The Court went on to emphasize that it did not matter that "applying a damage cap does not vitiate a person's remedy altogether." The partial denial of damages – characterized by the Court as an "enormous loss" to the plaintiff – "would 'impair' his cause of action. *Id.* at 489.[15] Similarly, in upholding damages caps for

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[14] This impairment is not implicated when judges reduce excessive jury awards; in such cases, the remedy is not impaired; rather, in such cases the measure of the harm has been determined to be overstated by the jury. *See Banegura v. Taylor,* 312 Md. 609, 624 (1988) (trial judge may determine whether new trial should be granted on ground of excessiveness of verdict; standard depends on whether "verdict is 'grossly excessive,' or 'shocks the conscience of the court,' or is 'inordinate' or 'outrageously excessive,' or even simply 'excessive'"; trial court has broad discretion in making that determination); *Hebron Volunteer Fire Dep't, Inc. v. Whitelock,* 166 Md. App. 619 (2006) ("[T]he trial court has broad discretion to determine whether a jury's damages award is so excessive that it warrants a new trial, and to give the plaintiff the alternative option of accepting a remittitur") (citing *Banegura v. Taylor* at 624). This authority provides trial judges ample room to determine whether, in a particular instance, a jury award was excessive in relation to the harm suffered, but unlike an automatic cap, it does not rob *all* plaintiffs of the ability to collect an *appropriate and proportional* judgment when the constitutional violation is so flagrant that a jury finds that the damages should exceed $200,000. Moreover, in those cases the plaintiff is given the option of a new trial or accepting a reduction in amount. No such option exists here, such that the plaintiff will never be able to have a meaningful remedy.

[15] While it is symbolically significant that Officer Jackson is fully liable because he was found to have acted with malice, in practice, it has little meaning for victims like the Espina family. *See* App. Br. at 56. If the only party liable for damages is the individual officer, only the smallest fraction of the remedy is likely to be recovered in these types of

common law torts, this Court has specifically indicated that, in enacting the caps, the state legislature has abrogated certain rights or remedies, but found such actions permissible because the legislature may modify the common law. *See Murphy,* 325 Md. at 362 (1992). Constitutional rights, in contrast, cannot be abrogated or restricted.

C. Application of the LGTCA Cap Here Would Create a Rule that Victims of the Most Egregious Constitutional Violations, Where Harms are Greatest, are Denied Any Adequate Remedy.

If the decision below is allowed to stand, it will mean that victims of the most egregious constitutional violations, whose damages are greatest, will *necessarily* be denied a remedy "fully without any denial." The more egregious the constitutional violation – and the greater the harm – the greater the deprivation of remedy to the victim of the illegal government conduct. As Judge Chasanow explained in *Murphy*:

> There is a sad, even tragic, aspect of the class of tort victims who will be most significantly affected by the cap. It is obvious that those whose noneconomic damages will be greatest and who will lose the most by the cap will be those whose injuries are the most severe as well as those who must endure their injuries for the longest period of time."
>
> *Id.* at 379 (Chasanow, J., dissenting).

The enormity of this deprivation is illustrated in the experience of the Espina family, where the remedy for the intentional killing of Mr. Espina would be the same as the remedy for the false arrest and false imprisonment of his son. Manuel Espina was himself grotesquely wronged by police. But the malicious killing of his father was a wrong of an entirely different magnitude. To provide for the same remedy for both wrongs grossly undervalues Mr. Espina's life and ignores the gravity of the loss when police intentionally take a human life. This cannot be.

From its founding, this state sought to guarantee its people strong protections against governmental abuse of power, and full remedies when such abuses do occur.

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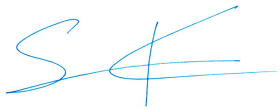
cases. Indeed, by the very nature of their jobs, police are able to exercise power totally disproportionate to their ability to remedy when that power is abused.

Allowing the government to avoid its responsibility to remedy Mr. Espina's shocking killing by police would render the Framer's Article 19 promise of "justice and right" a nullity and inflict yet another agonizing wrong upon the Espina family.

CONCLUSION

For the foregoing reasons, the Court of Appeals should reverse the decisions of the lower courts.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

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