IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2008

No. 1774

DAVID BROOKS,
Appellant,

v.

MARYLAND HEALTH INSURANCE PLAN
Appellee.

On Appeal from the Circuit Court for Baltimore City

BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE CENTER, AMERICAN CANCER SOCIETY SOUTH ATLANTIC DIVISION, AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, LEGAL AID BUREAU, INC., MARYLAND DISABILITY LAW CENTER, MEDICAID MATTERS! MARYLAND, HOMELESS PERSONS REPRESENTATION PROJECT, MARYLAND WOMEN'S COALITION FOR HEALTH CARE REFORM, AND CIVIL ADVOCACY CLINIC OF THE UNIVERSITY OF BALTIMORE SCHOOL OF LAW

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SUMMARY OF ARGUMENT

While the case at bar will grapple with a number of complex procedural issues, *amici* also believe that it presents an opportunity to reaffirm the centrality of constitutional processes that guard against erroneous agency decisions involving important property rights. To that end, the following brief aims to provide this Court with a broader understanding of the importance of enrollment in the Maryland Health Insurance Plan (MHIP) to its enrollees and the need for agencies to apply traditional procedural safeguards to reduce the risk of erroneous denial of significant property rights like membership in MHIP.

First, *amici* will explain the critical "gap-filling" role that MHIP plays for its enrollees in the provision of health insurance. Most enrollees obtain MHIP coverage because they have debilitating medical conditions yet no ability to obtain coverage in the private market. The current legal health insurance framework in Maryland allows insurers to deny applicants coverage when those applicants have a pre-existing medical condition and seek insurance in the individual, as opposed to group-based, marketplace. For these individuals and certain others, MHIP and "high-risk" insurance programs like it in 35 other states guarantee not to deny coverage if one has been turned away in the private market. Premiums in MHIP resemble market rates, except that individuals earning up to 300% of the federal poverty line may have premiums cut by up to 50%. Without MHIP, individuals with serious illnesses are left without health insurance and must either forego treatment or incur enormous medical bills that are very likely to drive low- and middle-income residents into bankruptcy and penury. Accordingly, MHIP

coverage is a significant property right to its members, and erroneous agency deprivations must be guarded against by a full application of due process protections.

The procedures implemented by MHIP in the present case wholly lacked essential components of traditional due process including, but not limited to: an opportunity to know and then rebut the evidence and reasoning underlying the agency's initial position before a final decision; an oral hearing critical to findings of fact and determinations of credibility and intent; and assurances of an impartial adjudicator free from the appearance of impropriety, particularly where no evidentiary hearing was held. A coherent body of jurisprudence mandates that the lack of these traditional safeguards in the termination of an entitlement is unacceptable and violative of procedural due process as embodied in Article 24 of the Maryland Declaration of Rights.[1] The presence of a private entity in the administration of the program does not alter this analysis. *Amici* urge this Court to recognize the importance of these procedural safeguards both for Mr. Brooks, whose only potential source of health insurance is in jeopardy, but for all persons holding important property rights.

INTERESTS OF AMICI

The **Public Justice Center (PJC)** is a non-profit civil rights and anti-poverty legal services organization. PJC's Appellate Advocacy Project seeks to expand and improve the representation of indigent and disadvantaged persons and their interests before state

[1] The Court of Appeals has held that the due process guarantees embodied in Article 24 are at least as expansive as the due process protections outlined in the 14th Amendment to Constitution of the United States. *See Murphy v. Edmonds,* 325 Md. 342, 353-55 (1992); *Attorney General of Maryland v. Waldron,* 289 Md. 683, 704-05 (1981). Thus, federal cases interpreting the 14th Amendment are instructive in the present case.

and federal appellate courts. PJC has represented parties or submitted *amicus* briefs in this Court, the Court of Appeals and others defending the right to procedural due process. *See, e.g., Parham v. Department of Labor, Licensing, and Regulation*, No. 986, Sept. Term 2008 (oral argument scheduled for May 6, 2009); *Albert S. v. Department of Health and Mental Hygiene,* 166 Md. App. 726 (2006). PJC has an interest in the present case because affirmance of the decision of the court below will severely dilute the procedural protections mandated by due process not only for Mr. Brooks but for thousands of other low- and middle income Maryland residents whose substantial property rights are threatened with termination by State agencies.

The **American Cancer Society** is the nationwide community-based voluntary health organization dedicated to eliminating cancer as a major health problem by preventing cancer, saving lives and diminishing suffering from cancer, through research, education, advocacy and service. The **American Cancer Society (ACS) South Atlantic Division** serves a number of states, including Maryland, where this case arises. The **American Cancer Society Cancer Action Network (ACS CAN)** is the advocacy affiliate of the American Cancer Society, and the two organizations partner together to encourage government officials to fight cancer through public policy. ACS has done extensive research proving a demonstrated link between health insurance coverage and cancer outcomes; both organizations work to secure access to health insurance that is adequate, affordable, available and administratively simple for consumers. ACS South Atlantic Division and ACS CAN believe MHIP provides critical insurance coverage to

those who are most in need, and that individuals should not be denied this coverage without appropriate due process of law. MHIP is one of the 35 state high risk pools that can be an important safety net for people with serious medical conditions like cancer. Unfortunately, many of these pools do not operate as well as they should, and some of them engage in practices and policies that directly undermine their role of helping people with serious medical conditions health coverage. ACS South Atlantic Division and ACS CAN have worked together on several legislative and administrative efforts to improve MHIP's transparency and accountability. As *amici*, our goal is to improve MHIP and the other state high risk pools.

The **Legal Aid Bureau, Inc.** is a non-profit law firm that provides legal services to low-income Maryland residents from thirteen offices located throughout the state. Legal Aid provides assistance to over 50,000 individuals annually. Its advocates address the legal needs of low-income persons regarding their most fundamental necessities, including obtaining needed healthcare and disability benefits, preventing foreclosures, recovering unpaid wages, restoring utilities, preventing unlawful evictions, and improving substandard and dangerous housing conditions. Maintaining health care benefits is critical to Legal Aid's clients, so that they can avoid the financial devastation that can result from high medical debt. Legal Aid frequently represents individuals at all stages of the administrative process who are denied health care as well as numerous other public benefits. In the present case, Legal Aid seeks to ensure that this Court recognize the importance of MHIP for its members and mandate the full application of procedural due process protections.

