

No. 13-2537

In the United States Court of Appeals
For the Fourth Circuit

**JOHN DOES AND JANE DOE,
INDIVIDUALLY, AND AS NEXT FRIENDS TO J.D., A MINOR CHILD**
PLAINTIFFS/APPELLANTS,

v.

**THE BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY AND
KATHLEEN SCHWAB**
DEFENDANTS/APPELLEES.

On Appeal from the United States District Court
for the District of Maryland

BRIEF OF

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/Francisco M. Negrón, Jr.

Date: June 4, 2014

Counsel for: Amicus Curiae

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I certify that on June 4, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Sharon Krevor-Weisbaum
Brown, Goldstein & Levy, LLP
120 East Baltimore Street
Suite 1700
Baltimore, MD 21202
slw@browngold.com

Abbey G. Hairston, Esq.
Thatcher Law Firm, LLC
Belle Point Office Park
7849 Belle Point Drive
Greenbelt, MD 20770
agh@thatcherlaw.com

/s/Francisco M. Negrón, Jr.
(signature)

June 4, 2014
(date)

TABLE OF CONTENTS

Page

CERTIFICATE OF CORPORATE DISCLOSURE AND
INTERESTED PERSONS

TABLE OF AUTHORITIES iii

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE
OF AUTHORITY TO FILE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I.

TABLE OF AUTHORITIES

CASES:

<i>American Civil Liberties Union of Florida, Inc. v. Miami-Dade County Sch. Bd.</i> , 557 F.3d 1177 (11th Cir. 2009)	25
<i>Board of Educ. v. Rowley</i> , 458 U.S. 176 (1982)	25
<i>Brodsky v. Trumbull Bd. of Educ.</i> , No. 3:06-CV-1947, 2009 WL 230708 (D. Conn. Jan. 30, 2009)	10
<i>Brooks v. City of Philadelphia</i> , 747 F.Supp.2d 477 (E.D. Pa. 2010)	16
<i>Bystrom v. Fridley High Sch.</i> , 686 F. Supp. 1387 (D. Minn. 1987)	26
<i>Chandler v. McMinnville Sch. Dist.</i> , 978 F.2d 524 (9th Cir. 1992)	25
<i>C.S. v. Couch</i> , 843 F.Supp.2d 894 (N.D. Ind. 2011)	16
<i>Davis v. Monroe County Bd. of Educ.</i> , 526 U.S. 629 (1999)	passim
<i>Demekpe v. Bd. of Trustees of California St. Univ.</i> , No. 11-CV-1177, 2011 WL 7578069 (C.D. Cal. Nov. 22, 2011)	27
<i>Doninger v. Niehoff</i> , 514 F. Supp. 2d 199 (D. Conn. 2007)	26
<i>D.T. ex rel. J.L. v. Somers Cent. Sch. Dist.</i> ,	11
<i>Faro v. New York Univ.</i> 502 F.2d 1229 (2d Cir. 1974)	27

<i>Gagliardo v. Arlington Cent. Sch. Dist.</i> , 489 F.3d 105 (2d. Cir. 2007).....	25
<i>Gebser v. Lago Vista Indep. Sch. Dist.</i> , 524 U.S. 274 (1998).....	13, 14
<i>Grayson v. Peed</i> , 195 F.3d 692 (4th Cir. 1999)	13
<i>Hazelwood Sch. Dist. v. Kuhlmeier</i> 484 U.S. 260 (1988).....	25-26
<i>H.B. v. Monroe Woodbury Central Sch. Dist.</i> , No. 11-CV-5881, 2012 WL 4477552 (S.D.N.Y. Sept. 27, 2012)	10, 26
<i>Hunter v. Board of Educ. of Montgomery County</i> , 439 A.2d 582, (Md. App. Ct. 1982).....	14-15
<i>Jones v. Oxnard Sch. Dist.</i> , 270 Cal. App. 2d 587 (1969)	14
<i>Lance v. Lewisville Indep. Sch. Dist.</i> , 743 F.3d 982 (5th Cir. 2014)	11
<i>LeVarge v. Preston Bd. of Educ.</i> , 552 F. Supp. 2d 248 (D. Conn. 2008).....	10
<i>Long v. Murray County Sch. Dist.</i> , 3)	11, 17
<i>M.H. v. New York City Dept. of Educ.</i> , 685 F.3d 217 (2d Cir. 2012).....	25
<i>Negron v. Ramirez</i> , No. CV 095013686, 2011 WL 2739499 (Conn. Super. Ct. June 10, 2011).....	14
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985).....	27

