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UNIVERSITY OF BALTIMORE LAW FORUM

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SPRING 2023

NUMBER 2

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LETTER FROM THE EDITOR-IN-CHIEF

To the Maryland Legal Community:

Since its founding in 1970, the *University of Baltimore Law Forum* has devoted itself to providing the Maryland Legal Community with a resource for evolving legal issues in Maryland. This issue represents *Law Forum's* commitment to preserving this fifty-year legacy of providing readers with thought-provoking and informative pieces.

Volume 53.2 opens with a comment written by Robert Taylor. This comment examines Maryland firearms regulations and highlights how legislatures' lack of understanding about the basic functions of firearms can—and does—lead to inconsistent laws related to assault weapons. Specifically, the article addresses how one of the United States' highest-selling assault-style weapons is currently bought, sold, and transferred in Maryland, despite lawmakers purporting Maryland to have an “assault weapons ban.” The second comment, written by Erin Carrington Smith looks at federal and state law governing noncitizen access to public health benefits and—exploring women's health issues specifically—discusses why and how Maryland should extend state-funded coverage to more categories of noncitizens living in the state.

The issue continues with a comment written by Julia Rowland in which she discusses the use of citizen suits to control water pollution and mitigate Maryland Clean Water Act violations. This comment examines how Maryland citizen suits will address environmental injustice and how the state should address the environmental concerns surrounding pollution in the Chesapeake Bay. The final comment, written by Leah Rowell, analyzes how investment in Maryland schools' infrastructure is critical to closing the academic achievement gap in Maryland. Further, this article examines issues surrounding the Built to Learn Act and Blueprint for Maryland's Future Act and proposes solutions for ensuring all Maryland students receive a 21st-century education in safe and healthy schools. Finally, included are six recent development pieces which interpret recent decisions made by Maryland's highest appellate court.

This publication reflects the hard work and commitment of our Editorial Board, Associate Editors, and Staff Editors. I want to thank the entire *Law Forum* Staff for their diligence, versatility, and creativity throughout the production process. I also want to recognize our Faculty Advisor, Professor Sheldon Lyke, and the Assistant Dean of Academic and Writing Support, Dean Claudia Diamond, for their guidance and support. On behalf of *Law Forum*, we thank you, our readers, for your continued interest in our publication.

Sincerely,
Chelsea Roberts
Editor-in-Chief
University of Baltimore Law Forum - Vol. 53, No. 2

Member, National Conference of Law Reviews

UNIVERSITY OF BALTIMORE LAW FORUM

VOLUME 53

SPRING 2023

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COMMENT

TO BAN OR NOT TO BAN: THE IMPACT OF EXCEPTIONS IN MARYLAND FIREARMS' REGULATIONS ON LEGISLATIVE INTENT

*By: Robert J. Taylor**

I. INTRODUCTION

Like any legislative action, the devil is in the details. Firearms regulations are no different. In April of 2013, the Maryland General Assembly passed Senate Bill 281 (cross-filed with House Bill 294).¹ The legislature invited Maryland residents to believe that the sale of assault weapons is banned in Maryland.² However, the law fell short of its objective by carving out an exception for certain firearms tantamount to assault weapons.³ Referred to as the heavy-barrel or “H-BAR” exception, the law effectively abrogates Maryland’s assault weapon ban.⁴ This exception allows AR-15 style firearms that are functionally indistinguishable from banned assault weapons to be legally sold, transferred, and possessed throughout the state.⁵

This article provides a brief history of some of the pertinent firearms’ regulations in the United States and Maryland. It surveys the effect of the General Assembly’s decision to except, by name, the Colt AR-15 Sporter H-

* Robert J. Taylor, J.D., University of Baltimore School of Law 2023. I would like to thank the 2022-2023 *University of Baltimore Law Forum* Executive Board and Staff Editors for their support during the editorial process. I also want to extend tremendous gratitude to my faculty advisor, Prof. Hugh McClean for his sage guidance during the writing process. Finally, a special thank you to my family, friends, and colleagues for acting as a sounding board for the issues, and ideas presented in this article.

¹ See 2013 Md. Laws 4195.

² See MD. CODE ANN., CRIM. LAW § 4-303(a) (LexisNexis 2022); Off. of Governor Martin O’Malley, *Comprehensive Public Safety Package Passes Maryland Legislature*, MARYLAND.GOV (Apr. 4, 2013), <https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/019000/019952/unrestricted/20141047e-004.pdf>.

³ See MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022).

⁴ See *id.* (excepting COLT AR-15 Sporter H-BAR rifles from the definition of assault weapon); see also MD. CODE ANN., CRIM. LAW § 4-301(d) (LexisNexis 2022).

⁵ The term “assault weapon” is the subject of intense public debate. For the purposes of this article, an “assault weapon” means those weapons enumerated in MD. CODE ANN., CRIM. LAW § 4-301(d) and includes the Colt AR-15 Sporter H-BAR rifle and other AR-15-style imitations.

BAR rifle, and its imitations in section 5-101(r) of the Public Safety Article and briefly summarizes the impact that these types of firearms have on communities across the United States. Finally, the article concludes by proposing legislative action to remove the illogical exceptions in the law to effectively support an assault weapons ban in Maryland.

II. BACKGROUND

A. A Brief History of Firearms Regulations at the National and State Levels is Necessary for Understanding How the State and Federal Governments Operate in Tandem to Support Firearms' Regulations.

The concept of federalism in the United States plays an essential role in firearms legislation due to overlapping federal and state laws.⁶ Federalism is “central to the constitutional design [and] adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.”⁷ In the context of firearms legislation, this means that states and the federal government each have separate (and co-existing) regulations.⁸

Congress defines a firearm as “any weapon which will or is designed to or may readily be converted to expel a projectile [or bullet] by the action of an explosive, or the frame or receiver of any such weapon[.]”⁹ The term semiautomatic indicates that a firearm uses energy gathered from the discharge of a projectile to extract a fired cartridge and chamber the next cartridge.¹⁰ A semiautomatic firearm “requires a separate pull of the trigger to fire each cartridge.”¹¹ Rifles, shotguns, and handguns each have semiautomatic versions.¹²

⁶ See generally 1996 Md. Laws 3139-40; Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 108 Stat. 1796, 2000 (1994) (repealed 2004).

⁷ *Hosford v. Chateau Foghorn LP*, 229 Md. App. 499, 509, 145 A.3d 616, 622 (2016) (quoting *Arizona v. United States*, 567 U.S. 387, 399 (2012)).

⁸ See 18 U.S.C. §§ 921-931 (2022); *Hosford*, 229 Md. App. at 509, 145 A.3d at 622 (quoting *Arizona*, 567 U.S. at 399).

⁹ 18 U.S.C. § 921(a)(3) (2022) (cleaned up).

¹⁰ See 18 U.S.C. § 921(a)(29) (2022) (defining the functionality of various semiautomatic firearms).

¹¹ *Id.* (explaining semiautomatic firearm in the context of a repeating rifle).

¹² See BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ATF GUIDEBOOK – IMPORTATION & VERIFICATION OF FIREARMS, AMMUNITION, AND IMPLEMENTS OF WAR 4, <https://www.atf.gov/firearms/docs/guide/atf-guidebook-importation-verification-firearms-ammunition-and-implements-war> [hereinafter ATF GUIDEBOOK].

A semiautomatic firearm is not a machinegun.¹³ A machinegun, by contrast, is designed to fire more than one cartridge (or bullet) each time the trigger is pulled, e.g., fully automatic or bursts of three to five rounds.¹⁴ Other firearms, such as bolt and lever action rifles or pump shotguns, require physical manipulation of the firearm by the operator, to extract a fired cartridge and chamber the next round.¹⁵

Under Maryland law, firearms are placed into two categories.¹⁶ These categories include: (1) regulated firearms, which includes handguns and an itemized list of semiautomatic assault weapons; and (2) all other firearms, including rifles and shotguns.¹⁷ Firearms in this category are impliedly unregulated.¹⁸ As described in section III below, the distinction between these categories is inconsistent, and many semiautomatic weapons remain unregulated simply because they are not included in the list of regulated firearms.¹⁹

B. A Brief History of Federal Firearms Regulations

In 1968, Congress passed the Gun Control Act of 1968 (“Gun Control Act”).²⁰ The “principal purpose [of the Gun Control Act] was ‘to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.’”²¹ Then, in 1994, Congress passed the Violent Crime Control and Law Enforcement Act.²² This Act built upon restrictions enacted to regulate

¹³ See 26 U.S.C. § 5845(b) (2022) (defining a machine gun as a firearm capable of firing more than one shot, automatically, with a single pull of the trigger).

¹⁴ See *id.* The laws governing machine gun possession in the United States have a long history dating back to prohibition-era alcohol smuggling and are not at issue in this article. The information here provides the reader with enough background to understand the distinction between semiautomatic weapons and machine guns.

¹⁵ See ATF GUIDEBOOK, *supra* note 12, at 5-9.

¹⁶ See MD. CODE ANN., PUB. SAFETY §§ 5-101(r)(1), (2)(i)-(xlv) (LexisNexis 2022); see also MD. CODE ANN., CRIM. LAW § 4-301(c) (LexisNexis 2022).

¹⁷ MD. CODE ANN., PUB. SAFETY §§ 5-101(r)(1) and (2)(i)-(xlv) (LexisNexis 2022); see also MD. CODE ANN., CRIM. LAW § 4-301(c) (LexisNexis 2022) (explaining that the statute lists semiautomatic assault weapons by make and model).

¹⁸ See MD. CODE ANN., PUB. SAFETY § 5-101(r)(1), (2)(i)-(xlv) (LexisNexis 2022).

¹⁹ Compare MD. CODE ANN., PUB. SAFETY §§ 5-101(r)(1), 2(i)-(xiv) (LexisNexis 2022), with MD. CODE ANN., CRIM. LAW §§ 4-301(d), (h) (LexisNexis 2022).

²⁰ Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. §§ 921-931 (2022)).

²¹ *Barret v. United States*, 423 U.S. 212, 220 (1976) (quoting S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968)).

²² Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 108 Stat. 1796.

dangerous weapons under the Gun Control Act of 1968.²³ Included in this legislation was the Public Safety and Recreational Firearms Use Protection Act (the “Recreational Firearms Use Protection Act”).²⁴ One purpose of the legislation was to ban certain types of firearms, including semiautomatic assault weapons.²⁵

Congress defined semiautomatic assault weapons by listing the make and model of prohibited weapons and also by including a list of features such as folding stocks, pistol-style grips, bayonet mounts, flash suppressors, or threaded barrels that, if present, would classify an unlisted semiautomatic firearm as an assault weapon.²⁶ A minimum of two features (the “two-feature test”) were required to classify a rifle as a semiautomatic assault weapon per the statute.²⁷ The legislation included an outright ban on the Colt AR-15 series rifle.²⁸

The Recreational Firearms Use Protection Act also made it unlawful for any person to “manufacture, transfer, or possess a semiautomatic assault weapon.”²⁹ Notably, the Recreational Firearms Use Protection Act established both an effective date for the statute and an automatic repeal date that would require the expiration of the statute in ten years unless amended by Congress.³⁰ On September 13, 2004, the federal ban on semiautomatic assault weapons expired.³¹

C. A Brief History of Maryland State Firearms Regulations

The Maryland General Assembly also enacted firearms legislation during this period. In 1989, Senate Bill 531 was enacted for the purpose of prohibiting the sale and possession of assault weapons in certain circumstances.³² There, the Colt-AR 15 “in any format” was designated as an assault weapon, along with twenty-four specific firearms.³³ There was no H-BAR exception.

²³ *See id.*

²⁴ Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 108 Stat. 1796, 1996 (1994) (codified as amended at 18 U.S.C. §§922(a)(30)(A)-(B) (1994) (repealed 2004)).

²⁵ *Id.*

²⁶ Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322 §§ 108 Stat. 1796, 1997-98 (1994) (codified as amended at 18 U.S.C. §§ 921(a)(30)(A)-(B) (1994) (repealed 2004)).

²⁷ *See* 18 U.S.C. § 921(a)(3)(B) (1994) (repealed 2004).

²⁸ *See* 18 U.S.C. §§ 921(a)(30)(A)-(B) (1994) (repealed 2004).

²⁹ 18 U.S.C. 922 § v(1) (1994) (repealed 2004).

³⁰ Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 108 Stat. 1796, 2000 (1994) (repealed 2004).

³¹ *Id.*

³² *See* 1989 Md. Laws 2483.

³³ *Id.* at 2485-2486.

In 1996, the General Assembly passed the Maryland Gun Violence Act (the “Gun Violence Act”).³⁴ The purpose of the Gun Violence Act was to further reduce the availability of assault weapons to the public.³⁵ As the court noted in *Moore v. State*, the General Assembly “chose to follow the federal model” and made additional changes to the law to “prevent weapons from being possessed by individuals who should not hold them . . . [adding a prohibition] on possession of firearms by felons convicted of crimes of violence or enumerated drug crimes.”³⁶ However, beyond just expanding prohibited persons, the bill expanded the list of banned assault weapons to forty-five, but this time the Colt AR-15 ban included the H-BAR exception.³⁷

Then, in response to the Sandy Hook Elementary School shooting that occurred in Newtown, Connecticut in 2012, Maryland enacted the Firearms Safety Act of 2013 (the “Firearms Safety Act”).³⁸ One purpose of the act was to further designate certain firearms as assault weapons.³⁹ The Firearms Safety Act expressly prohibited the future possession, sale, exchange, transfer, or receipt of assault weapons (or so the public was led to believe).⁴⁰ The bill also allowed persons who owned an “assault [weapon] or a copycat weapon before October 1, 2013” to retain lawful possession.⁴¹

III. ISSUE

The Firearms Safety Act was widely heralded as an assault weapons ban.⁴² However, the Act retained two provisions from previous legislation that created a polarizing effect on any purported assault weapons ban. First, the H-BAR exception in section 5-101(r)(2) of the Public Safety Article.⁴³ And second, a statutory definition of “copycat weapon” in section 4-301 of the Criminal Law Article.⁴⁴ These provisions operate to effectively reverse Maryland’s ban on assault weapons.⁴⁵

³⁴ See 1996 Md. Laws 3175.

³⁵ *Chow v. State*, 163 Md. App. 492, 507, 881 A.2d 1148, 1157 (2005).

³⁶ *Moore v. State*, 424 Md. 118, 134, 34 A.3d 513, 522 (2010).

³⁷ See 1996 Md. Laws 3183-3184.

³⁸ See 2013 Md. Laws 4195-4256.

³⁹ *Id.*

⁴⁰ *Id.* at 4195.

⁴¹ See MD. CODE ANN., CRIM. LAW § 4-303(b)(3) (LexisNexis 2022); 2013 Md. Laws 4195-4256.

⁴² See Aaron C. Davis, *Assault Weapons Ban Survives in Md. Gun-Control Bill*, WASH. POST (Mar. 29, 2013), https://www.washingtonpost.com/local/md-politics/assault-weapons-ban-survives-in-md-gun-control-bill/2013/03/29/26ac09ec-98c9-11e2-b68f-dc5c4b47e519_story.html?tid=a_inl_manual.

⁴³ See MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022).

⁴⁴ See MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022).

⁴⁵ Compare MD. CODE ANN. PUB. SAFETY §§ 5-101(r)(1), 2(i)-(xiv) (LexisNexis 2022), with MD. CODE ANN. CRIM. LAW § 4-301(h) (LexisNexis 2022).

A. The Regulated and Unregulated Distinction in Maryland's Firearms' Statute Creates Arbitrary Classifications of Firearms.

Assault weapons are plainly regulated firearms under Maryland law.⁴⁶ Among other definitions, “assault weapon” means an “assault long gun” (or rifle) listed under section 5-101(r)(2) of the Public Safety Article.⁴⁷ Included in section 5-101(r)(2) are forty-five shotguns and rifles manufactured by various companies.⁴⁸ The statute also incorporates “specific assault weapons or their copies, regardless of which company produced or manufactured that assault weapon” into the definition.⁴⁹ Out of the forty-five listed firearms, only one contains an exception—the “Colt AR-15 Sporter H-BAR rifle.”⁵⁰

When exempting the Colt AR-15 Sporter H-BAR rifle, the General Assembly did not define “H-BAR rifle” in the statute.⁵¹ Instead, what constitutes H-BAR often turns on “the manufacturer’s designation of a firearm as an H-BAR or heavy-barreled version of an AR-15[.]”⁵² Even the Bureau of Alcohol, Tobacco, Firearms and Explosives’ (the “ATF”) Federal Firearms Regulations Reference Guide does not provide a definition for H-BAR.⁵³ The commonly accepted definition of “H-BAR” is that it is “a heavy barrel iteration of the AR-15[.]”⁵⁴

The removal of the Colt AR-15 H-BAR rifle (and its imitations) from section 5-101(r)(2)(xv) of the Criminal Law Article reverses its classification as an assault weapon under section 4-301(d) of the Criminal Law Article despite *identical functionality* to its banned counterparts.⁵⁵ The result is that firearms that are *indistinguishable* from each other in (among other things) their lethality and functionality are simultaneously included and excluded as part of Maryland’s ban under section 5-101(r)(2).⁵⁶

⁴⁶ See MD. CODE ANN., PUB. SAFETY § 5-101(r) (LexisNexis 2022).

⁴⁷ See MD. CODE ANN., CRIM. LAW §§ 4-301(b), (d) (LexisNexis 2022).

⁴⁸ See MD. CODE ANN., PUB. SAFETY §§ 5-101(r)(2)(i)-(xlv) (LexisNexis 2022).

⁴⁹ MD. CODE ANN., PUB. SAFETY § 5-101(r)(2) (LexisNexis 2022).

⁵⁰ MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022).

⁵¹ See MD. CODE ANN., PUB. SAFETY § 5-101 (LexisNexis 2022).

⁵² STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK § 10:12 (2020) (discussing the Maryland State Police’s reliance on manufacturer designations to denote H-BAR designations on firearms).

⁵³ See generally U.S. DEP’T OF JUST., ATF FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE (2014).

⁵⁴ Kolbe v. Hogan, 813 F.3d 160, 169 n.4 (4th Cir. 2016).

⁵⁵ See MD. CODE ANN., CRIM. LAW § 4-301(d) (LexisNexis 2022) (emphasis added).

⁵⁶ Compare AR-556, Model: 8500, RUGER (Mar. 11, 2021, 2:45 PM), <https://ruger.com/products/ar556/specSheets/8500.html> (noting specifications that the caliber is 5.56 NATO), with AR-556, Model: 8502, RUGER (Dec. 28, 2020, 11:07 AM),

The following illustrations highlight the result:

Figure 1 illustrates a semiautomatic rifle, categorized as an assault weapon per section 5-101(r)(2) and currently banned under Maryland law.⁵⁷



Figure 1 – Assault Weapon Per section 5-101(r)(2).⁵⁸

Figure 2 highlights a semiautomatic rifle not subject to the assault weapons ban under Maryland law.⁵⁹



Figure 2 – Unregulated Firearm Under Maryland Law.⁶⁰

<https://ruger.com/products/ar556/specSheets/8502.html> (noting specifications that the caliber is 5.56 NATO) (emphasis added).

⁵⁷ See MD. CODE ANN., CRIM. LAW § 4-301(b) (LexisNexis 2022) (defining any assault weapon as a weapon listed under § 5-101(r)(2) of the Public Safety Article).

⁵⁸ AR-556, Model: 8500, RUGER (Mar. 11, 2021, 2:45 PM),

<https://ruger.com/products/ar556/specSheets/8500.html>; see also *Maryland State Police Firearms Search*, MARYLAND.GOV STATE POLICE,

<https://mdsp.maryland.gov/Organization/Pages/CriminalInvestigationBureau/LicensingDivision/Firearms/FirearmSearch.aspx> (last visited Feb. 21, 2023) (listing this firearm as “Banned” as of Nov. 9, 2015).

⁵⁹ See MD. CODE ANN., PUB. SAFETY § 5-101 (LexisNexis 2022).

⁶⁰ AR-556, Model: 8502, RUGER (Dec. 28, 2020, 11:07 AM),

<https://ruger.com/products/ar556/specSheets/8502.html>; see also *Maryland State Police Firearms Search*, MARYLAND.GOV STATE POLICE,

https://mdsp.maryland.gov/Organization/Pages/CriminalInvestigationBureau/LicensingDivision/Firearms/FirearmSearch.aspx?Paged=TRUE&p_Manufacturer=LRB%20Arms&p_St

In *all functional aspects*, the firearms shown in *Figure 1* and *Figure 2* are identical.⁶¹ And while, the figures contain depictions of firearms with detachable magazines of varying capacities,⁶² this fact does not impact the basic internal operation of the firearm.⁶³ The manufacturer uses an identical instruction manual to explain the safety, operation, disassembly, reassembly, and other details for both firearms.⁶⁴ The result highlighted in *Figures 1* and *2* is illogical considering as recently as 2010, the Attorney General of Maryland remarked that a firearm’s “internal components and function” are the important characteristics that will “bring a weapon within the regulated [assault weapons ban] firearms law.”⁶⁵ The Attorney General’s statement illuminates the issue clearly—the presence of a heavy-barrel on an AR-15-style rifle places the weapon outside of the assault weapons ban—despite *identical internal components and function*.⁶⁶

atus=BANNED&p_ID=294&PageFirstRow=201&&View={EB794138-CE9C-4E9E-B3D2-B78C316F87DF (last visited Feb. 21, 2023) (listing this firearm as “Not Regulated by Statute” as of Oct. 18, 2016).

⁶¹ Compare *AR-556, Model: 8500*, RUGER (Mar. 11, 2021, 2:45 PM), <https://ruger.com/products/ar556/specSheets/8500.html>, with *AR-556, Model: 8502*, RUGER (Dec. 28, 2020, 11:07 AM), <https://ruger.com/products/ar556/specSheets/8502.html> (noting the Instruction Manual for these firearms is identical) (emphasis added).

⁶² *Id.*

⁶³ A “detachable magazine” is an “ammunition feeding device that can be removed readily from a firearm without requiring disassembly of the firearm action or without the use of a tool, including a bullet or cartridge.” MD. CODE ANN., CRIM. LAW § 4-301(i) (LexisNexis (2022)). Detachable magazines that have a capacity of more than 10 rounds of ammunition cannot be sold, transferred, purchased, or received in Maryland. *See* MD. CODE ANN., CRIM. LAW § 4-305(b) (LexisNexis 2022). Figure-1 depicts a magazine with a capacity of 30 rounds of ammunition; Figure-2 depicts a magazine with a capacity of 10 rounds of ammunition.

⁶⁴ Compare *AR-556, Model: 8500*, RUGER (Mar. 11, 2021, 2:45 PM), <https://ruger.com/products/ar556/specSheets/8500.html>, with *AR-556, Model: 8502*, RUGER (Dec. 28, 2020, 11:07 AM), <https://ruger.com/products/ar556/specSheets/8502.html> (noting the Instruction Manual for these firearms is identical).

⁶⁵ 95 OP. ATT’Y GEN. 101 (Md. 2010) (clarifying for the Maryland State Police how the statutory language related to “copies” or “imitations” is to be interpreted with respect to regulated assault weapons).

⁶⁶ *See* MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022) (emphasis added); compare *AR-556, Model: 8500*, RUGER (Mar. 11, 2021, 2:45 PM), <https://ruger.com/products/ar556/specSheets/8500.html>, with *AR-556, Model: 8502*, RUGER (Dec. 28, 2020, 11:07 AM), <https://ruger.com/products/ar556/specSheets/8502.html> (noting the Instruction Manual for these firearms is identical) (emphasis added).

B. How Maryland's H-BAR Exemption Circumvents the Assault Weapon Ban's Policy Goals and Threatens the Safety of Communities

Assault weapons are “exceptionally lethal weapons of war.”⁶⁷ As the Supreme Court noted in *Staples v. United States*, the AR-15-style rifle “is the civilian version of the military’s M-16 rifle, and is, unless modified, a semiautomatic weapon.”⁶⁸ The effect of Maryland’s Colt AR-15 Sporter H-BAR exemption defeats the legislative intent of the assault weapons ban—which was to prohibit weapons “designed for the battlefield, for the soldier to be able to shoot a large number of rounds across a battlefield at a high rate of speed.”⁶⁹ Federal Bureau of Investigation (“FBI”) shared statistics from 2000 through 2013 that illustrate the impact that rifles have on communities across the United States.⁷⁰

The previous statistics are not indicative of the specific type, manner, or legality of how a particular firearm was obtained or used; instead, they illustrate the dangers that all firearms pose to communities when possessed by persons with malintent.⁷¹ Currently, “no national data source” is available to identify the “numbers of homicides, non-fatal shootings, or other crimes committed with [assault weapons]”.⁷² Nonetheless, the weapon of choice in many of these events was the AR-15-style rifle.⁷³

In the United States, a majority of criminal homicides involve the use of a handgun.⁷⁴ According to the FBI: “[h]andguns comprised 62.1 percent of the firearms used in murder and nonnegligent manslaughter incidents in

⁶⁷ *Kolbe v. Hogan*, 849 F.3d 114, 124 (4th Cir. 2017).

⁶⁸ *Staples v. United States*, 511 U.S. 600, 603 (1994).

⁶⁹ *Kolbe*, 849 F.3d at 125 (quoting *J.A.* at 206) (upholding Maryland’s assault weapon ban).

⁷⁰ FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., A STUDY OF ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES BETWEEN 2000 AND 2013 22-43 (2013) [hereinafter *Active Shooter Incidents, 2000-2013*].

⁷¹ *See id.*

⁷² Christopher S. Koper, William D. Johnson, Jordan L. Nichols, Ambrozie Ayers & Natalie Mullins, *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: An Updated Examination of Local and National Sources*, 95 J. OF URB. HEALTH VOL. 313, 314 (2017).

⁷³ Jonathan Franklin, *Where AR-15-Style Rifles Fit in America’s Tragic History of Mass Shootings*, NAT’L PUB. RADIO (May 26, 2022), <https://www.npr.org/2022/05/26/1101274322/uvalde-ar-15-style-rifle-history-shooter-mass-shooting>.

⁷⁴ *See Crime in the U.S. 2019, Table 20, Murder by State, Types of Weapons, 2019*, FED. BUREAU OF INVESTIGATION (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019//tables/table-20> [hereinafter, FBI, *Murder by State – 2019*].

2019.”⁷⁵ Nationally, only five percent of firearms used in reported homicides involved a rifle or shotgun.⁷⁶ In 2019, murders resulting from rifles and shotguns accounted for only 1.7% of all criminal homicides in Maryland.⁷⁷ These statistics show that the potential for death or serious injury by a rifle or shotgun is lower than the risk presented by handguns; however, when assault weapons, like those noted *supra*, are used during active shooter incidents, the results are exceedingly devastating.⁷⁸

Active shooter incidents that involve the use of rifles or shotguns have steadily increased in the United States over the last twenty years.⁷⁹ The FBI defines an active shooter incident as one where “an individual actively engage[s] in killing or attempting to kill people in a confined and populated area.”⁸⁰ Between 2000 and 2013, 47 of the 160 active shooter incidents that occurred in the United States involved at least one rifle or shotgun; by 2019 that number had risen to nearly fifty percent.⁸¹ Of the active shooter incidents occurring between 2000 and 2019 involving at least one rifle or shotgun, more than 500 people were killed and over 1100 people have been injured, with immeasurable impacts on communities and families across the United States.⁸²

⁷⁵ *Crime in the U.S., 2019, Expanded Homicide*, FED. BUREAU OF INVESTIGATION (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/expanded-homicide>.

⁷⁶ See FBI, *Murder by State – 2019*, *supra* note 74, at Table 8.

⁷⁷ *Id.*

⁷⁸ FBI, *Murder by State – 2019*, *supra* note 74, at Table 8.

⁷⁹ John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Feb. 3, 2022), <https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/>.

⁸⁰ *How Can We Help You: Active Shooter Safety Resources*, FED. BUREAU OF INVESTIGATION, (<https://www.fbi.gov/how-we-can-help-you/safety-resources/active-shooter-safety-resources>) (last visited Feb. 2, 2023).

⁸¹ See Active Shooter Incidents, 2000-2013, *supra* note 70, at 22-44; *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: An Updated Examination of Local and National Sources*, *supra* note 72, at 314.

⁸² See Active Shooter Incidents, 2000-2013, *supra* note 70 at 22-43; FBI, ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES IN 2014 AND 2015 6-11 (2016), https://www.fbi.gov/file-repository/activeshooterincidentsus_2014-2015.pdf/view; FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES IN 2016 AND 2017 (2018) 9-11 (2018), <https://www.fbi.gov/file-repository/active-shooter-incidents-us-2016-2017.pdf/view> [hereinafter Active Shooter Incidents, 2016 and 2017]; FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES IN 2018 9-12 (2019), <https://www.fbi.gov/file-repository/active-shooter-incidents-in-the-us-2018-041019.pdf/view> [hereinafter Active Shooter Incidents, 2018]; FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES IN 2019, 12-15 (2020), <https://www.fbi.gov/file-repository/active-shooter-incidents-in-the-us-2019-042820.pdf/view>.

In 2017, the people of Nevada experienced the extraordinary dangers that assault weapons present to communities.⁸³ Fifty-eight people were killed in a single incident when a person “armed with four AR-15-style rifles began shooting into a crowd of people . . . in Las Vegas, Nevada[.]”⁸⁴ An additional 489 people were injured in this incident.⁸⁵ The year prior, at the Pulse Nightclub shooting in Orlando, Florida, a person armed with an AR-15-style rifle killed forty-nine people.⁸⁶ Just last year, in May of 2022, a person armed with an AR-15-style rifle killed ten people at a grocery store in Buffalo, New York.⁸⁷

There is no serious dispute that AR-15-style firearms are designed for a battlefield.⁸⁸ Active shooter incidents in recent history demonstrate that large numbers of people can be killed or maimed in an extremely short period of time when the firearm used in an active shooter incident is an AR-15 style firearm.⁸⁹ While legislatures across the country try to mitigate the hazards to communities these weapons of war present, the failure by lawmakers to investigate and understand basic concepts regarding the functional operation of firearms leads to arbitrary and capricious implementation of these laws.⁹⁰

C. State Legislative Firearms Restrictions Consistently Fail Because of Ambiguities in the Laws.

The Maryland General Assembly is not the only legislative body in the United States to struggle over regulations related to firearms legislation.⁹¹ Under New Jersey law, “[a]ny person who knowingly [possesses] an assault

⁸³ Active Shooter Incidents, 2016 and 2017, *supra* note 82, at 9-17.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 10.

⁸⁷ Jonathan Franklin & Emily Olson, *The Buffalo Tops Shooting Suspect Pleads Guilty to State Murder Charges*, NAT’L PUB. RADIO (Nov. 28, 2022), <https://www.npr.org/2022/11/28/1138700312/buffalo-tops-shooter-guilty-plea-state-charges>.

⁸⁸ *Kolbe*, 849 F.3d at 125 (quoting J.A. at 206) (upholding Maryland’s assault weapons ban).

⁸⁹ Active Shooter Incidents, 2016 and 2017, *supra* note 82, at 9-17.

⁹⁰ *Compare AR-556, Model: 8500*, RUGER,

<https://ruger.com/products/ar556/specSheets/8500.html> (last visited Mar. 11, 2021, 2:45 PM), *with AR-556, Model: 8502*, RUGER,

<https://ruger.com/products/ar556/specSheets/8502.html> (last visited Dec. 28, 2020, 11:07 AM) (noting the Instruction Manual for these firearms is identical); *What Should America Do About Gun Violence: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 20-21 (2013) (testimony of David Kopel, Adjunct Professor, Advanced Constitutional Law, Denver University, Sturm College of Law, Denver, Colorado).

⁹¹ *See* Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 108 Stat. 1796, 1996 (1994) (repealed 2004).

firearm is guilty of a crime in the second degree[.]”⁹² New Jersey defines an assault firearm by enumerating thirty-six firearms by manufacturer or model.⁹³ Like the Maryland statute, the Colt AR-15 and CAR-15 assault rifles are listed in the New Jersey statute.⁹⁴ Unlike Maryland, however, New Jersey provides no exception for heavy-barrel (H-BAR) AR-15-style rifles.⁹⁵

The absence of an H-BAR exception in the New Jersey statute does not cure the statute’s failure to regulate assault weapons.⁹⁶ New Jersey further restricts “[a]ny firearm manufactured under any designation which is *substantially identical* to any of the firearms listed [in section 2C:39-1(w)(1)].”⁹⁷ The New Jersey legislature did not define “substantially identical” in the statute.⁹⁸ Responding to questions from prosecutors and other law enforcement officials regarding the vague language, the Attorney General for New Jersey released guidance clarifying section 2C:39(w)(2).⁹⁹ The Attorney General concluded that a semi-automatic firearm is substantially identical to a named assault weapon when:

the semi-automatic rifle has the ability to accept a detachable magazine and has at least [two] of the following: a folding or telescoping stock, a pistol grip that protrudes conspicuously beneath the action of the weapon, a bayonet mount, a flash suppressor or threaded barrel . . . or a grenade launcher[.]¹⁰⁰

The language above is similar in many aspects to Maryland’s “copycat” provision noted in section III above.¹⁰¹ The combination of the “substantially identical” language and the Attorney General’s interpretation of its meaning results in the same outcome in New Jersey that was noted *supra* in *Figure 1*

⁹² N.J. STAT. ANN. § 2C:39-5(f) (West 2013).

⁹³ N.J. STAT. ANN. § 2C:39-1(w)(1) (West 2020).

⁹⁴ *Id.*

⁹⁵ See MD. CODE ANN., PUB. SAFETY § 5-101(r)(xv) (LexisNexis 2019); N.J. STAT. ANN. § 2C:39(w)(1) (West 2020).

⁹⁶ See N.J. STAT. ANN. § 2C:39-1(w)(2) (West 2020) (stating that firearms that are “substantially identical” to those enumerated in the statute are prohibited but failing to define what “substantially identical” means).

⁹⁷ N.J. STAT. ANN. § 2C:39-1(w)(2) (West 2020) (emphasis added).

⁹⁸ See *id.*

⁹⁹ Letter from Peter Verniero, N.J. Att’y Gen., to Dir. Terrance P. Farley, Dir. Of Div. of Crim. Just. (Aug. 19, 1996), <https://www.state.nj.us/lps/dcj/agguide/3assltf.pdf> (issuing guidelines regarding the “substantially identical” provision in the New Jersey statute).

¹⁰⁰ N.J. STAT. ANN. § 2C:39-1(w)(2) (West 2020) (internal numbering removed for clarity).

¹⁰¹ See MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022).

and *Figure 2*.¹⁰² New Jersey's arbitrary statutory scheme nullifies their asserted comprehensive assault weapons ban.¹⁰³

Congress's effort to regulate assault weapons has not yielded different results.¹⁰⁴ Despite its statutorily imposed repeal, the Recreational Firearms Use Protection Act was largely unsuccessful due to its own ambiguities.¹⁰⁵ Testifying before Congress in 2013 regarding the Recreational Firearms Use Protection Act, Professor David Kopel highlighted that from 1994 through 2004, the statutory period the ban was in effect, the Department of Justice ("DOJ") concluded that federal assault weapons ban had no effect on criminal activity.¹⁰⁶ The ban, according to the DOJ, had not saved any lives; nor had it "reduced the number of bullets that were fired [during] crimes."¹⁰⁷ The failure of the Recreational Firearms Use Protection Act was not in its statutorily imposed expiration, but that the legislation was based on superficial characteristics instead of the functionality of a firearm.¹⁰⁸ The precise functionality that the Maryland Attorney General stated was the feature that mattered.¹⁰⁹

IV. SOLUTION

The FBI statistics above demonstrate that active shooter incidents are often "perpetrated by individuals with military-style assault rifles[.]"¹¹⁰ The

¹⁰² Compare N. J. Stat. Ann § 2C:39-1(w)(2) (West 2020), with Letter from Peter Verniero, N.J. Att'y Gen., to Dir. Terrance P. Farley, Dir. of Div. of Crim. Just. (Aug. 19, 1996); Compare AR-556, Model: 8500, RUGER, <https://ruger.com/products/ar556/specSheets/8500.html> (last visited Mar. 11, 2021, 2:45PM), with AR-556, Model: 8502, RUGER (Dec. 28, 2020, 11:07AM), <https://ruger.com/products/ar556/specSheets/8502.html> (last visited Dec. 28, 2020, 11:07AM) (noting the Instruction Manual for these firearms is identical).