Maryland Disability Law Center (MDLC) is the federally mandated, non-profit legal services organization designated by the State of Maryland as the Protection and Advocacy System for people with disabilities within the State. Founded in 1977. MDLC's mission is to work with and for people with disabilities in defense of their legal and human rights. A substantial component of MDLC's work relates to ensuring that persons with disabilities receive adequate healthcare services. MDLC regularly represents persons in administrative formal and informal hearings regarding Medicaid eligibility and state hearings determining eligibility for services from the Department of Health and Mental Hygiene. MDLC also represents hundreds of persons in other hearings related to special education, housing, transportation, and social security benefits. MDLC has identified access to healthcare as a priority service for people with disabilities due to the difficulty of navigating our complex, fragmented health care system and because of its implications for life and quality of life among people with disabilities. It is apparent to MDLC that many persons with disabilities are not able to adequately represent themselves in adverse proceedings and that its clients may be especially disadvantaged when required to represent themselves in writing or without an opportunity to be heard.

Medicaid Matters! Maryland (MM!MD), a consumer-oriented advocacy group, represents the voices of over 700,000 Marylanders who rely on Medicaid for life-saving health care: children and families, senior citizens, the low-income community and persons with disabilities. MM!MD strongly supports fair and equal access to health care for all Marylanders, including those who need to rely on MHIP due to chronic conditions.

Further, proper MHIP eligibility decisions actually alleviate the burden on Maryland's Medicaid program: that is, individuals who might otherwise become impoverished due to medical bills and thereby be forced to access Medicaid benefits are able to maintain income and assets while relying on MHIP for coverage. Therefore, it is essential that MHIP properly covers everyone who is eligible.

The **Homeless Persons Representation Project**, founded in 1990, is a non-profit legal services organization whose mission is to prevent, eliminate, and ameliorate homelessness in Maryland. HPRP attorneys provide direct legal representation at all stages of the public benefits process, including at administrative fair hearings. In 2008, HPRP provided legal assistance in more than 108 public benefits cases, including Food Stamps, Medicaid, Temporary Cash Assistance, Temporary Disability Assistance, and Veteran's Benefits. HPRP has also been counsel in numerous class actions seeking to enforce the rights of low-income individuals to receive public benefits. HPRP is committed to ensuring that participants in the fair hearing process receive full hearings and have their due process rights observed.

The **Maryland Women's Coalition for Health Care Reform** is an alliance committed to bringing comprehensive health care to Maryland. Its members include the major women's organizations in the State and all fifteen county commissions for women. The Coalition seeks solutions and advances reforms to provide every Maryland resident with affordable, accessible, high quality health care that is always available. The case at bar presents a unique opportunity for this Court to recognize the importance of state-

sponsored health care benefits to individuals who have serious medical conditions and the need for procedural safeguards to prevent arbitrary benefit denials.

The **Civil Advocacy Clinic of the University of Baltimore School of Law** is dedicated to excellent legal education and advocacy on behalf of low-income individuals and organizations. As part of the wide-range of civil legal issues the Civil Advocacy Clinic handles, the Clinic has a significant focus on advocating for increased access to health care and other public benefits. Specifically, the Civil Advocacy Clinic has provided direct legal representation in several Medical Assistance cases. In addition, the Clinic faculty and law students have worked in coalition with state agencies and advocates on policies and legislation to improve access to public benefits in Maryland.

ARGUMENT

I. THE WRONGFUL DENIAL OF MHIP COVERAGE RESULTS IN AN ENORMOUS LOSS TO THE AFFECTED INDIVIDUAL.

When the parties agree, as they have in this action, that an individual has a property right protected by due process, the salient question becomes: what process is due when that right is threatened by a State agency? *See Pitsenberger v. Pitsenberger*, 287 Md. 20, 30 (1980). As the Court of Appeals has observed, "it is well accepted that 'identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail.'" *Rhoads v. Sommer*, 401 Md. 131, 160 (2007) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)). With regard to the first factor, "the extent of procedural due process afforded is influenced by the extent to which an individual may be 'condemned to suffer grievous loss.'" *Superior Court v. Ricketts*, 153 Md. App. 281, 339 (2003) (quoting *Goldberg v. Kelly,* 397 U.S. 254 (1970)).

Amici contend that the wrongful denial of MHIP coverage to a qualified individual is indeed a grievous loss. This is because MHIP is the *only* health insurance available to certain Maryland residents who have debilitating medical conditions such as cancer, diabetes, coronary artery disease, emphysema, and many others. As the insurer-of-last-resort, MHIP plugs a tremendous hole in the current schema of available health insurance for a growing number of these particularly vulnerable individuals. Given the lack of other insurance options as well as the soaring costs of healthcare that often lead to bankruptcy and poverty for uninsured individuals, the loss of MHIP coverage is significant, particularly for low- and middle-income Maryland residents.

Full appreciation of MHIP's critical role in assisting medically impaired individuals can only be realized by examination of the deficiencies in the current health insurance arena upon a loss of coverage. Each month in the United States, over 2 million people lose their health insurance. Pamela Farley Short *et al.*, Commonwealth Fund, *Churn, Churn, Churn: How Instability of Health Insurance Shapes America's Uninsured Problem* at 3, Nov. 2003, *available at* http://www.commonwealthfund.org/Content/Publications/Issue-Briefs/2003/Nov/Churn--Churn--Churn--How-Instability-of-

Health-Insurance-Shapes-Americas-Uninsured-Problem.aspx. The most common reasons for loss of insurance include: loss of employment, an employer stops offering health benefits, a change in marital status, or loss of dependent status for a young adult. Karen Politz et al., Georgetown University and Health Policy Institute and American Diabetes Association, *Falling Through the Cracks: Stories Of How Health Insurance Can Fail People With Disabilities* at 5, Feb. 8, 2005, *available at* http://www.diabetes.org/advocacy-and-legalresources/healthcare/insurance-research.jsp [hereinafter *Falling Through the Cracks*]. Specifically for people with serious medical conditions, one of the most common reasons for coverage loss is that the individual becomes too ill to continue working and thereby loses employer-based coverage. *Id.* at 4.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) provides limited protection to some individuals who have serious medical conditions and suffer a loss of insurance. The Act prohibits insurers from limiting coverage to new enrollees based on a pre-existing condition when those individuals had been enrolled in a group-based insurance plan for at least 18 months immediately prior and experienced no lapses in coverage over 63 days. *See* 29 U.S.C. § 1181; Rebecca Lewin, *Job Lock: Will HIPAA Solve The Job Mobility Problem?*, 2 U. Pa. J. Lab. & Emp. L. 507, 525 (2000). There is no protection, however, for a person leaving a plan bought on the individual market for another individual plan or for any person leaving a group-based plan and purchasing in the individual market when that person experienced a lapse in coverage over 63 days or a lack of 18 months of prior enrollment. *Id.*; *see* Jack Royner, *Federal Regulation Comes To Private Health Care Financing: The Group Health Insurance*

Provisions Of The Health Insurance Portability and Accountability Act of 1996, 7 Annals Health L. 183, 187 n.31 (1998). Insurers may deny these persons coverage *in totum* due to a pre-existing condition. Lewin, *supra* at 525. Additionally, if a person wishes to enroll in a group-based plan but experienced a gap in insurance coverage over 63 days, HIPAA allows insurers to exclude treatment for a pre-existing condition from coverage for up to 18 months. Royner, *supra* at 187.