<i>Patterson v. Hudson Area Schools</i> , 551 F.3d 438 (6th Cir. 2009)	20
<i>P.K. v. Caesar Rodney High Sch.</i> , No. 10-CV-783, 2012 WL 253439 (D. Del. Jan. 27, 2012)	11, 12
<i>Power v. Gilbert Pub. Sch.</i> , th Cir.	

<i>Valle v. City of Houston</i> , 613 F.3d 536 (5th Cir. 2010)	14
<i>Vance v. Spencer Cnty. Pub. Sch.</i> , 231 F.3d 253 (6th Cir. 2000)	13
<i>Wise v. Pea Ridge Sch. Dist.</i> , 855 F.2d 560 (8th Cir. 1988)	

Letter from Russlyn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education to Francisco M. Negrón, Jr., General Counsel, National School Boards Association, (March 25, 2011), <u>available at</u> http://www.nsba.org/SchoolLawIssues/Safety/ED-Response-to-NSBA-GCs-Letter-to-ED-on-OCR-Bullying-Guidelines.pdf	8
NSBA Beliefs and Policies, Article II, Section 3.2 <i>Non-Discrimination</i> , NSBA RESOLUTIONS, BELIEFS & POLICIES, CONSTITUTION & BYLAWS (April 4, 2014).....	3
NSBA Beliefs and Policies, Article IV, Section 2, <i>Maintaining a Safe and Supportive School Climate</i> , NSBA RESOLUTIONS, BELIEFS & POLICIES, CONSTITUTION & BYLAWS (April 4, 2014)	3
NSBA Beliefs and Policies, Article IV, Section 2.11 <i>Harassment</i> , NSBA, RESOLUTIONS, BELIEFS & POLICIES, CONSTITUTION & BYLAWS (April 4, 2014).....	3

**STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF
AUTHORITY TO FILE**

The National School Boards Association (NSBA) is a non-profit

climate. *Amici* have taken a proactive approach to assist their members in meeting

SUMMARY OF THE ARGUMENT

Recognizing that safe and supportive learning environments are crucial to the mission of every school district, NSBA has stated clearly its support for strong

harassment. A school district is liable in money damages under civil rights statutes applicable to recipients of federal funds only when the district itself subjects a student to discrimination. *Amici* address these issues with respect only to the applicable standards under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

Amici urge this Court to follow this established precedent and to resist the attempt in this case to expand the clear standard articulated by the Supreme Court in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). There, the Court carefully explained the stringent parameters under which a school district might be found liable for money damages in cases of peer harassment brought under Title IX, a statute under which the private right of action is not express but has been judicially implied. Taking into account the unique characteristics of K-12 schools, where students are still learning how to interact with their peers, school administrators must enjoy flexibility to make individual, student-based decisions. For this reason, the Court set out a standard that would allow for liability only when the *district itself* subjects a student to discrimination.