¹⁰³ See N.J. STAT. ANN. § 2C:39-5(f) (West 2013); N.J. STAT. ANN § 2C:39-1(w)(2) (West 2020).

¹⁰⁴ Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 108 Stat. 1796, 1996(1994) (repealed 2004).

¹⁰⁵ See *id.*; *What Should America Do About Gun Violence: Hearing Before the S. Comm. on the Judiciary*, *supra* note 90 at 14-16.

¹⁰⁶ See *What Should America Do About Gun Violence*, *supra* note 90, at 22 (testimony of David Kopel, Adjunct Professor, Advanced Constitutional Law, Denver University, Strum College of Law, Denver, Colorado).

¹⁰⁷ *Id.* at 14-15.

¹⁰⁸ *Id.*

¹⁰⁹ Whether a Weapon is a "Copy" of a designated Assault Weapon and Therefore subject to the Regulated Firearms Law, 95 Md. Att'y Gen. Op. 101 (2010) (clarifying for the Maryland State Police how the statutory language related to "copies" or "imitations" is to be interpreted with respect to regulated assault weapons).

¹¹⁰ *Gallinger v. Becerra*, 898 F.3d 1012, 1018 (9th Cir. 2018); see also *Active Shooter Incidents, 2000-2013*, *supra* note 70.

aim of Maryland's Firearm Safety Act was to "reduce the availability of assault long guns and large capacity magazines so that when criminals act, [they] do so with a less dangerous weapon and less severe consequences."¹¹¹ As the court noted in *Gallinger v. Becerra*, "assault weapons are more dangerous than other kinds of firearms."¹¹²

Maryland's H-BAR exception in section 5-101(r) de-regulates firearms functionally identical to those the statute sought to prohibit.¹¹³ Aside from the limiting effect that the H-BAR exception has on the assault weapons ban, Maryland's copycat statute also erodes the purpose of the assault weapons ban.¹¹⁴ Section 4-301(h)(2) is nearly identical to the "two-feature" test implemented as part of the Recreational Firearms Use Protection Act in 1994.¹¹⁵ At the federal level, the "two-feature" test received heavy criticism for focusing attention on "superficial, cosmetic characteristics and accessories" rather than functionality of the firearm.¹¹⁶ Testifying before Congress in 2013, the Executive Director for the Coalition to Stop Gun Violence noted that federal legislation similar to Maryland's "copycat" statute "made it possible for the gun industry to manufacture [military style assault rifles] that violated the intent of the law."¹¹⁷ This criticism is directly applicable to Maryland's alleged assault weapons ban.¹¹⁸ Essentially, even if

¹¹¹ *Kolbe*, 849 F.3d at 140 (quoting Brief of Appellees at 42).

¹¹² *Gallinger*, 898 F.3d at 1018.

¹¹³ See MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022); MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022).

¹¹⁴ See MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022); *What Should America Do About Gun Violence*, *supra* note 90, at 26 (testimony of David Kopel, Adjunct Professor, Advanced Constitutional Law, Denver University, Strum College of Law, Denver, Colorado).

¹¹⁵ See Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 108 Stat. 1796, 1996 (1994) (repealed 2004); MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022).

¹¹⁶ *What Should America Do About Gun Violence: Hearing Before the S. Comm. on the Judiciary*, *supra* note 90, at 14-15 (testimony of David Kopel, Adjunct Professor, Advanced Constitutional Law, Denver University, Strum College of Law, Denver, Colorado).

¹¹⁷ *Id.* at 152 (testimony of Joshua Horwitz, Executive Director, Coalition to Stop Gun Violence discussing the "two-feature test" enumerated Recreational Firearms Use Protection Act).

¹¹⁸ *Id.* at 14-15 (testimony of David Kopel, Adjunct Professor, Advanced Constitutional Law, Denver University noting that the federal prohibition on assault weapons concerned physical characteristics as opposed to functional operation of a firearm). See also MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022); MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022); see also MD. CODE ANN., CRIM. LAW § 4-303(a) (LexisNexis 2022).

Maryland resolved the H-BAR exception, the “two-feature” test would forestall the General Assembly’s efforts.¹¹⁹

The idea of expanding firearms legislation to prohibit assault weapons is often met with resistance.¹²⁰ Powerful lobbying groups, like the National Rifle Association (NRA), routinely oppose federal and state efforts to expand firearms legislation that further restricts semiautomatic firearms.¹²¹ Testifying before Congress in 2013, NRA leadership claimed that “[l]aw-abiding gun owners will not accept blame for the acts of violent or deranged criminals.”¹²² This assertion by the NRA is consistent with their position that assault weapon bans have limited effect on reducing gun violence.¹²³ This is supported primarily because firearms legislation is often based on “superficial, cosmetic characteristics and accessories” rather than the functionality of the firearm.¹²⁴ Notwithstanding the NRA’s opposition to firearms safety legislation, Justice Ginsburg summed up the problem and the solution of firearms safety legislation succinctly: “[f]irearms are dangerous, and extraordinary dangers sometimes justify unusual precautions.”¹²⁵

While implementing restrictions on firearms is highly controversial, the Maryland General Assembly should adopt legislation to establish a commission to review the efficacy of Maryland’s assault weapon ban.¹²⁶ The commission would be responsible for thoroughly evaluating the language in the applicable statutes and making recommendations that align the code with the original purpose of the Firearms Safety Act.¹²⁷ The commission would address both the ambiguity in the copycat statute and the H-BAR exemption to underscore the language’s actual effect on an assault weapons ban.¹²⁸ The result should demand a logical, enforceable statute that regulates firearms functionally identical to those the Firearms Safety Act sought to prohibit.¹²⁹

¹¹⁹ MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022); *see also* MD. CODE ANN., CRIM. LAW § 4-303(a) (LexisNexis 2022).

¹²⁰ *See What Should America Do About Gun Violence*, *supra* note 90, at 15-16 (testimony of Wayne LaPierre, Executive Vice President, National Rifle Association of America).

¹²¹ *See id.*

¹²² *Id.*

¹²³ *See What Should America Do About Gun Violence*, *supra* note 90 at 9.

¹²⁴ *Id.*

¹²⁵ *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (discussing the threat firearms pose to public safety and its relationship to police stop and frisk policies based on reasonable suspicion).

¹²⁶ *See* S. 281, 2013 Leg., 433rd Sess. (Md. 2013); Christopher S. Koper, William D. Johnson, Jordan L. Nichols, Ambrozone Ayers & Natalie Mullins, *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: An Updated Examination of Local and National Sources*, 95 J. OF URB. HEALTH 313, 313 (2018).

¹²⁷ *Kolbe*, 849 F.3d at 140 (quoting Brief of Appellees at 42).

¹²⁸ *See* MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022); MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022).

¹²⁹ *See* MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022); MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022).

V. CONCLUSION

Maryland's narrow legislation, exempting AR-15-style rifles with a heavy barrel, allows firearms that are functionally identical to banned assault weapons to be sold, transferred, and possessed in the state.¹³⁰ The exemption permits firearms that would ordinarily be prohibited under section 4-303 to be freely purchased from licensed firearms dealers and private citizens throughout Maryland.¹³¹ In effect, the H-BAR exemption eviscerates Maryland's assault weapon ban and allows any resident to legally obtain firearms tantamount to banned assault weapons—those weapons the Firearms Safety Act sought to prohibit.¹³²

The General Assembly's purpose for passing the Firearms Safety Act was to reduce the accessibility of assault weapons among the general public.¹³³ By passing the legislation, the General Assembly led the citizens of Maryland to believe the legislature had achieved a major milestone in preventing weapons “designed for the battlefield” from propagating throughout the state.¹³⁴ Unfortunately, the H-BAR exception creates enough inconsistency in the law to allow firearms manufacturers to easily bypass the assault weapons ban and sell firearms in Maryland identical in functionality to those the law sought to prohibit.¹³⁵ To give the Firearms Safety Act any credible effect in Maryland, the General Assembly must establish a commission to evaluate and make recommendations to remove those inconsistencies and refine the language in the Maryland code that removes those exemptions and properly addresses assault weapons.¹³⁶ Otherwise, the law has no meaningful effect.

¹³⁰ See MD. CODE ANN., PUB. SAFETY § 5-101 (LexisNexis 2022) (defining regulated firearms, however providing no express definition for unregulated firearms).

¹³¹ See MD. CODE ANN., CRIM. LAW. § 4-303(a) (LexisNexis 2022); *see id.*

¹³² Compare *AR-556, Model: 8500*, RUGER, <https://ruger.com/products/ar556/specSheets/8500.html>, (last visited Mar. 11, 2021, 2:45PM), with *AR-556, Model: 8502*, RUGER, <https://ruger.com/products/ar556/specSheets/8502.html>, (last visited Dec. 28, 2020, 11:07AM) (noting specifications that the caliber is 5.56 NATO).

¹³³ *Chow*, 163 Md. App. at 507, 881 A.2d at 1157.

¹³⁴ *Kolbe*, 849 F.3d at 125 (quoting *J.A.* at 1693) (upholding Maryland's assault weapon ban).

¹³⁵ *What Should America Do About Gun Violence*, *supra* note 90, at 152 (testimony of Joshua Horwitz, Executive Director, Coalition to Stop Gun Violence discussing the “two-feature test” enumerated Recreational Firearms Use Protection Act).

¹³⁶ See MD. CODE ANN., PUB. SAFETY § 5-101 (LexisNexis 2022) (defining regulated firearms, however providing no express definition for unregulated firearms).

COMMENT

STUCK IN THE WAITING ROOM: WHY AND HOW MARYLAND SHOULD CLOSE HEALTHCARE GAPS THAT LEAVE IMMIGRANT WOMEN BEHIND

*By: Erin Carrington Smith**

I. INTRODUCTION

Maryland has a robust and ever-increasing immigrant population.¹ As of 2019, just over fifteen percent of the state's population (929,431) was foreign born, forty-eight percent (447,466) of whom remained noncitizens.² In 2016, about 275,000 immigrants were undocumented.³ Maryland has long recognized the importance of ensuring its immigrant population has access to available public benefits, such as Medicaid, when needed.⁴ Despite these efforts, however, gaps in health care coverage persist among the state's noncitizens and their families.⁵ These short-comings are a consequence of federal immigration and welfare policies, state policies and budget priorities,

* Erin Carrington Smith: J.D. Candidate, 2023, University of Baltimore School of Law. I would like to thank my faculty advisor, Elizabeth Keyes, for her guidance and unwavering support throughout both my comment writing process and my entire law school experience, as well as everyone on the *University of Baltimore Law Forum* staff for all the work they put into editing and preparing this comment for publication. I would also like to thank the wonderful doctors at Johns Hopkins who contributed their knowledge and experience to my research, and my own amazing surgeon who finally freed me from years of pain and suffering. Thank you to my outstanding and supportive husband for holding down the fort and bearing with me not only while I wrote this comment but while I pursued this crazy dream of becoming a lawyer while parenting through a pandemic. And finally, to my incredible, brilliant, beautiful daughter, Sally – thank you for being an endless source of comfort, love, and fun on this journey, even when I had to write or work or go to class instead of playing. I truly could not have done any of this without you.

¹ See *State Immigration Data Profiles: Maryland*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/data/state-profiles/state/demographics/MD> (last visited Jan. 5, 2022).

² *Id.*

³ IMMIGRANTS IN MARYLAND 2 (AM. IMMIGR. COUNCIL 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_maryland.pdf.

⁴ See discussion *infra* Sections I.B.i, I.B.ii.

⁵ See discussion *infra* Section I.B.ii.

as well as the overall hesitancy many immigrants⁶ have to participate in state-run programs.⁷

Since the COVID-19 pandemic began, the number of state initiatives that expand coverage to more residents increased as the importance of quality healthcare came to the forefront.⁸ However, critical gaps in care persist.⁹ Specifically, women of reproductive age¹⁰ face a number of unique, easily overlooked, and frequently debilitating health challenges.¹¹ Outside of pregnancy, low-income female immigrants are subject to the federal five-year bar on Medicaid participation, and thus have few options for accessing healthcare during times when they most need it.¹² This dearth in coverage limits these women's ability to obtain regular primary care, vital cancer screenings, and adequate treatment for chronic gynecologic health issues.¹³ This Comment proposes that Maryland expand healthcare coverage to residents who are currently ineligible based on their immigration status as a means of closing critical gaps in care, improving the overall health of

⁶ The term “immigrant” refers to anyone from a foreign country who relocates to live in another country, regardless of citizenship. Jessica Bolter, *Explainer: Who Is an Immigrant?*, MIGRATION POL’Y INST. (Feb. 2019), <https://www.migrationpolicy.org/content/explainer-who-immigrant>. However, because most relevant laws use the term “immigrant” to mean noncitizen, this paper will primarily do the same.

⁷ See discussion *infra* Section I.A.iii.

⁸ KAYLEE O’CONNOR, MAX BLUMENTHAL, PATRICIA BOOZANG & LINDA ELAM, SUPPORTING HEALTH EQUITY AND AFFORDABLE HEALTH COVERAGE FOR IMMIGRANT POPULATIONS: STATE-FUNDED AFFORDABLE COVERAGE PROGRAMS FOR IMMIGRANTS 1 (State Health & Value Strategies 2021), <https://www.shvs.org/wp-content/uploads/2021/10/State-Funded-Affordable-Coverage-Programs-for-Immigrants.pdf>.

⁹ See *infra* notes 10-14 and accompanying text.

¹⁰ According to the World Health Organization, women between the ages of 15 and 49 are considered of “reproductive age,” but this comment will focus primarily on women between 21 and 55. World Health Organization, *SDG Indicator 3.7.1: Proportion of Women of Reproductive Age (Aged 15-49 Years) Who Have Their Need for Family Planning Satisfied with Modern Methods*, GLOB. HEALTH OBSERVATORY, <https://www.who.int/data/gho/indicator-metadata-registry/imr-details/4988> (last visited Feb. 13, 2022).

¹¹ See discussion *infra* Part II. Although people of all sexes, genders, and ages face unique health problems that require access to quality care, this Comment looks specifically at just some of the health issues facing women of reproductive age to illustrate the importance of universal access to care.

¹² *Immigration Status Requirements for Medicaid*, MD. DEP’T OF HEALTH: MD. MEDICAID ADMIN., <https://health.maryland.gov/mmcp/Pages/Medicaid-Immigration-Status-Requirements.aspx> (last visited Oct. 29, 2021) [hereinafter MD. MEDICAID ADMIN.].

¹³ See *infra* Part II.

Maryland residents, and ultimately making Maryland's healthcare system more cost-efficient.¹⁴

Part I of this comment will explore the history of federal healthcare policy as it relates to immigrant access to public health benefits.¹⁵ Specifically, it will look at two eras affecting immigrants' access to healthcare: Welfare Reform in the 1990s and the Affordable Care Act in the 2010s.¹⁶ These two phases of health care and immigration policy have forged the current gaps in coverage among immigrants both directly and indirectly.¹⁷ It will also examine how federal policy has informed Maryland policy regarding noncitizen access to public health benefits over the same time period.¹⁸

Part II will examine the specific health challenges facing women of reproductive age, the importance of continuous healthcare coverage, and how a lack of access to healthcare negatively impacts health outcomes.¹⁹ Looking specifically at several women's health concerns, this section will explore this group's healthcare needs, the current resources available for public healthcare, and how gaps in coverage lead to poor outcomes.²⁰ It will also look at the financial and health-related shortcomings associated with requiring uninsured immigrants to depend on emergency care for basic healthcare needs.²¹

Finally, Part III will introduce a series of suggestions for closing the gaps in healthcare coverage among noncitizens in Maryland.²² Specifically, this section will describe how Minnesota and New York have used the Affordable Care Act's optional Basic Health Program to extend public healthcare coverage to more categories of immigrants and will detail how Maryland could effectively do the same.²³ It will also explore state-funded options for extending care to federally ineligible immigrants.²⁴

¹⁴ See *infra* Part III.

¹⁵ See *infra* Part I.

¹⁶ See discussion *infra* Sections I.A.i, I.A.ii.

¹⁷ See discussion *infra* Section I.A.iii.

¹⁸ See discussion *infra* Section I.B..

¹⁹ See *infra* Part II.

²⁰ See *infra* Part II.

²¹ See discussion *infra* Section II.C.

²² See *infra* Part III.

²³ See *infra* Part III.

²⁴ See *infra* Part III.

II. THE EVOLUTION OF HEALTHCARE AND IMMIGRATION POLICY

A. Federal Policy Over Time

Established in 1965, Medicaid is a joint federal-state program designed to provide health care benefits to certain categories of low-income individuals in the United States.²⁵ To qualify for these benefits, individuals must meet both categorical and income-based criteria.²⁶ For much of the program's life, these categories included children, pregnant women, parents of dependent children, the elderly, and persons with disabilities.²⁷ It was not until the Affordable Care Act was passed in 2010, that most other categories of low-income adults became eligible for Medicaid.²⁸

For nearly a decade, Medicaid did not include any eligibility restrictions based on immigration status.²⁹ Then, in 1973, the Department of Health, Education, and Welfare established a regulation excluding undocumented immigrants from Medicaid eligibility.³⁰ In 1986, Congress codified this limitation, reserving eligibility only for immigrants who were "lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law."³¹ At the same time, Congress passed the Emergency Medical Treatment and Active Labor Act ("EMTALA"), requiring hospitals to screen and stabilize all patients who arrive at an emergency room, including all immigrants regardless of status.³² The EMTALA, which provides federal reimbursements for these services, remains in effect today.³³

²⁵ ALISON MITCHELL, ANGELA NAPILI, EVELYNE P. BAUMRUCKER, CLIFF BINDER, KIRSTEN J. COLELLO & JULIA A. KEYSER, CONG. RSCH. SERV., R43357, MEDICAID: AN OVERVIEW 1-3 (2021), <https://crsreports.congress.gov/product/pdf/R/R43357>.

²⁶ *Id.* at 4-6.

²⁷ *Id.* at i.

²⁸ Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010), <https://housedocs.house.gov/energycommerce/ppacacon.pdf>.

²⁹ BEN HARRINGTON, CONG. RSCH. SERV., R46510 PRWORA'S RESTRICTIONS ON IMMIGRANT ELIGIBILITY FOR FEDERAL PUBLIC BENEFITS: LEGAL ISSUES 1 n.6 (Sept. 3, 2020), <https://crsreports.congress.gov/product/pdf/R/R46510>.

³⁰ Medha D. Makhoulf, *Laboratories of Exclusion: Medicaid, Federalism, & Immigrants*, 95 N.Y.U. L. REV., 1680, 1701-02 (2020).

³¹ Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9406, 100 Stat. 1874, 2057 (1986), <https://www.congress.gov/99/statute/STATUTE-100/STATUTE-100-Pg1874.pdf>.

³² *Emergency Medical Treatment & Labor Act (EMTALA)*, CTR. FOR MEDICAID & MEDICARE SERV. (Mar. 3, 2021), <https://www.cms.gov/Regulations-and-Guidance/Legislation/EMTALA> (last modified Dec. 5, 2022); see also Makhoulf, *supra* note 30, at 1702.

³³ See Makhoulf, *supra* note 30, at 1702.

i. **Welfare Reform & Immigrant Access to Public Health Care**

In the 1980s and 1990s, the United States experienced the twentieth century's largest increase in immigration to date, with over one million new immigrants arriving per year by 1990.³⁴ In the midst of this rapid influx of immigrants, the Immigration Reform and Control Act (IRCA) passed in 1996.³⁵ This bill, signed into law by President Reagan, granted amnesty to 2.4 million undocumented immigrants living in the United States at the time, adding to the ever-growing population of legally present immigrants eligible for public benefits.³⁶

As the immigrant population grew, so too did their use of public benefits.³⁷ A 1994 report by the National Bureau of Economic Research found that by 1990, not only was the overall cost of public benefits to immigrant families on the rise, but families headed by immigrants were receiving a disproportionately larger share of these benefits.³⁸ Census data indicated that while only 8.4 percent of American households were foreign-born, those households accounted for 10.1 percent of all households receiving public assistance.³⁹

It was at this time that Congress passed the 1996 Personal Responsibility and Work Opportunity Reconciliation Act ("Welfare Reform Act").⁴⁰ The language of the law connoted a desire to promote "self-sufficiency" as a means of preventing immigrants from becoming a burden on the public welfare system.⁴¹ Authors of the law prefaced it by asserting the belief that access to public benefits was acting as an incentive for immigration to the United States.⁴² As such, the law stated that it was a

³⁴ Zita Arocha, *1980s Expected to Set Mark as Top Immigration Decade*, WASH. POST (July 23, 1988), <https://www.washingtonpost.com/archive/politics/1988/07/23/1980s-expected-to-set-mark-as-top-immigration-decade/9ecd472f-e691-4d49-a0f4-00a3200250f5/>; Philip Martin, *Trends in Migration to the U.S.*, POPULATION REFERENCE BUREAU (May 19, 2014), <https://www.prb.org/resources/trends-in-migration-to-the-u-s/>.

³⁵ ELIZABETH S. ROLF, IMMIGRATION POLICES: LEGACIES FROM 1980S AND ISSUES FOR THE 1990S, 15 (Rand 1991), <https://www.rand.org/content/dam/rand/pubs/reports/2007/R4184.pdf>.

³⁶ Arocha, *supra* note 34.

³⁷ GEORGE I. BORJAS, IMMIGRATION AND WELFARE, 1970-1990 1 (Nat'l Bureau of Econ. Res.) (Sept. 1994), https://www.nber.org/system/files/working_papers/w4872/w4872.pdf.

³⁸ *Id.* at 3.

³⁹ *Id.* at 19.

⁴⁰ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 § 400, 110 Stat. 2105, 2260 (codified as 8 U.S.C. § 1601) [hereinafter *Welfare Reform Act*], <https://www.congress.gov/104/plaws/publ193/PLAW-104publ193.pdf>.

⁴¹ *Id.*

⁴² *Id.*

“compelling government interest” to establish rules that removed this incentive and assured immigrants remained self-reliant.⁴³

The Welfare Reform Act defined two new classes of immigrants for the purpose of public benefits eligibility: “qualified” and “nonqualified” immigrants.⁴⁴ Qualified immigrants included lawful permanent residents (LPRs) and several categories of legally present immigrants.⁴⁵ Nonqualified immigrants included undocumented immigrants, nonimmigrants, and various classes of noncitizens granted temporary permission to remain in the United States.⁴⁶ The law further divided qualified immigrants into two groups: those arriving before and after passage of the law on August 22, 1996.⁴⁷ Under the new provision, qualified immigrants who arrived after this date were restricted from accessing all means-tested public benefits, including Medicaid, for five years following their date of entry (“the five-year bar”).⁴⁸

The federal government also emphasized its existing public charge laws.⁴⁹ At the time, the Department of Health and Human Services defined a public charge as “an alien who has become or is likely to become primarily dependent on the government for subsistence,” through public cash-assistance or long-term institutionalized care.⁵⁰ Under welfare reform, the Immigration and Naturalization Service (INS) was charged with enforcing this rule.⁵¹ An immigrant categorized as a public charge could be denied a

⁴³ *Id.*

⁴⁴ KARINA FORTUNY & AJAY CHAUDRY, A COMPREHENSIVE REVIEW OF IMMIGRANT ACCESS TO HEALTH AND HUMAN SERVICES, at vii (Urb. Inst. 2011), <https://www.urban.org/sites/default/files/publication/27651/412425-A-Comprehensive-Review-of-Immigrant-Access-to-Health-and-Human-Services.PDF>.

⁴⁵ TANYA BRODER, GABRIELLE LESSARD & AVIDEH MOUSSAVIAN, OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 2 (Nat’l Immigr. L. Ctr. 2021), <https://www.nilc.org/wp-content/uploads/2022/10/overview-immeligfedprograms-2022-10.pdf>. In addition to LPRs, the “qualified” immigrant category includes people granted asylum or withholding of deportation/removal and conditional entrants; people granted parole by the Department of Homeland Security for a period of at least one year; Cuban and Haitian entrants; certain abused immigrants, their children, and/or their parents; certain survivors of trafficking; individuals residing in the U.S. pursuant to a Compact of Free Association. See *Welfare Reform Act*, *supra* note 40, at 2274.

⁴⁶ ALISON SISKIN, CONG. RSCH. SERV., RL33809, NONCITIZEN ELIGIBILITY FOR FEDERAL PUBLIC ASSISTANCE: POLICY OVERVIEW 16 (2016), <https://sgp.fas.org/crs/misc/RL33809.pdf>.

⁴⁷ *Welfare Reform Act*, *supra* note 40, at 2265-66 (The law includes exceptions for refugees and asylees, an alien lawfully residing in the United States who is a veteran or on active duty with the Armed Forces, and the spouse or child of a person in these two categories.).

⁴⁸ *Id.* at 2265.

⁴⁹ Namratha R. Kandula, Colleen M. Grogan, Paul J. Rathouz & Diane S. Lauderdale, *The Unintended Impact of Welfare Reform on the Medicaid Enrollment of Eligible Immigrants*, 35 HEALTH SERV. RES. 1509, 1510 (2004).

⁵⁰ *Id.*

⁵¹ *Id.*

green card, denied readmission to the United States from abroad, or deported.⁵² Although this rule was not designed to affect current LPRs or those receiving non-cash benefits, it was often misapplied.⁵³ In 1999, the INS issued a clarification that immigrants would not be considered a public charge for using Medicaid or other benefits.⁵⁴

In the years following welfare reform, several laws chipped away at some of the act's restrictions.⁵⁵ In 1997, Congress restored Medicaid eligibility to "all elderly or disabled immigrants" who were receiving Social Security benefits when the law was enacted, "all LPRs . . . who become disabled in the future," and all refugees during their first seven years in the United States.⁵⁶ In 2002, the Bush Administration created an exception that permitted states to provide prenatal care to pregnant women regardless of immigration status by extending Child Health Insurance Program benefits to their fetuses.⁵⁷ In 2009, President Obama signed the Children's Health Insurance Program Reauthorization Act, which allowed states to use federal funds to cover legally present immigrant children and pregnant women regardless of their date of arrival.⁵⁸ The gap created by the five-year bar, while shrinking, still restricted able-bodied, non-elderly, non-pregnant immigrants from access to public healthcare benefits.

ii. The Affordable Care Act and Immigrant Access to Public Healthcare

In 2010, Congress passed the Patient Protection and Affordable Care Act ("ACA"), a program designed to expand health care coverage in America.⁵⁹ Among its provisions, the ACA created a Medicaid expansion, effective in June 2014, extending eligibility to all Americans under the age of sixty-five with an income at or below 138 percent of federal poverty

⁵² *Id.*

⁵³ Claudia Schlosberg & Dinah Wiley, *The Impact of INS Public Charge Determinations on Immigrant Access to Health Care*, MONT. PRO BONO (May 22, 1998), <https://perma.cc/TCP7-CV3Q>.

⁵⁴ BRODER, LESSARD & MOUSSAVIAN, *supra* note 45, at 11.

⁵⁵ IMMIGRANTS AND WELFARE: THE IMPACT OF WELFARE REFORM ON AMERICA'S NEWCOMERS 14 (Michael E. Fix ed. 2009) [hereinafter IMMIGRANTS AND WELFARE].

⁵⁶ *Id.*

⁵⁷ Kinsey Hasstedt, *Toward Equity and Access: Removing Legal Barriers to Health Insurance Coverage for Immigrants*, 16 GUTTMACHER POL'Y REV. 2, 2 (2013), https://www.guttmacher.org/sites/default/files/article_files/gpr160102.pdf.

⁵⁸ *Id.* at 3.

⁵⁹ Patient Protection and Affordable Care Act of 2010, *supra* note 28.

lines.⁶⁰ The ACA required states to implement the expansion or face termination of all federal Medicaid funds.⁶¹ Almost immediately, twenty-six states filed suit against the Secretary of Health and Human Services challenging the constitutionality of the mandatory Medicaid expansion.⁶² Ultimately, the Supreme Court held that the mandate was an abuse of Congress's spending power.⁶³ As such, states were free to choose whether to implement the expansion.⁶⁴ To date, forty states have done so.⁶⁵

In addition to the Medicaid expansion, the ACA required each state to establish a health insurance exchange.⁶⁶ These virtual marketplaces are meant to help promote the acquisition of health coverage by allowing individuals and small businesses to “shop for and purchase private health insurance” policies.⁶⁷ Those purchasing coverage through the exchanges may be eligible for income-based financial assistance to reduce the cost of their coverage.⁶⁸ This assistance is typically available to those with incomes between 100 percent and 400 percent of the federal poverty level.⁶⁹

Although the ACA did not expand immigrants' access to Medicaid, it did permit legally present immigrants to access healthcare plans through the exchanges.⁷⁰ Immigrants whose income falls between 100 percent and 400 percent of the poverty line may purchase subsidized plans through the marketplace regardless of their entry date.⁷¹ Undocumented immigrants

⁶⁰ MEDICAID AND THE AFFORDABLE CARE ACT (Nat'l Conf. of State Legislatures 2011), <https://www.ncsl.org/documents/health/hrmedicaid.pdf>; Patient Protection and Affordable Care Act of 2010, *supra* note 28, at 179.

⁶¹ Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 519-20 (2012); 42 U.S.C.S. § 1396c.

⁶² *Sebelius*, 567 U.S. at 520.

⁶³ *Id.* at 577-78 (quoting *New York v. United States*, 505 U.S. 144, 178 (1992)). States argued that threatening to withhold all Medicaid grants unconstitutionally compelled the states to enact or administer a federal regulatory program. *Id.* In keeping with past precedent, the Supreme Court held that although “Congress may use its spending power to create incentives for States to act in accordance with federal policies,” when “pressure turns into compulsion,” the policy cannot stand. *Id.*

⁶⁴ *Id.* at 588.

⁶⁵ *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAMILY FOUND., <https://www.kff.org/medicaid/issue-brief/status-of-state-medicare-expansion-decisions-interactive-map/> (Feb. 7, 2023).

⁶⁶ VANESSA C. FORSBERG, CONG. RSCH. SERV., R44065, OVERVIEW OF HEALTH INSURANCE EXCHANGES i (Feb. 16, 2021), <https://sgp.fas.org/crs/misc/R44065.pdf>.

⁶⁷ *Id.* at 1.

⁶⁸ *Id.* at 14.

⁶⁹ *Id.*

⁷⁰ *Coverage for Lawfully Present Immigrants*, HEALTHCARE.GOV, <https://www.healthcare.gov/immigrants/lawfully-present-immigrants/> (last visited Jan. 3, 2022).

⁷¹ *Id.*

remain barred from Medicaid and from accessing private health plans through the exchanges.⁷²

In addition to expanding Medicaid coverage, the ACA also gave states the option to create a Basic Health Program (“BHP”).⁷³ This program was designed to limit turnover between Medicaid and qualified health plans among low-income enrollees.⁷⁴ It offers states ninety-five percent of what the federal government would have provided in subsidies through the health exchanges to cover two different groups.⁷⁵ The first is adults whose income falls between 138 and 200 percent of the federal poverty line.⁷⁶ The second is LPRs with an income below 138 percent of the poverty line who are ineligible for Medicaid due to the five-year bar.⁷⁷ Although this program offered a unique opportunity for states to provide federally subsidized benefits to more immigrants, only two states—New York and Minnesota—ultimately decided to implement it.⁷⁸

iii. The Chilling Effects of Federal Healthcare Policy on Immigrant Participation in Public Benefits

Federal healthcare policy has had two profound effects on immigrant access to healthcare. The first is the direct effects of legislatively proscribed gaps in coverage created by the Welfare Reform Act and retained under the ACA.⁷⁹ The second, and more subtle, is the chilling effect on public benefit participation among eligible immigrants.⁸⁰

Even before Welfare Reform, low-income immigrants were less likely to enroll in Medicaid or be insured.⁸¹ Between 1994 and 1999, LPR

⁷² *Id.*

⁷³ *Basic Health Program*, MEDICAID.GOV, <https://www.medicaid.gov/basic-health-program/index.html> (last visited Feb. 14, 2022).

⁷⁴ STAN DORN, THE BASIC HEALTH PROGRAM OPTION UNDER FEDERAL HEALTH REFORM: ISSUES FOR CONSUMERS AND STATES 3 (State Coverage Initiatives 2011), <http://www.statecoverage.org/files/TheBasicHealthProgramOptionUnderHealthReform.pdf>.

⁷⁵ *Id.*

⁷⁶ Amanda Cassidy, *Basic Health Program*, in HEALTH POL’Y BRIEFS, at 3 (Health Affs., Stan Dorn ed. 2012), https://www.healthaffairs.org/doi/10.1377/hpb20121115.215619/listitem/healthpolicybrief_80.pdf.

⁷⁷ *Id.*

⁷⁸ Cassidy, *supra* note 73.

⁷⁹ *See supra* Part I.

⁸⁰ *See infra* notes 81-91 and accompanying text.

⁸¹ Leighton Ku & Brian Bruen, *The Continuing Decline in Medicaid Coverage*, in NEW FEDERALISM ISSUES AND OPTIONS FOR STATES, at 5 (Urb. Inst., Ser. A No. A-37, 1999), <https://www.urban.org/sites/default/files/publication/62046/309303-The-Continuing-Divide-in-Medicaid-Coverage.PDF>.

participation in Medicaid declined by fifteen percent.⁸² Many believe this decline is related to the chilling effect created by Welfare Reform.⁸³ Not only did immigrant use of public benefits drop among newly excluded groups, it also declined among those still eligible for coverage.⁸⁴ Emphasis on and misuse of public charge rules further disincentivized LPRs from enrolling in benefits.⁸⁵ A message was sent that LPRs receiving public assistance may have difficulty obtaining citizenship and that applicants seeking LPR status may be denied based on past use of assistance.⁸⁶ This created a great deal of confusion and fear surrounding the use of public benefits, including Medicaid, even among LPRs that remained eligible for benefits after the Welfare Reform Act passed.⁸⁷ Despite the eventual clarification that immigrants would not be considered a public charge for using Medicaid or other benefits, much of the damage was already done.⁸⁸

Unfortunately, confusion surrounding the public charge doctrine persists today.⁸⁹ In 2019, the Trump Administration issued a new public charge rule that expanded the definition of the term to include individuals “receiving one or more public benefits for a period of 12 months during a 36-month period.”⁹⁰ Although this rule faced legal challenges and was removed by President Biden in 2021, the negative effects had already materialized.⁹¹ In 2019, “more than one in seven adults in immigrant families reported that they or a family member avoided a noncash government benefit program, such as Medicaid . . . for fear of risking future green card status.”⁹² Between 2018, when the public charge changes were first proposed, and 2019, the

⁸² Michael Fix & Jeffrey Passel, *The Scope and Impact of Welfare Reform's Immigrant Provision*, in ASSESSING THE NEW FEDERALISM (Urb. Inst., Discussion Papers No. 02-03, 2002), <https://www.urban.org/sites/default/files/public-ation/60346/410412-Scope-and-Impact-of-Welfare-Reform-s-Immigrant-Provisions-The.PDF>.

