In the

Court of Appeals of Maryland

No. 41

September Term, 2017

JUNE DIANE DUFFY,
As Personal Representative of the Estate of James F. Piper,

Appellant,

v.

CBS CORPORATION,
f/k/a Viacom, Inc., f/k/a Westinghouse Electric Corp.,

Appellee.

On Writ of Certiorari to the Court of Special Appeals of Maryland on an Appeal from the Circuit Court for Baltimore City, Maryland

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AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, AND AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF APPELLEE

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QUESTIONS PRESENTED

I. Did the Court of Special Appeals correctly hold that the statute of repose, Md. Code Ann. § 5-108(a), barred Appellant's asbestos-related claims, which did not accrue within twenty years of the completion of the relevant construction work, regardless of when Appellant's asbestos exposure allegedly occurred?

II. Did the Court of Special Appeals correctly hold that Md. Code Ann. § 5-108(d)(2)(ii) cannot be retroactively applied to revive a claim that was barred by repose prior to § 5-108(d)(2)(ii)'s effective date?

III. Did the Court of Special Appeals correctly reject Appellant's Article 19-based objection to the application of Md. Code Ann. § 5-108(a) where Appellant's claims did not accrue before § 5-108(a)'s effective date and application of § 5-108(a) does not unreasonably impair any right of access to the courts traditionally recognized by Maryland law?

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent companies doing business in Maryland, their insurers, and civil justice organizations.[1] *Amici* have a substantial interest in ensuring that Maryland's tort system reflects sound public policy. Statutes of repose for improvements to real property, such as the law at issue, represent an important component of a balanced liability system. They provide stability and predictability in the law, fostering construction and economic development. *Amici*'s members would be adversely affected if the Court invalidates the subject statute or limits its application.

STATEMENT OF THE CASE

Amici adopt Appellee's Statement of the Case.

STATEMENT OF FACTS

Amici adopt Appellee's Statement of Facts to the extent relevant to the arguments in this brief.

SUMMARY OF THE ARGUMENT

Statutes of repose reflect a sound policy judgment that the burdens of litigation should not be endless. Statutes of repose for improvements to real property balance the need for a rational outer time limit on litigation involving old construction with the interests of those who may become injured by construction deficiencies. These statutes address unique burdens posed by claims that may otherwise be brought decades after the completion of an improvement to real property.

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[1] No person other than the *amici*, their members, or attorneys made a monetary or other contribution to the preparation or submission of this brief.

As this Court has recognized, the expiration of the time period set forth in a statute of repose imposes "an absolute bar to an action." *Anderson v. U.S.*, 427 Md. 99, 118, 46 A.3d 426, 438 (2012). Construction-related entities obtain a vested right to be free from liability, which cannot be revived by subsequent legislation. *See infra* Part II. In the case at bar, Appellee obtained a vested right in 1990 to be free from liability for its 1970 improvements to real property based on the straight-forward application of Maryland's 20-year statute of repose for improvements to real property. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-108. The General Assembly's 1991 statutory amendment regarding asbestos-related claims does not affect that result.

The "absolute bar" to a claimant's legal action established under a statute of repose such as § 5-108 has been upheld by the vast majority of courts, including challenges based on access to courts provisions of state constitutions. Indeed, this Court has expressly stated that as applied to adults such as Appellant the time limits in § 5-108 "are not unreasonable restrictions upon remedies and access to the courts. . . ." *Piselli v. 75th St. Med.*, 371 Md. 188, 207-08, 808 A.2d 508, 519 (2002).

This Court should affirm the decision below.

ARGUMENT

I. STATUTES OF REPOSE PROMOTE SOUND PUBLIC POLICY BY ELIMINATING THE SPECTER OF INDEFINITE LIABILITY

Courts throughout the country, including the U.S. Supreme Court, have recognized the importance of statutes of repose to "allow more certainty and reliability" in civil litigation. *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2055

(2017). Many courts have stressed the importance of statutes of repose "to protect defendants from fraudulent or stale claims" and "bring finality to disputes." *Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund*, 613 N.W.2d 849, 863 (Wis. 2000).

