STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NUMBER ARO-21-312

DENNIS WINCHESTER,
PETITIONER/APPELLANT

v.

STATE OF MAINE,
RESPONDENT/APPELLEE.

ON APPEAL FROM THE AROOSTOOK COUNTY UNIFIED CRIMINAL DOCKET

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF MAINE

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Maine ("ACLU of Maine") is a nonprofit, nonpartisan organization founded in 1968 to protect and advance the civil rights and civil liberties of all Mainers. The ACLU of Maine strives to protect and defend the rights secured by the Maine and United States Constitutions, including the rights guaranteed by the Sixth Amendment.

ACLU of Maine actively works to safeguard the Sixth Amendment rights of individuals accused in criminal cases. For example, ACLU of Maine is currently lead counsel in *Robbins v. MCILS et al.*, No. KENSC-CV-22-54, a class action lawsuit seeking to ensure effective assistance of counsel under the Sixth Amendment for indigent criminal defendants in Maine.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus Curiae adopts the Statement of Facts and Procedural History as set forth in the Brief of Appellant.

STATEMENT OF THE ISSUES

The Court has invited amicus briefs on the following question: "Was Winchester's right to a speedy trial violated under article 1, section 6 of the Maine Constitution? Your response should include a discussion of the proper test Maine courts should apply in analyzing claims of speedy-trial violations under the Maine Constitution."[1]

SUMMARY OF THE ARGUMENT

This appeal provides an important and timely opportunity for this Court to re-establish its traditional, independent interpretation of the right to a speedy trial under Maine's Constitution, reinvigorating a right that has too often existed in theory but not in practice. Consistent with Maine's public policy goals of guaranteeing the "fundamental," "self-executing" right to a speedy trial, as well as this Court's own earlier precedents applying an independent speedy trial analysis, the appropriate framework for analyzing speedy trial claims under the Maine Constitution requires a showing of *either* presumptive prejudice based on an

[1] The Court has also invited amicus briefs on a second question, "If Winchester's right to a speedy trial was not violated under the Maine Constitution, was it violated under the Sixth Amendment of the United States Constitution?" Amicus Curiae takes no position on this second question and instead focuses on the scope of the speedy trial right under the Maine Constitution.

excessive delay *or* actual prejudice—not both. *State v. Couture*, 163 A.2d 646, 655 (Me. 1960).

To the extent other decisions of this Court have suggested that Maine automatically applies the Supreme Court's test for federal constitutional speedy trial claims, including its requirement that defendants bear the burden to prove both presumptive prejudice and actual prejudice,[2] we urge the Court to re-examine and overrule those portions of its decisions. The Supreme Court's burdensome *Barker*[3] analysis—and in particular its requirement that criminal defendants prove actual prejudice to their ability to present a trial defense even when they have already shown presumptive prejudice based on lengthy delay—has hollowed out the speedy trial right in practice, making it virtually impossible for defendants to prevail.[4] In this critical moment when Maine courts face historic backlogs and criminal defendants face unprecedented delays, we urge the Court to revitalize the Maine Constitution's guarantee that the accused in "all criminal prosecutions"

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[2] *See, e.g.*, cases cited in Appellant's Opening Brief at pp. 7-9, applying the Supreme Court's *Barker v. Wingo* test to Maine constitutional speedy trial claims and suggesting that defendants must prove both presumptive prejudice and "actual prejudice" to prevail on speedy trial claims under the Maine Constitution.

[3] *Barker v. Wingo*, 407 U.S. 514, 530–31 (1972).

[4] Sara Hildebrand & Ashley Cordero, *The Burden of Time: Government Negligence in Pandemic Planning as a Catalyst for Reinvigorating the Sixth Amendment Speedy Trial Right*, 67 Vill. L. Rev. 1, 2 (2022) (explaining that *Barker*'s "actual prejudice" requirement makes it "nearly impossible" to prevail on speedy trial claims).

have a fundamental right to "a speedy, public and impartial trial." Me. Const. art. I, § 6.

ARGUMENT

I. Now Is a Critical Time for this Court to Meaningfully and Independently Interpret Maine's Speedy Trial Right.

This appeal provides a critical opportunity for this Court to re-establish its independent interpretation of the right to a speedy trial under Maine's Constitution, breathing life back into a right that has too often in recent years existed only on paper.

The right to a speedy trial has perhaps never been as important as it is today. Two years into the Covid-19 pandemic, there were 26,000 pending felony and misdemeanor cases pending in Maine courts—as of March 2022, the number of pending criminal cases had jumped by 65% (an additional 10,500 cases) since March 2019.[5] As Chief Justice Stanfill explained in her annual address to state lawmakers earlier this year, this unprecedented backlog is a systemic problem with

[5] Emily Allen, "Backlogs causing delays in thousands of Maine court cases," *Portland Press Herald*, April 3, 2022, https://www.pressherald.com/2022/04/03/backlogs-causing-delays-in-thousands-of-maine-court-cases/, citing data from Maine Judicial System, available at https://cloudup.com/cMU_p1LR9t7.