⁸³ Kandula, *supra* note 49, at 1510.

⁸⁴ Joseph Duval, *The Problem with Public Charge*, 130 YALE L. J. 998, 1024 (2021).

⁸⁵ Schlosberg & Wiley, *supra* note 53.

⁸⁶ *Id.*

⁸⁷ BRODER, LESSARD & MOUSSAVIAN, *supra* note 45, at 10-11.

⁸⁸ *See* Fix & Passel, *supra* note 82, at 9-10.

⁸⁹ *See supra* notes 90-93 and accompanying text.

⁹⁰ Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019).

⁹¹ BRODER, LESSARD & MOUSSAVIAN, *supra* note 45, at 12.

⁹² HAMUTAL BERNSTEIN, DULCE GONZALEZ, MICHAEL KARPMAN & STEPHEN ZUCKERMAN, AMID CONFUSION OVER THE PUBLIC CHARGE RULE, IMMIGRANT FAMILIES CONTINUED AVOIDING PUBLIC BENEFITS IN 2019 5 (Rachel Kenny ed. 2020), https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019_3.pdf.

chilling effect among this group rose from 21.8 to 31 percent in “families where at least one member was not yet a permanent resident.”⁹³

B. Maryland’s Response to Federal Health and Immigration Policy

i. Welfare Reform in Maryland

Because Medicaid is jointly administered by the federal government and the states, the Welfare Reform Act had a significant effect on state health care policies for immigrants.⁹⁴ Prior to the act’s passage, states were constitutionally restricted from barring immigrants from federal benefits programs under the Equal Protection Clause.⁹⁵ After it became law, access to jointly funded public benefits, such as Medicaid, was restricted to at least some categories of legally present immigrants.⁹⁶

Under this scheme, states were given two options for how they decided to provide healthcare coverage to immigrant residents.⁹⁷ First, although the Welfare Reform Act maintained Medicaid eligibility for qualified immigrants who entered the United States after its passage, the new law gave states new discretion to restrict eligibility to all immigrants, regardless of their date of admission.⁹⁸ Second, the law permitted states to extend coverage to qualified immigrants who arrived post-enactment, even within the five-year bar, if they did so exclusively with their own funding.⁹⁹ This included undocumented immigrants, who could only receive benefits through affirmative state legislation using state-only funding.¹⁰⁰

Using the authority granted by the Welfare Reform Act in 1997, the Maryland General Assembly passed the Welfare Innovation Act (“the Act”).¹⁰¹ The Act used state-only funding to provide public healthcare coverage to those newly excluded from federally-funded coverage: “all legal immigrant children under the age of 18 years and pregnant women . . . who

⁹³ *Id.* at 2.

⁹⁴ Makhoulf, *supra* note 30, at 1708.

⁹⁵ *Graham v. Richardson*, 403 U.S. 365, 382-83 (1971) (holding that state discrimination against legal noncitizens in welfare programs violates the Equal Protection Clause); *see also* Audrey Singer, *Welfare Reform and Immigrants*, in *IMMIGRANTS, WELFARE REFORM, AND THE POVERTY OF POLICY* 21, 27 (Philip Kretsedemans & Ana Aparicio eds., 2004), https://www.brookings.edu/wp-content/uploads/2016/06/200405_singer.pdf.

⁹⁶ Singer, *supra* note 95.

⁹⁷ *IMMIGRANTS AND WELFARE*, *supra* note 55, at 12.

⁹⁸ *Id.* Only Alabama and Wyoming chose to restrict Medicaid benefits from pre-enactment immigrants otherwise eligible. *Id.*

⁹⁹ *Id.*

¹⁰⁰ Singer, *supra* note 95, at 28; *see also Welfare Reform Act*, *supra* note 40, at 2269.

¹⁰¹ *Ehrlich v. Perez*, 394 Md. 691, 703, 908 A.2d 1220, 1227 (2006).

arrived in the U.S. on or after August 22, 1996.”¹⁰² This coverage, known as the Medical Assistance Program, lasted until 2005, when Governor Ehrlich cut the program’s \$7 million in state funding from the budget.¹⁰³ This cut left up to 4000 previously covered individuals without healthcare in Maryland.¹⁰⁴ Several affected Maryland residents sued, and the case was heard by the Maryland’s highest appellate court.¹⁰⁵ There, the court ruled for the plaintiffs, finding that any state law restricting benefits to legal immigrants should be reviewed under strict scrutiny,¹⁰⁶ and that cost saving was not a compelling state interest to justify termination of benefits to legally present immigrants.¹⁰⁷

Following Governor Ehrlich’s cuts, Maryland Delegate Victor Ramirez introduced legislation requiring the governor to include at least \$3 million in the annual budget, starting in 2008, for legally-present immigrant children eighteen years of age and under and pregnant women who arrived in the United States on or after August 22, 1996.¹⁰⁸ After passage, this program maintained coverage for these immigrants until December 2009, when Maryland eliminated its state-funded program in favor of President Obama’s CHIP expansion.¹⁰⁹ Under the new program, all legally-present immigrant children under the age of twenty-one and pregnant women became eligible

¹⁰² *Id.*

¹⁰³ *Unhealthy Thinking*, WASH. POST (Oct. 9, 2005), <https://www.washingtonpost.com/archive/opinions/2005/10/09/unhealthy-thinking/cabed191-0282-4d00-a73f-d84ed192ff16/>.

¹⁰⁴ Tricia A. Bozek, *Immigrants, Health Care, and the Constitution: Medicaid Cuts in Maryland Suggest That Legal Immigrants Do Not Deserve the Equal Protection of the Law*, 36 UNIV. OF BALT. L. REV. 77, 77 (2006).

¹⁰⁵ *Id.* at 77-78.

¹⁰⁶ First applied in *Korematsu v. United States*, strict scrutiny refers to the most rigid standard of equal protection review under the Fifth and Fourteenth Amendments. *See id.* at 88; *Korematsu v. United States*, 323 U.S. 214, 216 (1944). When a law discriminates against a class of people based on race, ethnicity, or immigration status (when said immigrants are legally present in the United States), the state must offer a compelling interest in pursuing the goals of the legislation and the policy must be narrowly tailored to achieve that end. Bozek, *supra* note 104, at 88, 95-96; *Ehrlich*, 394 Md. at 717-19, 908 A.2d at 1235-36. In the vast majority of Equal Protection challenges put through this test, the laws in question did not survive. *See* Bozek, *supra* note 104, at 91-94.

¹⁰⁷ *Ehrlich*, 394 Md. at 730-31, 908 A.2d at 1243.

¹⁰⁸ DEP’T OF LEGIS. SERV., FISCAL POL’Y NOTE, 2006 Gen. Assemb., 422st Sess. (Md. 2006), https://mgaleg.maryland.gov/2006rs/fnotes/bil_0009/hb0089.pdf.

¹⁰⁹ Md. Fin. Inv. Admin., Control No. 10-14. FIA Action Transmittal (Nov. 17, 2009), https://dhr.maryland.gov/documents/FIA/Action%20Transmittals/AT2010/10-14%20AT%20X01%20Transition%20FINAL_12Nov.doc.

for federally-matched Medicaid benefits in Maryland regardless of their date of entry.¹¹⁰

ii. Maryland’s Medicaid Expansion and the Current State of Immigrant Healthcare in the State

Maryland was among the first states to adopt and implement the ACA’s Medicaid expansion, doing so on January 1, 2014, the first day it became available.¹¹¹ Under this expansion, all adults in Maryland with incomes at or below 138 percent of the federal poverty line became eligible for Medicaid coverage.¹¹² However, just as the ACA did not address immigrant access to public health benefits, eligibility did not expand among this group in Maryland.¹¹³

In 2012, the Maryland Department of Health and Mental Hygiene (“DHMH”) and the Hilltop Institute conducted a study into the benefits and drawbacks of implementing the Basic Health Program.¹¹⁴ The study projected that 82,000 people would enroll by 2016 and that such enrollment could divert enrollees, and with them funds, away from the health exchange.¹¹⁵ To compensate for these lost funds, the report posited that premiums on the health exchange would need to increase by sixteen to twenty-four percent.¹¹⁶ Although a separate study by the Urban Institute estimated that all fifty states would save money by implementing the BPH, Hilltop’s report showed a net cost to the state.¹¹⁷ These costs would primarily come from state-funded administrative expenses and medical costs exceeding the federal contribution.¹¹⁸ Because there was no deadline to implement the BHP, Maryland decided to opt out at that time.¹¹⁹

At present, Maryland follows federal guidance on eligibility requirements for immigrants and has not implemented any state-funded

¹¹⁰ *Id.*

¹¹¹ KAISER FAMILY FOUND., *supra* note 65.

¹¹² Charles Milligan, *Expanding Medicaid: The Smart Decision for Maryland*, HEALTH AFFS. (Aug. 29, 2021), <https://www.healthaffairs.org/doi/10.1377/forefront.20120829.022544/full/>.

¹¹³ MD. MEDICAID ADMIN., *supra* note 12.

¹¹⁴ CHUCK MILLIGAN, MD. DEP’T. HEALTH, THE BASIC HEALTH PROGRAM: FINDINGS FROM MARYLAND’S REPORT 3 (2012), https://health.maryland.gov/docs/Exchange_BHP_21412_milligan.ppt.

¹¹⁵ *Id.* at 3-4.

¹¹⁶ *Id.* at 8.

¹¹⁷ *Id.* at 6.

¹¹⁸ *Id.* at 8. This contribution is 95% of what the federal government would have spent on tax credits and subsidies for out-of-pocket costs for patients enrolled in the exchanges. *See supra* notes 74-76 and accompanying text.

¹¹⁹ *Id.* at 14.

programs to expand coverage.¹²⁰ Those who entered the United States on or after August 22, 1996, remain ineligible for Medicaid for their first five years of legal residency if they do not fit into one of the federally crafted exceptions.¹²¹ As proscribed in the ACA, LPRs in Maryland may take advantage of subsidized private healthcare plans purchased through the Maryland Health Exchange, the state's ACA marketplace.¹²² Finally, both uninsured LPRs and undocumented noncitizens may be eligible for Emergency Medicaid payments for emergency medical services, as long as they meet all other Medicaid eligibility criteria.¹²³

III. WOMEN'S HEALTH: WHY COVERAGE MATTERS

Although the years following the ACA's passage saw a reduction in the number of uninsured women in Maryland and across the United States, critical gaps in coverage persist.¹²⁴ Approximately 91,000 Maryland women in this age group remained uninsured in 2017.¹²⁵ Fifty percent of this group (46,410 women) were noncitizens who were likely ineligible for public assistance due to their immigration status.¹²⁶ Even in states that have implemented policies designed to extend state-funded health coverage to immigrants, most policies have focused on either young, old, or pregnant members of the population, leaving low-income nonpregnant adults roughly between the ages of twenty-one and fifty-five with no options.¹²⁷

¹²⁰ MD. MEDICAID ADMIN., *supra* note 12.

¹²¹ *Id.*

¹²² *Id.* The federal guidelines for Medicaid are under the Affordable Care Act federal program and the Maryland Health Connection is a Health Exchange. See MD. DEP'T OF HEALTH, UNDERSTANDING IMMIGRATION STATUS UNDER THE ACA (2019), https://health.maryland.gov/mmcp/Documents/Medicaid%20and%20QHP%20eligibility%20for%20Aliens%20by%20status_3.1.19.pdf; *Exchange*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/exchange/> (last visited Feb. 22, 2023); *The Marketplace in your State*, HEALTHCARE.GOV, <https://www.healthcare.gov/marketplace-in-your-state/> (last visited Feb. 22, 2023).

¹²³ *Id.*

¹²⁴ STACEY MCMORROW, EMILY M. JOHNSTON & TYLER W. THOMAS, INSURANCE COVERAGE AMONG WOMEN OF REPRODUCTIVE AGE IN MARYLAND (Urb. Inst. 2019), <https://www.urban.org/sites/default/files/2019/07/24/factsheet-uninsured-women-md.pdf>. The uninsured rate among women of reproductive age in America fell from 12.7 million in 2013 to 7.5 million in 2017. *Id.* In Maryland, the rate of uninsured women in this group fell from 13.6 percent to 7.7 percent over the same period. *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ MEDICAL ASSISTANCE PROGRAMS FOR IMMIGRANTS IN VARIOUS STATES (Nat'l Immigr. L. Ctr. 2021), <https://www.nilc.org/wp-content/uploads/2015/11/med-services-for-immigrants-in-states.pdf>.

In this vein, in July 2021, Maryland Governor, Larry Hogan, announced the launch of a \$72 million maternal and child health care initiative.¹²⁸ This plan is designed to provide comprehensive maternal and postpartum care to low-income women and their children.¹²⁹ During the 2021 legislative session, the Maryland General Assembly also passed a bill to extend Medicaid coverage to women from two to twelve months postpartum.¹³⁰

Although these policies are a step in the right direction, they fail to address the persistent gaps in coverage among nonpregnant immigrant women in the state.¹³¹ Extending postpartum care for twelve months will give low-income immigrant mothers an additional layer of support following childbirth, but it will not address their continued healthcare needs beyond the postpartum period.¹³² Once this coverage expires, these women will return to uninsured status, losing access to the healthcare providers they formed relationships with during their pregnancies.¹³³ Such gaps and disruptions to healthcare coverage create two significant problems for immigrant women in Maryland: a lack of access to vital preventative healthcare screenings and a lack of continuity of care over time.¹³⁴

A. Cancer Screenings Among Immigrant Women

One of the most important pieces of preventative women's healthcare is recommended screening for breast and cervical cancer.¹³⁵ A lack of reliable healthcare coverage among immigrant women in Maryland creates barriers to these vital health screenings.¹³⁶ Speaking about cervical cancer specifically, Dr. James Ferriss, Director of the F.J. Montz Gynecologic Oncology Fellowship Program at Johns Hopkins in Baltimore noted that advanced disease is almost 100 percent preventable through HPV

¹²⁸ *Governor Hogan Announces Launch of \$72 Million Maternal and Child Health Care Initiative*, OFF. OF GOVERNOR LARRY HOGAN (July 6, 2021), [https://health.maryland.gov/newsroom/Pages/GOV-RELEASE-Governor-Hogan-Announces-Launch-of-\\$72-Million-Maternal-and-Child-Health-Care-Initiative.aspx](https://health.maryland.gov/newsroom/Pages/GOV-RELEASE-Governor-Hogan-Announces-Launch-of-$72-Million-Maternal-and-Child-Health-Care-Initiative.aspx).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *But see id.*

¹³² *But cf. id.*

¹³³ *But cf. id.*

¹³⁴ *See infra* Sections II.A., II.B., II.C.

¹³⁵ Elizabeth Selvin & Kate M. Brett, *Breast and Cervical Cancer Screening: Sociodemographic Predictors Among White, Black, and Hispanic Women*, 93 AM. J. PUB. HEALTH 618, 618 (Apr. 2003).

¹³⁶ *See* Israel De Alba, F. Allan Hubbell, Juliet M. McMullin, Jamie M. Sweningson & Richard Saitz, *Impact of U.S. Citizenship Status on Cancer Screening Among Immigrant Women*, 20 J. GEN. INTERNAL MED. 290, 290 (2005).

vaccination, routine screening, and timely treatment of pre-cancerous cells.¹³⁷ Yet, he still sees patients present with terminal cancers because of lack of health insurance.¹³⁸ In his own practice, he personally encountered two immigrant patients forced to travel back to their home countries for cancer treatment because they were unable to obtain access to adequate public benefits in Maryland.¹³⁹

Dr. Ferriss's experience is supported by data indicating that citizenship status impacts a person's likelihood to obtain preventative cancer screenings.¹⁴⁰ A 2017 study found that, not only did citizenship status inform the likelihood of a woman to receive breast and cervical cancer screenings, so too did her duration of stay in the United States.¹⁴¹ Considering the effects of the five-year bar, the study looked specifically at differences in screening rates among immigrant women present for fewer than five years and those present for more than five years.¹⁴² Those who had been legally present for fewer than five years, and thus ineligible for Medicaid, were less likely to receive breast and cervical cancer screenings than U.S.-born citizens.¹⁴³ However, immigrant women legally present for five years or more not only had higher rates of screening, but were actually more likely to be screened for these cancers than their U.S.-born counterparts.¹⁴⁴

Recognizing the importance of these screenings, Maryland maintains a state-run Breast and Cervical Cancer Screening Program to provide preventative screenings to all uninsured Maryland residents, regardless of immigration status.¹⁴⁵ This free program provides breast and cervical cancer screening, diagnosis, and patient navigation services to women across the state.¹⁴⁶ To access this service, Maryland residents must contact their county health department.¹⁴⁷

¹³⁷ E-mail from James Stuart Ferriss, Dir., Johns Hopkins F.J. Montz Gynecologic Oncology Fellowship Program, to author (Oct. 26, 2021, 4:40 PM EST) (on file with author).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ De Alba et. Al., *supra* note 136.

¹⁴¹ Patricia Miranda, Nengliang Yao, S. Amy Snipes, Rhonda BeLue, Eugene Lengerich & Marianne M. Hillemeier, *Citizenship, Length of Stay, and Screening for Breast, Cervical, and Colorectal Cancer in Women, 2000–2010*, 28 *CANCER CAUSES & CONTROLS* 589, 589 (Mar. 31, 2017).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See Maryland Breast and Cervical Cancer Screening Program*, MD. DEP'T OF HEALTH, https://health.maryland.gov/phpa/cancer/Pages/bccp_home.aspx (last visited Jan. 5, 2022).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

One major drawback to this service is that it does not cover healthcare expenses after diagnosis.¹⁴⁸ To qualify for additional treatment coverage, Maryland residents must apply separately through the Maryland Breast and Cervical Cancer Diagnosis and Treatment Program.¹⁴⁹ This program, established in 1992, reimburses Maryland healthcare providers that offer diagnosis and treatment services to program participants.¹⁵⁰ To apply, participants must complete and submit a fifteen-page application along with supplemental documentation proving residency, medical diagnosis, and personal financial information.¹⁵¹ This is a complex and burdensome application which must be renewed annually to maintain access to continued treatment.¹⁵² Although no concrete data exists to prove that this process discourages immigrant women from participation, language barriers and immigrant hesitancy surrounding public benefits suggests that direct interface with public health officials and a lengthy and complex application process is not ideal for facilitating enrollment.¹⁵³

B. Benign Gynecologic Conditions

Although Maryland's programs targeting breast and cervical cancer diagnosis and treatment are not perfect, they do provide some assistance to uninsured immigrant women in the state.¹⁵⁴ The same cannot be said for the other myriad health problems women face.¹⁵⁵ Many common benign gynecologic conditions affect women's health, wellbeing, and quality of life.¹⁵⁶ These conditions include uterine fibroids, endometriosis, benign ovarian masses, adenomyosis, and pelvic organ prolapse.¹⁵⁷ Some common symptoms of these conditions are heavy menstrual bleeding and/or chronic pelvic pain.¹⁵⁸ Although many women live with these symptoms for years,

¹⁴⁸ *See id.*

¹⁴⁹ *See Breast and Cervical Cancer Diagnosis and Treatment (BCCDT) Program*, MD. DEP'T OF HEALTH, https://health.maryland.gov/phpa/cancer/Pages/bccdt_home.aspx (last visited Jan. 5, 2022).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (containing application hyperlink).

¹⁵² *Id.*

¹⁵³ *See supra* Section I.A.iii.

¹⁵⁴ *See supra* Section II.A.

¹⁵⁵ *See* Kirsten I. Black and Ian S. Fraser, *The Burden of Health Associated with Benign Gynecological Disorders in Low-Resource Settings*, 119 INT'L J. GYNECOLOGY AND OBSTETRICS S72, S74 (Mar. 2012).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at S72.

delays in diagnosis and lack of treatment options typically result in worsening symptoms and the need for increasingly invasive treatments.¹⁵⁹

Among these conditions, uterine fibroids are the most common, occurring in seventy percent of women by age fifty.¹⁶⁰ In the United States, an estimated twenty-six million women between the ages of fifteen and fifty have uterine fibroids.¹⁶¹ About twenty-five to fifty percent of women diagnosed with uterine fibroids will experience chronic heavy menstrual bleeding, often severe enough to cause iron-deficient anemia.¹⁶² Other common symptoms associated with fibroids include chronic pelvic pain, back pain, bladder and bowel problems, painful intercourse, miscarriage, and infertility.¹⁶³ Fibroid-related symptoms sent 65,685 women to the emergency room in 2017.¹⁶⁴ It is estimated that the personal and societal costs of diminished quality of life, disruption of usual activities, lost work time, and healthcare expenditures caused by uterine fibroids in the United States ranges from \$5.89 to \$34.37 billion annually.¹⁶⁵

Treatment for uterine fibroids runs the gamut from anti-inflammatory pain medication to total hysterectomy.¹⁶⁶ Nonsurgical treatments designed to control bleeding and inhibit or reverse fibroid growth include oral contraceptives, progesterone-only agents, and Gonadotropin-releasing hormone agonists that trigger temporary medical menopause.¹⁶⁷ The latter is generally used pre-operatively to reduce fibroid size.¹⁶⁸ Uterine artery embolization is a less invasive, nonsurgical technique designed to shrink fibroids by inserting small particles into the uterine artery to block the blood

¹⁵⁹ *Id.* at S73-74.

¹⁶⁰ AGENCY FOR HEALTHCARE RES. & QUALITY, U.S. DEP'T OF HEALTH & HUM. SERV., PUB. NO. 17(18)-EHC028-EF, MANAGEMENT OF UTERINE FIBROIDS ES-1 (2017), https://www.ncbi.nlm.nih.gov/books/NBK537742/pdf/Bookshelf_NBK537742.pdf.

¹⁶¹ *Id.*

¹⁶² Chelsea N. Fortin, Charley Jiang, Martina T. Caldwell, Sawsan As-Sanie, Vanessa Dalton & Erica E. Marsh, *Trends in Emergency Department Utilization Among Women with Leiomyomas in the United States*, 137 OBSTETRICS & GYNECOLOGY 897, 897, 899 (2021).

¹⁶³ *Fibroids*, JOHNS HOPKINS MED. (2022), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/uterine-fibroids>.

¹⁶⁴ Fortin et. Al., *supra* note 162, at 897.

¹⁶⁵ Eden R. Cardozo, Andrew D. Clark, Nicole K. Banks, Melinda B. Henne, Barbara J. Stegmann & James H. Segars, *The Estimated Annual Cost of Uterine Leiomyomata in the United States 5-6* (Mar. 1, 2013) (unpublished manuscript) (available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3292655/pdf/nihms343531.pdf>.) These numbers were calculated in 2010 dollars. In 2022 dollars this range is \$7.6 billion to \$44.3 billion.

¹⁶⁶ *Fibroids*, *supra* note 163.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

supply to the fibroids.¹⁶⁹ Surgical treatments include open, laparoscopic, or hysteroscopic myomectomy to remove fibroid tumors while preserving the uterus.¹⁷⁰ Despite the many treatment options available, however, hysterectomy remains the only permanent treatment option for fibroids.¹⁷¹ When selecting a treatment plan, the patient's age, the size and location of the fibroids, and the desire to preserve fertility are taken into account.¹⁷² It is easy to see how a lack of healthcare coverage makes access to early and effective treatment options for fibroids difficult, if not impossible.

A less common, but equally debilitating benign gynecologic condition is endometriosis.¹⁷³ This condition, characterized by endometrial tissue growth outside the uterine cavity on the surface of reproductive, chest, abdominal and/or pelvic organs, occurs in about ten percent of women in their reproductive years.¹⁷⁴ Endometriosis causes a range of symptoms including pelvic, abdominal, and lower back pain, abnormal or heavy menstrual bleeding, painful intercourse, bladder and bowel problems, and nausea and vomiting associated with menses.¹⁷⁵ Endometriosis is also a leading cause of infertility.¹⁷⁶ The annual economic burden of endometriosis, including direct health care costs and indirect productivity loss, was estimated to be \$69.4 billion in a 2010.¹⁷⁷

Like uterine fibroids, treatment for endometriosis can vary significantly from one patient to the next.¹⁷⁸ However, accessing adequate treatment for endometriosis is often much more difficult.¹⁷⁹ Because

¹⁶⁹ *Uterine Artery Embolization*, JOHNS HOPKINS MED. (2022), <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/uterine-artery-embolization>.

¹⁷⁰ *Fibroids*, *supra* note 163.

¹⁷¹ *Uterine Fibroids*, MAYO CLINIC (2022), <https://www.mayoclinic.org/diseases-conditions/uterine-fibroids/diagnosis-treatment/drc-20354294>.

¹⁷² *Fibroids*, *supra* note 163.

¹⁷³ *Endometriosis*, JOHNS HOPKINS MED. (2022), https://www.hopkinsmedicine.org/gynecology_obstetrics/specialty_areas/endometriosis/about-endometriosis.html.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Ahmed M. Soliman, Eric Surrey, Machaon Bonafede, James K. Nelson & Jane Castelli-Haley, *Real-World Evaluation of Direct and Indirect Economic Burden Among Endometriosis Patients in the United States*, 35 *ADVANCES IN THERAPY* 408, 409 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5859693/pdf/12325_2018_Article_667.pdf.

¹⁷⁸ *See Endometriosis*, *supra* note 173.

¹⁷⁹ Alice Broster, *Why it Takes so Long to Be Diagnosed with Endometriosis, According to an Expert*, FORBES (Aug. 27, 2020), <https://www.forbes.com/sites/alicebroster/2020/08/27/why-it-takes-so-long-to-be-diagnosed-with-endometriosis-according-to-a-expert/?sh=67520a676967>.

endometriosis does not present on ultrasounds, CT scans, or MRIs, laparoscopic exploratory surgery—an option low-income, uninsured patients are essentially barred from receiving—is the only definitive test for the disease.¹⁸⁰ Endometriosis symptoms mimic the symptoms of several other medical issues, leading many patients to visit multiple specialists before the diagnosis is even considered.¹⁸¹ A study by the World Endometriosis Research Foundation found that fifty percent of women referred to a gastroenterologist with bowel issues actually had endometriosis.¹⁸² Beyond gastroenterologists, endometriosis sufferers are often sent to “endocrinologists for metabolic syndrome/polycystic ovarian syndrome, rheumatologists for undifferentiated inflammatory conditions, neurologists for neuropathic conditions, and orthopedics for chronic back pain, leg pain or even shoulder pain.”¹⁸³ After many years of unremitting pain, some patients are referred to psychiatrists for anxiety and depression, often as a consequence rather than the cause of pain.¹⁸⁴ For these reasons, the average time from symptom onset to diagnosis with endometriosis is six to eleven years.¹⁸⁵

C. Lack of Healthcare Benefits and Continuity of Care

Because many women’s health problems—both cancerous and benign—require complex, expensive, and ongoing care, lack of health insurance coverage can be a severe detriment to getting adequate medical treatment.¹⁸⁶ Although emergency care is one of the few options available to uninsured patients, studies have shown that they do not use the emergency room in higher numbers than those with health insurance.¹⁸⁷ Because the uninsured use other types of care even less than insured patients, this leaves a serious gap in healthcare access.¹⁸⁸ For a woman with early-stage cervical cancer or one experiencing the nonspecific symptoms of fibroids,

¹⁸⁰ *Id.*

¹⁸¹ *Id.*; Malcom Mackenzie & Celeste Royce, *Endometriosis: A Common and Commonly Missed and Delayed Diagnosis*, PATIENT SAFETY NETWORK (June 24, 2020), <https://psnet.ahrq.gov/web-mm/endometriosiscommon-and-commonly-missed-and-delayed-diagnosis>.

¹⁸² See *Endometriosis*, *supra* note 173.

¹⁸³ Mackenzie & Royce, *supra* note 181.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See E-mail from Chailee Faythe Moss, Dir., Johns Hopkins Bayview Colposcopy Clinic, to author (Oct. 24, 2021, 6:59 PM EST) (on file with author).

¹⁸⁷ Paige Minemyer, *Study Debunks Idea that Uninsured Patients Overuse the ER*, FIERCE HEALTHCARE (Dec. 12, 2017), <https://www.fiercehealthcare.com/payer/uninsured-patients-emergency-care-medicare-outpatient-care-health-affairs>.

¹⁸⁸ *Id.*

endometriosis, or other benign gynecological conditions, these gaps will significantly exacerbate the challenges of diagnosis and treatment.¹⁸⁹

Dr. Chailee Moss, Director of the Bayview Colposcopy Clinic and Assistant Professor of Gynecology and Obstetrics at Johns Hopkins, sees this problem firsthand.¹⁹⁰ Speaking about the disconnect between state-covered prenatal care and ongoing coverage for nonpregnant women, she explained the frustration of administrative barriers to continuity of care.¹⁹¹ Dr. Moss explained that,

[i]n treating patients with abnormal pap tests, we often see patients screened as part of their prenatal care. The prenatal care program covers their pregnancy care costs, but they have to apply for a separate grant program (the Breast and Cervical Cancer Grant) to cover their care related to their abnormal pap tests.¹⁹²

Obtaining coverage through these programs can take several months, potentially affecting the safety of delivery.¹⁹³

Beyond pregnancy, these women often need follow up care.¹⁹⁴ They may be worried about being billed and avoid appointments, which can potentially lead to advanced disease.¹⁹⁵ Further, once treatment is complete and patients need follow up pap tests outside of pregnancy, they may have to go elsewhere because the grant applies to different services at different institutions.¹⁹⁶ Dr. Moss went on to express particular frustration with making patients “who may speak another language or have poor health literacy navigate the entire care system of another clinic, just because that is the only way their care can be affordable to them.”¹⁹⁷ Women with benign conditions have even fewer options for continuous care.¹⁹⁸

¹⁸⁹ See Moss, *supra* note 186.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Moss, *supra* note 186.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See *supra* Section II.B.

IV. EXPANDING HEALTHCARE TO MORE MARYLAND IMMIGRANTS

Immigrant access to affordable healthcare is essential for closing coverage gaps and reducing health disparities.¹⁹⁹ During the COVID-19 pandemic, many states began to explore options for covering their remaining uninsured population.²⁰⁰ In doing so, states are pursuing legislative or administrative actions to extend affordable healthcare coverage to all residents, regardless of immigration status, using state-only funds.²⁰¹ In announcing his initiative to extend health coverage to all mothers for twelve months postpartum using \$75 million in state funds, Governor Hogan and the Maryland General Assembly have already signaled their willingness to address health disparities in Maryland with state money.²⁰² However, more can be done.

A. Benefits of Expanded Healthcare Access in Maryland

In opting to expand Medicaid eligibility in Maryland in 2012, state health officials cited the significant health benefits that stem from increased coverage.²⁰³ Charles Mulligan, then deputy secretary for healthcare financing at the Maryland Department of Health and Mental Hygiene, referenced a New England Journal of Medicine study suggesting that expanding coverage to more adults would translate to a 6.1 percent reduction in mortality.²⁰⁴ This theory has been borne out, with study after study finding statistically significant reductions in mortality rates in states that expanded Medicaid.²⁰⁵ For example, one study found that early expansions in New York, Arizona, and Maine did, in fact, lead to a six percent reduction in mortality after five years, translating to thousands of saved lives.²⁰⁶

Beyond the obvious health benefits, Medicaid expansion has also had significant financial benefits: between 2013 and 2017, Maryland hospitals saw a thirty-seven percent decrease in uncompensated care as a share of their

¹⁹⁹ O'Connor et al., *supra* note 8, at 8.

²⁰⁰ *Id.* at 1.

²⁰¹ *Id.*

²⁰² OFF. OF GOVERNOR LARRY HOGAN, *supra* note 128.

²⁰³ See Milligan, *supra* note 112.

²⁰⁴ *Id.*

²⁰⁵ MATT BROADDUS & AVIVA ARON-DINE, CTR. ON BUDGET & POL'Y PRIORITIES, MEDICAID EXPANSION HAS SAVED AT LEAST 19,000 LIVES, NEW RSCH. FINDS 1-10 (Nov. 6, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/11-6-19health.pdf>.

²⁰⁶ *Id.* at 7.

annual budgets.²⁰⁷ That translates to an overall savings of \$304 million and is comparable with the forty percent drop in Maryland's uninsured rate during the same period.²⁰⁸ This makes sense considering that, typically, emergency medical care is one of the few options available to uninsured residents.²⁰⁹

B. Maryland Should Reconsider the Basic Health Program

A decade after Maryland declined to adopt the Basic Health Program, the two states that did implement the BHP have had great success.²¹⁰ New York's BHP, known as the Essential Plan, covers nearly one million low-income New York residents between the ages of nineteen and sixty five, including newly arrived immigrants ineligible for Medicaid during the five-year bar.²¹¹ As of 2021 all Essential Plan options are premium-free.²¹² In 2022, the state removed additional fees for dental and vision coverage, making both a standard part of the package.²¹³

Minnesota's BPH, MinnesotaCare, operates similarly.²¹⁴ Aside from federal subsidies, the program is funded through a state tax on Minnesota hospitals and health care providers, enrollee premiums, and cost sharing.²¹⁵

²⁰⁷ See Matt Broaddus, *Uncompensated Care Costs Well Down in ACA Medicaid Expansion States*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 21, 2021), <https://www.cbpp.org/blog/uncompensated-care-costs-well-down-in-aca-medicaid-expansion-states>.

²⁰⁸ *Id.* (noting that uncompensated costs fell more in states where uninsured rates fell more, with a roughly one-to-one relationship between the two).

²⁰⁹ MD. MEDICAID ADMIN., *supra* note 12.

²¹⁰ Press Release, Ctr. For Medicare & Medicaid Serv, Biden-Harris Administration Extends Hundreds of Millions of Dollars to New York's Essential Plan, Its Basic Health Program, Key Connection to Coverage Supported by American Rescue Plan (Nov. 10, 2021) [hereinafter CMMS Press Release], <https://www.cms.gov/newsroom/press-releases/biden-harris-administration-extends-hundreds-millions-dollars-new-yorks-essential-plan-its-basic>; see *New York Essential Plan*, VISTA HEALTH SOLS. (2022), https://www.nyhealthinsurer.com/new-york-essential-plan/#What_does_the_Essential_Plan_Cost (noting that children under age 19 may qualify for Child Health Plus and those past age 65 are usually covered by Medicare).

²¹¹ VISTA HEALTH SOLS., *supra* note 210.

²¹² *Id.*

²¹³ *Id.* These improvements are likely due, at least in part, to the \$750 million in additional funding the Biden Administration provided to the Essential Plan as part of the American Rescue Plan. See CMMS Press Prelease, *supra* note 210.

²¹⁴ Louise Norris, *Minnesota Health Insurance Marketplace: History and News of the State's Exchange*, HEALTHINSURANCE.ORG (Sept. 30, 2022), <https://www.healthinsurance.org/health-insurance-marketplaces/minnesota/>.