This Court has similarly recognized the General Assembly's prerogative to balance "the economic best interests of the public against the rights of potential plaintiffs" and determine "an appropriate period of time, after which liability no longer exists." *Anderson*, 427 Md. at 121, 46 A.3d at 439 (citing *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989)). Legislatures adopt statutes of repose to draw a balance between (1) the interests of the minority of consumers who suffer an injury caused by another; (2) the need for all consumers to have access to affordable goods and services; (3) the need for businesses to operate under fair and predictable liability law rules; and (4) the state's interest in stimulating investment and economic growth. *Cf.* Mitchael J. Vardaro & Jennifer E. Waggoner, *Statutes of Repose – The Design Professional's Defense to Perpetual Liability*, 10 St. John's L.J. Comm. 697, 697 (1995) (statutes of repose "are imposed in society's best interest").

Improvements to real property present unique challenges with respect to liability because they have the potential to last for such a long time – think of the Roman Pantheon (125 AD), the Tower of London (dating to 1078), or the many historical buildings in Maryland that date back to the time of the Founding Fathers or Civil War. Fixtures in buildings may not last as long as the Pantheon, but they can last many decades and create significant challenges arising from ancient claims, changed circumstances, and the availability of evidence. *See Cheswold Volunteer Fire Co. v. Lambertson Constr.*

Co., 489 A.2d 413, 416-17 (Del. 1984) (citing court rulings recognizing that this concern motivated legislatures to adopt statutes of repose for improvements to real property).

The Maryland General Assembly enacted § 5-108 due to concerns about a "dramatic expansion of liability" that could arise from changes to the traditional common law, including "a decline in the availability of defenses based on the absence of privity of contract" and the use of a "discovery rule where claims arose out of the construction of improvements to real property" that "expanded" the "time following Completion within which a damage action might properly be brought." *Whiting-Turner Contracting Co. v. Coupard*, 304 Md. 340, 349, 499 A.2d 178, 183 (1985). These changes created new uncertainty regarding improvements to real property "both with respect to the persons who might be held liable and with respect to the duration of that liability." *Rose v. Fox Pool Corp.*, 335 Md. 351, 362, 643 A.2d 906, 911 (1994). Maryland therefore joined many states in adopting a statute of repose as a direct "response to the problems arising from the expansion of liability based on the defective and unsafe condition of an improvement to real property." *Coupard*, 304 Md. at 349, 499 A.2d at 183.

Today, virtually every state has enacted a statute of repose for improvements to real property.[2] The vast majority of these statutes do not include a "carve out" for

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[2] *See* Ala. Stat. § 6-5-221; Alaska Stat. § 09.10.055; Ariz. Rev. Stat. Ann. § 12-552; Ark. Code Ann. § 16-56-112; Cal. Civ. Proc. Code § 337.15; Colo. Rev. Stat. § 13-80-104; Conn. Gen. Stat. § 52-584a; Del. Code Ann. tit. 10, § 8127; D.C. Code § 12-310; Fla. Stat. § 95.11; Ga. Code Ann. § 9-3-51; Haw. Rev. Stat. § 657-8; Idaho Code § 5-241; 735 ILCS 5/13-214; Ind. Code § 32-30-1-5; Iowa Code § 614.1; Kan. Stat. Ann. § 60-513; La. Stat. Ann. § 9:2772; Me. Stat. tit. 14, § 752-A; Md. Code Ann., Cts. & Jud. Proc. § 5-108; Mass. Gen. Laws. ch. 260 § 2B; Mich. Comp. Laws. § 600.5839; Minn. Stat. § 541.051; Miss. Code Ann. § 15-1-41; Mo. Rev. Stat. § 516.097; Mont. Code Ann.