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) provides some limited assistance in helping bridge the gap between insurance policies by allowing an individual to temporarily retain group-based coverage on loss of employment, but the individual must pay the entire insurance premium, and COBRA only applies to employers with 20 or more employees. 29 U.S.C. § 1161(b); *see* Lewin, *supra* at 517. Another source of insurance, Medicare, generally only assists persons over 65 years of age, 42 U.S.C. § 1395c, and eligibility for Medicaid is limited only to very low-income individuals. *See* 42 U.S.C. § 1396u-1; COMAR 10.09.24.07.N (discussing Maryland Medical Assistance income eligibility criteria).

Under this framework, the persons most vulnerable to becoming uninsured are those who have serious medical impairments, lose coverage temporarily, usually due to illness, and have no subsequent access to group-based coverage. Also significantly affected are individuals who may have access to group-based insurance but have experienced lapses in coverage due to prolonged unemployment or a more general loss of income. The former, who now must seek health insurance in the individual market, may be denied coverage entirely because of their illnesses. And the latter, who do have access

to group-based coverage, must contend with a highly burdensome, pre-existing condition exclusion of up to 18 months because of a prior lapse in coverage.

MHIP's role in providing coverage to these individuals is indispensable. MHIP is an "independent unit of State government responsible for the state's health high-risk pool." FY 2010 Operating Budget Testimony, Maryland Health Insurance Plan at 2, http://dbm.maryland.gov/dbm_publishing/public_content/dbm_search/budget/fy2010budgettestimony/d79z02_md_health_ins_plan.pdf. (last visited April 12, 2009) [hereinafter FY 2010 MHIP]. MHIP's authorizing statute states that the program is enacted to "provid[e] access to affordable, comprehensive health benefits for medically uninsurable residents of the State[,]" Md. Code Ann., Insur. Art § 14-502(c) (2006 Repl. Vol. 2008 Supp.). Proof of an inability to obtain market rate health insurance in the private market because of a medical condition is normally a pre-requisite to MHIP coverage.[2]

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[2] Applicants for MHIP qualify for coverage by producing proof that the individual:

- is unable to obtain substantially similar coverage from a health insurance carrier due to a health condition;
- is unable to obtain substantially similar coverage from a health insurance carrier due to a health condition, except at rate that exceeds the MHIP rate;
- has federal guaranteed-issue rights under the Health Insurance Portability and Accountability Act (HIPAA) of 1996;
- has a medical or health condition that is included on a list of conditions adopted by the Board for MHIP by regulation;
- is eligible for the 65 percent Health Care Tax Credit under §35 of the Internal Revenue Code, including former workers and retirees of Bethlehem Steel; or
- is a dependent of an individual who is eligible for coverage.

FY 2010 MHIP at 3. The above-referenced "list of conditions adopted by the Board for MHIP" includes: alzheimer's disease, bulimia/anorexia, cancer, cystic fibrosis, diabetes,

Maryland is one of 35 states that operate high-risk pools covering approximately 200,000 Americans. Lynn R. Gruber, National Association of State Comprehensive Health Insurance Plans (NASCHIP), How State Health Insurance Pools Are Helping Americans at 2, Jan. 6, 2009, *available at* http://www.naschip.org (follow "How State Health Insurance Pools are Helping Americans" hyperlink). Although each state's pool has various entry criteria and premiums, all are intended to create a safety net for individuals who are considered uninsurable in the private market. *Id.*

According to MHIP, 14,754 Maryland residents were enrolled in the program during fiscal year 2008 with an expected growth to 17,681 for fiscal year 2010. FY 2010 MHIP at 1. "MHIP members generally consist of self-employed individuals; employees of small businesses that don't offer insurance; people that formerly were in the employer group market such as retirees, the unemployed or young people coming off their family's coverage; and workers who are not a part of a large employer plan." *Id.* at 5. Insurance through MHIP is a temporary measure for many members with the average enrollment lasting 2-3 years. *Id.* Nonetheless, even as a temporary measure for members who migrate to group-based plans, its "gap-filling" role is critical because it allows those members to remain protected by HIPAA once they do return to a group plan, *i.e.*, the new group-based insurer may not exclude treatments for a pre-existing condition if a new enrollee had prior continuous coverage in a group-based plan like MHIP.

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coronary artery disease, AIDS, parkinson's disease, and emphysema. MHIP Application Booklet at 4, *available at* http://www.marylandhealthinsuranceplan.state.md.us/mhip/attachments/BRC6599.pdf (last visited Apr. 15, 2009).

In order to encourage residents to maintain health insurance and not seek out insurance only when ill, MHIP imposes up to a six-month pre-existing condition exclusion on some new members who lacked previous coverage. *Id.* at 7. This six-month exclusion, however, is less severe than the 18-month exclusion private insurers may impose: MHIP enrollees may purchase a rider, with the cost spread over 12 months, to obtain immediate coverage. Additionally, the six-month exclusion may be shortened depending on the length of time the individual lacked coverage. *Id.*

MHIP insurance premiums range from $90 to $893 monthly to reflect individual market rates. *Id.* at 2. Yet, to enable low- and middle-income persons to afford coverage, the plan subsidizes premiums for members whose incomes fall below 300% of federal poverty guidelines. Premiums for approximately 3,800 MHIP enrollees are as low as 50% of standard rates. *Id.* at 4. Even MHIP enrollees who do not have discounted premiums still find their rates subsidized. Because of the serious medical conditions sustained by MHIP's enrollees, the program pays out much more than it takes in through premiums. Premiums account for only 37 percent of MHIP's funding with the remainder financed by an assessment on Maryland hospitals and limited federal grant money. *Id.*