In the instant case, the Does attempt to change the standard to one of simple negligence, in which a court would look at an “industry standard” for appropriate prevention of and response to harassment in schools, as evidenced by agency guidance and “expert” reports and testimony. This proposed expansion of *Davis*

would discount years of precedent regarding deference to the decision-making of public officials generally, and school officials in particular with respect to matters of school discipline and safety. Such a change would not only constrain the ability of educators to address the needs of individual students and to take into account the specific circumstances of the alleged harassment, but also needlessly expose school districts to unwarranted

Id. at 650 (emphasis added). A plaintiff must satisfy *each* prong of the standard to be awarded damages. The Court was also very clear in its admonition that the "deliberate indifference" prong affords school officials much deference:

School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment *only where* the recipient's response to the harassment or lack thereof is *clearly unreasonable in light of the known circumstances*.

Id. at 648 (emphasis added).

The Does argue that the school district treated each alleged incident of harassment as a separate and distinct act of harassment.

Colleague Letter (2010 DCL)² (Does cite an earlier OCR document on sexual harassment).

OCR stated, “The DCL specifies the legal standards that apply in administrative enforcement and in court cases where plaintiffs are seeking injunctive relief.”⁵ The standard in private lawsuits for monetary damages is actual knowledge and deliberate indifference. *See Davis*, 526 U.S. at 643, 648. These statements acknowledging the limitations of its own guidance documents mean *ipso facto* the agency agrees that the standards it enunciated have no place in litigation seeking monetary damages.

1. *Davis* requires plaintiffs in peer harassment cases to satisfy several challenging prongs.

In *Davis*, the Supreme Court articulated a liability standard that is intentionally high. School districts may be liable for damages related to peer harassment only if the entity had “actual knowledge”⁶ of “harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”⁷ Finally and crucially, a school

⁵ Letter from Russlyn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education, to Francisco Negrón, General Counsel, National Sch. Bd. Ass’n at 2 (Mar. 25, 2011) (quoting 2010 DCL); *see also* Letter from Russlyn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education, to Colleagues at 4 fn. 12 (Apr. 4, 2011) (“This is the standard [referring to reasonableness standard] for administrative enforcement of Title IX and in court cases where plaintiffs are seeking injunctive relief (citing OCR’s *Revised Sexual Harassment Guidance* at ii-v, 12-13 (2001)).

⁶ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

⁷ *Id.* at 633.

involving alleged peer racial harassment,¹¹ as well as disability-based peer harassment.¹²

harassment case based on student's failure to show deliberate indifference, as school officials timely and thoroughly investigated each of plaintiff's complaints).

¹¹ *E.g.*, *D.T. ex rel. J.L. v. Somers Cent. Sch. Dist.*, 348 F. App'x 697, 699 (2d Cir. 2009) (under Title VI, a plaintiff may sue a school district for money damages based on alleged student-on-student harassment only if the school district acts with deliberate indifference to known acts of harassment.) (citations omitted)).

¹² *E.g.*, *Long v. Murray County Sch. Dist.*, 522 F. App'x 576 (11th Cir. 2013); *Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982 (5th Cir. 2014); *S.S. v. Eastern Kentucky Univ.*, 532 F.3d 445 (6th Cir. 2008) (affirming summary judgment for school district on disability-based harassment claim, as school officials took some action for each reported incident, demonstrating they were not deliberately indifferent); *P.R. v. Metro. Sch. Dist. of Washington Township*, No. 1:08-CV-1562, 2010 WL 4457417 (S.D. Ind. Nov. 1, 2010) (granting summary judgment to school district in Section 504/ADA case based on finding of no deliberate indifference to harassment of student with HIV where district took some action in three documented instances of harassment); *Scruggs v. Meriden Bd. of Educ.*, No. 3:03-CV-2224, 2007 WL 2318851 (D. Conn. Aug. 10, 2007) (granting summary judgment to school district based on finding of no deliberate indifference where school had provided services and referrals to student who suffered disability-based harassment for years and eventually committed suicide; court did allow case to go forward on claim of denial of free appropriate public education).

2.

recommendations on responding to harassment does not amount to deliberate indifference.