no easy or quick solution: "The bottom line: Despite applying all available resources, technologies, and revamped processes, we have yet to be able to cut the backlog in any meaningful way. . . . The pandemic has exposed the uncomfortable reality that we simply lack the capacity to just 'catch up' or to schedule and hear more cases with our existing workforce." [6]

The persistent backlog in pending criminal cases has meant historic delays in critical criminal proceedings for thousands of criminal defendants. As Chief Justice Stanfill explained, "Many cases are taking longer to resolve, and we worry that justice delayed is truly justice denied."[7] These delays have a dramatic human cost:

> Attorneys and experts say the impact of delayed criminal cases is felt across the board. They point out that defendants can be sitting in jail, losing out on employment and means to support their families. Victims of crime who were traumatized face added anguish waiting to see how the cases are resolved. And, these attorneys and experts say, there are practical reasons for trials to happen sooner rather than later. "You don't want witnesses' memories to fade," [Vanderbilt University law professor Christopher] Slobogin said. "You don't want evidence to go stale. The longer a trial takes, the greater those dangers become."[8]

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[6] Chief Justice Valerie Stanfill, Maine Judicial Branch: State of Judiciary, A Report to the Joint Convention of the Second Regular Session of the 130th Maine Legislature, March 1, 2022, at 6, https://www.courts.maine.gov/courts/sjc/soj/soj-2022.pdf.

[7] *Id*.

[8] Griff Witte & Mark Berman, "Long After the Courts Shut Down For Covid, The Pain of Justice Delayed Lingers," *The Washington Post* (Dec. 19, 2021), https://www.washingtonpost.com/national/covid-court-backlog-justice-delayed/2021/12/18/212c16bc-5948-11ec-a219-9b4ae96da3b7_story.html

And these delays have fallen disproportionately on the most vulnerable and marginalized members of our society. As explained by Vera Institute of Justice Vice President Insha Rahman, our court systems disproportionately "process cases for people who are poor, who are Black and brown. If the courts were filled with cases of White kids from suburban, wealthy parts of our communities, there would have been more urgency to bring things back to normal."[9]

For individuals facing indefinite trial delays, the right to a speedy trial is more important now than it has ever been. And yet, even as criminal defendants across the state and across the country experience unprecedented delays in criminal proceedings, the constitutional right to a speedy trial continues to fail them. Since the Supreme Court's decision in *Barker* a half-century ago, "courts have dismissed an extremely low number of cases for speedy trial right violations." [10] And many legal scholars "have expressed concerns over state courts applying the *Barker* test with unjust results."[11] Even amidst the historic trial delays brought on by the pandemic, "the burden placed on claimants [by *Barker*] to establish actual

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[9] *Id*.
[10] Seth Osnowitz, *Demanding a speedy trial: Re-evaluating the assertion factor in the* Barker v. Wingo *test*, 67 Case W. Res. L. Rev. 273, 299 (Fall 2016) (citations omitted).
[11] *Id*. (citations omitted).

prejudice to their ability to present a trial defense makes it nearly impossible to prevail on a Sixth Amendment speedy trial claim."[12]

In the fifty years since *Barker* was decided, the Supreme Court's speedy trial test has proven unworkable and unjust in practice, placing a series of roadblocks and burdens on defendants that make it virtually impossible to enforce the constitutional right to a speedy trial. In Maine, there have been thirty Law Court decisions applying the *Barker* test to speedy trial claims under the Maine Constitution, and the defendant has lost every single time. Indeed, based on our research, the last Law Court decision finding a violation of the Maine Constitution's speedy trial right was *Couture*, which was decided in 1960—12 years before *Barker*—and applied an independent analysis to the state constitutional claim. 163 A.2d 646. But this Court is not bound by the Supreme Court's burdensome *Barker* test when interpreting the Maine Constitution's speedy trial right. It is time for this Court to re-examine its wholesale adoption of the Supreme Court's Sixth Amendment speedy trial analysis and instead re-invigorate the speedy trial right under the Maine Constitution.

[12] Hildebrand & Cordero, *supra* note 4, at 2.

II. The Maine Constitution's Right to a Speedy Trial Must Be Interpreted Independently of the Right Under the Federal Constitution.

This appeal provides an opportunity for this Court to re-establish its independent and flexible interpretation of the right to a speedy trial guaranteed by Section 6 of the Maine Constitution's Declaration of Rights, consistent with the "fundamental" importance Maine assigns to this "self-executing" right. *See Couture*, 163 A.2d at 655 ("It is fundamental law that a person charged with crime is guaranteed a speedy trial by the Constitution.").

The Maine Constitution broadly guarantees the right to "a speedy, public and impartial trial" for the accused in "all criminal prosecutions." Me. Const. art. I, § 6. In a decision that itself addressed the speedy trial right, this Court recognized nearly forty years ago that the "policy of judicial restraint moves us to forbear from ruling on federal constitutional issues before consulting our state constitution." *State v. Cadman*, 476 A.2d 1148, 1150 (Me. 1984) (separately construing speedy trial right under state and federal constitutions and applying different analytical frameworks). Under the Court's "primacy approach," it must "first look to the Maine Constitution" to interpret individual rights, separate from and independent of the federal constitution. *State v. Fleming*, 2020 ME 120, ¶ 17 n.9, 239 A.3d 648 (concluding that Maine Constitution's Section 6 right to impartial jury "demands more" than the federal constitutional provision).