asbestos-related claims. States have enacted these laws to address the same overarching concern about potentially indefinite liability exposure by setting a strict time limit – which varies among states – for claimants to file an action. These time limits reflect realities such as the fact that "construction deteriorates over years," which can make "proof of construction error. . . speculative after many years." *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 146 P.3d 423, 436 (Wash. 2006). Legislatures and courts have also recognized that the "passage of time not only fades memories, but also increases '[t]he possibility of third-party neglect, abuse, poor maintenance, mishandling, improper modification, or unskilled repair.'" *Trinity River Auth. v. URS Consultants, Inc.-Texas*, 889 S.W. 2d 259, 264 (Tex. 1994) (internal citation omitted). Statutes of repose further "avoid the difficulties in proof and recordkeeping that suits involving older claims impose. . . and protect certain classes of persons. . . from claims that are virtually indefensible after the passage of time." *Albrecht v. General Motors Corp.*, 648 N.W. 2d 87, 91 (Iowa 2002) (quoting 51 Am. Jur. 2d Limitation of Actions § 18 (1970)).

In addition, statutes of repose for improvements to real property help control the costs of recordkeeping and liability insurance for older buildings. "Such costs could be significant and would likely increase the cost of building, which undoubtedly would be

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§ 27-2-208; Neb. Rev. Stat. § 25-223; Nev. Rev. Stat. § 11.202; N.H. Rev. Stat. Ann. § 508:4-b; N.J. Stat. Ann. § 2A:14-1.1; N.M. Stat. Ann. § 37-1-27; N.C. Gen. Stat. § 1-50; N.D. Cent. Code § 28-01-44; Ohio Rev. Code Ann. § 2305.131; Okla. Stat. tit. 12, § 109; Or. Rev. Stat. § 12.135; 42 Pa. Cons. Stat. § 5536; R.I. Gen. Laws § 9-1-29; S.C. Code Ann. § 15-3-640; S.D. Codified Laws § 15-2A-3; Tenn. Code Ann. § 28-3-202; Tex. Civ. Prac. & Rem. Code Ann. § 16.008; Utah Code Ann. § 78B-2-225; Va. Code Ann. § 8.01-250; Wash. Rev. Code § 4.16.310; W. Va. Code § 55-2-6a; Wis. Stat. § 893.89; Wyo. Stat. Ann. § 1-3-111.

passed on to consumers." *Craftsman Builder's Supply v. Butler Mfg. Co.*, 974 P.2d 1194, 1200 (Colo. 1999). These increased costs could, in turn, "adversely impact the state's economy by increasing the cost of living." *Id.*

Statutes of repose provide a mechanism for curbing such "social and economic evil." *Id.* They protect numerous entities that participate in an improvement to real property from endless liability exposure, such as "retired individuals or. . . businesses whose current owners had nothing to do with construction projects in the past." *Id.* State legislatures have worked to carefully balance all of these interests, and courts in Maryland and around the country have accepted the strong policy rationales for statutes of repose for improvements to real property time and again.

II. CLAIMS BARRED UNDER A STATUTE OF REPOSE CANNOT BE REVIVED BY SUBSEQUENT LEGISLATION

By establishing an absolute bar to liability, statutes of repose "create a substantive right protecting a defendant from liability after a legislatively-determined period of time." *Anderson*, 427 Md. at 120, 46 A.3d at 439; *see also Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 794 (6th Cir. 2016) ("statutes of repose vest a substantive right in defendants to be free of liability") (citing *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014)).

As the Court of Special Appeals recognized below, Appellee's substantive right to be free from liability related to improvements to real property "vested" under the "plain language" of Maryland's 20-year statute of repose for improvements to real property in

1990. Thus, the General Assembly's amendment of the statute of repose in 1991 does not revive causes of action, such as Appellant's, that had already been extinguished.[3]

This Court has long recognized that "Maryland's Declaration of Rights and Constitution prohibit the retrospective reach of statutes that would have the effect of abrogating vested rights." *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 555, 30 A.3d 962, 986 (2011) (citing *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 630 n. 9, 805 A.2d 1061, 1076 n. 9 (2002)); *see also Langston v. Riffe*, 359 Md. 396, 418, 754 A.2d 389, 401 (2000) ("Generally, a remedial or procedural statute may not be applied retroactively if it will interfere with vested or substantive rights."). "From the earliest cases to the present, this Court has consistently taken the position that retroactive legislation, depriving persons or *private entities* of vested rights, violates the Maryland Constitution. . . ." *Dua*, 370 Md. at 625, 805 A.2d at 1073 (emphasis added).[4]