The importance of MHIP's protection from uninsurance for enrollees cannot be overstated. As is common knowledge, healthcare costs are skyrocketing. *See* Centers for Medicare and Medicaid Services, National Health Expenditure Projections, 2008-2018,http://www.cms.hhs.gov/NationalHealthExpendData/downloads/proj2008.pdf (last visited Apr. 20, 2009) (per capita healthcare expenditures expected to grow from $7,804 in 2008 to $13,100 in 2018, a rate of growth that far outpaces GDP growth). Arthur

Birmingham LaFrance, *Reform In The United States: The Role Of The States*, 6 Seattle J. for Soc. Just. 199, 199 (Fall/Winter 2007) ("Total national healthcare expenditures exceed $1 trillion annually and, at the present rate of increase, will surpass $2 trillion within the present decade. This burden . . . [exceeds] by nearly a factor of two to three times expenditures by other industrialized nations."). Additionally, numerous studies have confirmed that medical debt, particularly for individuals without insurance, is one of the most frequent causes of bankruptcy and poverty. *See* Aparna Mathur, Am. Enterprise Inst., *Medical Bills and Bankruptcy Filings* 21 (July 19, 2006), *available at* http://www.aei.org/publication24680 (medical debt is the primary cause of approximately 27% of bankruptcies in the United States).

The American Cancer Society and Kaiser Family Foundation recently released a study detailing the ways in which cancer causes numerous individuals to lose employer-based insurance, the lack of options in the private market due to their pre-existing conditions, and the manner in which uninsured and underinsured individuals are routinely forced to forego treatment or enter into a state of poverty due to medical bills. Karyn Schwartz et al., American Cancer Soc. and Kaiser Family Found., *Spending to Survive: Cancer Patients Confront Holes in the Health Insurance System* (Feb. 2009), *available at* www.kff.org/insurance/upload/7851.pdf. The study asserts that the following participant narrative is typical of its findings:

> Kathleen, 46, previously had insurance through her husband's employer and elected COBRA when he became disabled. Kathleen exhausted COBRA and became uninsured in January 2004. . . . When her COBRA coverage first expired, she was offered $900 per month coverage for those who are HIPAA-eligible, but she could not afford it.

> When she then tried to purchase coverage in the individual market, she was denied coverage during the medical underwriting process. While she was unaware that she had symptoms that could be signs of leukemia, the insurance company discovered a diagnosis of leukocystosis in the insurance billing codes and she was denied coverage due to this pre-existing condition.
>
> After being uninsured for 63 days, Kathleen lost the protections offered through HIPAA. She has now been denied multiple individual market plans because of her health status. . . .
>
> Kathleen has more than $60,000 in medical debt. She spent all of her savings on health care and has borrowed additional money from family members. One doctor recommended that she get a bone marrow test to diagnose and treat her condition, but she cannot afford the $15,000 procedure.
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> "I have gone to the local health department, but they take one look at me and say they don't have the knowledge to deal with my condition and send me to the emergency room," Kathleen says.
>
> One medical center refused to admit her because of her lack of insurance. Kathleen is worried that she may have leukemia; however, she cannot access the appropriate tests to find out if she does.
>
> "I have lost all faith in physicians and the health care system," Kathleen says. "No one is doing anything to help me."

Id. at 46.

In sum, there can be little doubt that the wrongful denial of MHIP coverage for a low- or middle-income person with a debilitating medical condition renders that person remarkably vulnerable to the vicissitudes of unaffordable medical bills and the oft-resulting descent into poverty. Individuals seek MHIP coverage because they have run out of options. Removal from MHIP or the wrongful denial of a qualified applicant falls particularly hard on low- and middle-income individuals who are left with two repugnant

choices: continue to pay the high costs of treatment until one is left no assets and so little income as to qualify for Medicaid, or forego treatment except for emergency medical care. Accordingly, a robust application of procedural due process is necessary to ensure that individuals with serious medical conditions are not denied MHIP access.

II. MEANINGFUL NOTICE AND A MEANINGFUL HEARING BEFORE AN ADJUDICATOR FREE FROM THE APPEARANCE OF IMPROPRIETY ARE ESSENTIAL TO DUE PROCESS PROTECTION OF SIGNIFICANT PROPERTY RIGHTS.

The Court of Appeals has been unambiguous: "At '[t]he core of due process is the right to notice and a meaningful opportunity to be heard.' " *Roberts v. Total Health Care, Inc.*, 349 Md. 499, 508-09 (1998) (quoting *LaChance v. Erickson*, 522 U.S. 262, 266 (1998)). That is, while due process is flexible, it "requires the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Pitsenberger*, 287 Md. at 30 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)); *Maryland Racing Com'n v. Castrenze*, 335 Md. 284, 299 (1994). This hearing must take place before an agency adjudicator free from the appearance of impropriety. *Spencer v. Maryland State Bd. of Pharmacy*, 380 Md. 515, 534 n.7 (2004). Given the important private interest at stake in the present case, the salient question becomes whether the process provided by MHIP to Brooks was sufficiently meaningful to prevent erroneous deprivations within the parameters set by Article 24 of the Maryland Declaration of Rights.

Amici answer with a resounding no. The opportunity to email documents and a statement of argument to the agency's final adjudicator who likely played a role in the initial termination decision lacks numerous procedural safeguards that have historically

been at the very core of due process. Several of the present *amici* frequently represent low-income individuals who challenge agency terminations of important property rights. *See, e.g.*, Md. Code Ann., Human Services Art., §§ 5-501 (2007 Repl. Vol. 2008 Supp.) (food stamps); Human Serv. §§ 5-201 – 5-321 (Temporary Cash Assistance); Human Serv. § 5-308 (Temporary Disability Assistance Program). While most such terminations are governed by the Maryland Administrative Procedure Act ("APA"), Md. Code Ann., State Gov't Art. §§ 10-201 – 10-226 (2004, 2008 Supp.) ("SG"), or a similar statutory schema with a panoply of procedural rights, *amici* shudder to think that a given agency may try to dispense with these traditional protections when terminating an entitlement simply by crafting regulations, like those applicable to MHIP, that remain largely silent on the procedural protections necessary to a termination of benefits. *See* COMAR 31.17.03.19D.[3]

Amici urge this Court to find controlling its most recent decision in *Reese v. Department of Health and Mental Hygiene*, and hold that where the State seeks to deprive an individual of a significant property right, that individual is "entitled to an opportunity to be heard in connection with her application by way of a contested case