Although the Does acknowledge that the *Davis* standard, including the requirement of deliberate indifference, is appropriately applied in this case, they urge this Court to adopt an analysis that departs from established legal doctrine on deliberate indifference. Instead, they attempt to steer this Court toward a professional negligence standard, as measured against OCR's enforcement guidance, as well as the testimony of "experts." This Court should reject this approach as an unwarranted extension of *Davis* that: (1) deprives school officials of the substantial flexibility that the Supreme Court has already acknowledged they need in responding to discriminatory peer harassment;¹³ and (2) erroneously judges the effectiveness of the district's response in hindsight based solely on the recurrence of harassment and on "expert" evaluations made after the fact.¹⁴

In *Davis*, the Court clearly confirmed the necessity for a standard higher than negligence in Title IX suits for monetary damages. Citing its landmark ruling

¹³ 526 U.S. at 648.

¹⁴ See, e.g., *Sauls v. Pierce Cnty. Sch. Dist.*, 399 F.3d 1279, 1285 (11th Cir. 2005) ("the relevant inquiry is not whether the measures taken were effective in stopping discrimination, but whether the school district's actions amounted to deliberate indifference"); *P.K.*, 2012 WL 253439 at *9 ("the Supreme Court has made clear, the effectiveness of a district's methods is not a factor considered in the Title IX analysis and ineffectiveness is not dispositive of Title IX liability").

on Title IX liability in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), the Court explained in *Davis* that it not only had rejected the use of agency principles to impute liability to a school district for teacher misconduct, but also had “declined the invitation to impose liability under what amounted to a negligence standard” holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have known*.¹⁵

Deliberate indifference, the Court explained, is not a mere “reasonableness” standard under which a judge or jury assesses whether the response met an established duty of care as they would in a negligence case.¹⁶ Instead, the school district may be found liable only when the school officials’ intentional actions or failure to act can be said to “cause” the discrimination or to make students vulnerable to harassment on the basis of the protected category.¹⁷ For liability to attach to the district, an “official decision not to remedy the violation” must have occurred “i.e., a school official must have made a conscious choice to endanger the plaintiff, e.g., *Valle v. City of Houston* 613 F.3d 536, 548 (5th Cir. 2010);

¹⁵ 526 U.S. at 642.

¹⁶ *Id.* at 649.

¹⁷ *Vance v. Spencer Cnty. Pub. Sch.*, 231 F.3d 253, 260 (6th Cir. 2000) (citing *Davis*, 526 U.S. at 645); see also *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999) (“Deliberate indifference is a very high standard—a showing of mere negligence will not meet it.”).

misjudgment, mismanagement and neglect are not enough, nor are the independent

of circumstances; but without more, it would not necessarily amount to deliberate indifference.²²

3. Failure to conduct a formal investigation of every reported incident of student-on-student misconduct as sexual harassment or bullying does not equate with deliberate indifference.

As discussed more thoroughly below, courts have recognized that not every instance of inappropriate behavior among students constitutes harassment that violates federal anti-discrimination laws.²³ Nor is every crude remark or unwanted contact suffered at the hands of a classmate automatically a violation of a school district's policies prohibiting harassment and bullying. For this reason, the on-site school official receiving the report of the misconduct properly has the responsibility and the discretion to evaluate the situation and to determine the appropriate degree of inquiry as well as any disciplinary measures that may be warranted. Failure to perceive particular student misconduct as sexual harassment and to conduct formal investigations under a district's bullying or harassment

²² See, e.g., *C.S. v. Couch*, 843 F. Supp. 2d 894 (N.D. Ind. 2011) (finding in suit alleging race-based peer harassment that school district investigated and took disciplinary action against perpetrators in four of six incidents allegedly motivated by race of which school officials were aware. School's response, therefore, was not clearly unreasonable.).