Other courts have rejected plaintiffs' attempts to revive expired claims through subsequent amendments to statutes of repose exempting asbestos and other claims. *See, e.g., School Bd. of City of Norfolk v. U.S. Gypsum Co.*, 360 S.E.2d 325 (Va. 1987) (legislature could not revive claims for recovery of asbestos abatement costs otherwise time-barred under a previously enacted statute of repose); *Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771 (Neb. 1991) (rejecting retroactive application of statutory

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[3] *Cf. Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771, 775 (Neb. 1991) ("If the [statute of repose] bar was completed before passage of the amendment, then the Legislature's intent as to retroactive application is immaterial.").

[4] *See, e.g., State v. Goldberg*, 437 Md. 191, 217, 85 A.3d 231, 247 (2014) (holding that state statute establishing a lien-and-foreclosure process for ground lease holders unconstitutionally abrogated their vested rights).

amendment where asbestos claims at issue were barred under Nebraska's products liability statute of repose); *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263 (Ala. 1981) (denying retroactive application of amended statute of repose where the bar was complete with respect to the asbestos claims at issue), *superseded by statute*; *Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958, 968 (Kan. 1992) ("The legislature *cannot* revive a cause of action barred by a statute of repose, as such action would constitute the taking of property without due process.") (emphasis in original).[5]

In protecting the vested rights of entities such as Appellee, this Court will fulfill the General Assembly's policy underlying the statute of repose. This policy protects businesses from becoming mired in litigation based on allegations of ancient harms, after memories have faded, evidence has been lost, and determining causation has often become speculative. Moreover, the policy enables businesses and other entities to price their goods and services based on what they reasonably expect to be the costs of doing business, including their tort liability. If liability can be imposed after the fact, then these entities may be unjustly harmed because they cannot go back in time and choose not to

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[5] *See also Wyatt v. A-Best Prods. Co.*, 924 S.W.2d 98 (Tenn. Ct. App. 1995) (asbestos exception to Tennessee Product Liability Act could not be applied retroactively to revive claims that were time barred when Act was enacted); *Larson v. Babcock & Wilcox*, 525 N.W.2d 589 (Minn. Ct. App. 1994) (no retroactive application for claims against supplier barred under Minnesota's statute of repose for improvements to real property); *Waller v. Pittsburgh Corning Corp.*, 946 F.2d 1514 (10th Cir. 2001) (amendment to Kansas statute of repose purporting to revive actions which would otherwise be barred was invalid); *Farber v. Lok-N-Logs, Inc.*, 701 N.W.2d 368 (Neb. 2005) (amendment to product liability statute of repose could not resurrect action which prior version of statute of repose had already extinguished); *Firestone Tire & Rubber Co v. Acosta*, 612 So. 2d 1361 (Fla. 1992) (repeal of statute of repose did not have effect of reestablishing cause of action that had been previously extinguished by operation of law).

offer the particular good or service at issue and they cannot charge more after the fact to reflect a greater than expected liability risk.

III. COURTS HAVE ROUTINELY UPHELD THE CONSTITUTIONALITY OF STATUTES OF REPOSE

Statutes of repose have been subject to challenges under a variety of state constitutional provisions wherein the vast majority of courts have upheld these laws as a valid exercise of legislative policymaking. *See Validity, as to Claim Alleging Design or Building Defects, of Statute Imposing Time Limitations Upon Action Against Architect, Engineer, or Builder for Injury or Death Arising out of Defective or Unsafe Condition of Improvement to Real Property*, 5 A.L.R.6th 497 (originally published in 2005) (discussing different types of state constitutional challenges and citing cases); *see also* J. Alex Bruggenschmidt, *Asbestos for the Rest of Us: The Continued Viability of Statutes of Repose in Product Liability*, 76 Def. Couns. J. 54, 60 (2008) ("In recent decades, the majority of federal and state opinions considering the question of the constitutionality of product liability repose statutes have upheld their constitutionality.").