[3] As the appellant is likely to explain in more detail, the statutory/regulatory schema provides that Carefirst makes an initial eligibility determination from which the affected individual may appeal first to Carefirst and then to the Board of MHIP. *See* Insur. § 14.506; COMAR 37.17.03.19D. Neither the statute nor the regulation mandate any type of notice or hearing; nor do these ordinances provide for an impartial adjudicator. In the case at bar, there is some evidence that Mr. Popper, MHIP's executive director, played a controlling role in Carefirst's initial termination decision. There is little mention in the record of Mr. Brooks' subsequent appeal to Carefirst. In any event, both parties agree that Mr. Popper, by designation of MHIP's Board, was the sole decisionmaker in Mr. Brooks' subsequent appeal to MHIP.

hearing" thereby bringing the required procedure under the safeguards of the APA.[4] 177 Md. App. 102, 164 (2007). As the *Reese* case illustrates, a broad holding that mandates the imposition of constitutional procedural protections is particularly important not just for Mr. Brooks but for all MHIP participants who may be subject to the constitutionally infirm "procedure" provided in COMAR 31.17.03.19D.

The *Reese* court did not remand to the agency to determine what process was due nor hypothesize about a form of process by which the affected individual does not have the opportunity to know and rebut the underpinnings of the agency's case before a final decision nor a process that denies the adjudicator a sufficient opportunity to make critical factual and credibility determinations via an oral hearing. Such prognostication was unnecessary. As *amici* now explain in more detail, it is well-established that where an individual is deprived of a significant property right through a fact-based analysis, meaningful notice and a meaningful hearing must include the opportunity to know the agency's evidence, its rationale, and any criteria used in decisionmaking before the final agency decision, and to rebut the basis of its case through an oral hearing. This procedure is critical to the resolution of disputed questions of fact and credibility, including issues that turn in part on a party's true intent such as a determination of

[4] *See* SG § 10-208 (detailing processes for contested case hearings); *Quesenberry v. Washington Suburban Sanitary Com'n*, 311 Md. 417, 425 n.1 (1988) ("Where a hearing is required by law, the proceeding becomes a "contested case" within the meaning of the Maryland Administrative Procedure Act.").

residency.[5] Additionally, when there is a question of the appearance of impropriety on the part of the adjudicator, the importance of the full evidentiary hearing is even more pronounced to the assurance of due process.[6] Finally, *amici* note, the presence of a private administrator for the program does nothing to change the mandatory due process analysis.

A. The Opportunity To Know In Advance And Rebut The Underpinnings Of The Agency's Case At A Hearing Is Essential To Due Process.

1. Notice must inform the affected individual of the full basis of the agency's position for a subsequent hearing to be meaningful.

Historically, the notice and hearing components of due process are analytically interwoven: that is, whether a party is given sufficient notice is measured by whether the party has a meaningful opportunity to know and rebut the agency's case at a subsequent hearing. Meaningful notice and a meaningful hearing are not satisfied by mere knowledge of an initial benefit denial and the ability to submit documents and written argument on appeal. Indeed, no matter the context, "[t]he right to a hearing embraces not

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[5] *Mundey v. Erie Ins. Group*, 396 Md. 656, 678-79 (2007) (adopting a "totality of the circumstances" approach to questions of residency, which includes any evidence of the party's intent to return to the household in question).

[6] While the brief of *amici* only highlights the central role of three aspects of procedural due process at issue in this case, MHIP's processes are likely inadequate in other respects including its failure to inform dissatisfied enrollees that they may seek a writ of mandamus (or judicial review depending on statutory interpretation) in the circuit court and a failure to safeguard the integrity of the agency record subject to judicial review. *See Bereano v. State Ethics Com'n*, 403 Md. 716, 740 (2008) ("There are sound policy reasons for the requirement that agencies are limited to the record in deciding a given case. In addition to satisfying constitutional due process requirements, the rule that agency decisions are limited to the record ensures that the agencies 'observe the basic rules of fairness as to parties appearing before them.'") (internal quotation omitted).

only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one." *Morgan v. United States*, 304 U.S. 1, 18 (1938) (business challenging prices set by the U.S. Secretary of Agriculture); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) (notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund); *Gray v. Netherland*, 518 U.S. 152, 182 (1996) (inmate sentencing). This aspect of due process is so fundamental that the Court of Appeals time and again has stated that agency decisions must be vacated when fair notice of the agency's evidence and rationale—the basis of the agency's initial position—was not communicated to the affected individual thereby robbing the party of a meaningful "opportunity for cross-examination and/or rebuttal. . . ." *Maryland State Police v. Zeigler*, 330 Md. 540, 559 (1993). *See Rogers v. Radio Shack*, 271 Md. 126, 129 (1974) (in the context of unemployment benefits: "with no opportunity for cross-examination or rebuttal, fundamental fairness would preclude reliance upon the report by an administrative agency"); *Temmink v. Bd. of Zoning Appeals*, 205 Md. 489, 497 (1954) (holding that where a party had no opportunity to challenge evidence relied upon by the agency in a zoning decision, the case would be remanded to the agency for a further hearing at which "the parties may produce any further evidence and have the right of cross-examination").

Thus, for notice and a hearing to be meaningful, the underpinnings of the agency's initial position, including any determinations of fact and credibility as well as any criteria used by the agency, must be communicated to the affected individual with the initial

decision of the agency to provide an adequate opportunity for rebuttal. In the administrative context, the most oft-cited articulation of this standard is by the Supreme Court in *Goldberg v. Kelly*: For notice and hearing to be meaningful, a welfare recipient must "have timely and adequate notice detailing the reasons for a proposed termination." 397 U.S. 254, 268 (1970). In *Goldberg*, the notice requirements were satisfied by giving the affected individual an "individual letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility. . . . [T]he recipient is told the legal and factual bases for the Department's doubts." *Id.* at 268.

With regard to determinations of credibility, *Gonzales v. United States*, is instructive. There, a draftee into the United States military was denied conscientious objector status by recommendation of the Department of Justice. 348 U.S. 407 (1955). The Department had concluded that the draftee's declaration of official membership in the Jehovah's Witnesses occurred in such close proximity to his registration for the draft (one month) that his religious membership was not credible evidence of a sincere objection to combat. *Id.* at 410. The Department, however, informed the draftee only of its conclusion to recommend denial of his objector status request, not the underlying credibility judgment. *Id.* The Appeal Board, charged with a final agency determination of the draftee's case, received the Department's full report including the credibility judgment. The draftee filed objections with the Board but did not address the credibility issue since he was unaware that the Department's recommendation was based thereon.