²¹⁵ RANDALL CHUN, MN. HOUSE RSCH. DEP'T., MINNESOTACARE: AN OVERVIEW (2021), <https://www.house.leg.state.mn.us/hrd/pubs/ss/ssmncare.pdf> (noting that state funding for MinnesotaCare and other health care access initiatives is provided by a tax of 1.8 percent

In 2020, the MinnesotaCare program paid \$452.6 million for medical services provided to enrollees.²¹⁶ Eighty-eight percent of this cost was paid for by the federal government, six percent by the state, and six percent by enrollees through premium payments and cost-sharing.²¹⁷ Enrollees in MinnesotaCare do not pay a monthly premium until they reach 160 percent of the federal poverty limit.²¹⁸ The highest monthly premium is twenty-eight dollars per month for those making 200 percent of the poverty limit.²¹⁹ This, too, is a substantial savings over the state's lowest-premium health exchange option (the Bronze Plan) of \$293 per month.²²⁰ As of 2021, 103,687 residents were enrolled in the plan, with the state's overall expenditure in state-only funds just \$305 per year per enrollee.²²¹

Although one of Maryland's biggest concerns about the BHP surrounded its potential impact on marketplace participation and premiums, the success of New York and Minnesota's plans indicate no substantial deleterious effects.²²² In 2022, the average cost of a Bronze Plan premium in the United States was \$329.²²³ New York's \$429 per month premium, while higher, is reasonably reflective of the state's higher cost of living.²²⁴ Further, this higher-than-average rate is not an outlier.²²⁵ Four states currently have higher Bronze Plan rates than New York.²²⁶ As expected, Minnesota, with a lower average cost of living, carries a lower-than-average Bronze Plan rate of \$287 per month, despite its BHP.²²⁷ Both state's marketplace rates fit within national norms despite significant enrollment in their BHPs.²²⁸ By the end of May 2021, for example, the New York State of Health had more than

on the gross revenues of health care providers and a tax of 1 percent on the premiums of nonprofit health plan companies).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ MN DEP'T OF HUM. SERVS., DHS-4139A-ENG, MINNESOTACARE PREMIUM ESTIMATOR TABLE (2022), <https://edocs.dhs.state.mn.us/lfservlet/Public/DHS-4139A-ENG>.

²¹⁹ *Id.*

²²⁰ *Average Marketplace Premiums by Metal Tier 2018-2023*, KAISER FAMILY FOUND., <https://www.kff.org/health-reform/state-indicator/average-marketplace-premiums-by-metal-tier/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Mar. 1, 2023).

²²¹ CHUN, *supra* note 215. 6% of \$452.6 million divided by 103,687 enrollees = \$305.55/enrollee.

²²² *See supra* Section II.B.

²²³ KAISER FAMILY FOUND., *supra* note 220.

²²⁴ *Id.*; *see* Casey Bond, *Cost of Living Comparison by State*, INSURE.COM (Feb. 7, 2023), <https://www.insure.com/cost-of-living-by-state.html>.

²²⁵ KAISER FAMILY FOUND., *supra* note 220.

²²⁶ *Id.*

²²⁷ *Id.*; *see* Bond, *supra* note 224.

²²⁸ *Id.*

893 thousand enrollees.²²⁹ Most are enrolled in Medicaid, the Essential Plan, or Child Health Plus, with only 220,000 enrolled in qualified health plans.²³⁰ Minnesota has a more even split, with 122,269 QHP enrollees and 103,687 MinnesotaCare participants.²³¹

Maryland already has an advantage in maintaining the stability of its marketplace rates.²³² In 2019, it became the seventh state to implement a state-based reinsurance plan to stabilize premium rates in the health exchange marketplace.²³³ This program, which reimburses insurers for eighty percent of an enrollee's claims, is funded through an ACA 1332 innovation waiver.²³⁴ This waiver, which provides states with additional federal funds to make innovative changes to their healthcare systems, has primarily been used to implement this type of federally-subsidized reinsurance plan.²³⁵ Maryland lawmakers expect this program will reduce the cost of marketplace premiums by thirty percent in the coming years.²³⁶ The same system was responsible for a twenty percent drop in marketplace premiums in Minnesota in 2018, contributing to the state's low marketplace rates alongside its BHP.²³⁷ Having a reinsurance plan in place may allay lawmakers' fears that a BHP would significantly disrupt marketplace premiums in Maryland.

Another primary concern reflected in Maryland's 2012 assessment of the Basic Health Program was the myriad unknowns regarding funding and implementation.²³⁸ At the time the report was published, the Centers for Medicare and Medicaid Services ("CMS") at Health and Human Services had

²²⁹ Louise Norris, *New York Health Insurance Marketplace: History and News of the State's Exchange*, HEALTHINSURANCE.ORG (Jan. 2, 2022),

<https://www.healthinsurance.org/health-insurance-marketplaces/new-york/>.

²³⁰ *Id.*

²³¹ Norris, *supra* note 229.

²³² See Katie Keith, *CMS Approves Maryland's 1332 Waiver for State-Based Reinsurance Program*, HEALTH AFFS. (Aug. 23, 2018),

<https://www.healthaffairs.org/doi/10.1377/forefront.20180823.322471/full/>.

²³³ *Id.*

²³⁴ *Id.* Reimbursement is capped at \$250,000.

²³⁵ Louise Norris, *What Is Reinsurance and Why Are States Pursuing It?*, VERYWELL HEALTH (June 14, 2021), <https://www.verywellhealth.com/reinsurance-4174980#:~:text=In%20a%20nutshell%2C%20the%20idea,funded%20by%20the%20federal%20government.>

²³⁶ Keith, *supra* note 232.

²³⁷ *Minnesota Premium Security Plan & Section 1332 State Innovation Waiver*, MN COM. DEP'T, <https://mn.gov/commerce/insurance/industry/reinsurance/> (last visited Feb. 7, 2023).

²³⁸ DHMH MEDICAID OFF. OF PLAN. & THE HILLTOP INST., ANALYSIS OF THE BASIC HEALTH PROGRAM 1-2 (2012), <https://health.maryland.gov/docs/BHP%2001%2018%2012%20Report%20Analysis%20FINAL.pdf>.

not yet published a final rule with these guidelines.²³⁹ Regulations establishing funding guidelines were finalized in March 2014.²⁴⁰ Among the provisions adopted, CMS established a comprehensive BHP Blueprint for states looking to implement the program and a funding plan outlining enrollment and cost projections for the first twelve months of operation.²⁴¹

When implementing a BHP, states may choose between Medicaid rules and rules that apply in the marketplace.²⁴² This flexibility allows states to craft an administrative structure for their BHPs that works best with their existing state healthcare structure and minimizes administrative costs.²⁴³ Although states cannot use federal funds to cover administrative expenses, as with the marketplaces, states may fund these costs by surcharging BHP plans and using federal funds to cover the resulting rise in premiums.²⁴⁴

It is possible that folding a BHP into the existing marketplace structure in Maryland may present fewer administrative challenges a decade into ACA implementation than envisioned by lawmakers in 2012. Because of the benefits this plan offers to low-income immigrants in Maryland, the state should consider reevaluating the BHP in light of available real-world information from Minnesota and New York and well-established federal rules governing the program.

C. Maryland Should Consider Extending Coverage to Immigrants with State-Only Funds

If implementation of the BHP is not favorable to state lawmakers, there are other options available.²⁴⁵ Some states have opted to extend Medicaid-like coverage to ineligible immigrants using state-only funds.²⁴⁶ California, the District of Columbia, Massachusetts, and Pennsylvania offer specific programs that extend coverage to some lawfully present immigrants otherwise the District of Columbia offers one of the most progressive

²³⁹ *Id.* at 4.

²⁴⁰ See 42 C.F.R. §§ 600.600 – 600.615(2014) (allocating designation of funds and accounting for Basic Health Programs in participating states); see also 45 C.F.R. § 144.103 (2014) (excluding from the definition of “individual market” health insurance offered to individuals pursuant to coverage offered based on a contract between the health insurer and a Basic Health Program).

²⁴¹ *Id.*

²⁴² STAN DORN & JENNIFER TOLBERT, THE ACA’S BASIC HEALTH PROGRAM OPTION: FEDERAL REQUIREMENTS AND STATE TRADE-OFFS 1, 2 (2014), <https://files.kff.org/attachment/the-acas-basic-health-program-option-federal-requirements-and-state-trade-offs-report>.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ See O’Connor et al., *supra* note 8.

²⁴⁶ *Id.*

programs in the country, which is available to all income-eligible immigrant adults, including undocumented immigrants.²⁴⁷

Through its state public health program, Medi-Cal, California offers state-funded coverage for all income-eligible legally present immigrants regardless of entry date, and undocumented immigrants between the ages of nineteen and twenty-six and over fifty.²⁴⁸ At the time of writing, California is considering a plan to extend this coverage to all income-eligible adult immigrants regardless of entry date and legal status.²⁴⁹ As of fiscal year 2020, state and local funds made up thirty-five percent of all Medi-Cal funding.²⁵⁰ According to the California Health Care Foundation, “California’s nonfederal share of Medi-Cal expenditures is financed through the state general fund, county revenues, and taxes and fees on managed care organizations, hospitals, and tobacco products.”²⁵¹

With a comparatively low immigrant population, crafting a state-only option to cover newly arrived immigrants subject to the five-year bar may be a simpler and more cost-effective option for Maryland than establishing a BHP, which offers coverage to a larger population.²⁵² California is home to nearly five million noncitizens, while Maryland has just under 450,000.²⁵³ In 2019, the Migration Policy Institute found that Maryland had 202,000 foreign born adults who were income-eligible for Medicaid.²⁵⁴ Of that number, 100,000 were federally ineligible based on immigration status.²⁵⁵

Although a state-funded option to cover all immigrants regardless of legal status is preferable, it is reasonable for Maryland to initially extend state coverage to legally present immigrants within the five-year bar. Based on Maryland’s undocumented population (sixty-one percent of all noncitizens), the number of legally present, income-eligible noncitizens covered by a state-

²⁴⁷ *Id.* at 13.

²⁴⁸ *Id.*; see also CA. HEALTH CARE FOUND., *MEDI-CAL FACTS AND FIGURES: ESSENTIAL SOURCE OF COVERAGE FOR MILLIONS*, in *CA. HEALTH CARE ALMANAC 2* (2021), <https://www.chcf.org/wp-content/uploads/2021/08/MediCalFactsFiguresAlmanac2021.pdf>.

²⁴⁹ Soumya Karlamangla, *California Poised to Extend Health Care to All Undocumented Immigrants*, N.Y. TIMES (Jan. 12, 2022), <https://www.nytimes.com/2022/01/12/us/health-care-undocumented-immigrants.html>.

²⁵⁰ *MEDI-CAL FACTS AND FIGURES*, *supra* note 248, at 16.

²⁵¹ *Id.* at 15.

²⁵² See *State Immigration Data Profiles*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/data/state-profiles/state/demographics/CA/MD/> (last visited Mar. 11, 2022); see also *supra* text accompanying notes 76-77.

²⁵³ MIGRATION POL’Y INST., *supra* note 252.

²⁵⁴ Valerie LaCarte, Mark Greenberg & Randy Capps, *Medicaid Access and Participation*, MIGRATION POL’Y INST 9 (Oct. 2021), https://www.migrationpolicyinstitute-europe.com/sites/default/files/publications/mpi-hsi_medicaid-brief_final.pdf.

²⁵⁵ *Id.* at 6, 9.

funded program would likely be 40,000 or fewer.²⁵⁶ As of 2019, the average cost of Medicaid in Maryland was \$7,700 per enrollee.²⁵⁷ Adding 40,000 new enrollees would cost an estimated \$308 million per year.²⁵⁸

V. CONCLUSION

Although recent history has seen a push towards more expansive public healthcare options, many immigrants have continued to be excluded due to the antiquated five-year bar and the chilling effect that immigration policy and public opinion has on that population's participation in public benefits programs.²⁵⁹ Although Maryland has opted to extend coverage to all federally eligible immigrants such as children and pregnant women, they have not extended coverage to other adults subject to the five-year bar or otherwise ineligible based on legal status.²⁶⁰

One possible reason for leaving this group out of healthcare expansions is that young and middle-aged adults typically consume less healthcare proportionally than adults fifty-five and older.²⁶¹ Although children account for the least amount of healthcare spending, societal norms dictate that children be afforded access to primary care.²⁶² As Part II of this comment shows, however, the myriad health challenges facing women of reproductive age make a lack of access to healthcare at this time particularly damaging.²⁶³ Years of untreated chronic pain or delayed cancer diagnoses

²⁵⁶ See *supra* notes 1-3 and accompanying text. In 2019, there were 447,466 noncitizens in Maryland, of which about 270,000 remained undocumented. *Id.* This is approximately 61%. If 100,000 income eligible Maryland residents are ineligible for federal benefits based on their immigration status and approximately 61% of this group is undocumented, that leaves just about 40,000 income-eligible, legally present noncitizens who would become eligible for state-funded benefits.

²⁵⁷ *Medicaid Spending per Enrollee*, KAISER FAMILY FOUND. (2019), <https://www.kff.org/medicaid/state-indicator/medicaid-spending-per-enrollee/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

²⁵⁸ See *id.*

²⁵⁹ See *supra* Sections I.A.i, I.A.iii.

²⁶⁰ See *supra* Sections I.B.i, I.B.ii.

²⁶¹ Jared Ortaliza, Matthew McGough, Emma Wager, Gary Claxton & Krutika Amin, *How Do Health Expenditures Vary Across the Population?* HEALTH SYS. TRACKER (Nov. 12, 2021), <https://www.healthsystemtracker.org/chart-collection/health-expenditures-vary-across-population/#:~:text=While%20there%20are%20people%20with,for%20only%2021%25%20of%20spending>.

²⁶² *Nat'l Health Expenditure Data Fact Sheet*, CTR. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet> (last visited Feb. 8, 2023).

²⁶³ See *supra* Part II.

take a major personal and financial toll on women who cannot access reliable and continuous healthcare during their adult years.²⁶⁴ A five-year wait for coverage can be a matter of life and death.²⁶⁵

Although any program to cover this group of people will carry a cost, at this moment Maryland is well situated to consider this option.²⁶⁶ The state is currently projected to have an unprecedented \$7.6 billion budget surplus by the end of 2023.²⁶⁷ As lawmakers debate how best to use this windfall, it is an ideal time to consider extending healthcare to more Maryland immigrants.²⁶⁸ To find the best solution, Maryland lawmakers should initiate a renewed study into the practicality of establishing a Basic Health Program. At the same time, the state should also conduct an economic study into the cost and feasibility of creating a state-funded Medicaid option for legally present immigrants subject to the five-year bar and the potential for extending this program to undocumented immigrants. Finally, Maryland should consider establishing outreach programs to its immigrant population to promote increased enrollment among its currently eligible population and effective proliferation of information about any future policy changes.

Since the ACA's Medicaid expansion, Maryland has seen both the human and financial benefits of extending public healthcare coverage to more residents.²⁶⁹ Reductions in preventable deaths and savings in uncompensated care show the net benefits of reducing the state's uninsured rate.²⁷⁰ With its current budget surplus, Maryland has a unique opportunity to make substantive changes that will benefit its immigrant residents and the state as a whole.²⁷¹

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ See Erin Cox, *Maryland's Unprecedented Surplus Grows by \$1.6 Billion, Setting Stage for Renewed Tax Cut Debate*, WASH. POST (Mar. 10, 2022, 6:54 PM), <https://www.washingtonpost.com/dc-md-va/2022/03/10/maryland-surplus-tax-cuts-spending/>.

²⁶⁷ *Id.*

²⁶⁸ See *id.*

²⁶⁹ See *supra* Section III.A.

²⁷⁰ See *supra* Section III.A.

²⁷¹ See Cox, *supra* note 266.

COMMENT

CLEANING UP MARYLAND: UTILIZING CITIZEN SUITS TO REMEDY ENVIRONMENTAL INJUSTICE AND ATTAIN CLEANER WATER

*By: Julia Rowland**

I. INTRODUCTION

The fight to return a heavily polluted ecosystem to a healthy balance is a considerable challenge.¹ Human impact on the physical environment has negatively affected the health and resilience of Maryland waterways and the Chesapeake Bay.² Maryland environmental organizations are working diligently towards restoring the Chesapeake Bay.³ However, efforts have not progressed at the expected rate due to a lack of government resources and support.⁴ In recent years, states have been adjusting their approach regarding the availability of environmental citizen suits to supplement government action and maximize resources.⁵

Maryland Governor Larry Hogan enacted a law allowing citizens to intervene in civil actions through citizen suits to control water pollution under Article II, Section 17(c) of the Maryland Constitution in 2021.⁶ The new law

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¹ See *What Is Killing the Bay?*, CHESAPEAKE BAY FOUND., <https://www.cbf.org/how-we-save-the-bay/chesapeake-clean-water-blueprint/what-is-killing-the-bay.html> (last visited Feb. 11, 2022).

² *Id.*

³ Robert L. Glicksman & Ling-Yee Huang, *Failing the Bay: Clean Water Act Enforcement in Maryland Falling Short* 39 (Ctr. for Progressive Reform, White Paper No. 1004, Apr. 2010), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1681&context=faculty_publications.

⁴ Timothy B. Wheeler, *Chesapeake Bay Restoration Stumbles in Race to Finish Line*, BAY J. (May 10, 2021), https://www.bayjournal.com/news/fisheries/chesapeake-bay-restoration-stumbles-in-race-to-finish-line/article_01a3f94a-ada9-11eb-8c89-fb011173c7bc.html.

⁵ James R. May, *The Availability of State Environmental Citizen Suits*, 18 NAT. RES. & ENV'T 53, 53 (2004); Mark A. Ryan, *Clean Water Act Citizen Suits: What the Numbers Tell Us*, 32 NAT. RES. & ENV'T 1, 3 (2017).

⁶ S.B. 334, 442nd Gen. Assemb., Reg. Sess. (Md. 2021); MD. CONST. art. II, § 17(c).

emphasizes Maryland's need for the community to work together to reduce water pollution.⁷ Citizen suits are certainly part of a larger movement toward mitigating Maryland Clean Water Act violations.⁸ However, solely relying on individuals to bring citizen suits may only achieve a modest attempt to curb environmental concerns surrounding Maryland Clean Water Act violations.⁹ Citizen suits alone are not successful unless supplemented with government action that develops continuous regulation of environmental violations.¹⁰

The following sections of this comment will analyze how Maryland citizen suits will address environmental injustice and how the state should address the environmental concerns surrounding pollution in the Chesapeake Bay.¹¹ Section II discusses the history of pollution in the Chesapeake Bay, examining the primary sources of pollution.¹² This section also briefly provides the history of Clean Water Act citizen suits and the environmental revolution that empowered communities to address water pollution.¹³ Lastly, this section will analyze the development of Maryland's Clean Water Act provisions.¹⁴

Section III explores agricultural pollution's impact on the Chesapeake Bay and enforcement of these pre-existing conditions.¹⁵ This section also describes the need for a more robust citizen suit provision to ensure increased accountability for state and government officials and achieve proper redress.¹⁶ Section IV provides two solutions to adjust and enhance the use of Maryland citizen suits to achieve Maryland's environmental goals.¹⁷ Part one offers recommendations for more robust inspections and monitoring of agricultural practices that could restore the Chesapeake Bay's health and

⁷ Tom Pelton & Betsy Nichols, *Maryland Legislature Passes Law Allowing Public Intervention in Clean Water Enforcement*, ENV'T INTEGRITY PROJECT, (Apr. 8, 2021), <https://environmentalintegrity.org/news/maryland-legislature-passes-law-allowing-public-intervention-in-clean-water-enforcement/#:~:text=Maryland%20Legislature%20Passes%20Law%20Allowing%20Public%20Intervention%20in%20Clean%20Water%20Enforcement,-April%208%2C%202021&text=Annapolis%2C%20MD%20%E2%80%94%20Today%2C%20the,enforcement%20lawsuits%20brought%20against%20polluters.>

⁸ *See id.*

⁹ *See* Catherine M. Kaiman, *Environmental Justice and Community-Based Reparations*, 39 SEATTLE U. L. REV. 1327, 1342 (2016).

¹⁰ *See* Glicksman & Huang, *supra* note 3, at 6.

¹¹ *See infra* Section II-IV.

¹² *See infra* Section II.A.

¹³ *See infra* Section II.B.

¹⁴ *See infra* Section II.C.

¹⁵ *See infra* Section III.A.

¹⁶ *See infra* Section III.B.

¹⁷ *See infra* Section IV.

improve the overall health of Maryland's bodies of water.¹⁸ Finally, part two addresses the need for imposing and raising penalties through a deterrence-based approach to put forth attainable efforts to protect the Chesapeake Bay from pollution.¹⁹ These solutions focus on utilizing citizen suits in connection with robust government action to achieve Maryland's environmental goals.²⁰

II. BACKGROUND

A. *The Chesapeake Bay and Pollution*

One of the nation's most studied bodies of water is the Chesapeake Bay.²¹ The Chesapeake Bay is the largest estuary and possesses one of the most extensive ecosystems in the United States.²² Estuaries are confined coastal bodies where freshwater from streams and rivers merge with saltwater from the ocean.²³

Increased levels of nitrogen and phosphorus in the Chesapeake Bay are a regional water quality concern.²⁴ Although nitrogen and phosphorus have continually played a role in the Chesapeake Bay ecosystem, substantial human activity has caused the levels to rise dramatically over the last few decades.²⁵ Due to the actions of over thirteen million people in the Chesapeake Bay watershed, three significant sources of pollution are affecting the health of streams and rivers that empty into the Chesapeake Bay: nitrogen, phosphorus, and sediment.²⁶

Nitrogen and phosphorus pollution emanates from sewage treatment plants, fertilizer, wastewater, air pollution, and runoff.²⁷ Agricultural runoff is the greatest source of pollution to the Chesapeake Bay, contributing approximately forty percent of nitrogen and fifty percent of phosphorus

¹⁸ See *infra* Section IV.A.

¹⁹ See *infra* Section IV.B.

²⁰ See *infra* Section IV.

²¹ *History of the Chesapeake Bay Cleanup Efforts*, CHESAPEAKE BAY FOUND., <https://www.cbf.org/how-we-save-the-bay/chesapeake-clean-water-blueprint/the-history-of-bay-cleanup-efforts.html> (last visited Feb. 11, 2022).

²² Robert Costanza, *Ecological and Economic System Health and Social Decision Making*, in 28 *EVALUATING AND MONITORING THE HEALTH OF LARGE-SCALE ECOSYSTEMS* 103, 117 (David J. Rapport, Connie L Gaudet & Peter Calow eds., 1995).

²³ Nat'l. Ocean & Atmospheric Admin., *What is Eutrophication?*, NAT'L OCEAN SERV., <https://oceanservice.noaa.gov/facts/eutrophication.html> (last updated Jan. 20, 2023).

²⁴ *Addressing Nutrient Pollution in the Chesapeake Bay*, ENV'T PROT. AGENCY, <https://www.epa.gov/nutrient-policy-data/addressing-nutrient-pollution-chesapeake-bay-resources> (last updated June 5, 2020).

²⁵ *Id.*

²⁶ *Id.*; see *What Is Killing the Bay?*, *supra* note 1.

²⁷ *What Is Killing the Bay?*, *supra* note 1.

pollution entering the Chesapeake Bay.²⁸ Sediment pollution consists of dirt, sand, and clay particles from erosion and construction sites floating in the water.²⁹

These sources of pollution harm the water quality by diminishing the oxygen levels, which results in dead zones.³⁰ A dead zone is an area in a body of water where aquatic species are incapable of survival due to deficient oxygen levels.³¹ Nitrogen and phosphorus produce algae blooms, which occur when an abundance of algae accumulates quickly.³² Consequently, algae blooms block the sunlight and consume the oxygen from the water.³³ Dead zones harm the economy because they threaten aquatic animals that humans rely on for seafood and release unpleasant odors from dead fish washed onto the beaches.³⁴ The prevalence of dead zones has slightly declined through initiatives like planting trees to act as buffers along rivers and streams connected to the Chesapeake Bay, enhancing soil health, and improving wastewater treatment plant technology.³⁵ While there is a positive trajectory of higher oxygen levels, heightened management procedures must be implemented for the better health of the Chesapeake Bay.³⁶

B. History of the Clean Water Act Citizen Suits

In 1972, a growing concern for regulating water pollution influenced the expansion of amendments to the 1948 Federal Water Pollution Control Act.³⁷ The law is now known as the Clean Water Act.³⁸ Public awareness

²⁸ *Nitrogen & Phosphorus*, CHESAPEAKE BAY FOUND., <https://www.cbf.org/issues/agriculture/nitrogen-phosphorus.html#:~:text=Nutrients%E2%80%94primarily%20nitrogen%20and%20phosphorus,degrade%20the%20Bay's%20water%20quality> (last visited Feb. 11, 2022).

²⁹ *What Is Killing the Bay?*, *supra* note 1.

³⁰ *Id.*

³¹ *The Effects: Dead Zone and Harmful Algal Blooms*, ENV'T PROT. AGENCY, <https://www.epa.gov/nutrientpollution/effects-dead-zones-and-harmful-algal-blooms> (last updated Jan. 20, 2023).

³² *Id.*

³³ *Id.*

³⁴ *Dead Zones*, CHESAPEAKE BAY FOUND., <https://www.cbf.org/issues/dead-zones/> (last visited Feb. 11, 2022).

³⁵ *Id.*

³⁶ Jim Erickson, *For the Second Straight Year Smaller Chesapeake Bay Dead Zone Forecast for the Summer*, U. OF MICH. NEWS (June 23, 2021), <https://news.umich.edu/for-the-second-straight-year-smaller-chesapeake-bay-dead-zone-forecast-for-the-summer/>.

³⁷ *History of the Clean Water Act*, ENV'T PROT. AGENCY, <https://www.epa.gov/laws-regulations/history-clean-water-act#:~:text=As%20amended%20in%201972%2C%20the,setting%20wastewater%20standards%20for%20industry> (last visited Feb. 11, 2022).

³⁸ 33 U.S.C. §§ 1251(a)-(g) (1972).

concerning the increase in water pollution motivated the inclusion of the citizen suit provision in the 1972 amendments of the Clean Water Act.³⁹

The Clean Water Act states that any eligible person may file a citizen suit against any individual or against an administrator who allegedly violates an effluent standard or failed to perform any [nondiscretionary] act or duty.⁴⁰ Effluent standards are national wastewater discharge guidelines developed by the Environmental Protection Agency.⁴¹ Effluent standards create technology-based regulations predicated on the performance of treatment plants and control levels rather than the risks and negative impacts on bodies of water.⁴² A citizen suit allows qualified citizens to hold private actors accountable for violations of environmental statutes and effluent standard regulations.⁴³ Therefore, the Clean Water Act citizen suit provision serves as a significant deterrent to individuals who discharge pollutants without a proper permit.⁴⁴

The reform of the 1970s regulatory standards started a pivotal advance in the environmental revolution to address water pollution.⁴⁵ Accordingly, citizen suits empower communities that have suffered environmental injustice by regulating overlooked sources of pollution in the citizens' neighborhoods.⁴⁶ This empowerment of the communities continuously improves environmental law by allowing environmental interests to advance straight to court to enforce statutory standards.⁴⁷

Since 2016, there has been an increase of judicial challenges by environmental groups and citizens to rulemaking and agency inaction.⁴⁸ This

³⁹ ENV'T PROT. AGENCY, *supra* note 37.

⁴⁰ 33 U.S.C. § 1365(a)(1) (2012).

⁴¹ *Learn About Effluent Guidelines*, ENV'T PROT. AGENCY, <https://www.epa.gov/eg/learn-about-effluent-guidelines> (last visited Feb. 11, 2022).

⁴² *Industrial Effluent Guidelines*, ENV'T PROT. AGENCY, <https://www.epa.gov/eg/industrial-effluent-guidelines> (last visited Feb. 11, 2022).

⁴³ *Citizen Suit Provisions in Environmental Law*, THE ENV'T RTS. DATABASE, <http://environmentalrightsdatabase.org/citizen-suit-provisions-in-environmental-law/> (last visited Feb. 11, 2022).

⁴⁴ See Douglas A. Henderson, *Clean Water Act Citizen Suit Enforcement of Wastewater Discharges*, in PROC. OF THE 2015 GA. WATER RSCH. CONFERENCE 28, 29 (Robin John McDowel, Carson A. Pruitt & Robert Bahn eds., 2015), <http://gwri.gatech.edu/sites/default/files/files/docs/2015/6.5.2henderson.pdf>.

⁴⁵ Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, 25 COLO. NAT. RES., ENERGY & ENV'T'L. L. REV. 62, 63 (2014).

⁴⁶ See Jeanne Marie Zokovitch Paben, *Approaches to Environmental Justice: A Case Study of One Community's Victory*, 20 S. CAL. REV. L. & SOC. JUST. 235, 235-36 (Spring 2011).

⁴⁷ See Coplan, *supra* note 45, at 85.

⁴⁸ Bonnie L. Heiple & Rachel Jacobson, *Environmental Litigation Alert: Citizen Suits Challenge Rollbacks, Replacements and Project Approvals*, WILMERHALE (Mar. 28, 2019),

increase led to an expansion of private citizens alleging violations of Clean Water Act laws to enforce compliance without agency action.⁴⁹ Most recently, the Supreme Court ruled on a high-profile case that arose as a local citizen suit asserting that a wastewater facility in Hawaii violated the Clean Water Act.⁵⁰ The county of Maui pumped approximately four million gallons of pollution through wells into groundwater connected to the Pacific Ocean without a permit.⁵¹ The county argued that only point source discharges to navigable waters through groundwater are regulated by the Clean Water Act.⁵² Here, the county's wastewater facility was not directly dumping pollutants into the Pacific Ocean but indirectly dumping pollutants through wells into groundwater.⁵³

The Supreme Court established a new test to determine whether the pollution discharges were the functional equivalent of direct discharges to the ocean in response to the county's claim.⁵⁴ The test required assessment of seven factors, including time and distance.⁵⁵ The case was remanded to the district court, where it applied the Supreme Court's test for the first time, finding that the county was required to obtain a Clean Water Act permit for discharging pollution into the wells.⁵⁶

The ruling provided a powerful message that the Supreme Court recognizes the vital importance of citizen suits and their aim to protect bodies of water.⁵⁷ *County of Maui v. Hawaii Wildlife Fund* set a clear example of how citizen suit provisions favorably produce an opportunity to achieve

<https://www.wilmerhale.com/en/insights/client-alerts/20190328-citizen-suits-challenge-rollbacks-replacements-and-project-approvals>.

⁴⁹ *Id.*

⁵⁰ *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020).

⁵¹ *Id.* at 1466.

⁵² *Id.* at 1466-67.

⁵³ *Id.*

⁵⁴ *Id.* at 1476-77.

⁵⁵ *Id.*; see also *Cnty of Maui*, 140 S. Ct. at 1476 (“Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies. If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply.”).

⁵⁶ *Haw. Wildlife Fund v. Cnty. of Maui*, 550 F. Supp. 3d 871, 888 (D. Haw. 2021) (“What the court does not disregard is the evidence that the wastewater travels a minimum distance of between 0.3 and 1.5 miles to the sea Such a distance weighs in favor of requiring an NPDES permit.”).

⁵⁷ See *The Clean Water Case of the Century*, EARTH JUST.,

<https://earthjustice.org/features/supreme-court-maui-clean-water-case> (last updated Oct. 2021).

environmental justice.⁵⁸ An increase in citizen suits filed due to regulation rollbacks, whether successful or not, should be expected.⁵⁹

C. Maryland's Clean Water Act Provisions

Before 2021, Maryland law made it almost impossible for citizens to obtain the right to participate in Clean Water Act enforcement actions through citizen suits.⁶⁰ The Federal Clean Water Act mandates that every state must provide citizen intervention as a right or provides an alternative avenue for citizens to carry out their own Clean Water Act programs.⁶¹ Under previous Maryland law, if the state brought an enforcement action in federal court for Clean Water Act violations, citizens would have an unconditional opportunity to intervene.⁶² Nevertheless, in Maryland courts, citizens would not be allowed to intervene in the case even if the violations were initially investigated and submitted by one of the individuals.⁶³ Maryland does not present an unconditional right to intervene in state lawsuits under the Maryland Water Pollution Control Act, requiring citizens to seek a conditional right to intervene and adhere to additional requirements listed under Md. Rule 2-214(a)(2).⁶⁴

In 2010, the Appellate Court of Maryland analyzed the requirements for standing under Md. Rule 2-214(a), which set a precedent that made it nearly impossible for citizens to intervene as of right in clean water cases.⁶⁵ In this case, five citizens lived within ten to fifteen miles of power plants that unlawfully dumped toxic pollution into the Wicomico and Potomac rivers.⁶⁶ The Potomac Riverkeeper and the Environmental Integrity Project attempted to intervene in a state clean water enforcement action against the power plant facilities.⁶⁷ The court held that while there was a broad interest in the litigation, the organization's interest in intervening was insufficient to provide the proper standing required under Md. Rule 2-214(a).⁶⁸ Following

⁵⁸ See Heiple & Jacobson, *supra* note 48.

⁵⁹ *Id.*

⁶⁰ See *Water Pollution Control – Intervention in Civil Actions – Rights and Authority: Hearing on S.B. 334 Before the Jud. Proc. Comm.*, 442nd Gen. Assemb., Reg. Sess. (Md. 2021) [hereinafter *Hearing on S.B. 334*] (statement of the Waterkeepers Chesapeake).

⁶¹ 40 C.F.R. § 123.27(d) (2022).

⁶² *Hearing on S.B. 334*, *supra* note 60 (statement of Waterkeepers Chesapeake).

⁶³ *Id.*

⁶⁴ See generally *Hearing on S.B. 334*, *supra* note 60 (statement of Jill P. Carter).

⁶⁵ *Env't Integrity Project v. Mirant Ash Mgmt., LLC*, 197 Md. App. 179, 185, 13 A.3d 34, 38 (2010).

⁶⁶ *Id.* at 183-84, 13 A.3d at 37.

⁶⁷ *Id.* at 184, 13 A.3d at 37.

⁶⁸ *Id.* at 189, 13 A.3d at 40; see Rule 2-214(a) (2022).

this ruling, all Maryland-based clean water citizen intervention lawsuits were unsuccessful.⁶⁹

The passage of Senate Bill 334 aligns Maryland's clean water laws with the Federal Clean Water Act.⁷⁰ Maryland followed the many other states that enacted legislation to allow for citizen intervention as a right to guarantee citizen participation in court.⁷¹ The new implementation of citizen intervention provides a chance to advocate “for full and fair enforcement of laws that affect Maryland's local waterways and health.”⁷² Given Maryland's 2025 pollution reduction commitments under the state's blueprint for clean water, citizen intervention is crucial in promoting progress.⁷³

In 2010, the six states and the District of Columbia bordering the Chesapeake Bay and its rivers developed personalized plans to limit the amount of pollution entering the Chesapeake Bay.⁷⁴ The blueprint for clean water 1) assures that all six states share equal responsibility for cleaning up the Chesapeake Bay waterways, 2) sets two-year reduction goals, and 3) imposes consequences for failure to ensure that the states meet their obligations.⁷⁵ While Maryland is currently on the way to meeting its overall nutrient reduction goals by 2025, agricultural runoff and septic pollution continue to increase, posing long-term concerns for Maryland waterways.⁷⁶ In addition to those growing concerns, the U.S. Environmental Protection Agency has failed to hold states accountable for their obligations to their clean water blueprints.⁷⁷ Therefore, citizen intervention will hold violators responsible for upholding clean water blueprint goals.⁷⁸

⁶⁹ *Hearing on S.B. 334*, *supra* note 60 (statement of Waterkeepers Chesapeake).

⁷⁰ *Id.*

⁷¹ *See Water Pollution Control – Intervention in Civil Actions – Rights and Authority: Hearing on H.B. 76 Before the Env't and Transp. Comm.*, 442nd Gen. Assemb., Reg. Sess. (Md. 2021) [hereinafter *Hearing on H.B. 76*] (statement of Chesapeake Legal Alliance). Eight other states enacted legislation to ensure citizen intervention was allowed as a right: Alabama, Arkansas, Florida, Indiana, Kansas, Oklahoma, Tennessee, and Wyoming. *Id.*

⁷² *Hearing on S.B. 334*, *supra* note 60 (written testimony of Waterkeepers Chesapeake).