With respect to the access to courts challenges such as the one raised by Appellant, the "constitutionality of [real property improvement] repose legislation has been upheld. . . as being a valid attempt to eliminate the clear social and economic evils of costs to the construction industry of liability insurance and records storage in a

reasonable and nonarbitrary manner." Validity of Repose Legislation, Am. L. Prod. Liab. 3d § 47:97 (updated August 2017) (internal citations omitted).[6]

For example, as the Alabama Supreme Court explained in rejecting such a challenge to the state's then-13-year statute of repose for improvements to real property:

> Buildings are unique in that typically they are intended to endure indefinitely if not permanently. Without this statute, architects, builders, and engineers would remain subject to liability until they die or, indeed, for some months after they have died. The construction statute of repose bears a substantial relationship to the eradication or amelioration of this potentially perpetual liability as well as the evils specifically found by the Legislature.

Baugher v. Beaver Constr. Co., 791 So. 2d 932, 937 (Ala. 2000) (internal citations omitted).

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[6] *See Baugher v. Beaver Constr. Co.*, 791 So. 2d 932, 937 (Ala. 2000); *Zapata v. Burns*, 542 A.2d 700, 710 (Conn. 1988); *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 418 (Del. 1984); *Bauld v. J.A. Jones Constr. Co.*, 357 So. 2d 401, 402 (Fla. 1978); *Nelms v. Georgian Manor Condo. Ass'n, Inc.*, 321 S.E.2d 330, 331 (Ga. 1984); *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 644 P.2d 341, 346 (Idaho 1982); *Burmaster v. Gravity Drainage Dist. No. 2 of St. Charles Parish*, 366 So. 2d 1381, 1388 (La. 1978); *Klein v. Catalano*, 437 N.E.2d 514, 517 (Mass. 1982); *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 454 (Minn. 1988); *Anderson v. Fred Wagner & Roy Anderson, Jr., Inc.*, 402 So. 2d 320, 321 (Miss. 1981); *Magee v. Blue Ridge Prof'l Bldg. Co., Inc.*, 821 S.W.2d 839, 845 (Mo. 1991); *Reeves v. Ille Elec. Co.*, 551 P.2d 647, 650 (Mont. 1976); *Williams v. Kingery Constr. Co.*, 404 N.W.2d 32, 34 (Neb. 1987); *Lennartz v. Oak Point Assocs., P.A.*, 112 A.3d 1159, 1162 (N.H. 2015); *Lamb v. Wedgewood South Corp.*, 302 S.E.2d 868, 881-83 (N.C. 1983); *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 782 P.2d 915, 918-20 (Okla. 1989); *Freezer Storage, Inc. v. Armstrong Cork Co.*, 382 A.2d 715, 720-21 (Pa. 1978); *Walsh v. Gowing*, 494 A.2d 543, 548 (R.I. 1985); *Harmon v. Angus R. Jessup Assocs., Inc.*, 619 S.W.2d 522, 524 (Tenn. 1981); *Trinity River Auth. v. URS Consultants, Inc.-Texas*, 889 S.W. 2d 259, 263 (Tex. 1994); *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1199 (Utah 1999); *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 29 P.3d 1249, 1255 (Wash. 2001); *Gibson v. W. Va. Dep't of Highways*, 406 S.E.2d 440, 451 (W. Va. 1991); *Kohn v. Darlington Cmty. Sch., EMC*, 698 N.W.2d 794, 807 (Wis. 2005); *Worden v. Village Homes*, 821 P.2d 1291, 1295 (Wyo. 1991).