The Board adopted the Department's recommendation over the draftee's objections. *Id.* at 411.

The Supreme Court reversed, holding that procedural due process dictated that "if the [draftee] is to present his case effectively to the Appeal Board, he must be cognizant of all the facts before the Board as well as the over-all position of the Department of Justice. . . . The petitioner was entitled to know the thrust of the Department's recommendation so he could muster his facts and arguments to meet its contentions." *Id.* at 413-14 (citing *Morgan*, 304 U.S. at 18). In this case, the Court noted, if the Department had informed the draftee that its decision rested on a lack of credibility inferred from the temporal proximity of his declaration of membership in the Jehovah's Witnesses to the draft, the draftee may have successfully persuaded the Appeal Board that he had actually been a sincere, practicing Jehovah's Witness long before he officially declared as such. *Id.* at 414.

Opinions confirming the central tenets of *Goldberg* and *Gonzales* in various administrative contexts are legion: Meaningful notice and an opportunity to be heard must include a disclosure of the evidentiary basis of an initial position, any legal standards relied on by the agency, and the rationale of the agency's initial position to the affected individual *before the final decision* in order to give the individual a meaningful opportunity for rebuttal at a subsequent hearing. *See, e.g., Greene v. McElroy* 360 U.S. 474, 496-97 (1959) ("[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to

show that it is untrue"); *Cabo Distributing Co., Inc. v. Brady*, 821 F. Supp. 601, 611-12 (N.D. Cal. 1992) (Bureau of Alcohol, Tobacco & Firearms violated procedural due process rights of vodka distributor by initially informing distributor only that it was relying on "administrative expertise" to characterize bottling label as misleading and revoke label approval; agency should have better disclosed the basis of its administrative expertise to ensure that the distributor was given an effective right to challenge the finding); *Monumental Health Plan, Inc. v. Department of Health and Human Services*, 510 F. Supp. 244, 248-49 (D. Md. 1981).

In the specific context of Medicaid eligibility determinations, the U.S. Court of Appeals for the Sixth Circuit held that Tennessee's notice of denial was constitutionally infirm because rejected applicants "were not adequately advised of the reasons for denial of their applications, their right to appeal, the existence of a presumption that [applicants] did not apply for coverage as uninsurable persons, and the consequences of not appealing and filing new applications." *Hamby v. Neel*, 368 F.3d 549, 560 (6th Cir. 2004); *see Tripp v. Coler*, 640 F. Supp. 848, 860 (N.D. Ill. 1986) (Illinois' Medicaid administration agency failed to comply with procedural due process in denying benefit requests because the agency "failed to identify the precise medical items or services at issue and failed to identify the standard by which such use has been judged" including clarification of the meaning of the term "medically necessary").

2. An evidentiary hearing provides the standard format to dispute the denial of an important property right.

After sufficient notice is provided, an evidentiary hearing that allows for the presentation and cross-examination of witnesses provides the standard opportunity to rebut the opposing evidence and argument before final agency denial of an important property right. In *Goldberg*, the Supreme Court found that the termination of welfare benefits must be preceded by a hearing with "minimum procedural safeguards" including "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." 397 U.S. at 267-68. The evidentiary hearing outlined in *Goldberg* has become standard procedure in Maryland by virtue of the APA which mandates a "trial type" hearing for numerous potential wrongful deprivations. *See* SG §§ 10-201 and 10-208 (defining "contested case" as an agency adjudicaton of a "right, duty, statutory entitlement, or privilege of a person that is required by law to be determined only after an opportunity for an agency hearing" and specifying hearing rules in contested cases); *Quesenberry*, 311 Md. at 425 n.1 ("Where a hearing is required by law, the proceeding becomes a 'contested case' within the meaning of the Maryland Administrative Procedure Act."). While the hearing may occur post-termination and still satisfy due process in some cases, *see Mathews v. Eldridge*, 424 U.S. 319, 347 (1976), the evidentiary hearing before a final agency decision is nonetheless a "minimum" of the process due to give the full meaning to the right of confrontation in cases involving important property rights. *See, e.g.*, *Davis v. Mansfield Metro. Hous. Auth.*, 751 F.2d

180, 185 n. 4 (6th Cir. 1984) (holding that expulsion of public housing residents requires adequate notice, the right to counsel, the right to cross-examine witnesses, and a written decision by an impartial hearing panel based solely on evidence presented at the hearing); *Powell v. District of Columbia Housing Authority*, 818 A.2d 188, 196 (D.C. 2003) (termination of state rental subsidy required *Goldberg*-type hearing for due process).[7]

Even in situations where the Supreme Court has found the State's interest in efficiency or reduced administrative costs controlling over the individual's property right, the Court has still prescribed some form of hearing to allow for full knowledge and confrontation of the agency's case and to tell one's own side of the story. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) (mandating an oral hearing before state termination of employment implicating a property interest: "Even where the facts are clear, the appropriateness or necessity of the [agency action] may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect."); *Goss v. Lopez*, 419 U.S. 565, 583-584 (1975) (before implementation of short school suspension, due process requires "oral and written notice of the charges against [the student] and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."); *Wolff v. McDonnell,* 418 U.S. 539 (1974) (prison disciplinary hearing requires notice, opportunity to present evidence and call witnesses unless unduly hazardous, and confrontation and cross-examination within the discretion of the warden).

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[7] Medicaid, an analogous benefit for due process concerns, requires a number of "trial type" procedures for its hearings to determine the right of "any person whose claim for assistance is denied or not acted upon promptly." 42 C.F.R. § 431.200 – 431.250.

B. Disputes of Fact And Questions of Credibility Must Be Resolved At An Oral Hearing.

The lack of an oral hearing in the present case further exacerbates the risk of an erroneous decision and offends due process. Another well-established requirement of a "meaningful" hearing is the provision for an oral or in-person hearing where determinations turn on issues of credibility and questions of fact. The requirement of an oral or in-person hearing as part of due process has roots firmly planted roots throughout American jurisprudence. As Fifth Circuit Judge Patrick Higginbotham recently explained:

> Reciting the rote that oral hearings test credibility is an anemic and inadequate statement of their force. It is the hearing in open court which offers the opportunity to expose the very core of the evidence, its accuracy, and its weight. Our faith in live hearings is a judgment made at least two centuries ago, reaffirmed for so long as to become a central part of this country's democratic tradition and of a piece with its sense of fairness, and its defining of the relationship of citizen and state.