⁷³ *Maryland's Blueprint for Clean Water*, CHESAPEAKE BAY FOUND., <https://www.cbf.org/how-we-save-the-bay/chesapeake-clean-water-blueprint/2019-state-of-the-blueprint/blueprint-for-clean-water-md.html> (last visited Feb. 10, 2023).

⁷⁴ *Id.* The six bordering states are Virginia, West Virginia, Delaware, Pennsylvania & New York. *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Current and Future Challenges*, CHESAPEAKE BAY FOUND., <https://www.cbf.org/how-we-save-the-bay/chesapeake-clean-water-blueprint/current-and-future-challenges.html> (last visited Feb. 11, 2022).

⁷⁸ *See id.*

III. ISSUE

Pollution in Maryland and the Chesapeake Bay is a complex issue.⁷⁹ Agricultural runoff is the leading source of water pollution.⁸⁰ Adding a citizen suit provision is a step in the right direction, but whether it is enough to make a significant impact remains to be seen.⁸¹ Citizen suits are necessary to increase accountability for state and government officials and achieve proper redress.⁸² However, citizen suits may hold the public accountable and responsible for addressing pollution concerns, placing the burden on the citizens rather than state officials and government leaders.⁸³

If the citizen suit provision imposes too much responsibility on citizens, there will be significant gaps in reducing the Maryland Clean Water Act violations.⁸⁴ Correspondingly, findings show that perceptions surrounding citizen suits are widespread among the Maryland community and the general public, leading to opposing views.⁸⁵ Lastly, even if a Maryland Clean Water Act citizen suit is successful, there is limited judicial relief.⁸⁶ Therefore, the new citizen suit provision would likely require members of Maryland's governmental agencies to implement more robust inspections and monitoring of agricultural operations to protect the health of the Chesapeake Bay and Marylanders.⁸⁷

⁷⁹ See Audrey Decker, *Chesapeake Bay Fate Depends on Many States*, CAP. GAZETTE, (Apr. 24, 2021, 12:38 PM), <https://www.capitalgazette.com/environment/ac-cn-cns-chesapeake-pollution-2021425-20210424-c5nm3fomnffkzo6kpmfbpsqsji-story.html> (noting that pollution in Maryland is a complex issue because it requires multi-state cooperation).

⁸⁰ See Karl Blankenship, *Chesapeake Cleanup Goals Out of Reach?*, BAY J., (Sept. 8, 2020), https://www.bayjournal.com/news/policy/chesapeake-cleanup-goals-out-of-reach/article_5604a5e4-ceed1-11ea-8c97-f38ffded1d77.html.

⁸¹ See Kaiman, *supra* note 9, at 1342.

⁸² Katherine A. Rouse, *Holding the EPA Accountable: Judicial Construction of Environmental Citizen Suit Provisions*, 93 N.Y.U. L. REV. 1271, 1278 (2018).

⁸³ David E. Adelman & Robert L. Glicksman, *Reevaluating Environmental Citizen Suits in Theory and Practice*, 91 U. COLO. L. REV. 386, 391 (2020).

⁸⁴ See *id.*

⁸⁵ Glicksman & Huang, *supra* note 3, at 37.

⁸⁶ See 33 U.S.C. §§ 1365(a)(2), (d) (2012).

⁸⁷ See MARIAH LAMM, LOUISA MARKOW, COURTNEY BERNHARDT & TOM PELTON, BLIND EYE TO BIG CHICKEN FREQUENT VIOLATIONS BUT FEW PENALTIES FOR MARYLAND'S POULTRY INDUSTRY 7 (Env't Integrity Project 2021), <https://environmentalintegrity.org/wp-content/uploads/2021/10/MD-Poultry-Report-10-28-21.pdf>.

A. Maryland Needs Stronger Regulations Under the Clean Water Act to Make Substantial Progress in Reducing Runoff.

Agricultural runoff is the principal source of water pollution in Maryland and specifically the Chesapeake Bay.⁸⁸ Agricultural pollution encompasses water emissions and discharges from farming practices, including irrigating farmland, over-tilling soil, and applying fertilizers that push pollution into the Chesapeake Bay and its watersheds.⁸⁹ Based upon 2015 data gathered from the Chesapeake Bay Program, agriculture runoff contributes to approximately forty-two percent of the nitrogen, fifty-five percent of the phosphorus, and sixty percent of the sediment infiltrating the Bay.⁹⁰ Farmland covers roughly forty percent of Maryland, and farming practices use manure from one-third of a billion chickens and 300,000 cows annually.⁹¹ Given farming's scope and power, it is unsurprising that agricultural runoff is the leading source of pollution in the Chesapeake Bay.⁹² As a result of the overapplication of fertilizers and manure, the Chesapeake Bay has suffered increased pollution.⁹³ These increases warrant the need for additional regulatory action which addresses agricultural runoff and its environmental impacts.⁹⁴

Despite the success of national Clean Water Act citizen suits, the Clean Water Act currently contains limitations that prevent agricultural pollution from being adequately addressed.⁹⁵ Discharge or fill of materials into United States water covered under Section 404 includes dumping soil, sand, gravel, dredged and excavation materials, or similar substances.⁹⁶

⁸⁸ *Agriculture Runoff*, CHESAPEAKE BAY PROGRAM, <https://www.chesapeakebay.net/issues/threats-to-the-bay/agricultural-runoff> (last visited Feb. 11, 2022).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ RONA KOBELL, TOM HORTON, TOM SIMPSON & ROBERT M. SUMMERS, *THE CHESAPEAKE BAY AND AGRICULTURE POLLUTION: THE PROBLEM, POSSIBLE SOLUTIONS, AND THE NEED FOR VERIFICATION 4* (Abell Found. 2015), <https://abell.org/wp-content/uploads/2022/02/env-agrunoff1215.pdf>.

⁹² *Id.*

⁹³ *See* CHESAPEAKE BAY PROGRAM, *supra* note 88.

⁹⁴ *See id.*

⁹⁵ Melissa McCoy, *Establishing Requirements to Control Nonpoint Source Pollution Under the U.S. Clean Water Act: The Role of Public Participation*, GLOB. WATER F. (Sept. 9, 2014), <https://globalwaterforum.org/2014/09/09/establishing-requirements-to-control-nonpoint-source-pollution-under-the-u-s-clean-water-act-the-role-of-public-participation/>.

⁹⁶ *Id.*; *see also* 33 U.S.C § 404.

Most routine farm practices that involve discharging or filling materials into water bodies do not require a Section 404 permit.⁹⁷ To be exempt from obtaining a Section 404 permit, farming practices must be in continuous operation and not involve procuring a wetland for agricultural practices.⁹⁸ The exemption to agricultural practices is supported by the prominent role farming plays in our nation.⁹⁹ Maryland's farmers and farming businesses are involved in a global food system that unintentionally contributes to water pollution by purchasing cheap and abundant food and using considerable amounts of concentrated manure.¹⁰⁰ Farming practices also fall outside the strict permit regulations because the Clean Water Act focuses primarily on point source pollution or pollution directly discharged into bodies of water through a pipe or similar source.¹⁰¹

In Maryland, the Maryland Department of the Environment and the Maryland Department of Agriculture regulate agricultural runoff.¹⁰² The Maryland Department of the Environment issues water control permits for poultry operations and enforces the federal Clean Water Act.¹⁰³ The Maryland Department of Agriculture ensures that farmers are following management plans.¹⁰⁴ However, the Environmental Integrity Project discovered that state oversight was ineffective, as almost two-thirds of poultry operations violated waste management requirements during inspections from 2018 to 2020.¹⁰⁵ With little supervision from state and government officials, citizen suits are unlikely to decrease agricultural pollution by themselves.¹⁰⁶

Although citizens are encouraged to communicate their views by offering public comments on Maryland Environmental Protection Department's website or attending public hearings concerning the water resource management plan, this does not guarantee a favorable response in enforcing control measures for agricultural runoff.¹⁰⁷

⁹⁷ *Overview of Clean Water Act Section 404*, ENV'T PROT. AGENCY, <https://www.epa.gov/cwa-404/overview-clean-water-act-section-404> (last updated July 28, 2022).

⁹⁸ *Id.*

⁹⁹ See Jan G. Laitos & Heidi Ruckriegle, *The Clean Water Act and The Challenge of Agriculture Pollution*, 37 VT. L. REV. 1033, 1052 (2013).

¹⁰⁰ KOBELL ET AL., *supra* note 91.

¹⁰¹ McCoy, *supra* note 95.

¹⁰² LAMM ET AL., *supra* note 87, at 3.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 3-4

¹⁰⁶ *Id.* at 4.

¹⁰⁷ McCoy, *supra* note 95.

B. Citizen Suits Disproportionately Hold the Public Responsible, Leaving Significant Gaps in Reducing Violations of the Maryland Clean Water Act.

There is uncertainty whether the citizen suit provision alone will significantly impact the prevention and mitigation of pollution in the Chesapeake Bay and Maryland bodies of water.¹⁰⁸ In Maryland, the budget for environmental regulation has decreased considerably, and government oversight has been reduced dramatically.¹⁰⁹ Citizen enforcement of Maryland's Clean Water Act provisions is more necessary than ever.¹¹⁰ Still, citizen enforcement is only effective if the state employs the resources needed to ensure everyone follows the regulations.¹¹¹

The legislative intent behind utilizing citizen suits was that multiple enforcers would provide more comprehensive and effective enforcement than one enforcer.¹¹² Before implementing the citizen suit, pollution control in Maryland was left mainly to the government.¹¹³ The new citizen suit provision now allows citizens to participate in helping enforce the state environmental statutes to assure transparency and accountability.¹¹⁴ The hope behind the recent implementation of a citizen suit provision is to increase the effectiveness of state regulations regarding the pollution of Maryland's waters.¹¹⁵

However, as Maryland's government faces a decreased budget, hiring restrictions, and staff reductions, the role of the citizen takes on a heavier burden to enforce violations.¹¹⁶ This presents the concern that state and government officials will voluntarily leave the fight to citizens to ensure Maryland Clean Water Act enforcements are carefully prosecuted.¹¹⁷ Citizen suits could successfully supplement government action by bringing actions against agencies and individuals who violate regulations but may still fail to maintain continuous regulation of Maryland's Clean Water Act provisions.¹¹⁸

¹⁰⁸ Hearing on S.B. 334, *supra* note 60.

¹⁰⁹ Jill Carter & Sara Love, *Carter and Love: Legal Rights and Clean Water*, DAILY REC. (Jan. 7, 2021), <https://thedailyrecord.com/2021/01/07/carter-and-love-legal-rights-and-clean-water/>.

¹¹⁰ *Id.*

¹¹¹ *See* Hearing on S.B. 334, *supra* note 60.

¹¹² Gail J. Robinson, *Interpreting the Citizen Suit Provision of the Clean Water Act*, 37 CASE W. RES. L. REV. 515, 519 (1987).

¹¹³ Hearing on S.B. 334, *supra* note 60.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Hearing on H.B. 76, *supra* note 71.

¹¹⁷ *See id.*

¹¹⁸ Hearing on S.B. 334, *supra* note 60.

C. Marylanders' Differing Perceptions of Citizen Suits

There are differing views regarding the role, impact, and effectiveness citizen suits will have on the community and environment.¹¹⁹ Those favoring citizen suits viewed the suit as "a critical piece of the enforcement toolset" and "helpful to drive action and policy."¹²⁰ One environmental interviewee expressed that citizen suits prove to be more effective when the industry knows citizens are keeping a careful watch, especially as government and state enforcement resources continue to decline.¹²¹ While citizen suits positively impact cleaning up the Chesapeake Bay, there are circumstances where citizen suits can be fruitless and waste significant resources for all parties involved.¹²²

Contrarily, members of the industry argue that citizen suits are as impactful as placing a single "grain of sand on the beach to make it bigger."¹²³ Citizen suits influence the timing of enforcement actions with little change to the outcome.¹²⁴ Citizen suits provide notice to the Maryland Department of the Environment, influencing them to act faster than they initially would have absent the notice.¹²⁵ Yet, industry interviewees commented that the Maryland Department of the Environment will act quickly but is "not likely to take any action that it wouldn't have taken [in the first place]."¹²⁶

The most concerning perception raised by officials is that the Maryland Department of the Environment made it difficult for citizens to attempt to bring citizen suits in the past due to the fear that others will believe they are not doing their job.¹²⁷ Regardless of the diverse views, interviewees all agreed that citizen watch groups are practical when delivering information regarding violations to the appropriate state agencies.¹²⁸

D. Judicial Relief Is Limited for Individuals Who Bring Citizen Suits

Injured plaintiffs seeking Maryland Clean Water Act citizen suit actions are restricted to the limited remedies of injunctive relief, civil

¹¹⁹ Glicksman & Huang, *supra* note 3, at 37.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Glicksman & Huang, *supra* note 3, at 37.

¹²⁵ *Id.* at 38.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 39.

penalties, and reasonable attorney or expert witness fees.¹²⁹ A successful Clean Water Act citizen suit would reinforce Maryland regulations and statutes against violators by penalizing polluters' unlawful activity and providing judicial relief.¹³⁰ However, successful plaintiffs do not receive monetary awards or remedies for extended exposure to pollution.¹³¹ Therefore, plaintiffs could still suffer the consequences of the long-term effects caused by the pollutant.¹³² Consequently, this leaves individuals or organizations with little confidence that a successful suit will lead to an impactful change in their community.¹³³

IV. SOLUTION

Maryland's failure to adequately monitor water pollution in the Chesapeake Bay can be remedied by using citizen suits to harness the power of the public spotlight to create more robust inspection processes and monitoring plans.¹³⁴ Citizens possess a powerful position in restoring the Chesapeake Bay by applying pressure to Maryland's Department of Agriculture and Maryland's Department of the Environment as a way to supplement enforcement actions and maximize resources.¹³⁵ Maryland needs to take necessary measures to strengthen compliance with federal and state clean water laws and protect the health of Maryland's residents.¹³⁶ These measures should include more robust inspections and monitoring of agricultural operations and imposing penalties for violations to protect the health of the Chesapeake Bay and Marylanders.¹³⁷

A. Citizen Suits Will Pressure Maryland Agencies to Implement More Robust Inspections and Monitoring of Agricultural Operations.

Maryland's government agencies and state regulators do not properly allocate funding, staff, or resources to consistently inspect and monitor

¹²⁹ 33 U.S.C. §§ 1365(a)(2), (d) (2012).

¹³⁰ See Hearing on H.B. 76, *supra* note 71.

¹³¹ Kaiman, *supra* note 9, at 1346.

¹³² See *id.* at 1345-46.

¹³³ *Id.*

¹³⁴ David Markell, *The Role of Citizen Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425, 430 (2010).

¹³⁵ KOBELL ET AL., *supra* note 91, at 19.

¹³⁶ LAMM ET AL., *supra* note 87, at 6.

¹³⁷ *Id.* at 6.

pollution levels.¹³⁸ Thus, citizen suits are essential to supplement enforcement actions and maximize resources.¹³⁹ While the Chesapeake Bay Program has established computer modeling programs to predict how management actions could affect the Chesapeake Bay, the models are inefficient without satisfactory data.¹⁴⁰ For example, due to insufficient staffing, the Maryland Department of the Environment has decreased agricultural farm inspections by forty percent since 2013, even as agricultural operations have increased.¹⁴¹ The lack of record-keeping for these inspections leads to inaccurate or varied data, resulting in an inability to meet environmental goals.¹⁴²

The Environmental Integrity Project examined Maryland's public records to discover that the State's oversight system for agricultural practices is unsustainable.¹⁴³ The Maryland Department of Agriculture follows an approach of trusting farmers and their independent contractors to inspect the farm for high levels of nutrients.¹⁴⁴ In other words, Maryland utilizes data directly from farmer's paper reviews of their farm's pollution discharge monitoring report without verifying the results.¹⁴⁵ Maryland should stop using paper review reports without on-site inspections to verify the data.¹⁴⁶ Far too many fraudulent paper review reports have been submitted that fail to provide realistic data or accountability to control agricultural runoff pollution and protect the Chesapeake Bay.¹⁴⁷

Aspects of this solution may need further study. One area to examine is inspection reports produced by the Maryland Department of the Environment when overseeing agricultural operations that the State considers high-risk.¹⁴⁸ The inspection reports demonstrate high rates of noncompliance with state laws and requirements regarding the water pollution control permit.¹⁴⁹ Between 2017 and 2020, eighty-four farms failed their initial routine inspections due to waste management problems and failure to keep

¹³⁸ KOBELL ET AL., *supra* note 91, at 7.

¹³⁹ *See id.*

¹⁴⁰ *Modeling*, CHESAPEAKE BAY PROGRAM., <https://www.chesapeakebay.net/what/programs/modeling> (last visited Feb. 11, 2022); *see* KOBELL ET AL., *supra* note 91, at 7.

¹⁴¹ LAMM ET AL., *supra* note 87, at 5.

¹⁴² *See* KOBELL ET AL., *supra* note 91, at 7.

¹⁴³ LAMM ET AL., *supra* note 87, at 3.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; *see* Adelman & Glicksman, *supra* note 83, at 387.

¹⁴⁶ LAMM ET AL., *supra* note 87, at 5.

¹⁴⁷ *Id.* at 3.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 5.

records.¹⁵⁰ Of those eighty-four percent, nearly half of those farms failed secondary inspections.¹⁵¹

These reports indicate the crucial need for citizen suits to develop accountability, more robust inspections, and incentives for farmers to comply with the law.¹⁵² For example, in 2016, Wicomico County, Maryland, residents formed a group to raise awareness of Concentrated Animal Feeding Operations (CAFOs) production and expansion.¹⁵³ While filing a civil suit was not a viable option in 2016, the group of citizens convinced the chicken farm to cancel its production and expansion plans.¹⁵⁴ The public has massive investment and interest in successfully restoring the Chesapeake Bay and its tributaries.¹⁵⁵ In return, the public needs to join forces and file a citizen suit to pressure Maryland government officials to create a more robust inspection and management process to ensure that restoration efforts are on the right track and working as intended.¹⁵⁶

B. Imposing and Collecting Penalties for Violations

In addition to pressuring Maryland to conduct robust inspections and increased monitoring of agricultural operations, penalties for pollution violations need to be raised and collected to deter violators from repeating offenses.¹⁵⁷ The EPA traditionally prefers a deterrence-based approach that emphasizes two elements.¹⁵⁸ First, the seriousness of the violation, and second, the recovery of any financial gain obtained by the regulated entity from violating the law.¹⁵⁹ However, the Maryland Department of the Environment's enforcement program takes a more cooperative approach that does not effectively deter intentional violators from violating the Clean Water Act and Maryland water quality laws.¹⁶⁰ Maryland should reevaluate the

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See LAMM ET AL., *supra* note 87, at 27; see also Adelman & Glicksman, *supra* note 145, at 392.

¹⁵³ Elizabeth Shwe, *Report: Majority of Poultry Farms in Md. Failed Inspections but Few Faced Penalties*, MD. MATTERS (Oct. 28, 2021), <https://www.marylandmatters.org/2021/10/28/report-majority-of-poultry-farms-in-md-failed-inspections-but-faced-few-penalties/>.

¹⁵⁴ *Id.*

¹⁵⁵ KOBELL ET AL., *supra* note 91, at 19.

¹⁵⁶ See *id.*

¹⁵⁷ Adelman & Glicksman, *supra* note 145, at 392.

¹⁵⁸ Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twent-First Century: Harnessing the Power of the Public Spotlight*, 55 ALA. L. REV. 775, 796 (2004).

¹⁵⁹ Glicksman & Huang, *supra* note 3, at 13.

¹⁶⁰ See *id.* at 34 (discussing the benefits and drawbacks of cooperative and traditional enforcement).

penalty structure to recover the economic benefit acquired by individuals in enforcement actions who violate pollution laws.¹⁶¹ For example, citizen suits can be filed in federal court to supplement the Maryland Department of the Environment's enforcement program to create maximum deterrence for violators and increase penalty recoveries.¹⁶²

Another suggestion would be for Maryland to increase penalties.¹⁶³ Maryland's maximum penalty is \$27,500 less than that of the Environmental Protection Agency.¹⁶⁴ Additionally, the Maryland Department of the Environment imposed penalties on only eight of seventy-eight farms with reoccurring violations and only collected fines from four of those eight farms.¹⁶⁵ Public records from 2019 revealed that Maryland failed to impose penalties or fines on agricultural operations that applied illegal amounts of manure to their crops.¹⁶⁶ If Maryland used a practical deterrence-based approach coupled with increased penalties, it would increase confidence that violators of the Clean Water Act and Maryland laws would be penalized.¹⁶⁷

The Environmental Protection Agency suggests that the most successful way to determine a reasonable penalty is through the economic benefits of noncompliance (BEN) computer model.¹⁶⁸ The BEN allows the Environmental Protection Agency to calculate the violator's economic benefit of noncompliance to evaluate what penalty will deter violators from repeating violations.¹⁶⁹ Maryland would benefit from using BEN computer models to adjust its penalties accordingly to ensure that violators understand that their actions come with high consequences.¹⁷⁰

Further, Maryland should establish a mandatory minimum penalty for environmental pollution violations.¹⁷¹ A mandatory minimum penalty modernizes the environmental enforcement process by creating predetermined penalties for specific violations, ultimately saving the state

¹⁶¹ *Id.* at 6.

¹⁶² *Id.*

¹⁶³ *Id.* at 18.

¹⁶⁴ *Id.* at 20. The Environmental Protection Agency has a \$37,500 maximum penalty for Clean Water Act violations, while Maryland has a \$10,000 maximum penalty for Clean Water Act violations.

¹⁶⁵ LAMM ET AL., *supra* note 87, at 6.

¹⁶⁶ *Id.* at 5.

¹⁶⁷ Glicksman & Huang, *supra* note 3, at 53; *see also* LAMM ET AL., *supra* note 87, at 6.

¹⁶⁸ Glicksman & Huang, *supra* note 3, at 43.

¹⁶⁹ ENV'T PROT. AGENCY, GUIDANCE ON CALCULATING THE ECONOMIC BENEFIT OF NONCOMPLIANCE BY FEDERAL AGENCIES (1999), <https://www.epa.gov/sites/default/files/2015-01/documents/econben20.pdf>.

¹⁷⁰ *See* Glicksman & Huang, *supra* note 3, at 43.

¹⁷¹ *Id.* at 44.

resources and time.¹⁷² This system provides transparency to the community and delivers consistent penalties unsusceptible to interference.¹⁷³ For example, New Jersey and California have successfully increased compliance by implementing mandatory minimum penalties for environmental violations.¹⁷⁴ New Jersey splits mandatory minimum penalties into two distinct categories, "serious" and "significant" violators, with mandatory minimums of \$1,000 and \$5,000.¹⁷⁵ On the other hand, California established "serious" violations at a \$3,000 minimum dependent upon the type of pollutant discharged.¹⁷⁶ Maryland legislature should implement a mandatory minimum penalty to efficiently and effectively ensure that violators are held accountable for their actions.¹⁷⁷ This, in turn, will ensure that the Maryland Department of the Environment's enforcement program will take full advantage of a deterrent-based approach to put forth an attainable effort to protect the Chesapeake Bay from pollution.¹⁷⁸

V. CONCLUSION

The Chesapeake Bay and Maryland waterways need more robust inspections and monitoring of agricultural operations to restore their health.¹⁷⁹ Implementing a citizen suit provision reflects a positive movement towards achieving Maryland's environmental goals.¹⁸⁰ However, Maryland's lack of a deterrence-based approach will allow violators of clean water laws to continue polluting the Chesapeake Bay and Maryland waterways regardless of citizen suits.¹⁸¹ By failing to implement a mandatory minimum penalty to hold individuals who violate Maryland's clean water laws

¹⁷² Rena Steinzor & Yee Huang, *Back to the Basics: An Agenda for the Maryland General Assembly to Protect the Environment* 7 (The Ctr. for Progressive Reform, Briefing Paper No. 1110, 2011),

https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2210&context=fac_pubs.

¹⁷³ *Id.*

¹⁷⁴ *Id.*; see Rechtschaffen et al., *supra* note 158, at 785; see also WILLIAM COYNE & LUKE METZGER, MANDATORY MINIMUM PENALTIES: AN EFFECTIVE TOOL FOR ENF'T OF CLEAN WATER LAWS 13 (TexPrig Educ. Fund 2004), https://publicinterestnetwork.org/wp-content/uploads/2013/03/Mandatory_Minimum_Penalties.pdf (noting that pollution violations in New Jersey decreased by eighty seven percent after enactment of mandatory minimum penalty requirements).

¹⁷⁵ Glicksman & Huang., *supra* note 3, at 44.

¹⁷⁶ Steinzor & Huang, *supra* note 172, at 7.

¹⁷⁷ See Glicksman & Huang, *supra* note 3, at 43.

¹⁷⁸ Steinzor & Huang, *supra* note 172, at 8.

¹⁷⁹ See LAMM ET AL., *supra* note 87, at 7.

¹⁸⁰ See Pelton & Nicholas, *supra* note 7.

¹⁸¹ See Glicksman & Huang, *supra* note 3, at 53; see also LAMM ET AL., *supra* note 87, at 5.

accountable, violators will continue to break these laws with no consequences.¹⁸²

It is in the best interest of Maryland to take necessary measures to strengthen compliance with federal and state clean water laws and protect the health of Maryland's waterways.¹⁸³ Citizen suits will have a powerful position in restoring the Chesapeake Bay by applying pressure to Maryland's Department of Agriculture and Maryland's Department of the Environment to supplement enforcement actions and maximize resources.¹⁸⁴ However, without robust inspection processes, monitoring plans, and minimum penalties, citizen suits will not be enough to make a lasting impact on restoring Maryland waterways and the Chesapeake Bay.

¹⁸² See Glicksman & Huang, *supra* note 3, at 6.

¹⁸³ LAMM ET AL., *supra* note 87, at 6.

¹⁸⁴ See KOBELL ET AL., *supra* note 91, at 19.

COMMENT

TURNING UP THE HEAT ON PUBLIC SCHOOL ADMINISTRATORS: WHEN WILL MARYLAND PUBLIC SCHOOLS FINALLY HAVE AIR CONDITIONING AND ADEQUATE HEATING?

*By: Leah Rowell**

I. INTRODUCTION

In 2014, the Office of Civil Rights at the United States Department of Education stated the following in a Dear Colleague letter¹:

Structurally sound and well-maintained schools can help students feel supported and valued. Students are generally better able to learn and remain engaged in instruction and teachers are better able to do their jobs, in well-maintained classrooms that are well-lit, clean, spacious, and heated and air-conditioned as needed. In contrast, *when classrooms are too hot, too cold, overcrowded, dust-filled, or poorly ventilated, students and teachers suffer.*²

In 2018, the nation watched as pictures of children in Baltimore City Public Schools sat shivering in their classrooms with winter coats and mittens,

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¹ A Dear Colleague letter provides notifications on updates from an agency as well as guidance on how to interpret regulations administered by an agency. *See, e.g., Dear Colleague Letters*, FED. STUDENT AID, <https://fsapartners.ed.gov/knowledge-center/library/resource-type/Dear%20Colleague%20Letters> (last visited Feb. 15, 2022).

² Mary Filardo, Jeffrey M. Vincent & Kevin J. Sullivan, *How Crumbling School Facilities Perpetuate Inequality*, PHI DELTA KAPPAN (Apr. 29, 2019) (emphasis added), <https://kappanonline.org/how-crumbling-school-facilities-perpetuate-inequality-filardo-vincent-sullivan/>.

struggling to stay warm.³ The Baltimore City Public Schools' Superintendent responded that many schools possess "leaky windows" and outdated heating systems that make maintenance difficult.⁴ However, this incident was not isolated.⁵ In 2021, after a year of online learning due to the coronavirus pandemic, children from twenty-four schools in Baltimore City were greeted with closed doors due to a lack of air conditioning during the first week of school.⁶ These are just two examples of the stark conditions of inadequate school facilities that Maryland students are forced to endure every day.⁷

Public school facilities represent the second largest sector of public infrastructure spending, yet it is continually underfunded.⁸ Research demonstrates that nationally, 53% of public school districts need to update or replace multiple building systems, including heating, ventilation, and air conditioning ("HVAC") systems.⁹ According to the *Impact of School Infrastructure on Learning Report*, investments in quality school infrastructure and facilities are strongly associated with improved learning outcomes.¹⁰ Prioritizing investment in school facilities increases the chances of creating quality education for all students.¹¹ The recent enactment of the Built to Learn Act and the Blueprint for Maryland's Future require rectifying decades of neglect in investment in school infrastructure and facilities to

³ John Bacon, *Outrage in Baltimore After Kids Huddle in Freezing Classrooms*, USA TODAY (Jan. 4, 2018), <https://www.usatoday.com/story/news/nation/2018/01/04/outrage-baltimore-after-kids-huddle-freezing-classrooms/1004530001/>.

⁴ *Id.*

⁵ See Lillian Reed, *About 35 Baltimore-Area Schools Without Air Conditioning Dismiss Early Amid June Heat Wave*, BALT. SUN (June 7, 2021, 10:59 PM), <https://www.baltimoresun.com/education/bs-md-schools-close-heat-20210607-20210607-2big6ph46nct3ftc435zvdfr4-story.html> (reporting thirty Baltimore City schools were closed due to high temperatures); see also *For the Third Day in a Row, Some Baltimore City Schools Were Forced to Dismiss Early Due to Lack of Air Conditioning*, WJZ 13: CBS BALT. (Sept. 15, 2021, 10:59 PM), <https://baltimore.cbslocal.com/2021/09/15/for-the-third-day-in-a-row-some-baltimore-city-schools-were-forced-to-dismiss-early-due-to-lack-of-air-conditioning/>.

⁶ Rose Wagner, *Parents Frustrated by Early Release at Baltimore City Schools Lacking Air Conditioning on First Day*, BALT. SUN (Aug. 30, 2021, 3:05 PM), <https://www.baltimoresun.com/education/bs-md-early-school-release-ac-20210830-nix3ps42ine73femjpbhltbb4-story.html>.

⁷ See *id.*; see also Bacon, *supra* note 3.

⁸ AM. SOC'Y OF CIV. ENG'RS, 2021 REPORT CARD FOR AMERICA'S INFRASTRUCTURE 118 (2021), https://infrastructurereportcard.org/wp-content/uploads/2020/12/National_IRC_2021-report.pdf.

⁹ *Id.*

¹⁰ PETER BARRETT, ALBERTO TREVES, TIGRAN SHMIS, DIEGO AMBASZ & MARIA USTINOVA, *THE IMPACT OF SCHOOL INFRASTRUCTURE ON LEARNING: A SYNTHESIS OF THE EVIDENCE* vi (Int'l Bank for Reconstruction and Dev./The World Bank ed., 2019).

¹¹ *Id.*

ensure that all of Maryland's students receive a 21st century education in safe and healthy schools.¹²

Part II of this paper will discuss why investment in school infrastructure is critical to students' success and how Maryland has historically dealt with school infrastructure.¹³ This section will also include an analysis of the Blueprint for Maryland's Future and the Built to Learn Act.¹⁴ Part III explains how Maryland's current system is inadequate to address students' needs.¹⁵ The section begins with an examination of how Maryland's crumbling school facilities reveal the State's inability to address equity implications, as well as an analysis on the Built to Learn Act's failure to emphasize maintenance concerns.¹⁶ Part IV will conclude with a discussion of possible solutions, including amending the Built to Learn Act and using litigation to force Maryland to recognize a right to adequate facilities for students.¹⁷

II. HISTORICAL DEVELOPMENT

Our nation has historically neglected the importance of investment in school infrastructure.¹⁸ There are currently around 84,000 public schools with nearly 100,000 buildings located in the United States.¹⁹ By 2026, projected student enrollment in public schools is estimated to be approximately 56.8 million.²⁰ However, in 2013, about 53% of all public schools reported a need for money for repairs, renovations, and modernizations in order to put

¹² MD. GEN. ASSEMB. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, H.B. 1, 2020 Gen. Assemb. 441st Sess., at 1 (2020) (explaining that the Built to Learn Act allows the Maryland Stadium Authority ("MSA") to issue revenue bonds to fund school construction, and the Blueprint for Maryland's Future) [hereinafter Built to Learn Act Fiscal Note]; MD. GEN. ASSEMB. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, H.B. 1300, 2020 Gen. Assemb., 441st Sess., at 1 (2020) (explaining that the Blueprint for Maryland's Future creates new funding formulas and substantially alters State policy for Maryland public schools based on the recommendations of the Commission on Innovation and Excellence) [hereinafter Blueprint for Maryland Fiscal Note].

¹³ See discussion *infra* Sections II.A, II.B.

¹⁴ See discussion *infra* Section II.C.

¹⁵ See discussion *infra* Section III.

¹⁶ See discussion *infra* Sections III.A, III.B.

¹⁷ See discussion *infra* Section IV.

¹⁸ See generally LAURA JIMENEZ, CTR. FOR AM. PROGRESS, THE CASE FOR FEDERAL FUNDING FOR SCHOOL INFRASTRUCTURE I (Feb. 12, 2019),

<https://www.americanprogress.org/wp-content/uploads/2019/02/School-Infrastructure1.pdf>.

¹⁹ AM. SOC'Y OF CIV. ENG'RS, *supra* note 8.

²⁰ *Id.*

buildings in “good overall condition.”²¹ Several years later in 2020, the United States General Accountability Office found that 41% of public school districts specifically reported issues with HVAC systems.²²

A. Investment in School Facilities Is Important as Evidence Reveals School Buildings Impact Student Health and Students’ Ability to Learn.

A growing body of research demonstrates that investment in quality school infrastructure directly correlates to improved learning outcomes and student achievement.²³ For example, studies demonstrate that students’ performance on tests decreases by 5%-10% when ventilation rates are at or below minimum standards.²⁴ Factors such as poor indoor air quality, extreme temperature fluctuations, and inadequate lighting can negatively affect student learning when failing building systems and materials contribute to the deterioration of air quality.²⁵ This can lead to issues such as mold problems and other toxins and irritants poisoning our children.²⁶

No study has been conducted in Maryland tying student achievement to investment in public school infrastructure.²⁷ However, recent data from the 2018 Maryland report card strongly substantiates studies that indicate the negative impact a lack of investment in school facilities has on student achievement.²⁸ In 2018, Maryland created a new rating scheme as a part of a new accountability system that provided information to educators, families,

²¹ STEVEN BAHR & DINAH SPARKS, U.S. DEP’T OF EDUC., CHANGES IN AMERICA’S PUBLIC SCHOOL FACILITIES: FROM SCHOOL YEAR 1998-99 TO SCHOOL YEAR 2012-13 6 (Nov. 2016), <https://nces.ed.gov/pubs2016/2016074.pdf> (defining “good overall condition” as the “facility meets all the reasonable needs for normal school performance, is most often in good condition, and generally meets some, but not all, of the characteristics of an excellent facility.”).

²² AM. SOC’Y OF CIV. ENG’RS, *supra* note 8.

²³ BARRETT ET AL., *supra* note 10, at vi; *see also* LINDSAY BAKER, CTR. FOR GREEN SCHS. AT THE U.S. GREEN BLDG. COUNCIL & HARVEY BERNSTEIN, MCGRAW HILL CONSTR., THE IMPACT OF SCHOOL BUILDINGS ON STUDENT HEALTH AND PERFORMANCE 1 (Feb. 27, 2012), https://www.usgbc.org/sites/default/files/2022-06/McGrawHill_ImpactOnHealth.pdf.