Similarly, the Rhode Island Supreme Court rejected an "access to courts" challenge to the state's 10-year statute of repose, stating:

> The judiciary, in abrogating the common-law doctrine of privity of contract, exposed architects, engineers, and other improvers of real property to unlimited potential liability to third parties. The General Assembly responded by enacting [the statute of repose] to limit this exposure. In doing so, it acted well within its constitutional authority. We recognize that economic forces within the marketplace would have eventually reflected this increased potential liability. It is not our position, however, to question the propriety of the General Assembly's judgment in this case. It stepped in and placed limits upon this newly exposed common-law source of liability. It has done so without unreasonably denying injured parties access to the courts.

Walsh v. Gowing, 494 A.2d 543, 548 (R.I. 1985).

Numerous other courts of last resort have upheld statutes of repose for improvements to real property against other "rational basis" test challenges, such as due process, equal protection, and state prohibitions against "special laws."[7]

This Court, in *Whiting-Turner Contracting Co. v. Coupard*, expressly rejected "a variety of challenges" to the constitutionality of § 5-108, including under the equal protection provisions of the Maryland and U.S. Constitutions and the Maryland Constitution's prohibition against special laws, single subject rule, and access to the

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[7] *See Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1067-69 (Alaska 2002); *Carter v. Hartenstein*, 455 S.W.2d 918, 920 (Ark. 1970); *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822, 826 (Colo. 1982); *Krull v. Thermogas Co. of Northwood, Iowa, Div. of Mapco Gas Prods., Inc.*, 522 N.W.2d 607, 615 (Iowa 1994); *O'Brien v. Hazelet & Erdal*, 299 N.W.2d 336, 338 (Mich. 1980); *Smith v. Fluor Corp.*, 514 So. 2d 1227, 1232 (Miss. 1987); *Allstate Ins. Co. v. Furgerson*, 766 P.2d 904, 907 (Nev. 1988); *Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 823-24 (N.J. 1981); *Coleman v. United Eng'rs & Constructors, Inc.*, 878 P.2d 996, 1000 (N.M. 1994); *Bellemare v. Gateway Builders, Inc.*, 420 N.W.2d 733, 737-40 (N.D. 1988); *Snavely v. Perpetual Fed. Sav. Bank*, 412 S.E.2d 382, 384 (S.C. 1991); *Hess v. Snyder Hunt Corp.*, 392 S.E.2d 817, 821 (Va. 1990).

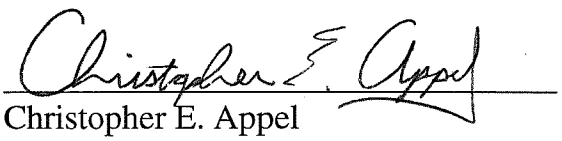
courts provision. 304 Md. 340, 345, 499 A.2d 178, 181. With respect to the Article 19 (access to the courts) challenge, the Court considered the "reasonableness" of the statute in light of its purpose. 304 Md. at 360, 499 A.2d at 189. The Court further equated this test with a "rational-basis" equal protection analysis, and held that the law was reasonable. *See id.* More recently, in *Piselli v. 75th St. Med.*, this Court reiterated its view that the time limits in § 5-108 "are not unreasonable restrictions upon remedies and access to the courts, and thus do not violate Article 19...." 371 Md. 188, 207-08, 808 A.2d 508, 519 (2002).

There is no compelling reason for this Court to disturb this settled law[8] and adopt a contrary position at odds with the vast majority of courts around the country.

CONCLUSION

For these reasons, the Court should affirm the decision below.

Respectfully submitted,



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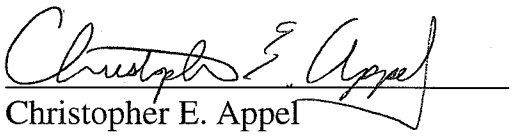
[8] *See DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 63, 5 A.3d 45, 55 (2010) ("The tests for departing from *stare decisis* are extremely narrow in Maryland. . . .").

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3,779 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112. This brief was printed using a 13 point Times New Roman font.



Christopher E. Appel

Dated: November 7, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2017, two copies of the foregoing were sent by first class U.S. mail, postage prepaid, to the following:

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