²³ See, e.g., *Sanches*, 647 F.3d 156; *Brooks v. City of Philadelphia*, 747 F. Supp. 2d 477 (E.D. Pa. 2010); *R.S. v. Board of Educ. of Hastings-*

policy does not make a district's respon

that a more thorough investigation would have led school officials to knowledge that would have prompted more aggressive remedial measures that might have

In *Patterson v. Hudson Area Schools*, 551 F.3d 438, 450 (6th Cir. 2009), after the Sixth Circuit found that the peer-to-peer harassment had occurred over years, and the district had repeatedly used the same ineffective method to address it, which the appeals court said a jury could find to be deliberate indifference subjecting the district to liability, it remanded the case for trial. The jury returned a verdict of \$800,000 for the plaintiff. Importantly, however, the district court *set aside* the verdict, granting the school district's motion for judgment as a matter of law:

In the instant case, the Court finds that the uncontroverted evidence is that Defendant's teachers and administrators responded to each and every incident of harassment of which they had notice. More critically, the Court concludes that, as a matter of law, there was no evidence whatsoever presented that Defendant "was aware that adverse consequences from its action or inaction were certain or substantially certain to cause harm ... and that Defendant decided to act or not act in spite of that knowledge." . . . In other words, the Court finds, as a matter of law, that Defendant "responde[d] to known peer harassment in a manner that [was] not clearly unreasonable."²⁷

²⁷ 724 F. Supp. 2d 682, 696 (E.D. Mich. 2010) (citations omitted). *Contra Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299 (D. Kan. 2005).

B. *Davis* otice Requirement Should Not Be Expanded.

- 1. All reports of peer mistreatment do not constitute knowledge of actionable harassment under federal anti-discrimination laws.**

often engage in behavior that might be deemed harassment if carried out by adults in other contexts, but that such rough and tumble behavior does not necessarily constitute the type of harassment covered by Title IX. *Davis*, 526 U.S. at 672-73.

II. School Officials are in the Best Position to Respond to Known Incidents of Bullying or Harassment.

A. This Court Should Affirm Established Precedent of Deferring to the Educational Judgments of Local School Officials, Who Know Needs.

School officials need leeway to exercise educational discretion in determining whether an incident of bullying or harassment is isolated, is related to school climate issues, is a result of trending societal pressures in the community, or is related to other indicia of which only a school official can be aware. School size, student experiences and relationships, socio-economic realities, and community dynamics and history may all play a role.

School board members, school district administrators, school principals, and teachers have more direct and genuine information about their students than any other body of government – local, state, or federal. In addition, local school officials are keenly aware of societal issues affecting their own communities. They typically have important leadership roles in their communities. School officials – especially school principals, who interact daily with students, parents, and staff –

tend to be aware of individual students or groups of students who are coming up through the grades and may be having difficulties in peer-to-peer or peer-to-faculty interactions.

Building and district-level educators trained in student service needs typically know community experts in various fields, such that they are able, through consultation and staff discussion, to obtain input and knowledge about what types of services would best serve each student. These educators could include school nurses, guidance counselors, school psychologists, special education teachers, social workers, etc.

In terms of student discipline, building and district-level officials sometimes work with local law enforcement in identifying trends in types of misconduct, creating plans for curbing such behaviors, and seeking out other possible methods for creating a more positive school environment for students and staff.

Based on this ground-level knowledge of students and communities, as well as their specialized training as educators and representatives of their communities, school officials craft and implement policy. They base their decisions on myriad considerations within their unique professional judgment and frame of reference

in community demographics brought about by economic tides might require the school board and district-level administrators to rethink how certain policies, including student discipline codes and harassment guidelines, might need to be modified to better address student needs and educational demands.

In implementing and enforcing policies school officials must consider all the circumstances, including the rights and interests of the parties involved. With respect to disciplining students, school officials have just as much responsibility to the accused student as to the complainant when determining what interventions or corrective actions should or may be taken. To the extent the district is unable after investigation to corroborate a complaint or has evidence contradicting the complaint, it may be limited in what actions it may take against the alleged wrongdoer.