²⁴ BAKER & BERNSTEIN, *supra* note 23 (minimum ventilation standards are around 15 cubic feet per minute per student).

²⁵ *Id.* at 8.

²⁶ *Id.*

²⁷ BAKER & BERNSTEIN, *supra* note 23, at 1 (study was a generalized national study that did not specifically examine Maryland).

²⁸ *See* Liz Bowie & Talia Richman, *Maryland Releases First Star Ratings for Every Public School; 60 Percent Earn Four or Five Stars Out of Five*, BALT. SUN (Dec. 4, 2018, 12:00 PM), <https://www.baltimoresun.com/education/bs-md-star-rating-release-20181203-story.html> [<https://perma.cc/2JXM-477M>].

and the public about every public school in Maryland.²⁹ Maryland's Report Card provides information about the performance of Maryland public schools giving a star rating based on various indicators of a school's performance.³⁰ The indicators of school performance are student achievement and growth on state tests in English language arts and mathematics; student achievement on state tests in science; graduation rates; progress of English language learning students in achieving English language proficiency; student readiness for postsecondary success; and school quality and student success (including measures of chronic absenteeism and a school survey).³¹ In 2018, Carroll County's school system was ranked one of the highest performing school systems in Maryland with 95% of its schools receiving four or five stars.³² Howard County also performed extremely well, as 91% of its schools received four or five stars.³³ In comparison, more than 50% of Baltimore City Schools received either one or two stars as its ratings in 2018, with twenty-three schools receiving only one star.³⁴

Baltimore City has the oldest buildings of any school district in the State.³⁵ Numerous schools reported a need for significant system upgrades or complete building replacements.³⁶ Thus, even after accounting for additional variables known to impact student success such as students' socioeconomic backgrounds³⁷ or a high percentage of English language learners, inadequate

²⁹ *Id.*; see also MD. STATE DEP'T OF EDUC., MARYLAND REPORT CARD: MARYLAND'S ACCOUNTABILITY SYSTEM (Nov. 2019), https://reportcard.msde.maryland.gov/HelpGuides/ReportCard_Overview_2019_v4a.pdf (describing Maryland's accountability system); *Every Student Succeeds Act (ESSA)*, U.S. DEP'T OF EDUC., <https://www.ed.gov/essa?src=rn> (last visited Dec. 27, 2021) (discussing the Every Student Succeeds Act that reauthorized the Elementary and Secondary Education Act, the nation's national education law, that mandated that every state create an accountability system for public schools).

³⁰ See generally MD. STATE DEP'T OF EDUC., MARYLAND STATE DATA: 2018-2019 SCHOOL REPORT CARD, (2019), <https://reportcard.msde.maryland.gov/Graphs/##/ReportCards/ReportCardSchool/1/E/1/99/XXXX/2019>.

³¹ *Id.*

³² Bowie & Richman, *supra* note 28.

³³ *Id.*

³⁴ *Id.*

³⁵ BALT. CITY PUB. SCHS., BALTIMORE CITY PUBLIC SCHOOLS' AIR-CONDITIONING PLAN: UPDATE 1 (Sept. 2021), <https://www.baltimorecityschools.org/sites/default/files/2021-09/ACPlan-9-2-21.pdf>.

³⁶ *Id.*

³⁷ *Awareness of Socioeconomic Diversity*, YALE: POORVU CTR. FOR TEACHING AND LEARNING, <https://poorvucenter.yale.edu/SocioeconomicDiversityAwareness> (last visited Mar. 13, 2022).

facilities and failing infrastructure present an additional hurdle to increasing student achievement in Baltimore City.³⁸

B. Pulling Back the Bureaucratic Veil of the World of School Construction in Maryland

Investment in school infrastructure traditionally was a local affair.³⁹ However, following World War II, a surge of reinvestment in school construction occurred which led to the State becoming involved in financing and overseeing public-school construction for the first time.⁴⁰ The sale of State bonds was authorized to aid in counties' school construction projects, but the State required that financial assistance be contingent on the Board of Public Works' ("BPW") approval.⁴¹

The BPW is tasked with hearing and determining such matters that affect the public works of the State.⁴² The BPW is comprised of the Governor, the Comptroller, and the Treasurer.⁴³ In 1971, the Maryland General Assembly created the Public School Construction Program, which gave the BPW the ability to "determine the organization, structure, rules, regulations, and procedures" related to school construction.⁴⁴ One of the BPW's first initiatives in the vast world of school construction was the creation of the Interagency Committee on School Construction.⁴⁵

Following the creation of the Interagency Committee on School Construction in 1971, there were large gaps in Maryland's history of investment in school infrastructure.⁴⁶ After the passage of the Bridge to Excellence in Public Schools Act of 2002,⁴⁷ Maryland did not address the critical need for improvement of Maryland public schools' infrastructure and

³⁸ See BARRETT ET AL., *supra* note 10, at v-vi.

³⁹ State v. Merritt Pavilion, LLC, 230 Md. App. 597, 617, 149 A.3d 682, 693 (2016) ("Public school construction was once a local concern, but through a series of loan programs during the twentieth century, the General Assembly gradually conferred supervisory power over school construction on the Board of Public Works.").

⁴⁰ Bldg. Materials Corp. of Am. v. Bd. of Educ. of Balt. Cnty., 428 Md. 572, 587, 53 A.3d 347, 355 (2012) (citing Alan Wilner, THE MD BOARD OF PUBLIC WORKS: A HISTORY 95, 103 (1984)).

⁴¹ *Id.*

⁴² Merritt Pavilion, LLC, 230 Md. App. at 602, 149 A.3d at 684 (quoting MD. CONST. art. XII, § 1).

⁴³ *Id.*

⁴⁴ History of the Public School Construction Program, INTERAGENCY COMM'N ON SCH. CONSTR., https://iac.mdschoolconstruction.org/?page_id=255 (last visited Nov. 21, 2021).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

facilities again for another thirteen years.⁴⁸ It was only in 2018, after the national uproar concerning the conditions of Baltimore City Public Schools made national news, that the Maryland General Assembly passed the 21st Century School Facilities Act of 2018.⁴⁹ The 21st Century School Facilities Act transformed the Interagency Committee on School Construction to the Interagency Commission on School Construction (“IAC”) and also transferred several of the BPW’s powers to the IAC.⁵⁰ The IAC is now tasked with developing and approving “policies, procedures, guidelines, and regulations on State school construction allocations to local jurisdictions.”⁵¹

The IAC consists of the following members: the State Superintendent of Schools, the Secretary of Planning, the Secretary of General Services, two members of the public appointed by the Governor, two members appointed by the President of the Senate, and two members appointed by the Speaker of the House.⁵² Under the 21st Century Facilities Act, the IAC is responsible for defining what constitutes an eligible and ineligible public school construction project or capital improvement cost.⁵³ The IAC adopts regulations containing requirements and specifications needed in order to obtain approval of school building capital projects and plans.⁵⁴

In Maryland, all twenty-three counties and Baltimore City possess their own local education agency (“LEAs”).⁵⁵ For any school construction to occur, LEAs must submit a construction project or plan for the review and approval of the State-controlled IAC.⁵⁶ LEAs are also required to develop and submit a facilities master plan on an annual basis to the IAC that includes an analysis of future school facility needs based on the current condition of school buildings and the projected enrollment.⁵⁷ The IAC may approve projects that comprise 75% of the preliminary school construction budget.⁵⁸ However, projects that comprise 90% of the school construction allocation must be approved by the presiding officers and budget committees of the

⁴⁸ *Id.*

⁴⁹ *Id.* (The 21st Century School Facilities Act of 2018 codified many of the recommendations of the 21st Century Schools Facilities Commission that was responsible for reviewing all aspects of the school facilities process in Maryland schools).

⁵⁰ *History of the Public School Construction Program*, *supra* note 44.

⁵¹ MD. CODE ANN., EDUC. § 5-302 (West 2018).

⁵² *Id.*

⁵³ MD. CODE ANN., EDUC. § 5-303 (West 2021).

⁵⁴ *Id.*

⁵⁵ See *Maryland State Department of Education Directory*, MD. STATE DEP’T OF EDUC., <https://www.marylandpublicschools.org/about/Pages/directory.aspx> (last visited Feb. 3, 2023) (listing local educational agencies in Maryland); see also *Glossary of Education Terms*, EDSOURCE, <https://edsources.org/glossary> (last visited Feb. 3, 2022) (defining LEA).

⁵⁶ MD. CODE ANN., EDUC. § 5-304 (West 2018).

⁵⁷ See *Built to Learn Act Fiscal Note*, *supra* note 12, at 20.

⁵⁸ MD. CODE ANN., EDUC. § 5-304(b)(2) (West 2018).

General Assembly as well as the Department of Legislative Services.⁵⁹ Although LEAs may appeal the IAC's decisions,⁶⁰ the IAC is often the final decision maker for local public-school construction.

The IAC established the Educational Facilities Sufficiency standards to assist LEAs as they seek to obtain approval of their capital improvement projects.⁶¹ The Educational Facilities Sufficiency Standards sets minimum levels for the physical condition and educational suitability of public school facilities.⁶² For example, the Educational Facilities Standards provide that building systems must be "in working order and capable of being properly maintained" and defined building systems to include roofs, plumbing, telephone systems, electrical, and heating and cooling systems.⁶³ It also provides that each classroom "shall have a heating, ventilation and air conditioning (HVAC) system" that is able to maintain a temperature between 68 and 75 degrees Fahrenheit.⁶⁴ The IAC assesses whether these standards are met through the Annual Report on Maintenance of Maryland Public School Buildings, also known as the Maintenance Effectiveness Assessment Results report.⁶⁵ The report provides an overview of maintenance assessments conducted at selected schools in each school system.⁶⁶ School systems could receive one of the following rating levels under the assessment: superior, good, adequate, not adequate, and poor.⁶⁷ Failing

⁵⁹ MD. CODE ANN., EDUC. § 5-304(b)(4) (West 2018).

⁶⁰ MD. CODE ANN., EDUC. § 5-304(b)(3) (West 2018).

⁶¹ MD. CODE ANN., EDUC. § 5-303(d) (West 2021); *see also* MD. PUB. SCH. FACILITIES EDUC. SUFFICIENCY STANDARDS (IAC May 31, 2018), https://iac.mdschoolconstruction.org/wp-content/uploads/2020/12/Md.-Educ.-Sufficiency-Standards_Adopted_180531-1.pdf.

⁶² MD. PUB. SCH. FACILITIES EDUC. SUFFICIENCY STANDARDS, *supra* note 61.

⁶³ *Id.* at 2.

⁶⁴ *Id.* at 6.

⁶⁵ *See* INTERAGENCY COMM'N ON SCH. CONSTR., FY 2021 ANNUAL REPORT: MAINTENANCE OF MARYLAND'S PUBLIC SCHOOL BUILDINGS, MD. PUB. SCH. CONSTR. 8 (Oct. 1, 2021), <https://iac.mdschoolconstruction.org/wp-content/uploads/2021/09/FY21-Annual-Maintenance-Report.pdf>.

⁶⁶ *Id.* at 4.

⁶⁷ *Id.* at 10; *see also* INTERAGENCY COMM'N ON SCH. CONSTR., REPORT ON THE STATUS OF AIR CONDITIONING IN MARYLAND'S SCHOOL FACILITIES 9 (Oct. 8, 2021), <https://iac.mdschoolconstruction.org/wp-content/uploads/2021/10/Report-on-the-Status-of-Air-Conditioning-in-Marylands-School-Facilities.pdf> (A school system's facility could also be flagged as having a minor deficiency, which occurs when a building system or component poses a "potential threat to the life, safety, or health of occupants, the delivery of educational programs or services, or the expected lifespan of the facility." While a "poor rating" is given if the system is "nonfunctional or unsafe to operate; there is evidence of extensive signs of corrosion, collapsed or missing filters, leaking, or activated alarm indicators, there is evidence of issues requiring extensive repairs or replacement; or there is evidence of consistent sub-par maintenance projects.") [hereinafter REPORT ON STATUS OF AIR CONDITIONING].

ratings include: not adequate, poor, or a minor deficiency rating.⁶⁸ Most money allocated to routine maintenance comes from an LEA's operating budget.⁶⁹ An operating budget is also used to pay for teachers, staff, administration materials, and other day-to-day educational necessities.⁷⁰ In recent years, several schools have received failing ratings on the Maintenance Effectiveness Assessment Results report due to inadequate routine maintenance.⁷¹ This illustrates that the standards set forth in the Educational Facilities Sufficiency Standards are not achieved in all of Maryland's public schools as of 2021.⁷²

Maryland recognized that despite recent attempts to streamline the process of school construction and facilities improvement in recent years, school facilities nevertheless are inadequately equipped to provide suitable learning environments for students in the 21st century.⁷³ Maryland's General Assembly sought to solve the problem by passing two monumental bills that aimed to address some of these persisting issues.⁷⁴

C. *Maryland's Quest to Create 21st Century Schools*

In 2020, the Maryland General Assembly implemented the Blueprint for Maryland's Future—a landmark bill that substantially altered the formula for State aid and State policy for public schools.⁷⁵ This bill incorporated the recommendations of the Commission on Innovation and Excellence, also known as the Kirwan Commission.⁷⁶ The General Assembly created the

⁶⁸ REPORT ON STATUS OF AIR CONDITIONING, *supra* note 67, at 9 (A “not adequate” rating can be given even if a system is not functioning as intended, there are “significant” signs of corrosion, collapsed or missing filters, leaking or activated alarm indicators, or evidence of issues requiring “significant repairs or replacement.”).

⁶⁹ *School Conditions and Educational Equity in Baltimore City*, BLOOMBERG CTR. GOV'T EXCELLENCE JOHNS HOPKINS UNIV. (Sept. 19, 2022), <https://gisanddata.maps.arcgis.com/apps/Cascade/index.html?appid=3ddf7ded140d4dc38bedc27d6c0e44f7>.

⁷⁰ Filardo et al., *supra* note 2.

⁷¹ See REPORT ON STATUS OF AIR CONDITIONING, *supra* note 67, at 9-10.

⁷² Bacon, *supra* note 3; see also Rachel Cohen, *Public School Buildings Are Falling Apart, and Students Are Suffering for It*, WASH. POST (Jan. 8, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/01/08/public-school-buildings-are-falling-apart-and-students-are-suffering-for-it/>.

⁷³ See *supra* note 12 and accompanying text.

⁷⁴ See discussion *infra* Section II.C.

⁷⁵ See Blueprint for Maryland Fiscal Note, *supra* note 12, at 1; see also H.B. 1372, 2021 Gen. Assemb., 442nd Sess. (Md. 2021) (updating bill to extend timelines and to include new provisions to address COVID-19 related issues).

⁷⁶ Md. State Dep't of Educ., *What is the Blueprint for Maryland's Future?*, BLUEPRINT FOR MD.'S FUTURE, <https://blueprint.marylandpublicschools.org/about/> (last visited Mar. 14, 2022).

Kirwan Commission to review the current funding formula for Maryland schools and develop policies to help Maryland schools prepare students for career and college readiness in the 21st century.⁷⁷ The Kirwan Commission recommended the Blueprint for Maryland's Future to focus on the following areas: early childhood education; high quality teachers and leaders; college and career readiness pathways; resources to ensure all students are successful, and governance and accountability measures.⁷⁸ However, Maryland's legislators understood that in order to create 21st century schools in Maryland, investment in school infrastructure and facilities was also necessary.⁷⁹ Thus, the Built to Learn Act, which aims to improve Maryland's schools' infrastructure and facilities, was passed, contingent on the Blueprint for Maryland's Future's enactment.⁸⁰

The Built to Learn Act codified a constitutional amendment from the 2018 general election that created the Education Trust Fund ("ETF") lockbox.⁸¹ The ETF lockbox is a fund supported by commercial gaming revenues in Maryland and is specifically dedicated to funding public education.⁸² Under the Built to Learn Act, the Maryland Stadium Authority is authorized to issue up to \$2.2 billion, beginning in fiscal year 2022, in revenue bonds supported by annual payments from the ETF for public school construction projects.⁸³ Projects funded under the bill must still be approved by the IAC.⁸⁴ The bill also created the Public School Facilities Priority Fund which provides State funds to address school facility needs in local jurisdictions which suffer from severe facility issues.⁸⁵ However, in the 2021 legislative session, a revised version of the Built to Learn Act was passed that specified the IAC must give priority in awarding grants to schools based on

⁷⁷ MD. GEN. ASSEMB. DEP'T OF LEGIS. SERVS., OVERVIEW OF THE MD. COMM'N ON INNOVATION AND EXCELLENCE IN EDUC. FINAL RECOMMENDATIONS, H.B. 1, 2020 Gen. Assemb., 441st Sess., at 1 (2020).

⁷⁸ *Priority Issue: The Blueprint for Maryland's Future*, MD. ASS'N BDS. EDUC., <https://www.mabe.org/adequacy-funding/> (last visited Nov. 3, 2021); *see id.*

⁷⁹ *See* MD. GEN. ASSEMB. DEP'T OF LEGIS. SERVS., OVERVIEW OF THE MD. COMM'N ON INNOVATION AND EXCELLENCE IN EDUC. FINAL RECOMMENDATIONS, H.B. 1, 2020 Gen. Assemb., 441st Sess., at 1 (2020) (Built to Learn Act was contingent on the passage of the Blueprint for Maryland's Future).

⁸⁰ Built to Learn Act Fiscal Note, *supra* note 12, at 1.

⁸¹ *Id.* at 2; *see also* MD. CONST. art. XIX, § 1 (Built to Learn Act codified a constitutional amendment that dedicated certain revenue from video lotteries in education as supplementary funding).

⁸² Built to Learn Act Fiscal Note, *supra* note 12, at 10.

⁸³ *Id.* at 1.

⁸⁴ *Id.* at 3.

⁸⁵ *Id.* at 8.

the severity of issues in the school, including: air conditioning, heating, and indoor air quality.⁸⁶

Maryland has passed several initiatives to address decades of lack of investment in school facilities.⁸⁷ For example, in 2017 Baltimore City devised an Air-Conditioning Plan to provide seventy-six schools in the district with air conditioning.⁸⁸ As of September 2021, Baltimore City has made significant progress as only twenty-four schools currently lack air conditioning.⁸⁹

As Maryland continues to solve the problems caused by a lack of investment in school facilities, an examination must occur as to whether these solutions adequately resolve the issues of uninhabitable learning environments. In addition, an analysis of whether proposals such as the Built to Learn Act truly accomplish the goal of creating 21st century schools for Maryland students must also occur.

III. ISSUE/PROBLEM

Although Maryland has taken initial steps in creating safe and healthy schools for Maryland's children in the last several years,⁹⁰ as of October 2020, fifty school facilities in the State, half of which are located in Baltimore City, still did not possess any air conditioning.⁹¹ And although proper air conditioning is critical for schools during Maryland's sweltering months, schools lose more instructional days due to a lack of heating in Maryland.⁹² Moreover, proper facilities are required now more than ever as school

⁸⁶ S.B. 551, 2021 Gen. Assemb., 442nd Sess. (Md. 2021).

⁸⁷ See INTERAGENCY COMM'N ON SCH. CONSTR., SUMMARY OF ACTIVE IAC PROGRAMS, (Sept. 29, 2021), <https://iac.mdschoolconstruction.org/wp-content/uploads/2021/09/Summary-of-PSCP-Programs-Initiatives-Revised-9.29.21.pdf> (Built to Learn Act allows the Maryland Stadium Authority to issue revenue bonds to fund school construction projects and provides for MSA to manage projects. The Healthy School Facilities Fund is used to address the "health and safety needs" in public school facilities. The Capital Improvement Program is also used to provide State funding to capital maintenance public school construction projects however, this program differs from the Built to Learn Act as the Capital Improvement Program does not provide funding through special revenue bonds issued by the MSA and the funding allocation process is different. Healthy School Facilities Fund provides grants to public schools for capital projects that will improve health and safety issues in school facilities.) [hereinafter SUMMARY OF ACTIVE IAC PROGRAMS].

⁸⁸ BALTIMORE CITY PUBLIC SCHOOLS' AIR-CONDITIONING PLAN: UPDATE, *supra* note 35.

⁸⁹ *Id.*

⁹⁰ See SUMMARY OF ACTIVE IAC PROGRAMS, *supra* note 87.

⁹¹ REPORT ON STATUS OF AIR CONDITIONING, *supra* note 67, at 3.

⁹² BALTIMORE CITY PUBLIC SCHOOLS' AIR-CONDITIONING PLAN: UPDATE, *supra* note 35, at 1.

systems nationally struggle to provide proper equipment in classrooms to ensure continued learning in the age of the COVID-19 pandemic.⁹³

Continual investment in school infrastructure and facilities is essential to cultivating student achievement.⁹⁴ However, poor and low-wealth districts are typically unable to adequately maintain their buildings.⁹⁵ Students who attend schools with crumbling facilities are often forced to lose out on important instructional days which results in the widening of the achievement gap for low-income and minority students.⁹⁶ Further, maintenance problems are often deferred, thereby increasing the costs of properly fixing these facilities for future generations.⁹⁷ These issues present some of the challenges unaddressed by the current Built to Learn Act and Blueprint for Maryland's Future.

A. Maryland's Deteriorating Schools Facilities Reveal the State's Inability to Address Equity Implications.

Horace Mann once stated that education is a "great equalizer of the conditions of men."⁹⁸ However, a plethora of factors curtail this ideal from becoming a reality for many students.⁹⁹ Insufficient investment in school infrastructure and facilities represents one of these factors.¹⁰⁰ Growing empirical research has proven that poor building conditions are directly linked to students' academic achievement and physical well-being.¹⁰¹

⁹³ AM. SOC'Y OF CIV. ENG'RS, *supra* note 8, at 119.

⁹⁴ BARRETT ET AL., *supra* note 10, at v-vii.

⁹⁵ Filardo et al., *supra* note 2.

⁹⁶ *School Conditions and Educational Equity in Baltimore City*, *supra* note 69; see also discussion *infra* Section III.A.i.

⁹⁷ Richard C. Hunter, *The Public School Infrastructure Problem: Deteriorating Buildings and Deferred Maintenance*, ASS'N SCH. BUS. AFFS. INT'L 12 (Feb. 2009), <https://files.eric.ed.gov/fulltext/EJ918584.pdf>.

⁹⁸ Thomas B. Edsall, *Is Education No Longer the 'Great Equalizer'?*, N.Y. TIMES: OPINION (June 23, 2021), <https://www.nytimes.com/2021/06/23/opinion/education-poverty-intervention.html>.

⁹⁹ See Sonja Ralston Elder, *Enforcing Public Educational Rights Via a Private Right of Action*, 1 DUKE F. FOR L. & SOC. CHANGE 137, 145 (2009) (identifying high turnover among teachers, inability to purchase instructional materials, and lower teacher salaries are all factors associated with low-achieving schools); see also David Earl Hale, *Factors that Contribute to Student Achievement: A Case Study of one High School* (May 2015) (Ph.D. dissertation, University of Tennessee at Chattanooga) (on file with author) (identifying high absenteeism, lack of a two-parent family household and low socio-economic status as three factors that impacted student success).

¹⁰⁰ BARRETT ET AL., *supra* note 10, at v-vii.

¹⁰¹ Corsica D. Smith, *Continued Disparities in School Facilities: Analyzing Brown v. Board of Education's Singular Approach to Quality Education*, 3 TENN. J. RACE, GENDER & SOC. JUST. 39, 56 (2014).

Researchers noted that there was a five to seventeen percentile point difference in student achievement between students who attended schools in above-standard buildings compared with students who attended schools in substandard buildings.¹⁰² Los Angeles Unified School District for instance, found that investment in improvements that raised a school's facility's overall environmental compliance rating from "worst" to "best" led to a staggering thirty-six point average increase in a school's Academic Performance Index.¹⁰³

Yet, funding has not historically been equally distributed between affluent, predominately white districts and low-income, predominantly minority districts.¹⁰⁴ In a national study of more than 146,000 schools, researchers found that poor communities whose facilities required the most attention typically receive the least amount of funding compared to facility improvement projects located in high wealth zip codes, who received more than three times the capital investment of schools within the lowest-wealth zip codes.¹⁰⁵ "These differences in funding mean that students from affluent districts are more likely to attend school in bright, comfortable, and healthy facilities, while students in poorer districts are likely to attend school in dilapidated, obsolete, and unhealthy facilities that pose substantial obstacles to learning and overall student well-being."¹⁰⁶ Although Maryland's recent developments in passing the Built to Learn Act and the continuing development of the IAC has led to an increase in spending on construction, maintenance, and renovation for Maryland's schools, there remains a disparity in the access to sufficient resources for adequate facilities across racial and socio-economic groups.¹⁰⁷

i. Deteriorating Facilities Result in a Loss of Key Instructional Days for Students.

Poor school conditions lead to several obstacles like absenteeism, lower test scores, lower student achievement, asthma attacks, and lower

¹⁰² Filardo et al., *supra* note 2.

¹⁰³ *Id.* (citing Jack Buckley, Mark Schneider & Yi Shang, *LAUSD School Facilities and Academic Performance*, 1, 4 (Jan. 2004), https://www.researchgate.net/publication/228510814_LAUSD_school_facilities_and_academic_performance).

¹⁰⁴ Smith, *supra* note 101, at 54-55 (citing Mary W. Filardo et al., *Growth and Disparity: A Decade of U.S. Pub. Sch. Constr.*, BLDG. EDUC. SUCCESS TOGETHER at 17-24 (Oct. 2006), <http://www.21csf.org/csf-home/publications/BEST-Growth-Disparity-2006.pdf>).

¹⁰⁵ Filardo et al., *supra* note 2 (citing Filardo et al., *supra* note 104, at 12).

¹⁰⁶ Filardo et al., *supra* note 2.

¹⁰⁷ *School Conditions and Educational Equity in Baltimore City*, *supra* note 69.

teacher retention.¹⁰⁸ Baltimore City's school district is one of the oldest school systems in the State where over three quarters of the students are Black, and more than half come from low-income families.¹⁰⁹ Numerous buildings within the Baltimore City school district need significant facility upgrades or complete building replacements.¹¹⁰ During the 2018-2019 school year, Baltimore City Public Schools collectively lost more than 500,000 school instructional hours.¹¹¹ Yet in the last five years, more than 179,000 school days were lost due to problems with heating and cooling systems.¹¹² This loss of instructional time has a clear impact on student achievement.¹¹³ More than half of the lost school time due to inadequate school facilities occurred in Baltimore City Public Schools that received a one or two-star rating on their Maryland report card.¹¹⁴

Local school districts are typically responsible for the majority of their capital facilities costs, which often results in low-wealth districts being frequently unable to adequately maintain their buildings and grounds.¹¹⁵ Inadequate funding often means that critical facilities, like HVAC systems, are often repaired or patched, or school districts are resigned to using window units, a cheaper approach, instead of replacing HVAC systems.¹¹⁶ These "solutions" are often merely a band-aid on the problem, as cheaper remedies like installing window units instead of replacing HVAC systems are often more difficult to maintain.¹¹⁷ Yet, these schools are not being equipped with

¹⁰⁸ *Id.*

¹⁰⁹ *A New Tool to Measure HVAC-Related School Closures in Baltimore*, JHU CTR. FOR APPLIED PUB. RSCH., <https://appliedresearch.jhu.edu/a-new-tool-to-measure-hvac-related-school-closures-in-baltimore/> (last visited Jan. 3, 2022) [<https://web.archive.org/web/20210723200047/https://appliedresearch.jhu.edu/a-new-tool-to-measure-hvac-related-school-closures-in-baltimore/>].

¹¹⁰ BALTIMORE CITY PUBLIC SCHOOLS' AIR-CONDITIONING PLAN: UPDATE, *supra* note 35.

¹¹¹ *A New Tool to Measure HVAC-Related School Closures in Baltimore*, *supra* note 109; *see also State Education Practices (SEP)*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/statereform/tab5_14.asp (last visited Mar. 14, 2022) (noting that there are 1,080 hours in instructional times per school year and 1,170 hours in instructional times for public high schools). Students at Baltimore City Public Schools lost an aggregate amount of 500,000 hours in school instructional time. *School Conditions and Educational Equity in Baltimore City*, *supra* note 69.

¹¹² *School Conditions and Educational Equity in Baltimore City*, *supra* note 69; *see also State Education Practices (SEP)*, *supra* note 111 (stating that Maryland schools had 180 instructional days in 2018). Over the last five years, the amount of school days lost by various schools in the Baltimore City Public Schools System totaled over 179,000 days. *School Conditions and Educational Equity in Baltimore City*, *supra* note 69.

¹¹³ *School Conditions and Educational Equity in Baltimore City*, *supra* note 69.

¹¹⁴ *Id.*

¹¹⁵ Filardo et al., *supra* note 2.

¹¹⁶ *School Conditions and Educational Equity in Baltimore City*, *supra* note 69.

¹¹⁷ *Id.*

new HVAC systems as sufficient funds were not available to install the needed central HVAC systems in all of its buildings, but the district was resigned to use vertical package units (VPUs) instead.¹¹⁸ While VPUs meet the necessary building codes and are cost-effective, the United States Department of Environmental Protection Agency recommends that central HVAC systems should be used instead of unit ventilators¹¹⁹ as it is more difficult to properly maintain unit ventilators over time and these types of units present additional risks for moisture problems.¹²⁰ Moreover, from September 2018 to September 2019, school staff from over 100 schools in Baltimore City made a total of 736 complaints related to HVAC systems to the Baltimore City School's facilities team.¹²¹ Baltimore City hails their significant progress as only twenty-one schools require air conditioning to be installed as of September 2021.¹²² However, the use of VPUs and the backlog of facility complaints demonstrates that it is unclear whether these quick-fix solutions go far enough in adequately addressing facilities' issues.¹²³

¹¹⁸ BALTIMORE CITY PUBLIC SCHOOLS' AIR-CONDITIONING PLAN: UPDATE, *supra* note 35; see, e.g., *Appliance and Equipment Standards Rulemakings and Notices*, U.S. DEP'T OF ENERGY,

https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=30 (last visited Mar. 14, 2022) (defining a single package vertical air conditioner pump as an air-cooled commercial package air conditioning and heating equipment piece that is an "encased combination of cooling and optional heating components"). See also *Product Catalog: Vertical Classroom Unit Ventilator: 750 CFM to 1500 CFM*, TRANE 1, 3 (Feb. 2021), https://www.trane.com/content/dam/Trane/Commercial/global/products-systems/equipment/terminal-devices/unit-ventilators/vuve-vertical-classroom/UV-PRC003T-EN_02062021.pdf (explaining schools choose classroom unit ventilators due to their ability to heat, cool and ventilate and their small footprint).

¹¹⁹ See *Product Catalog: Vertical Classroom Unit Ventilator: 750 CFM to 1500 CFM*, *supra* note 118 (stating a vertical package unit is a type of unit ventilator).

¹²⁰ *Heating, Ventilation and Air-Conditioning Systems, Part of Indoor Air Quality Design Tools for Schools*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/iaq-schools/heating-ventilation-and-air-conditioning-systems-part-indoor-air-quality-design-tools> (last visited Dec. 16, 2021).

¹²¹ Elizabeth Shwe, *Only Two Baltimore City School Buildings Visited by State Inspectors This Year*, MD. MATTERS (Sept. 10, 2020), <https://www.marylandmatters.org/2020/09/10/only-two-baltimore-city-school-buildings-visited-by-state-inspectors-this-year/> (citing *School Conditions and Educational Equity in Baltimore City*, *supra* note 69).

¹²² *Baltimore City Public Schools' Air-Conditioning Plan: Update*, *supra* note 35.

¹²³ See *School Conditions and Educational Equity in Baltimore City*, *supra* note 69.

ii. **The Implications of Disparate Treatment: The Racial Gap**

Despite Maryland's recent progress in the investment of school facilities and infrastructure, the Built to Learn Act and the Blueprint for Maryland's Future fail to consider the implications caused by a historical lack of investment in minority majority and low-socioeconomic school districts.¹²⁴ For example, in fiscal year 2021, the IAC conducted the Annual Report on Maintenance of Maryland Public School Buildings.¹²⁵ The report identified ninety-seven schools in Maryland that received failing ratings for their HVAC systems.¹²⁶ Around 268 schools in total were assessed for the Maintenance Assessments Report, yet out of the ninety-seven schools that received a failing rating for their HVAC system, 35% of Baltimore City schools received a failing rating of not adequate or poor while, 40% of Prince George's County Schools received a failing rating.¹²⁷ Moreover, 60% of schools assessed in Prince George's County received a minor deficiency.¹²⁸

School districts like Baltimore City and Prince George's County, both of which possess a high percentage of minority students and large groups of students from low-socioeconomic backgrounds, struggle to possess adequate facilities for students.¹²⁹ The Built to Learn Act provides that the IAC must give priority in awarding grants for construction and capital improvement projects to schools based on the severity of issues in the school including: air conditioning; heating; indoor air quality; mold remediation; temperature regulations; plumbing; windows; roofs; or any additional issue in the school severe enough that would result in the school's closure.¹³⁰ Yet, neither the

¹²⁴ See H.B. 1, 2020 Gen. Assemb., 441st Sess. (Md. 2020). See H.B. 1300, 2020 Gen. Assemb., 441st Sess. (Md. 2020).

¹²⁵ INTERAGENCY COMMISSION ON SCHOOL CONSTRUCTION, *supra* note 65, at 6.

¹²⁶ *Id.* at 21.

¹²⁷ *Id.* at 21, 131.

¹²⁸ *Id.* at 129-30.

¹²⁹ *City Schools at a Glance*, BALT. CITY PUB. SCHS.,

<https://www.baltimorecityschools.org/district-overview> (last visited Jan. 5, 2022) (noting that in the 2020-2021 academic school year, African American students made up 75.7% of the student population while Hispanic/Latino students comprised 14.2% of the student population in the Baltimore City Public School System and around 58% of the student population is low income); *Facts and Figures*, PRINCE GEORGE'S CNTY. PUB. SCH., <https://www.pgcps.org/about-pgcps/facts-and-figures> (Sept. 30, 2020) (noting that in Prince George's County Public School System, around 55.32% of the student population is Black or African American while 36.46% is Hispanic or Latino and students on free and reduced meals, an indicator of low-income status, is 66.46% of the student population); see also *School Conditions and Educational Equity in Baltimore City*, *supra* note 69.

¹³⁰ S.B. 551, 2021 Gen. Assemb., 442nd Sess. (Md. 2021) (This bill is the enacted 21st Century School Facilities Act and Built to Learn Act—Revisions).

Built to Learn Act nor the Blueprint for Maryland’s Future accounts for the inequalities created due to a historical lack of investment in school infrastructure and facilities in low-income and high minority school districts.¹³¹ Investment in more affluent school districts tend to go towards enhancements, such as science labs and performing arts centers, while investments in schools serving low-income, minority students are regularly used for overdue repairs.¹³² “Inadequate facilities compound the disparate academic problems such students experience, forcing them to fall behind their peers and increase the academic gap.”¹³³ Thus, a major deficiency with the Built to Learn Act and the Blueprint for Maryland’s Future is their inability to address the inequalities created by lost instructional days or the high amount of students forced to try to concentrate in classrooms with “failing HVAC systems.”

a. The Built to Learn Act Is Ineffective in Achieving Its True Goal Due to its Inability to Prioritize Routine and Preventive Maintenance.