Hall v. Quarterman, 534 F.3d 365, 390 (5th Cir. 2008) (Higginbotham, J., concurring in part, dissenting in part). Judge Higginbotham proceeded to note that the esteemed position of oral or live testimony extends from the requirement of an oral hearing in determinations of mental handicap, jury selection, and numerous other civil and criminal proceedings to the deference on appeal owed to the fact-finder who alone witnessed the live testimony. *Id.* at 390-91.

In the context of an administrative decision affecting an important property right, the Supreme Court's decision in *Goldberg* is again controlling. There, the Court held that

welfare participants must be granted an in-person hearing prior to termination of benefits reasoning as follows:

> [W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. . . . Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence.

Goldberg, 397 U.S. at 269 (1970) (emphasis added); *see Londoner v. City of Denver*, 210 U.S. 373 (1908) (rejecting the proposition that an opportunity to submit written comments satisfied the due process requirement of a hearing before tax assessments were finalized as to individual property owners.); *cf Mathews*, 424 U.S. at 335 (no need for in-person hearing pre-termination where full evidentiary hearing is provided post-termination and issue of medical disability is "easily documented").

The *Goldberg* Court additionally noted that an oral hearing is still more critical to due process when written submissions are not a realistic option for many individuals affected by the agency's decision:

> The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance.

Id. at 269.

While not applicable in Mr. Brooks' specific situation, *amici* submit that in their collective experience, individuals who have serious health conditions covered by MHIP

often lack the means of presenting an effective written case. According to MHIP's application booklet, the program automatically deems eligible for coverage numerous conditions that can limit cognitive and functional abilities including: alzheimer's disease, dementia, AIDS, parkinson's disease, organic brain syndrome, bipolar disorder, psychotic disorder, and muscular dystrophy. MHIP Application Booklet at 4. Requiring written communication from persons who qualify for benefits based on impairments or illness that may limit their very access to such benefits presents a quandary as obvious as its solution: beneficiaries must have the opportunity to present their claims in person. Having the wherewithal to appeal when one is ill is difficult enough, requiring written communications and correspondence and prohibiting an opportunity to present one's defense in person can present insurmountable burdens. Such processes will have the unambiguous affect of limiting access to the appeal process. Accordingly, the "capacities and circumstances" of a number of individuals enrolled in MHP present the same concerns recognized by the Court in *Goldberg*, which, in turn, argues yet more forcefully for a full oral hearing in coverage terminations to protect due process.

Goldberg's central holding requiring an oral hearing to determine disputed issues of fact, credibility, and intent remains binding precedent. The Supreme Court affirmed this holding in *Califano v. Yamasaki*, distinguishing "straightforward matters of computation" from matters of "fault" and "good faith" in determining whether certain Social Security overpayments must be repaid by the recipient. 442 U.S. 682, 696-97 (1979). For determinations of the former, written submissions were appropriate. For the latter, however, involving determinations of credibility and intent, an in-person hearing

was required: "We do not see how these can be evaluated absent personal contact between the recipient and the person who decides his case. Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale." *Id.* at 697.

Even where less important property rights are at stake and the constitutionally-mandated procedure is less extensive, an oral hearing is still a requirement of due process. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (in challenge to a municipal utility's procedure for terminating service for non-payment of bills, hearing mandated by due process required, at a minimum, an "opportunity for a meeting with a responsible employee empowered to resolve the dispute."); *Goss*, 419 U.S. at 581 (before suspending a student, due process requires oral hearing); *District of Columbia v. Jones*, 442 A.2d 512, 522 (D.C. 1982) (police officer is entitled to an "informal oral hearing before his right to administrative sick leave is finally terminated").

As the Court of Appeals for the District of Columbia Circuit explained in *Gray Panthers v. Schweiker*, "paper hearings" even for disputes of payment by Medicare recipients totaling less than $100 are wholly inadequate given the centrality of oral hearings to due process. 652 F.2d 146 (D.C. Cir. 1980). The court discussed in detail the historical necessity of an oral hearing to due process, pointing out that, first, an oral hearing "provides a way to ensure accuracy when facts are in dispute, especially if credibility is an issue. . . . Even if credibility is not likely to be directly in issue, personal, oral hearings are an effective way to eliminate misunderstandings and focus issues.

Ambiguities which are not readily apparent on the face of a document can be disclosed and clarified with a few moments of oral exchange between the individual and the decisionmaker." *Id.* at 161-62. Second,

> The hearing requirement and many of the additional procedural safeguards that due process may require in particular circumstances also serve as an institutional check on arbitrary or impermissible action. Caseworkers, auditors, parole officers and other initial decisionmakers, if required to meet personally with those whose lives they are touching, and justify, however briefly, their decisions to those who are dissatisfied, are faced with a powerful disincentive to arbitrary action. . . . An oral hearing requirement thus serves to ensure that decisionmakers recognize that their decisions affect the lives of human beings, a fact that is often obscured by a jumble of papers and depersonalized identification numbers.

Id. (citing *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972)).

The court further observed:

> Third, and perhaps most important reason for generally insisting upon an oral hearing is that no other procedure so effectively fosters a belief that one has been dealt with fairly, even if there remains a disagreement with the result. . . . During an oral hearing, the "Government" loses its nameless, faceless quality and comes into focus as another human being with whom the citizen can speak, present his or her case, and look to for a responsible decision. To quote Justice Frankfurter again, no better way has "been found for generating the feeling, so important to a popular government, that justice has been done." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 [] (1951).

Id. at 162-63 (footnotes omitted).

C. An Evidentiary Hearing Is Yet More Essential When The Impartiality Of The Adjudicator Is In Question.

For purposes of procedural due process, the lack of an evidentiary hearing—indeed, any form of oral hearing—in the case at bar is only aggravated by the combination of Mr. Richard Popper's at least partial role in the initial decision to

terminate Mr. Brooks with his subsequent role as both sole prosecutor and adjudicator of Mr. Brooks' appeal. The requirement of an impartial agency adjudicator, which is grounded in avoiding even the "appearance of impropriety," is another core tenet of due process. *See Spencer v. Maryland State Bd. of Pharmacy*, 380 Md. 515, 534 n.7 (2004) (requiring recusal of final agency decision makers for the "appearance of impropriety"); *Sewell v. Norris*, 148 Md. App.122, 136-37 (2002) (in police disciplinary case in which Commissioner and Mayor had publicly criticized accused officer, appointment of Baltimore City Police Department officers who were beholden to the Commissioner for employment as final adjudicators violated due process), *cert. granted*, 373 Md. 406, *appeal dismissed*, 374 Md. 81 (2003). "The test generally used in the application of [the appearance of impropriety] standard is an objective one-whether a reasonable member of the public knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned." *In re Turney,* 311 Md. 246, 253 (1987) (cited with approval in *Sewell*, 148 Md. App. at 137-38).