Such community- and situation-specific information is obtained only through the close knowledge of community schools and local educators and is critical in making decisions about policies and how to apply those policies to particular situations. For this reason, School administrators are better equipped than judges to develop policies that best meet their local educational goals,³⁰ including the appropriate response to inappropriate student conduct. Indeed, courts

³⁰ Karen M. Clemes, *Lovell v. Poway Unified School District: An Elementary Lesson Against Judicial Intervention in School Administrator Disciplinary Discretion*, 33 CAL. W. L. REV. 219, 241 (Spr. 1997).

have routinely deferred to the decision-making of local school boards and school administrators. As courts have acknowledged, “the judiciary generally lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.”³¹ Courts have recognized, “deference is owed to a municipal body’s statutory interpretation of its own rules and regulations so long as its interpretation is based on a permissible construction.”³²

Courts have recognized that they are not educational experts in numerous areas in which school officials have had to make hard decisions,³³ expressing clear reluctance to encroach into areas such as the regulation of student speech,³⁴ student

³¹ *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 113 (2d Cir. 2007) (citations omitted).

³² *American Civil Liberties Union of Florida, Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1228 (11th Cir. 2009) (citations omitted) (deferring to school board’s reasonable interpretation of its own local rule upholding decision to remove school library book from all school libraries).

³³ *Davis*, 526 U.S. at 648 (courts should not second guess school administrators’ disciplinary decisions); *M.H. v. New York City Dept. of Educ.*, 685 F.3d 217, 240 (2d Cir. 2012) (courts should not substitute their own notions of sound educational policy for those of the school authorities which they review) (citing *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) (deference owed to administrative findings in IDEA case)); see also *T.P. ex rel. S.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247 (2d Cir. 2009) (reversing district court’s order for failure “to defer appropriately to the decisions of the administrative experts on a difficult question of educational policy” in IDEA case).

³⁴ *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (indicating in dicta, without any mention of “viewpoint neutrality,” that *Hazelwood*

discipline,³⁵ student dismissal,³⁶ ADA/Section 504 harassment,³⁷ racial harassment,³⁸ grade appeals,³⁹ and First Amendment dress code challenges.⁴⁰

Sch. Dist. v. Kuhlmeier,

Indeed, if courts did not generally defer to school officials's judgment in these matters, the unlimited availability of judicial review of disputes would subject virtually every decision to a court inquiry at the behest of unsuccessful or disgruntled faculty, parents, or students. *See Faro v. New York Univ.*, 502 F.2d 1229 (2d Cir. 1974).

School officials have unique expertise to make decisions that will support the students in their charge. They should not have to work in fear that any particular decision they make, whether on student discipline, special education placement, curriculum materials, programming, textbook selection, or the like, would be easily subjected to judicial scrutiny. Local school officials need the flexibility to craft plans and policies that will meet the needs of their continually

administrations that are important to the "preservation of order in the schools." (quoting

changing student population

Respectfully submitted this 4th day of June 2014,

/S/ Francisco M. Negrón, Jr.

Francisco M. Negrón, Jr.

Naomi E. Gittins

Sonja H. Trainor

Leza Conliffe

Mark Blom

National School Boards Association

1680 Duke Street

Alexandria, VA 22314

Phone: (703) 838-6722

Email: fnegron@nsba.org

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I certify that on June 4, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Sharon Krevor-Weisbaum
Brown, Goldstein & Levy, LLP
120 East Baltimore Street, Suite 1700
Baltimore, MD 21202
slw@browngold.com

Abbey G. Hairston, Esq.
Thatcher Law Firm, LLC
Belle Point Office Park
7849 Belle Point Drive
Greenbelt, MD 20770
agh@thatcherlaw.com

/s/Francisco M. Negrón, Jr.

Signature

June 4, 2014

Date