Another critical piece of the puzzle that is missing from the Built to Learn Act is an emphasis on routine and preventive maintenance.¹³⁴ The Built to Learn Act provides up to \$2.2 billion in revenue bonds, issued by the Maryland Stadium Authority, for school construction project funding.¹³⁵ Capital maintenance and systemic renovation projects used to replace or upgrade single building systems, like HVAC systems, plumbing, electrical, or building envelopes, are eligible to receive the special revenue bonds under the School Facilities Priority Fund, established under the Built to Learn Act.¹³⁶ However, these projects are distinct from routine maintenance activities and repairs, which are typically funded through a LEA’s local operating budget.¹³⁷ Thus, a major deficiency in the current Built to Learn Act is its inability to equip local education agencies with the necessary tools to both replace and maintain facilities through sufficient funds for routine and preventive maintenance.

Capital maintenance projects or systemic renovations aim to extend the “useful life” of a school through improving major building systems.¹³⁸ Routine maintenance is a critical element in the successful extension of the

¹³¹ *See id.*

¹³² Smith, *supra* note 101, at 55.

¹³³ *Id.* at 58.

¹³⁴ *See* H.B. 1, 2020 Gen. Assemb., 441st Sess. (Md. 2020).

¹³⁵ INTERAGENCY COMMISSION ON SCHOOL CONSTRUCTION, *supra* note 65, at 1.

¹³⁶ *Id.* at 1-2.

¹³⁷ *Id.* at 2.

¹³⁸ *Id.* at 1.

“useful life” of facilities.¹³⁹ In the Annual Report on Maintenance of Public School Buildings, the IAC notes that “[e]very facility requires maintenance on a virtually ongoing basis in order to ensure the continued effectiveness of the facility in supporting the delivery of programs and services; to achieve the full expected lifespans of the facility and its components; and to ensure that the facility remains fiscally sustainable.”¹⁴⁰ Studies have found that large cities tend to have a higher percentage of deteriorating public school buildings, often citing insufficient funding and deferred maintenance, which ultimately requires exorbitant sums to bring buildings up to acceptable standards.¹⁴¹ For example, Baltimore City reported that its school district has a \$5 billion backlog in maintenance and repairs.¹⁴²

A standard practice utilized by school districts is to spend 3% of what it would cost to replace school buildings on preventive and routine maintenance.¹⁴³ Yet, the Baltimore City Public School System spends only \$25 million or 0.5% of the operating budget on maintenance.¹⁴⁴ This amount is devoted to maintenance and repairs, and it is less than half of what is spent by Baltimore County Public Schools.¹⁴⁵

Baltimore City is underfunded by approximately \$358 million every year.¹⁴⁶ When older or poorer school districts lack the requisite capital funding needed to resolve maintenance issues, school districts are often forced to make expensive and short-term repairs out of their operating budgets instead, which often stretches the budget past its limits.¹⁴⁷ This common practice illustrates a critical issue as school districts simply defer maintenance, placing the burden on future generations to manage.¹⁴⁸

Under the current Built to Learn Act, routine maintenance is only mentioned in two contexts.¹⁴⁹ In the first context, the Built to Learn Act provides that the IAC may adopt requirements to create a standardized statewide computerized maintenance management system to track facilities management work orders.¹⁵⁰ While in the second instance, the Act provides that the IAC shall require local education agencies to adopt, implement, and

¹³⁹ *Id.*

¹⁴⁰ INTERAGENCY COMMISSION ON SCHOOL CONSTRUCTION, *supra* note 65, at 7.

¹⁴¹ Hunter, *supra* note 97, at 12.

¹⁴² *Focus on High Schools*, BALT. CITY PUB. SCHS., <https://www.baltimorecityschools.org/focus-high-schools> (last visited Jan. 5, 2022).

¹⁴³ *School Conditions and Educational Equity in Baltimore City*, *supra* note 69.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Filardo et al., *supra* note 2.

¹⁴⁸ Hunter, *supra* note 97, at 12.

¹⁴⁹ H.B. 1, 2020 Gen. Assemb., 441st Sess. (Md. 2020).

¹⁵⁰ *Id.*

periodically update “comprehensive maintenance plans and preventive maintenance plans.”¹⁵¹ Preventive and reactive maintenance on a continual basis, in addition to necessary capital maintenance, creates a highly effective local educational agency.¹⁵² The Built to Learn Act’s inability to emphasize the importance of routine and preventive maintenance and to assist in providing the requisite funds to do so presents an enormous issue.¹⁵³ Without sufficient funding, LEAs will continually be forced to defer necessary routine maintenance repairs as they compete to pay for educational programs.¹⁵⁴ Thus, when sufficient funding is not allocated for routine and preventive maintenance and repairs, the cost of capital projects increases and maintenance problems are compiled due to years of deferral and neglect.¹⁵⁵

IV. SOLUTION

Adequate and equitable funding of school infrastructure is a multifaceted policy challenge that requires innovative solutions, some of which have been recently proposed by the Maryland General Assembly.¹⁵⁶ On its face, it appears that Maryland is chipping away at the problem, yet these solutions are dependent on state administrators’ willingness to see these projects come to fruition within a reasonable period of time. These solutions are also dependent on the political agendas of current legislators and their desire to prioritize the education and safety of Maryland’s children.

This comment proposes two solutions. First, empowering students, parents, and concerned community members to utilize the litigation process as a means to hold school administrators and state leaders accountable and to obtain a means of redress for the decades of neglect in investment in infrastructure.¹⁵⁷ Second, amending the Built to Learn Act to include an emphasis on maintenance by providing additional funds for routine and preventive maintenance.¹⁵⁸

¹⁵¹ *Id.*

¹⁵² INTERAGENCY COMMISSION ON SCHOOL CONSTRUCTION, *supra* note 65, at 7.

¹⁵³ *See id.* (explaining that there are numerous preventive and reactive maintenance activities that must be performed in order to keep facilities in good condition that require a sufficient capital maintenance budget); *see also* Built to Learn Act Fiscal Note, *supra* note 12, at 67 (2020) (explaining that the Built to Learn Act allows the IAC to include in its regulations a requirement for LEAs to use a standard statewide computerized maintenance management system but fails to mention routine or preventive maintenance).

¹⁵⁴ *See* Hunter, *supra* note 97.

¹⁵⁵ *See id.*

¹⁵⁶ *See* discussion *supra* Section II.C.

¹⁵⁷ *See infra* Section IV.A.

¹⁵⁸ *See infra* Section IV.B.

A. Empowerment Through Litigation—Providing a Tool for Parents and Students to Ensure Accountability for State Administrators and State Leaders.

For decades, thousands of students across Maryland have attended schools that possess deteriorating or crumbling facilities.¹⁵⁹ These students often lose out on critical instructional days when schools are forced to close due to inadequate facilities.¹⁶⁰ Yet, even when students are in the classroom, some students still struggle to concentrate as they are forced to huddle in their winter coats and mittens due to the unbearable cold.¹⁶¹ This has resulted in the widening of the achievement gap for low-income and minority students who have historically suffered from a lack of investment in school facilities as evidenced by Baltimore City's low performance on the Maryland report card.¹⁶²

Neither the Built to Learn Act, nor the Blueprint for Maryland's Future accounts for the inequalities created due to a historical lack of investment in school infrastructure and facilities in low-income and high minority school districts.¹⁶³ The State Legislature should codify a private right of action for students to have a right to adequate heating and cooling systems in their schools. This legislation would address the disparities created by a historical lack of investment in school facilities. Students and parents should look to the court system as a solution to hold both school administrators and state leaders accountable in ensuring that school facilities provide a safe and healthy environment for all students, and to obtain a means of redress for the decades of neglect due to a lack of investment.

i. The Avenue to Litigation: How Do Students Get to Court

Education clauses in state constitutions have provided an avenue for which students and parents can argue in court that education is a fundamental right and that inequity in funding is a violation of a state's obligation to provide adequate education to all students.¹⁶⁴ Forty-seven states have been faced with school funding inequity cases, with a majority of courts

¹⁵⁹ See AM. SOC'Y OF CIV. ENG'RS, *supra* note 8, at 117-18.

¹⁶⁰ See discussion *supra* Section III.A.i.

¹⁶¹ Bacon, *supra* note 3.

¹⁶² See *supra* Sections II.A, III.A.

¹⁶³ See discussion *supra* Section III.A.ii.

¹⁶⁴ Nadine F. Mompremier, *Battle for the School Grounds: A Look at Inadequate School Facilities and a Call for a Legislative and Judicial Remedy*, 56 HOW. L. J. 505, 528 (2013).

recognizing a right to an adequate education in state constitutions.¹⁶⁵ Article VIII of Maryland’s Constitution provides that the General Assembly shall establish a “thorough and efficient System of Free Public Schools” throughout the State and shall provide for their maintenance.¹⁶⁶

In December 1994, parents of several students in Baltimore City filed a class action lawsuit against the State in *Maryland State Board of Education v. Bradford*.¹⁶⁷ The parents alleged that the State had failed to provide sufficient resources to enable Baltimore City Public Schools to meet contemporary education standards.¹⁶⁸ The Circuit Court for Baltimore City held that students in Baltimore City were not receiving a “thorough and efficient” public school education under the Maryland Constitution.¹⁶⁹ The parties later entered into a Consent Decree that provided several remedies.¹⁷⁰ Some of the remedies included the creation of a new Board of School Commissioners (“Board”) for Baltimore City, a mandated master plan to increase student achievement in BCPS, and the allotment of additional financial resources to assist the Board in implementing the City-State partnership and to improve the quality of public education in Baltimore City.¹⁷¹

The *Bradford* decision illustrates the possibilities of utilizing litigation as a means to acquire adequate educational facilities.¹⁷² However, *Bradford* also demonstrates the time-consuming and slow-moving process of trying to move educational adequacy cases through the court system.¹⁷³ Currently under the Built to Learn Act, students are resigned to either wait to see if their school receives funds under the Built to Learn Act to replace and improve their facilities, or to use the court system to litigate a right to

¹⁶⁵ Abigail W. Mahoney, *The Williams Complaint and the Role of the Learning Environment in Education Adequacy: “You Count; Do Well,”* 62 B.C. L. REV. 659, 668 (2021).

¹⁶⁶ MD. CONST. art. VIII, § 1.

¹⁶⁷ Md. State Bd. of Educ. v. Bradford, 387 Md. 353, 360-61, 875 A.2d 703, 707-08 (2005).

¹⁶⁸ *Id.* at 361-62, 875 A.2d at 707-08.

¹⁶⁹ *Id.* at 364, 875 A.2d at 709; see also *Concerned Parents and Civil Rights Organizations Call on the State of Maryland to Provide More Education Funding for Baltimore Schools and Investment in Children of Color*, LEGAL DEF. FUND (Jan. 22, 2019), <https://www.naacpldf.org/press-release/concerned-parents-civil-rights-organizations-call-state-maryland-provide-education-funding-baltimore-schools-investment-children-color/>.

¹⁷⁰ Consent Order, No. 94340058/CE189672.

¹⁷¹ *Id.*

¹⁷² See *Bradford*, 387 Md. at 353, 875 A.2d at 703; see also *Concerned Parents and Civil Rights Organizations Call on the State of Maryland to Provide More Education Funding for Baltimore Schools and Investment in Children of Color*, *supra* note 169.

¹⁷³ See *A Brief History: Bradford v. Maryland State Board of Education*, AM. C.L. UNION OF MD., https://www.aclu-md.org/sites/default/files/legacy/files/bradford_summary.pdf (last visited Mar. 15, 2022).

adequate education and maintenance under Maryland's education clause.¹⁷⁴ This can cause students to wait years before heating and cooling issues are addressed.¹⁷⁵ To rectify the years of lack of investment in school infrastructure and facilities in the most time efficient and cost-effective manner, the Maryland General Assembly should create a private right of action for students, thereby codifying students' rights to adequate heating and cooling facilities.

Lawsuits typically focus on the "macrolevel rather than the microlevel," which results in multiple years passing by before judgments are enforced or until students feel the benefits of those judgments.¹⁷⁶ To obtain immediate results, the Maryland General Assembly should create a private right of action based on the Maryland Constitution, codifying students' right to adequate heating and cooling. This would allow plaintiffs to bring their educational rights claim by pleading directly for the enforcement of the statute.¹⁷⁷ The Individuals with Disabilities Education Act ("IDEA") serves as a model that a private right of action in the educational context is possible.¹⁷⁸ The IDEA provides students with disabilities with procedural and substantive rights to education.¹⁷⁹ The IDEA has been enforced by state and federal courts for several decades.¹⁸⁰ Under the IDEA, for parents to protect a child's right to public education, parents were given access to the child's records, the right to receive an independent review of the child's needs, and the ability to submit complaints.¹⁸¹ Although complaints had to first be adjudicated in an administrative due process hearing, parents were able to appeal the result of the hearing in state or federal court as a result of IDEA's private right of action.¹⁸² The benefit of allowing complaints to go through the administrative process of a hearing is that it also affords the school district the opportunity to correct its mistakes without the need for litigation.¹⁸³ However, if a parent appeals the hearing decision to a state or federal court,

¹⁷⁴ See H.B. 1, 2020 Gen. Assemb., 441st Sess. (Md. 2020); see also *Bradford*, 387 Md. at 353, 875 A.2d at 703.

¹⁷⁵ See generally *A Brief History: Bradford v. Maryland State Board of Education*, *supra* note 173.

¹⁷⁶ Elder, *supra* note 99, at 143.

¹⁷⁷ See *id.* at 149.

¹⁷⁸ *Id.* at 154.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Elder, *supra* note 99, at 155.

¹⁸³ Alyssa Kaplan, Comment, *Harm Without Recourse: The Need for A Private Right of Action in Federal Restraint and Seclusion Legislation*, 32 CARDOZO L. REV. 581, 611 (2010).

courts assess whether specific performance or monetary damages are an appropriate remedy.¹⁸⁴

a. Why the Judicial System Works in Achieving Educational Outcomes

Like the plaintiffs in *Bradford*, Maryland students and parents can use litigation as a means to hold Maryland's state leaders accountable in fulfilling the obligations and measures set forth in The Built to Learn Act and the Blueprint for Maryland's Future as well as a means to seek an equitable redress for the decades of lack of investment that resulted in a widening achievement gap. Some critics may argue that these claims are outside the purview of a court's discretion or raise a question as to what litigation of these claims can actually accomplish.¹⁸⁵ However, these questions can be rebutted due to the success of the *Williams*' Complaint.

In 2000, the plaintiff-students in *Williams v. State* filed a class action lawsuit in California Superior Court.¹⁸⁶ The plaintiff-students argued that every student had a right to receive a quality education in California and that the state government had a duty to provide the tools students needed to learn.¹⁸⁷ Although California's constitutional guarantee of education was undefined at the time, the plaintiff-students first articulated a baseline for the education owed to them under state law.¹⁸⁸ Next, the plaintiffs demonstrated how their schools were not meeting those obligations in terms of student outcomes.¹⁸⁹ After several years of litigation, the *Williams*' plaintiffs entered a settlement resulting in the enactment of five bills that codified the settlement agreements.¹⁹⁰ Furthermore, nine years after the implementation of the *Williams* Complaint's remedies, studies illustrate the success of the settlement as California's lowest performing schools have made significant progress in providing sufficient textbooks and instructional materials to

¹⁸⁴ *Id.* at 588-89.

¹⁸⁵ Plaintiff's Opposition to Motion to Dismiss at 44, *Bradford v. Md. State Bd. of Educ.*, No. 943440058/CE 189672 (Md. Cir. Ct., Aug. 23, 2019) (referencing State's argument that the court has no power to determine the case as the *Bradford* case presents "non-justiciable questions under political question doctrine and separation of powers principles"); see also NAT'L RSCH. COUNCIL, EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 184 (Helen F. Ladd et al. eds., 1999) (stating that advocates are unsure whether even successful school finance litigation was truly helping students).

¹⁸⁶ Mahoney, *supra* note 165, at 673.

¹⁸⁷ *Id.* at 673-74.

¹⁸⁸ *Id.* at 675.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 679; see CAL. CODE REGS. tit. 2, §§ 1859.300-.329 (2021); *id.* tit. 5 §§ 17101, 80331(a), 80335, 80339.

schools, creating clean and safe school facilities, and hiring qualified teachers, all areas under which the student-plaintiffs argued created a successful learning environment.¹⁹¹

Maryland has already established a baseline for education owed to students under state law as evidenced by Article VIII of the Maryland Constitution and the court's verdict in *Bradford*.¹⁹² Taking the next step of codifying students' right to adequate heating and cooling systems will allow for students to receive remedies without decades passing by in the meantime.¹⁹³ Litigation provides a powerful tool for students, parents, and community members. Litigation offers an opportunity for students to reject the empty promises of improvement and a means by which administrators and State leaders can be held accountable regarding inadequacies and thereby force the State to take responsibility for unacceptable conditions.¹⁹⁴

A private right of action that would allow parents and students to ascertain whether state administrators and State leaders are fulfilling their obligations articulated in the Built to Learn Act in providing safe facilities for every Maryland student is within the Court's jurisdiction. In addition, litigation can pose a meaningful solution as it can drive students and State leaders to negotiate possible remedies such as additional school days or optional online tutoring sessions to make up for lost instructional days.¹⁹⁵

B. Amending the Built to Learn Act—Emphasizing Routine and Preventive Maintenance

Public investment in school facilities is an essential component in achieving 21st century schools under the Blueprint for Maryland's Future. However, as new facilities and capital improvement projects are approved under the Built to Learn Act, Maryland legislators must also consider the sustainability of these improvements. The American Society of Heating, Refrigerating and Air-Conditioning Engineers defines sustainability as "providing for the needs of the present without detracting from the ability to

¹⁹¹ SALLY CHUNG, WILLIAMS V. CALIFORNIA: LESSONS FROM NINE YEARS OF IMPLEMENTATION, 7 (2013) (ebook).

¹⁹² Md. CONST. art. VIII, § 1; *see also Bradford*, 387 Md. at 364, 875 A.2d at 709.

¹⁹³ *See Elder, supra* note 99.

¹⁹⁴ *See* Thomas Saunders, Comment, *Settling Without "Settling": School Finance Litigation and Governance Reform in Maryland*, 22 YALE L. & POL'Y REV. 571, 599 (2004) (explaining that when Maryland failed to comply with the 1996 settlement the Court ordered the State to pay \$55 million in addition to the \$265 million judgment).

¹⁹⁵ *See generally Bradford*, 387 Md. at 353, 875 A.2d at 703; *see also* CHUNG, *supra* note 191, at 13, 22.

fulfill the needs of the future.”¹⁹⁶ Accordingly, the Built to Learn Act must also address LEAs ability to sustain their new facilities with adequate funds for maintenance after awarding millions of dollars in capital improvement projects.¹⁹⁷

The Built to Learn Act currently requires LEAs to adopt, implement, and periodically update “comprehensive maintenance plans and preventive maintenance plans.”¹⁹⁸ In addition, the Built to Learn Act states that the IAC may adopt requirements to create a standardized statewide computerized maintenance management system to track maintenance work orders.¹⁹⁹ By focusing primarily on public school construction projects within the State and failing to include maintenance concerns except in two contexts, the Built to Learn Act implicitly encourages a “breakdown maintenance” method.²⁰⁰ A breakdown maintenance program “defers repairs and allows damage to accumulate, compounding an organization’s problems.”²⁰¹ Maryland has historically taken this approach. For example, Baltimore City Public Schools currently possess a backlog of maintenance requests that would cost approximately \$5 billion to fix.²⁰² Even if Baltimore City is awarded funds under the Built to Learn Act for replacing HVAC systems, these facilities will fail if routine and preventive maintenance fall to the bottom of Baltimore’s endless backlog of maintenance requests.²⁰³ The Built to Learn Act should be amended to increase funds that are dedicated to routine and preventive maintenance of facilities.

Critics might argue that there are insufficient funds to provide for the routine and preventive maintenance of facilities.²⁰⁴ However, Maryland has

¹⁹⁶ *Facilities Planning Guide for Maryland Public Schools*, INTERAGENCY COMM’N ON SCH. CONSTR., 1, 7 (2009), <https://iac.mdschoolconstruction.org/wp-content/uploads/2020/12/IAC-APG-111-Facilities-Planning-Guide.pdf>.

¹⁹⁷ *Id.* at 8.

¹⁹⁸ H.B. 1, 2020 Gen. Assemb., 441st Sess. (Md. 2020).

¹⁹⁹ *Id.*

²⁰⁰ See *Planning Guide for Maintaining School Facilities*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/pubs2003/maintenance/chapter5.asp#2> (last visited Feb. 3, 2023).

²⁰¹ *Id.*

²⁰² *Focus on High Schools*, *supra* note 142.

²⁰³ See INTERAGENCY COMMISSION ON SCHOOL CONSTRUCTION, *supra* note 65, at 7 (suggesting that routine maintenance should be done on a continual basis to extend the life of facilities).

²⁰⁴ Len Lazarick, *Record Funding, But Legislators Want More for Schools and Search for Ways to Fund It*, MD. REP. (Feb. 4, 2020), <https://marylandreporter.com/2020/02/04/record-funding-but-legislators-want-more-for-schools-and-search-for-ways-to-fund-it/> (noting that poll results demonstrate that both Democrats and Republicans don’t support tax increases to support school funding).

recently experienced an unprecedented \$4.6 billion dollar surplus.²⁰⁵ Former Governor, Larry Hogan, revealed a budget proposal that allocates the \$4.6 billion surplus in several areas including statewide construction projects, the elimination of income taxes for retirees, and additional funds for “safety net programs” like support for child-care workers and food assistance programs for seniors and children.²⁰⁶ However, Governor Hogan failed to allocate \$125 million originally intended to help pay for education reforms in Maryland’s schools districts with the highest concentration of poverty schools.²⁰⁷

During the 2023 legislative session, newly elected Governor Wes Moore, submitted a budget proposal of \$1 billion to the Maryland General Assembly to address school construction concerns.²⁰⁸ Yet, during the ninety day session, Maryland’s legislators only approved \$447 million for school constructions projects for the Built to Learn Act to be funded by revenue bonds.²⁰⁹ This budget allotment creates a requisite commitment towards school construction however, it fails to account for shortfalls within the Act such as budgeting for routine and preventive maintenance.²¹⁰ Thus, in upcoming legislative sessions, Maryland’s legislators will again be faced with the opportunity to decide how important it is to create a safe learning environment for all Maryland students by allocating additional funds to provide for routine and preventive maintenance. Thorough facility management plans include four categories: emergency, routine, preventive, and predictive maintenance.²¹¹ Preventive maintenance is considered one of the keys to an efficient facilities plan as preventive maintenance is the continual scheduled maintenance of a piece of equipment.²¹² HVAC systems in particular must be maintained on a routine basis as preventive maintenance will “ensure reliability, reduce operating costs, and increase the life expectancy of the equipment.”²¹³ Therefore, the Built to Learn Act should be amended to provide additional funds to LEAs for both routine and preventive maintenance in order to protect its investment in school facilities.

²⁰⁵ Erin Cox, *Hogan Outlines Plans for Maryland’s Historic Budget Surplus*, WASH. POST (Jan. 19, 2022, 7:05 PM), <https://www.washingtonpost.com/dc-md-va/2022/01/19/maryland-hogan-budget/>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Tim Tooten, *New Maryland Governor Commits \$500M to Education Funding in Blueprint for Maryland’s Future*, WBLATV 11 (Jan. 20, 2023, 6:12 PM), <https://www.wbaltv.com/article/maryland-governor-wes-moore-dollar500m-education-funding/42594050>.

²⁰⁹ DEP’T OF LEGIS. SERVS. MD. GEN. ASSEMB., *THE 90 DAY REPORT - A REVIEW OF THE 2023 LEGISLATIVE SESSION*, 2023 Gen. Assemb., 445th Sess., at A-33 (2023).

²¹⁰ *See id.*

²¹¹ *Planning Guide for Maintaining School Facilities*, *supra* note 200.

²¹² *Id.*

²¹³ *Id.*

V. CONCLUSION

Maryland is not alone in its lack of investment in school infrastructure, as the entire nation has implicitly declared it a non-priority for years.²¹⁴ Yet, Maryland boldly declared in 2020 that school facilities should be a priority.²¹⁵ However, in Maryland's monumental stand, Maryland failed to consider the impact a lack of investment in 50-year-old school buildings would have on students and a clear plan for maintaining new capital improvement projects with LEAs' limited operating budgets.

Failing to invest in school facilities results in children losing thousands of hours of instructional time.²¹⁶ Lost instructional time disproportionately impacts minority and low-income students as students fall behind in subjects, thereby widening the achievement gap.²¹⁷ However, even when improvements occur, tax dollars often go to waste due to LEAs' inability to maintain new facilities due to insufficient funding for routine maintenance. Thus, action is needed to bridge the gap to bring Maryland's goal to fruition of creating 21st century schools and to prevent another generation of children from falling between the cracks due to inadequate learning environments.

²¹⁴ AM. SOC'Y OF CIV. ENG'RS, *supra* note 8, at 118.

²¹⁵ See discussion *supra* Section III.C.

²¹⁶ See discussion *supra* Section IV.A.1.

²¹⁷ See discussion *supra* Section III.A.

RECENT DEVELOPMENT

ALETI V. METRO. BALT., LLC: TENANTS CANNOT RECOVER RENT PAID TO AN UNLICENSED LANDLORD BASED SOLELY UPON THE LANDLORD’S LACK OF PROPER LICENSING.

By: Dean LaPonzina

The Supreme Court of Maryland¹ held that under Article 13, section 5-4(a)(2) of the Baltimore City Code, tenants could not recover the rent they’ve paid to an unlicensed landlord because the code does not provide tenants with a private right of action. *Aleti v. Metro. Balt., LLC*, 479 Md. 696, 718–19, 279 A.3d 905, 917–18 (2022). The court also held that the tenants in the present case failed to state a claim against their landlord for breach of contract and money had and received as to their payment of rent and related fees, but that they did state a claim against their landlord for money had and received as to their payment of legal fees. *Id.* at 706, 279 A.3d at 910-911.

Karunaker and Chandana Aleti (“the Aletis”) were tenants in an apartment building located in Baltimore City. The property was owned by Metropolitan Baltimore, LLC, and managed by Gables Rental Services, Inc. (collectively “Metropolitan”). The Aletis discovered that Metropolitan did not possess an active rental license as required by the Baltimore City Code for approximately ten months while they were tenants in the building. During this period, the Aletis continued to pay rent and other fees per their lease.

On February 24, 2020, the Aletis filed a complaint in the Circuit Court for Baltimore City alleging that Metropolitan violated section 5-4(a)(2) by improperly charging them rent and other fees while tenants in the unlicensed property. The Aletis also alleged that Metropolitan falsely represented that it was licensed when previously filing complaints against them for nonpayment of rent. The Aletis additionally sought to represent a class consisting of the property’s other tenants.

The circuit court dismissed the case, and the Aletis appealed. The Appellate Court of Maryland reversed in part, holding that section 5-4(a)(2) did not enable the Aletis to recover rent paid, the Aletis did not establish a breach of contract claim, the Aletis could only recover the legal and other related fees they paid in the previous cases brought against them by Metropolitan, and the Aletis were entitled to a declaratory judgment.

The Supreme Court of Maryland granted the Aletis’ petition for writ of *certiorari* to determine: (1) if section 5-4(a)(2) allows a tenant to recover the

¹ At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland and the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

rent they paid to a landlord while leasing an unlicensed property, (2) if money had and received was an available remedy, and (3) if the Aletis established a breach of contract claim against Metropolitan.

The Supreme Court of Maryland, reviewing *de novo*, began its analysis by first determining whether section 5-4(a)(2) established an implied private right of action to recover rent paid to an unlicensed landlord based solely upon a landlord's lack of licensure. *Aleti*, 479 Md. at 723, 279 A.3d at 920. To do so, the court employed a three-part test articulated by the U.S. Supreme Court that asked whether the Aletis were a part of the class that benefitted from the enactment of the statute, whether there was any indication of legislative intent to create or deny a private right of action, and whether implying a private right of action was consistent with the underlying purposes of the legislative scheme. *Id.* at 723-24, 279 A.3d at 920-21 (citing *Scull v. Groover, Christie & Merritt, P.C.*, 435 Md. 112, 121, 76 A.3d 1186, 1191 (2013); *Baker v. Montgomery County*, 427 Md. 691, 709, 50 A.3d 1112, 1122 (2012)).

First, the court found that the statute was enacted for the protection and benefit of the health, safety, and welfare of the public, not to provide a right of free housing to tenants in unlicensed properties. *Aleti*, 479 Md. at 725-26, 279 A.3d at 921-22. Second, the court found that there was no indication of legislative intent to create a private right of action based on the statute's expressly stated purpose, nor was this intent raised in any supporting testimony when it was being considered. *Id.* at 728-29, 279 A.3d at 923. Third, the court found that implying a private right of action was not consistent with the underlying purpose of the city's rental license scheme because doing so could have severe consequences on Baltimore City landlords without taking into consideration the reason for their lack of licensure. *Id.* at 734, 279 A.3d at 926-27. Because the statute was enacted to benefit the general public rather than tenants in particular, and the legislative history was so barren of any evidence indicating that the locality or the state intended to imply a private right of action, the court held that section 5-4(a)(2) did not provide the Aletis with this right. *Id.* at 735, 279 A.3d at 927.

The court then turned to the Aletis' claim for money had and received. *Aleti*, 479 Md. at 735, 279 A.3d at 927. The common law action of money had and received is an equitable remedy that permits the recovery of money paid when it was wrongfully obtained by an opposing party. *Id.* at 737, 279 A.3d at 928 (citing *Bourgeois v. Live Nation Ent., Inc.*, 430 Md. 14, 46, 59 A.3d 509, 527 (2013)). However, money had and received is generally not available once a contract has been fully executed. *Aleti*, 479 Md. at 737, 279 A.3d at 928. The court has previously held that it is not unjust to allow a landlord to keep rent and other fees that have been paid by a tenant where the

tenant attempts to recover based solely on the grounds that the landlord was improperly licensed. *Id.* at 739, 279 A.3d at 930. In the present case, the Aletis received the benefits that they bargained for in the lease. *Id.* at 740, 279 A.3d at 930. Therefore, the court held that the Aletis failed to state a cause of action for money had and received as to payment of rent and related fees because the lease was fully performed by Metropolitan and the Aletis had suffered no actual injuries or damages. *Id.* at 739, 279 A.3d at 929. However, the court held that the Aletis *did* state a cause of action for money had and received as to the legal fees they paid in the actions brought against them by Metropolitan for failure to pay rent, because a landlord must be licensed to bring such an action. *Id.* at 740-41, 279 A.3d at 930-31 (emphasis added).

Finally, the court turned to whether the Aletis' complaint properly stated a claim for breach of contract against Metropolitan. *Aleti*, 479 Md. at 741, 279 A.3d at 931. The court found that the Aletis did not identify any breach or damages caused by a breach and therefore held that the Aletis failed to state a claim against Metropolitan for breach of contract. *Id.* at 742, 279 A.3d at 931 (citing *Aleti v. Metro. Balt., LLC*, 251 Md. App. 482, 512, 254 A.3d 533, 550 (2021)).

In a concurring and dissenting opinion, Justice Watts argued that section 5-4(a)(2) did provide a private right of action enabling tenants to recover rent paid to an unlicensed landlord. *Aleti*, 479 Md. at 744-45, 279 A.3d at 933 (Watts, J., dissenting). Justice Watts argued that all three factors considered were satisfied in the present case. *Aleti*, 479 Md. at 745, 279 A.3d at 933 (Watts, J., dissenting) (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)). Justice Watts also argued that the Aletis sufficiently stated a claim against Metropolitan for both breach of contract and money had and received. *Aleti*, 479 Md. at 745, 279 A.3d at 933 (Watts, J., dissenting).

The Supreme Court of Maryland held that tenants are unable to recover the rent they've paid to an unlicensed landlord under Article 13, section 5-4(a)(2) of the Baltimore City Code based solely upon the landlord lacking the proper licensing for the property. Allowing tenants to recover rent paid based solely on lack of proper licensing could have severe negative economic consequences for landlords throughout Baltimore City, some of whom simply allow their licenses to lapse due to carelessness and oversight. At the same time, as currently interpreted, tenants have limited means and methods to recover when unlicensed landlords violate the statute. This is an important issue that the court needs to consider the consequences of, especially to protect tenants in substandard housing and to make a remedy available to them when landlords violate the statute. It is necessary for tenants to be able to bring such claims to ensure properly licensed housing that they should have a right to under the law.

RECENT DEVELOPMENT

IN RE T.K.: A CUSTODIAL PARENT MAY PRESENT EVIDENCE TO CHALLENGE FACTUAL FINDINGS BEFORE THEIR CHILD IS REMOVED FROM THEIR CUSTODY.

By: Patricia Ziff

In a case of first impression, the Supreme Court of Maryland¹ held that before a juvenile court awards custody of a child to a noncustodial parent pursuant to a CINA proceeding, a custodial parent has the right to an evidentiary hearing. *In re T.K.*, 480 Md. 122, 133, 279 A.3d 1010, 1016 (2022) (citing Md. Code Ann., Cts. & Jud. Proc. § 3-819(e)). However, the right to an evidentiary hearing exists only if there is a factual dispute, based on the evidence already presented, over the noncustodial parent’s ability and willingness to care for their child. *Id.* Courts must use the best interest of the child standard when awarding custody. *Id.*

In January 2021, a magistrate judge heard a Child in Need of Assistance (“CINA”) petition against T.K.’s mother (“Mother”) for neglect and an inability and unwillingness to care for her son, T.K. T.K.’s father (“Father”) was present, although his paternity regarding T.K. was not established. Mother stipulated to some, but not all, of the facts in the Department of Social Services (“Department”) CINA petition. After the hearing, the court found the facts that Mother had stipulated to were proven based on a preponderance of the evidence.

The following month, while T.K. was still living with Mother, the juvenile court met to consider altering T.K.’s custody arrangements. Father, whose paternity was now established, presented himself as a parent who was able and willing to care for his child. The Department proffered that it had “cleared” Father, but Mother argued that she should be allowed to present evidence against Father challenging the Department’s proffer and that the court should conduct a best interest analysis. Ultimately, the court dismissed the CINA case and granted Father custody of T.K. without hearing Mother’s testimony and evidence.

Mother appealed the juvenile court’s decision to the Appellate Court of Maryland, which affirmed. The court agreed that a child’s best interest is “paramount,” but held that Mother did not have a right to present evidence against Father about his ability to care for T.K. The Supreme Court of

¹ At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland and the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Maryland granted *certiorari* to determine what standard should apply to discretionary custody changes under section 3-819(e) of the Maryland Code, Courts and Judicial Proceedings (“the statute”), and whether in such cases where a parent may lose custody, if that parent should have an opportunity to present evidence.

The Supreme Court of Maryland prefaced its analysis with a review of the CINA statutory scheme. *In re T.K.*, 480 Md. at 135-36, 279 A.3d at 1017-18. CINA proceedings enable the court to change a child’s custodial arrangements to protect a child from abuse and neglect. *Id.* at 132, 279 A.3d at 1015 (citing Md. Code Ann., Cts. & Jud. Proc. §§3-801-3-830). These proceedings begin with a CINA petition, which alleges two conditions: (1) a “child has been abused or neglected” and (2) the child lives with parents, guardians, or custodians that cannot and will not properly care for the child. *Id.* at 147, 279 A.3d at 1024. A juvenile court will use a preponderance of the evidence standard when reviewing these allegations. *Id.* at 132, 279 A.3d at 1015.