To be sure, an administrative agency and various individuals within the agency will often serve in some capacity as investigator, prosecutor and judge in the same case without violating due process. *See Consumer Protection Div. v. Morgan*, 387 Md. 125, 194-95 (2005); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Nonetheless, the fact "'[t]hat the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not . . . preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.'" *Morgan*, 387 Md. at 195 (2005) (quotation omitted); *Withrow*, 421

U.S. at 58 ("That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial . . . ."). In other words, procedural due process dictates that where there are other failings in process, *e.g.*, lack of an evidentiary hearing, the combination of final agency adjudicator with other case responsibilities within one person may render the process constitutionally infirm. *See* Mark D. Debofsky, *What Process Is Due In The Adjudication of ERISA Claims*, 40 J. Marshall L. Rev. 811, 835-36 (Spring 2007).

The recent decision in *Stevenson v. Willis* is instructive. 579 F. Supp. 2d 913 (N.D. Ohio 2008). There, the recipient of a section 8 rental subsidy under the Federal Housing Act of 1937, 42 U.S.C. § 1437f, claimed that the manager of the local housing authority had denied her procedural due process in terminating her subsidy. *Id.* at 918-19. The housing manager relied primarily on hearsay not subject to cross-examination in terminating the subsidy, and the manager was the sole and final investigator, prosecutor, and adjudicator of the recipient's case. The court held that this combination of circumstances was a clear violation of the recipient's right to due process:

> To have . . . *a single individual* in the agency's employ performing the dual functions of advocate and adjudicator thus raises very serious constitutional concerns. Impermissible bias on the part of a hearing officer can exist where "the decisionmaker was engaged in adjudicative and executive functions in violation of the principle of separation of powers." *Hammond v. Baldwin*, 866 F.2d 172, 177 (6th Cir.1988). . . . *see also Elliott v. SEC*, 36 F.3d 86, 87 (11th Cir.1994) . . . 5 U.S.C.A. § 554(d) (prohibiting an "employee or agent" engaged in investigation or prosecution from participating or advising on the decision in that case. . .).

Id. at 920 (emphasis original). Thus, when the housing manager "acted both as advocate and adjudicator, she amplified the danger to plaintiff's right to procedural due process already posed by her reliance on untested hearsay." *Id.*

Moreover, as the Supreme Court has noted, whereas it is often permissible to have a single agency member serve as both prosecutor and adjudicator, it is absolutely violative of due process for the initial decisionmaker to be the decisionmaker on appeal: "[W]hen review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review." *Withrow*, 421 U.S. at 58 n. 25 (citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and *Morrissey v. Brewer*, 408 U.S. 471 (1972)). This is because "no man can be a judge in his own case." *Sewell*, 148 Md. App. at 138 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); *see also Mayer v. Montgomery Co.,* 143 Md. App. 261, 275 (2002) (initial agency decisionmaker's position as supervisor of appellate decisionmaker renders the case "destined for a particular result from the start" and therefore violative of due process).

Thus, the risk of an erroneous deprivation made more likely by lack of a*n* evidentiary hearing is exacerbated by an ambiguous role for the final adjudicator in the initial agency decision, thereby implicating at least the "appearance of impropriety."

D. Involvement Of A Private Program Administrator Does Not Alter The State's Obligation To Comport With Procedural Due Process.

Finally, *amici* would urge this Court to reject any notion that the presence of CareFirst as a private actor initially reviewing the termination pursuant to COMAR 31.17.03.19D altered the State's obligation to comply with constitutionally-mandated due

process. Without meaningful notice of the basis of the agency's initial decision and a corresponding opportunity to rebut that position in an oral hearing with a neutral adjudicator, any process provided by the private entity is inadequate.

The Supreme Court has stated clearly and repeatedly that "outsourcing" of a state function does not remove that operation from constitutional mandates: "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995); *see also Bd. of Co. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996) ("Determining constitutional claims on the basis of formal distinctions, which can be manipulated largely at the will of the government agencies concerned, . . . is an enterprise we have constantly eschewed. . . .")

In the context of state Medicare and Medicaid functions being outsourced to private entities, numerous courts have concluded that the above-referenced principles do not allow states to shirk constitutional duties merely by transferring administrative responsibilities to private entities. *See, e.g.*, *Catanzano by Catanzano v. Dowling*, 60 F.3d 113, 118 (2nd Cir. 1995) (certified home healthcare agencies are state actors in determining whether aid provided was medically necessary and reimbursable; thus, notice and hearing mandates applied); *John B. v. Menke*, 176 F.Supp.2d 786, 801 (M.D. Tenn. 2001); *J.K. By and Through R.K. v. Dillenberg*, 836 F.Supp. 694, 699 (D.Ariz. 1993). Accordingly, because the parties have already conceded that Mr. Brooks possessed a property right in MHIP membership, the due process safeguards deeply ensconced in this country's legal system must be provided.

CONCLUSION

The present circuit court decision would allow State agencies to terminate important property interests without an opportunity to know and then rebut the reasoning and evidence underlying the agency's initial position, without an oral hearing critical to findings of fact and determinations of credibility and intent, and with a final adjudicator who also acted as the agency's prosecutor in the case and likely had some role in the initial agency investigation and decision to terminate the benefit. A vast body of American jurisprudence dictates that this lack of traditional procedural safeguards in the termination of an important property right clearly violates the procedural due process requirements of Article 24 of the Declaration of Rights. *Amici* urge this Court to recognize the importance of these procedural safeguards, particularly for participants in MHIP, and mandate the use of traditional procedural safeguards for future MHIP enrollees disputing an eligibility determination, as this Court did for Medicaid benefit determinations in *Reese v. Dep't of Health and Mental Hygiene*. 177 Md. App. at164.

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I hereby certify that on this 27th day of April 2009, I mailed first class, postage prepaid, two copies of the foregoing Brief of *Amici Curiae* to:

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