If the court finds that the allegations are true and the child is in need of assistance, the court may change a child’s custodial arrangement. *In re T.K.*, 480 Md. at 135, 279 A.3d at 1017. If the child is not in need of assistance, the court must dismiss the petition. *Id.* However, if the court sustains petition allegations against only one parent, the court may use the statute to dismiss the case, find that the child is not in need of assistance, and award custody to the other parent, provided the other parent is able and willing to care for the child. *Id.* at 136, 279 A.3d at 1017-18 (citing Md. Code Ann., Cts. & Jud. Proc. §3-819(e)). A juvenile court can use this section of the code to remove a child from a custodial parent when the Department knows very little about the noncustodial parent. *Id.* at 1362, 279 A.3d at 1016.

Before deciding the correct standard to apply when juvenile courts make discretionary custody changes pursuant to the statute, the court emphasized the core idea that parents have a right to raise their own children free from State intrusion. *In re T.K.*, 480 Md. at 131, 279 A.3d at 1015. However, the court qualified that State intrusion on this basic parental right sometimes is warranted and a CINA proceeding is the means the State uses to do so. *Id.* at 132, 279 A.3d at 1015. The court held that the best interest of the child standard is “transcendent” and “dispositive” in all cases that relate to the custody of children. *Id.* at 150-51, 279 A.3d at 1026 (citing *In re Adoption of Ta’Niya C.*, 417 Md. 90, 112, 8 A.3d 745, 747 (2010); *In re Yve S.*, 373 Md. 551, 570, 819 A.2d 1030, 1041 (2003)).

The court then turned to the second issue: whether a parent, who may lose custody under the statute, should have an opportunity to present evidence that the non-custodial parent was not fit to care for the child. *In re T.K.*, 480 Md. at 152, 279 A.3d at 1027. The court found nothing in the statutory language

preventing a juvenile court from holding an evidentiary hearing. *Id.* The court noted that not all cases would require an evidentiary hearing, especially if parties had stipulated to allegations or if the adjudicatory hearing included evidence. *Id.* at 152, 279 A.3d at 1027. However, given the high stakes of losing custody, the Department and court agreed that in most cases a juvenile court should hear evidence from parties. *Id.* The court reasoned that when the parties have a factual dispute or have made conflicting proffers, an evidentiary hearing could and should be allowed. *Id.* at 153, 279 A.3d at 1028. This reasoning was especially relevant as Mother did not present evidence she thought necessary to the juvenile court's decision, and the juvenile court deferred to the Department's findings. *Id.* at 154, 279 A.3d at 1028-29.

The court also clarified the definition of evidence by distinguishing evidence from proffers. *In re T.K.*, 480 Md. at 152-53, 279 A.3d at 1027. Placing a witness under oath and enforcing the rules of evidence would produce better results than a proffer. *Id.* at 153, 279 A.3d at 1027. The court found two errors in the Department, Father, and T.K.'s argument that the juvenile court had not erred by relying on their counsels' undisputed proffers. *Id.* at 152, 279 A.3d at 1027. First, "proffers are not evidence," and, second, Mother did contradict Father's proffers. *Id.*

Justice Hotten dissented from the decision believing that the statute already served a child's best interest by awarding custody to the parent that met two conditions: first, they had not been involved in abuse or neglect, and second, they were able and willing to care for their child. *In re T.K.*, 480 Md. at 163, 279 A.3d at 1033 (Hotten, J., dissenting). Justice Hotten also noted that here, the juvenile court found that Mother had neglected T.K., and the Department had established Father both wanted to care for his son and was able to do so. *Id.* at 162, 279 A.3d at 1033 (Hotten, J., dissenting). Further, under the statute, the juvenile court still has an option to not make a custody change. *Id.* at 163, 279 A.3d at 1034 (Hotten, J., dissenting). In short, Justice Hotten found the prerequisites flexible enough to ensure the child's best interest and preserve the juvenile court's discretion. *Id.* at 165, 279 A.3d at 1035 (Hotten, J., dissenting).

In this case, the Supreme Court of Maryland held that the best interest standard remains paramount, and a parent faced with losing custody must be afforded an opportunity to present evidence that would better inform a change in custody. Maryland's statutory scheme, specifically section 3-819(e) of the Maryland Code, Courts and Judicial Proceedings, allows a juvenile court to change the custody arrangements of a child when the CINA allegation are sustained against only one parent and the other noncustodial parent is willing and able to care for the child. However, when a custodial parent has evidence that may show that the noncustodial parent is not the better choice, the

custodial parent can present evidence to the juvenile court. This evidence adds information to a custody decision and potentially safeguards both children's and parents' rights. A child's best interests are undoubtedly better served when parents can present evidence and the courts do not rubber-stamp an administrative agency's custody recommendation.

RECENT DEVELOPMENT

RAINEY V. STATE: A DEFENDANT’S CHANGE IN APPEARANCE AFTER THE COMMISSION OF A CRIME MAY WARRANT GIVING A DESTRUCTION OR CONCEALMENT OF EVIDENCE JURY INSTRUCTION.

By: Kaitlyn Lyons

The Supreme Court of Maryland¹ held that a change in appearance, including cutting one’s hair, between the commission of a crime and the time of arrest, might indicate a defendant’s desire to destroy or conceal evidence. *Rainey v. State*, 480 Md. 230, 267, 280 A.3d 697, 718 (2022). This post-crime conduct may support a jury instruction on destruction or concealment of evidence if there is at least some evidence to support all four requisite inferences. *Id.* The court further held that trial courts need not expressly articulate each of the requisite inferences on the record. *Id.*

On May 2, 2017, officers from the Baltimore City Police Department found Dartania Tibbs (“Tibbs”) shot dead in an alley. Surveillance video and an eyewitness account from Daphne Creighton (“Ms. Creighton”) revealed that before the shooting, Tibbs was seen and heard arguing over money with petitioner Robert Rainey (“Rainey”). Ms. Creighton informed the police that Rainey had been involved in the local drug trade for the past year and a half, and that Rainey had dreadlocks at the time of the murder. Rainey was arrested a few weeks after the murder, when Ms. Creighton informed the police that she saw him with a short haircut near her home.

At Rainey’s trial in the Circuit Court for Baltimore City, Ms. Creighton testified that after hearing several gunshots, she saw Tibbs lying in an alley and Rainey with his arm raised. Immediately after, she observed Rainey glance around the street and then flee the scene. The State requested a jury instruction on destruction or concealment of evidence, reasoning that Rainey’s change in appearance after the murder was indicative of a consciousness of guilt. The court read the requested instruction over defense counsel’s objection. The jury found Rainey guilty of first-degree murder, and the court sentenced him to life in prison. Rainey appealed to the Appellate Court of Maryland, which upheld the conviction and the jury instruction.

¹ At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland and the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Rainey then filed a petition for *certiorari*, which the Supreme Court of Maryland granted.

Ultimately, three issues came before the court: (1) can a defendant's change in appearance after the commission of a crime support a destruction or concealment of evidence jury instruction; (2) is the circuit court required to expressly consider *Thompson v. State's* four-inference test before giving a consciousness of guilt instruction; and (3) did the circuit court err in reading an unmodified consciousness of guilt instruction? *Rainey*, 480 Md. at 241-42, 280 A.3d at 703.

The Supreme Court of Maryland began its analysis with an explanation of consciousness of guilt. *Rainey*, 480 Md. at 256, 280 A.3d at 711. A defendant's post-crime conduct, including the destruction or concealment of evidence, "may be admissible as circumstantial evidence of consciousness of guilt" if a court finds that such conduct makes the defendant's guilt more probable. *Id.* (citing *Alberty v. U.S.*, 162 U.S. 499, 511 (1896)).

Maryland courts consider the four-part *Thompson* test, initially utilized in the context of flight from a crime scene, when determining the applicability of a consciousness of guilt instruction to a particular case. *Rainey*, 480 Md. at 257, 280 A.3d at 712. The test requires that: (1) "the behavior of the defendant suggests flight"; (2) "the flight suggests a consciousness of guilt"; (3) "the consciousness of guilt relates to the crime charged"; and (4) "the consciousness of guilt suggests actual guilt." *Id.* (quoting *Thompson v. State*, 393 Md. 291, 312, 901 A.2d 208, 220 (2006)). Courts must find "some evidence" to support each inference. *Rainey*, 480 Md. at 258, 280 A.3d at 712 (quoting *Dishman v. State*, 352 Md. 279, 292, 721 A.2d 699, 705 (1998)). The test is applicable to a wide range of post-crime conduct, including changes in appearance. *Rainey*, 480 Md. at 258, 280 A.3d at 712-13.

In a case of first impression, the court considered whether cutting one's hair is admissible as evidence of consciousness of guilt. *Rainey*, 480 Md. at 260, 280 A.3d at 714. The court adapted the *Thompson* inferences to this case to require that the State prove the following to support the requested instruction: (1) the cutting of Rainey's dreadlocks indicates "a desire to conceal or destroy evidence"; (2) this desire "suggests a consciousness of guilt"; (3) "the consciousness of guilt relates" to Tibbs' murder; and (4) "the consciousness of guilt for murder . . . suggests actual guilt" of murder. *Id.* at 260, 280 A.3d at 713-14.

The court found that Ms. Creighton's testimony and the surveillance footage did "double duty" as evidence to support the first and second inferences. *Rainey*, 480 Md. at 262, 280 A.3d at 715. The State's evidence established that Rainey regularly visited the neighborhood with dreadlocks before the murder, but after, he cut off his dreadlocks and ceased visiting regularly. *Id.* at 261, 280 A.3d at 714-15. The evidence further established

that Rainey hastily departed the scene after checking for potential witnesses. *Id.* at 262, 280 A.3d at 715. From this, the jury could infer that Rainey cut his dreadlocks to a close crop as a means of destroying or concealing “an identifying characteristic,” which thus “tended to establish” his consciousness of guilt for Tibbs’ murder. *Id.* at 261, 280 A.3d at 714. The establishment of the first two inferences tended to establish the latter two inferences that Rainey’s consciousness of guilt for Tibbs’ murder suggests actual guilt. *Id.* Thus, the court held that because the evidence supported all four *Thompson* inferences, the circuit court did not err by providing a destruction or concealment of evidence instruction. *Id.* at 267, 280 A.3d at 718.

The court next addressed Rainey’s argument that the circuit court erred by not expressly stating the *Thompson* inferences on the record. *Rainey*, 480 Md. at 267, 280 A.3d at 718. The court explained that it is presumed that circuit courts know and accurately apply the law, thus it is expected that courts scrutinize the *Thompson* inferences before giving a consciousness of guilt instruction. *Id.* at 267-68, 280 A.3d at 718. Furthermore, “meaningful appellate review” of circuit court decisions is ensured because jury instructions are reviewed *de novo* by Maryland appellate courts. *Id.* at 267, 280 A.3d at 718. Therefore, the Supreme Court of Maryland held that trial courts need not expressly articulate their rationale for giving a consciousness of guilt instruction on the record. *Id.*

Finally, the court examined whether the circuit court’s formulation of the jury instruction was a harmless error. *Rainey*, 480 Md. at 268, 280 A.3d at 719. A harmless error is one that does not impact the verdict and will leave the judgment intact. *Id.* at 268-69, 280 A.3d at 719. Although a tailored instruction that specifically referenced Rainey’s change of appearance would have been preferable, “any potential prejudice” was harmless. *Id.* at 269, 280 A.3d at 719. The court reasoned that in closing argument, the State stressed Rainey cutting his hair and linked that to consciousness of guilt, not to the destruction or concealment of evidence. *Id.* at 269-70, 280 A.3d at 719. Furthermore, the jury did not express confusion and understood that destruction or concealment of evidence referred to Rainey cutting his dreadlocks. *Id.* at 270, 280 A.3d at 720.

The Supreme Court of Maryland held that cutting one’s hair after the commission of a crime may support a destruction or concealment of evidence jury instruction. The party requesting a destruction or concealment of evidence instruction can conceivably present any post-crime conduct that even slightly suggests a consciousness of guilt. The court’s decision opens the door for a wide range of innocent conduct to be considered as evidence of consciousness of guilt because there are various non-criminal reasons people may cut their hair or otherwise change their appearance. Judges and

practitioners should be wary of such a consequence, and thus should strive to reduce the potential for prejudice by modifying the pattern instruction to the particular facts of a given case.

RECENT DEVELOPMENT

SMITH V. STATE: THE THIN BLUE LINE DISPLAYED BY COURT AGENTS AT CRIMINAL TRIALS RISKS IMPACTING THE JURY'S DECISION AND INHERENTLY PREJUDICING DEFENDANTS' RIGHT TO A FAIR TRIAL.

By: Yakira Price

In a case of first impression, the Supreme Court of Maryland¹ held that the display of pro-law enforcement political messages by an officer of the court at a criminal trial threatens a defendant's constitutional right to a fair trial. *Smith v. State*, 481 Md. 368, 414, 281 A.3d 931, 959 (2022). Specifically, the court said that displays such as the thin blue line flag create a risk that the jury will consider impermissible factors when rendering its decision and may be inherently prejudicial to the defendant. *Id.*

Amidst the height of the COVID-19 pandemic, another affliction was brewing. Following the murder of George Floyd, a Black man, by a White police officer, social groups assembled to protest against police brutality and law enforcement's mistreatment of people of color. The Black Lives Matter movement received support from those who felt police needed to be held accountable, with some even calling to "defund the police." At the same time, pro-law enforcement groups rallied together to show their support for the police. Many pro-law enforcement groups adopted the "thin blue line" flag as the expression of their movement. While the thin blue line is seen by some as a symbol of pride and support for law enforcement, others see it as a symbol that supports white supremacy and violence against people of color.

In October 2020, against this political climate, Everett Smith ("Smith"), a Black man, was on trial in the Circuit Court for Kent County for various criminal charges relating to the alleged assault of his teenage daughter. At the time, the County Sheriff required all bailiffs in his county to wear masks depicting the thin blue line, including the bailiffs present in the courtroom at Smith's trial. Although Smith's counsel opposed this practice, the court allowed the trial to proceed without requiring the bailiffs to change their masks. During the trial, the jury interacted with the bailiffs on numerous occasions. Ultimately, Smith was convicted of second-degree assault and second-degree child abuse by a custodian.

¹ At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland and the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Following his conviction, Smith appealed to the Appellate Court of Maryland, arguing that the bailiffs' thin blue line masks violated his constitutional right to a fair trial. The court rejected Smith's contention and affirmed his conviction. Smith filed a petition for *certiorari*, challenging the intermediate court's decision. The Supreme Court of Maryland granted *cert.*

The Supreme Court of Maryland began its analysis by establishing that the Sixth Amendment to the United States Constitution requires a fair trial and an impartial jury. *Smith*, 481 Md. at 392, 281 A.3d at 945-46. The court explained that a courtroom is "a neutral forum for the resolution of civil and criminal matters." *Id.* at 400, A.3d at 950 (quoting *State v. Jaime*, 168 Wash. 2d 857, 233, 233 P.3d 554, 559 (2010)). Accordingly, a judge has a duty to guarantee that the jury will come to its decision based on the presented evidence alone. *Smith*, 481 Md. at 401, 281 A.3d at 951. In doing so, a judge must try to eliminate the appearance of bias towards a particular party. *Id.* The Sixth Amendment is violated when inherently prejudicial factors appear at a trial. *Id.* at 392-93, 281 A.3d at 946. Claims of inherent prejudice must be considered along with the particular facts and circumstances of each case. *Id.* at 400, 281 A.3d at 950. To demonstrate inherent prejudice, a defendant must have "objected to the challenged practice" during trial, establish based on the record that the jury observed the challenged practice during trial, and show that the challenged practice created the risk for impermissible factors to weigh on the jury's deliberation and determination. *Id.*

Smith argued that his case was prejudiced by the bailiffs wearing thin blue line masks in the courtroom. *Smith*, 481 Md. at 390-91, 281 A.3d at 944-45. Smith reasoned that the symbol represents support for law enforcement and possibly urged jurors to "pick sides" between himself and the State. *Id.* at 391, 281 A.3d at 945. The State denied Smith's position, stating that to show that the masks were inherently prejudicial, Smith must have established that they conveyed one "clear and unmistakable" message to the jury that spoke to his case in particular. *Id.* The court rejected the State's position, stating that even if the symbol did not convey a specific message to the jury, the masks were still problematic. *Id.* at 403-04, 281 A.3d at 952. Because the State may utilize law enforcement assets against a criminal defendant, any pro-law enforcement message is improper at a criminal trial. *Id.* at 402, 281 A.3d at 951. Therefore, even "the most benign" message related to the masks did not belong at Smith's trial. *Id.* at 403-04, 281 A.3d at 952.

The court next addressed Smith's position that because a bailiff is an officer of the court, the jury would believe the court approved any message they conveyed. *Smith*, 481 Md. at 405, 281 A.3d at 953. The court agreed, reasoning that, unlike members of the gallery, as an officer of the court, any message conveyed by a bailiff to the jury could be attributed to the court. *Id.* at 405-06, 281 A.3d at 953-54. Because of this, the donning of the thin blue

line symbol by the bailiffs at Smith's trial had the potential for prejudice. *Id.* at 406, 281 A.3d at 954. The court also rejected the State's attempt to equate the bailiffs' masks with general law enforcement uniforms, reasoning that unlike the masks, a uniform is normal attire in the context of a courtroom, not a "controversial political symbol" that sparks the potential for bias towards law enforcement. *Id.* at 407, 281 A.3d at 954-55.

The court went on to explain that given the polarized state of the nation following George Floyd's murder, the possibility of impermissible factors coming into Smith's trial was exacerbated. *Smith*, 481 Md. at 408, 281 A.3d at 955. At a time when social groups were calling to "defund the police," the bailiffs' display of the controversial symbol in the courtroom could have reasonably caused the jury to believe that the court was siding with the State and implicitly telling them to do so as well. *Id.* at 411-12, 281 A.3d at 957. Such potential for bias was increased given the political climate in the United States at the time of Smith's trial. *Id.* at 408, 281 A.3d at 955.

Finally, the State argued that Smith failed to sufficiently document the claimed prejudice. *Smith*, 481 Md. at 392, 281 A.3d at 945. The court disagreed, reasoning that because the jury had significant interaction with the bailiffs throughout the trial, because bailiffs are authority figures in a courtroom, and because masks were generally referenced throughout the trial, the jury had ample opportunity to observe the masks and possibly be influenced by their presence and messaging. *Id.* at 412-14, 281 A.3d at 958-59. Therefore, the court stated that the thin blue line masks inherently prejudiced Smith's right to a fair trial. *Id.* at 414, 281 A.3d at 959. As such, Smith's case was reversed and remanded for a new trial. *Id.*

In his dissenting opinion, Justice Gould, joined by Justice Getty, voiced his position that the thin blue line masks did not infringe on Smith's right to a fair trial. *Smith*, 481 Md. at 422, 281 A.3d at 963-64 (Gould, J., dissenting). Justice Gould criticized the majority for failing to describe how the masks' message, as perceived in Kent County specifically, risked introducing impermissible factors at Smith's trial. *Id.* at 414, 417, 281 A.3d at 959, 961 (Gould, J., dissenting). He also questioned the chances that any message conveyed by the masks would be considered by a jury during a trial for a father's assault of his daughter, which does not concern police misconduct. *Id.* at 420, 281 A.3d at 962 (Gould, J., dissenting).

In *Smith*, the Supreme Court of Maryland held that officers of the court displaying political messages at a criminal trial risk introducing impermissible factors that may impact the jury's decision and inherently prejudice the defendant's constitutional right to a fair trial. It is not hard to imagine a similar scenario occurring again considering the growing political divide in America. With social movements and symbols originating daily, Maryland courts will need to constantly evaluate the attire of court officials

and possibly spectators in future cases. While this promotes a politically neutral atmosphere, it also usurps a certain level of freedom of expression. With the boundaries of what Maryland courts consider politically permissible attire unclear, Maryland practitioners must continue fighting for their clients' rights to a fair trial while remaining mindful of the constitutional rights of others present in the courtroom.

RECENT DEVELOPMENT

WADSWORTH V. SHARMA: IN WRONGFUL DEATH OR SURVIVAL ACTIONS, THE EVIDENCE MUST SHOW A DEFENDANT’S NEGLIGENCE PROXIMATELY CAUSED AN INJURY BECAUSE MARYLAND DOES NOT RECOGNIZE THE LOSS OF CHANCE DOCTRINE.

By: Autumn Reed

The Supreme Court of Maryland¹ held that the loss of chance doctrine is not a legitimate cause of action in wrongful death or survival suits. *Wadsworth v. Sharma*, 479 Md. 606, 612, 278 A.3d 1269, 1273 (2022). As such, a plaintiff cannot argue that a medical professional’s negligence diminished a patient’s chance to survive or have a better outcome as grounds for recovery. *Id.* Instead, a plaintiff must prove the medical professional’s negligence proximately caused the patient’s injury. *Id.*

In 2006, Stephanie Wadsworth (“Ms. Wadsworth”) was diagnosed with breast cancer and underwent a left mastectomy, chemotherapy, and radiation. Subsequent PET/CT scans in 2006 and 2008 revealed that Ms. Wadsworth was cancer-free following these procedures. However, in 2013, a follow-up PET/CT scan revealed an abnormal lesion on Ms. Wadsworth’s clavicle. Ms. Wadsworth’s oncologist, Poornima Sharma, M.D. (“Dr. Sharma”), reviewed the scan, but she did not share the abnormal results with Ms. Wadsworth or order additional testing. In 2016, Ms. Wadsworth went to the hospital after she fell and injured her right shoulder. A bone scan showed a lesion on her right clavicle. A biopsy of the lesion confirmed that Ms. Wadsworth’s breast cancer had metastasized. On June 10, 2017, Ms. Wadsworth died while undergoing a new round of cancer treatment.

After Ms. Wadsworth’s death, her surviving husband, Scott Wadsworth (“Mr. Wadsworth”), brought a wrongful death and survival claim against Dr. Sharma, among others, in the Circuit Court for Baltimore County. In response, the defendants moved for summary judgment arguing that Mr. Wadsworth brought a loss of chance claim, a cause of action that is not recognized in Maryland. The court granted summary judgment for the defendants after reviewing the depositions from two medical experts who both testified that metastatic breast cancer is incurable. One of the medical experts, however, suggested that with treatment, Ms. Wadsworth could have

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lived for another eighty months after the abnormal lesion was discovered in 2013.

Based on the experts' testimony, the trial court found that metastatic breast cancer was the proximate cause of Ms. Wadsworth's death. The Appellate Court of Maryland upheld the trial court's summary judgment because Mr. Wadsworth failed to present evidence that, absent Dr. Sharma's negligence, Ms. Wadsworth had more than a fifty percent chance of survival. Mr. Wadsworth petitioned the Supreme Court of Maryland for a writ of *certiorari* to determine whether Maryland's Wrongful Death Statute prevents a beneficiary from recovering in a wrongful death suit when the negligence of a health care provider accelerates the death of a terminally ill individual.

First, the Supreme Court of Maryland examined the language and legislative history of Maryland's Wrongful Death Statute to determine the General Assembly's intent in its enactment. *Wadsworth*, 479 Md. at 617-24, 278 A.3d at 1276-78. The Maryland Wrongful Death Statute "provides [t]hat an action may be maintained against a person whose wrongful act causes the death of another." *Id.* at 620-21, 278 A.3d at 1277 (citing Md. Code. Cts. & Jud. Proc. § 3-902, (2022)). The court concluded that the word "causes" means proximate causation. *Wadsworth*, 479 Md. at 621, 278 A.3d at 1278. Thus, in a wrongful death claim a plaintiff must prove that the defendant's actions were the proximate cause of the injury. *Id.* (citing *Henley v. Prince George's Cty.*, 305 Md. 320, 333, 503 A.2d 1333, 1339-40 (1986)).

The court's analysis of the statute's legislative history revealed that the General Assembly has only modified the statute three times, and never as a result of judicial interpretations. *Wadsworth*, 479 Md. at 622, 278 A.3d at 1279. As such, the court inferred that the Assembly's inaction denoted its concurrence with its interpretation of the statute. *Id.* Likewise, the court concluded that it would be the General Assembly's prerogative to amend the statute to create a loss of chance claim. *Id.* at 623, 278 A.3d at 1280.

The court examined Maryland case law that addressed medical negligence in wrongful death claims. *Wadsworth*, 479 Md. at 623, 278 A.3d at 1280. In *Weimer*, an infant died shortly after birth. *Id.* at 624, 278 A.3d at 1280 (citing *Weimer v. Hetricks*, 309 Md. 536, 539, 525 A.2d 643, 644 (1987)). The parents alleged the doctor's negligence was the cause of death. *Wadsworth*, 479 Md. at 623, 278 A.3d at 1280 (citing *Weimer*, 309 Md. at 539, 525 A.2d at 644). The *Weimer* court held that a plaintiff must prove that a defendant's negligent actions are the proximate cause, not the substantial, or the likely cause, in wrongful death and survival actions. *Wadsworth*, 479 Md. at 628, 278 A.3d at 1278 (citing *Weimer*, 309 Md. at 554, 525 A.2d at 652). Similarly, in *Fennell*, a woman died after emergency room doctors failed to properly identify meningitis as the cause of her severe headache. *Wadsworth*, 479 Md. at 628-29, 278 A.3d at 1283 (citing *Fennell v. Southern Maryland*

Hospital Center Inc., 320 Md. 776, 580 A.2d 206 (1990)). The *Fennell* court expanded upon *Weimer* and held that Maryland does not recognize the loss of chance doctrine in either survival or wrongful death suits. *Wadsworth*, 479 Md. at 628-29, 278 A.3d at 1283 (citing *Fennell*, 320 Md. at 778-80, 794, 580 A.2d at 215). The *Fennell* court also concluded that the General Assembly is responsible for altering the statute. *Wadsworth*, 479 Md. at 630, 278 A.3d at 1283 (citing *Fennell*, 320 Md. at 793-94, 580 A.2d at 214).

The court affirmed the lower courts' decisions because it held that under the doctrine of *stare decisis* the *Weimer* and *Fennell* decisions are controlling. *Wadsworth*, 479 Md. at 633, 278 A.3d at 1285. The court also held that Mr. Wadsworth's claim was likewise predicated on the legal theory of loss of chance because he could not prove by a preponderance of the evidence that Dr. Sharma's negligence, and not metastatic breast cancer, proximately caused his wife's death. *Id.* These holdings rested primarily upon Mr. Wadsworth's failure in circuit court to provide sufficient evidence that Ms. Wadsworth had more than a fifty percent chance of survival, which the court required him to prove to establish that Dr. Sharma's negligence proximately caused Ms. Wadsworth's death. *Id.* at 631-32, 278 A.3d at 1284-85.

Judge Watts, joined by Judge Harrell, dissented, arguing that the majority erroneously categorized Mr. Wadsworth's suit as a loss of chance claim, rather than determining whether the statute applies when the negligence of a medical professional accelerates the death of a terminally ill individual. *Wadsworth*, 479 Md. at 633-34, 278 A.3d at 1286-87 (Watts, J., dissenting). The minority asserted that the *Weimer* and *Fennell* holdings cannot control because the decedents in those cases died immediately. *Id.* at 638. In contrast, Ms. Wadsworth indisputably survived for four additional years after Dr. Sharma's negligence. *Id.* at 638-39, 278 A.3d at 1289. As such, the dissent argued that the majority overlooked the medical expert who concluded that without Dr. Sharma's negligence, Ms. Wadsworth had more than a fifty percent chance of surviving beyond those four years. *Id.* at 639, 278 A.3d at 1288-89. To the dissent, Mr. Wadsworth should have prevailed in his wrongful death suit because he met the required evidentiary standards of proximate causation. *Id.*

In *Wadsworth*, the Supreme Court of Maryland reaffirmed that the loss of chance doctrine is an unrecognized cause of action. The court reiterated that Maryland's Wrongful Death Statute only acknowledges proximate causation as the evidentiary standard. Medical practitioners benefit from this decision because it shields them from medical malpractice suits arising from their negligent treatment of a terminally ill patient. Alternately, the decision disadvantages claimants by restricting their access to a legal remedy if a terminally ill individual dies prematurely at the hands of a negligent doctor. The majority's failure to answer the question of what constitutes proximate

cause in a wrongful death suit involving a terminally ill person, however, indicates this legal question remains unresolved. Therefore, the General Assembly should clarify whether the Wrongful Death Statute applies to claims involving terminally ill individuals.

RECENT DEVELOPMENT

WILLIAMS V. DIMENSIONS HEALTH CORP.: THE RELIANCE ELEMENT OF APPARENT AGENCY MAY BE SATISFIED BY AN INDIVIDUAL ACTING IN THE INTEREST OF A PLAINTIFF.

By: Anastacia Topaltzas

The Supreme Court of Maryland¹ held that a Hospital Center was vicariously liable for one of its surgeon's negligence because the surgeon was an apparent agent of the Hospital. *Williams v. Dimensions Health Corp.*, 480 Md. 24, 56, 279 A.3d 954, 972 (2022). Especially within the context of medical services, the court broadened Maryland's standard for assessing the subjective "reliance" element of apparent agency by allowing Emergency Medical Services ("EMS") personnel acting in the patient's interest to satisfy the requirement. *Id.* at 58, 279 A.3d at 973.

In May 2014, Terence Williams suffered severe injuries during a car crash and was dispatched via ambulance to the Prince George's Hospital Center of Dimensions Health Corporation ("the Hospital"), a Level II Trauma Center. EMS personnel elected to transport Williams to this particular facility because its trauma center offered treatment specific to Williams' needs. Although Williams was "dazed" and "verbally confused," he was aware that he was being treated in a trauma center. Upon arrival, Williams was allegedly asked to sign a "Consent to Treatment" form, although there was no evidence indicating that Williams signed or viewed it. The first paragraph provided that the emergency staff were neither employees nor agents of the Hospital, while the second paragraph stated that treatment would be provided by "employees, agents, and independent contractors." Dr. Montague Blundon, an independent contractor and the on-call Chief of Orthopedic Surgery, performed emergency surgery on Williams' legs, which were later amputated above the knee due to irreparable damage.

Williams filed suit against the Hospital and Dr. Blundon in 2017, alleging that Dr. Blundon acted negligently while serving as an agent of the Hospital. In the Circuit Court for Prince George's County, the jury determined that: (1) Dr. Blundon was directly liable to Williams for negligence, and (2) the Hospital was vicariously liable for Dr. Blundon's negligence due to the physician's apparent agency. In 2020, the circuit court granted the Hospital's motion for judgment notwithstanding the verdict and found that the jury's

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determination was unsupported by Maryland precedent. The Appellate Court of Maryland likewise concluded that there was insufficient evidence to support a finding that Williams subjectively believed that Dr. Blundon was an agent. Ultimately, the Supreme Court of Maryland granted *certiorari* to clarify the issue of the requisite evidence necessary to establish an apparent agency relationship.

Before examining the legal issue, the court laid the foundation for understanding the doctrine of common law agency and vicarious liability. *See Williams*, 480 Md. at 31-33, 279 A.3d at 958-59. Agency is a fiduciary relationship that results when a principal and an agent manifest mutual assent that the agent will act subject to the principal's control and on behalf of the principal. *Id.* at 32, 279 A.3d at 958 (citing Restatement (Third) of Agency § 1.01 (Am. L. Inst. 2006)).

Specifically, the issue of whether a hospital is vicariously liable for the alleged negligence of an independent contractor (rather than a contractual employee) is evaluated under the doctrine of apparent agency. *Williams*, 480 Md. at 33, 279 A.3d at 959. From the perspective of the third-party receiving care, the alleged principal is liable for harm caused by one who *appears* to be his agent when the principal represents that the person is his agent and subsequently causes the third party to rely on the agent's services. *See id.* at 37, 279 A.3d at 961 (citing Restatement (Second) of Agency § 267 (Am. L. Inst. 1958)).

The court evaluated three factors to aid in the apparent agency determination: (1) *representation* - the principal's role in the manifestation of an agency relationship; (2) *reliance* - the plaintiff's subjective belief that the care provider was an agent when selecting the agent's service; and (3) the plaintiff's *reasonableness* in doing so. *Williams*, 480 Md. at 37-38, 279 A.3d at 961-62 (citing *Bradford v. Jai Medical Systems Managed Care Org., Inc.*, 439 Md. 2, 18, 93 A.3d 697, 707 (2014)).

First, the Hospital represented that Dr. Blundon was an apparent agent of the trauma center for several reasons: (1) the Hospital held out to treat patients in critical circumstances, (2) the Hospital publicly represented that it was designated as a Level II Trauma Center, and (3) Dr. Blundon was the orthopedic and on-call surgeon who fulfilled the Hospital's designation criteria. *Williams*, 480 Md. at 51, 279 A.3d at 969.

Second, in instances where a patient's condition is critical, the patient—or medical personnel acting on behalf of the patient—rely on the facility's representation that its staff will provide the necessary treatment. *Williams*, 480 Md. at 52, 279 A.3d at 970. An individual acting in the interest of the patient retains the ability, at least in part, to satisfy the reliance element because the distressed patient neither has the time to discern the contractual relationship of each facility member nor select a specific physician. *Id.* Here,

EMS personnel followed their protocol of ensuring patients are transported to the correct facility to receive the appropriate care by selecting the Hospital's trauma center, rather than a facility that was closer to the scene of the accident. *Id.* Furthermore, Williams testified that he was cognizant of the fact that he was in a trauma center and relied on the staff to provide treatment. *Id.* at 52-53, 279 A.3d at 970. Therefore, the court concluded that Williams *and* the EMS personnel relied on the Hospital's representation that the appropriate medical staff would provide the requisite care for Williams. *Id.* at 54, 279 A.3d at 970.

Finally, the court concluded that even if Williams saw the consent form, it was hardly a "model[] of clarity" in providing its intended notice that the staff members were classified as independent contractors. *Williams*, 480 Md. at 54-55, 279 A.3d at 971. To a lay reader, the paragraph asserting that hospital personnel were not considered agents would be understood as explaining that the patient would receive multiple bills (one from the Hospital and one from the doctor). *Id.* Furthermore, the consent form would not be reasonably understood as a disclaimer of liability for the actions of the staff because it did not explain the nuanced distinction between employees and independent contractors. *Id.*

In the dissenting opinion, Chief Justice Getty and Justice Biran took issue with the majority's revision of the reliance element. *Williams*, 480 Md. at 56-57, 279 A.3d at 972 (Getty, J., dissenting). Now, for the first time, Maryland jurisprudence will allow the reliance element to be satisfied by someone acting on behalf of the patient, rather than the patient alone. *See id.* at 58, 279 A.3d at 973 (Getty, J., dissenting). To the dissent, this deviation "creates a strict liability scenario" by holding the Hospital liable simply because of the EMS personnel's reliance on the Hospital's designation when choosing the facility. *Id.* at 62-63, 279 A.3d at 975-76 (Getty, J., dissenting). Under the new "broadened standard," medical providers are left in the dark on how to best shield themselves from vicarious liability when critically injured patients are brought in for treatment. *Id.* at 62, 279 A.3d at 976 (Getty, J., dissenting).

The majority's modification of the evidentiary standard sufficient to satisfy the reliance element will likely result in an increase in plaintiffs' recovery in vicarious liability actions. While *Williams* is a 5-2 decision, the dissent provides a compelling argument regarding the future implications of the holding within the medical realm. In efforts to avoid the repercussions of the *Williams* decision, hospitals may begin asking EMS personnel to sign special forms that waive their ability to act on the patient's behalf. Nonetheless, future decisions will clarify the application of the new standard and provide insight as to whether the majority wrongfully brought Maryland's apparent agency doctrine one step closer to strict liability.