The federal constitution sets the floor, not the ceiling, for protection of individual rights in Maine. States are free to "adopt a higher standard" than that set by the federal constitution. *State v. Collins*, 297 A.2d 620, 626 (Me. 1972) (quotation omitted). This Court has "reject[ed] any straitjacket approach" that would keep interpretation of the state constitution in lockstep with its federal counterpart. *State v. Bouchles*, 457 A.2d 798, 801–02 (Me. 1983). The Court interprets state constitutional provisions more expansively based on the "value[s]" and "public policy" that animate the Maine Constitution, even when the language of the state constitutional provision is similar or identical to that of the federal provision. *Collins*, 297 A.2d at 626.

State constitutional provisions do not "*depend* on the interpretation of" parallel federal provisions. *State v. Flick*, 495 A.2d 339, 343 (Me. 1985) (emphasis in original). "[T]o construe such opinions as expressing a limitation upon the scope of" a state constitutional provision "would be to stand the state-federal relationship . . . on [its] head[]." *State v. Caouette*, 446 A.2d 1120, 1122 (Me. 1982). As one Maine constitutional scholar has observed, interpreting Maine constitutional rights as identical to parallel federal rights fails to take into account the unique values, policies, and circumstances in Maine that provide the foundation for our state constitution:

> A court that attempts to employ a valid state constitutional analysis predicated upon the unexplored assumption that the underlying

> constitutional principles are the same under state and federal law is like a building contractor who erects a splendid edifice upon a foundation intended for a different structure entirely.

Marshall Tinkle, *State Constitutional Law in Maine: At the Crossroads*, 13 Vt. L. Rev. 61, 78 (1988).

The Court looks to federal precedent only "with respect to constitutional provisions with similar goals," and even then only as "*potentially persuasive* but not dispositive guidance." *Fleming*, 2020 ME 120, ¶ 17 n.9 (emphasis added). Thus, when this Court "cites federal opinions in interpreting a provision of [state] law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines." *Flick*, 495 A.2d at 343 n.2 (quotation omitted). And even when the drafters of parallel provisions plainly sought the same objectives, this "proposition does not support the non sequitur that the United States Supreme Court's decisions under such a text not only deserve respect but presumptively fix its correct meaning also in state constitutions." *Id.* at 343 (quotation omitted); *see also Bouchles*, 457 A.2d at 801–02 (rejecting approach "by which we would automatically adopt the federal construction of the fourth amendment ban of 'unreasonable searches and seizures' as the meaning of the nearly identical provision of the Maine Constitution.").

Alongside Maine's general commitment to construe its own constitutional provisions independent of the federal constitution, this Court has a long track

record of independently and expansively interpreting the very constitutional provision at issue here—Section 6 of the Maine Constitution's Declaration of Individual Rights, "Rights of persons accused." Over the past half-century, Maine has repeatedly and definitively construed Section 6 more broadly than its closest federal corollary, the Sixth Amendment. Just two years ago in *Fleming*, this Court concluded that Section 6's right to an impartial jury requires more than the corollary federal right, and emphasized that "[t]o the extent that the federal counterparts to Maine's requirement of an impartial jury, found in art. I, § 6 of the Maine Constitution, are deemed not to impose the inquiry we mandate today, we conclude that the Maine Constitution demands more." *Fleming*, 2020 ME 120, n. 9. This is only the most recent in this Court's long history of construing Section 6 state rights independently of, and more broadly than, federal rights under the Sixth Amendment. *See, e.g., State v. Sklar*, 317 A.2d 160, 171 (Me. 1974) (construing right-to-jury-trial guarantee in Section 6 to apply to all criminal prosecutions, even though federal jury-trial right extended only to serious or non-petty crimes).

III. A Violation of the Maine Constitutional Right to a Speedy Trial May Be Presumptively Established Based on Excessive Delay Alone, and Does Not Require a Separate Showing of Actual Prejudice.

In this critical moment, as criminal defendants face historic and indefinite delays, we urge the Court to breathe life back into the Maine Constitution's

guarantee that the accused "all criminal prosecutions" have a fundamental right to "a speedy, public and impartial trial." Me. Const. art. I, § 6. Consistent with Maine's public policy goals of guaranteeing the "fundamental," "self-executing" right to a speedy trial, as well as this Court's own precedents independently interpreting the Maine speedy trial right, this Court should re-establish its traditional, independent interpretation of Maine's constitutional right to a speedy trial: a speedy trial violation can be established through a showing of *either* presumptive prejudice based on excessive delay, *or* actual prejudice based on the defendant's individual circumstances. *Couture*, 163 A.2d at 655. When a defendant has shown a "conspicuously excessive" delay in trial, that alone establishes a presumptive violation of the speedy trial right, and the defendant does not bear an additional burden to show actual prejudice. *Cadman*, 476 A.2d at 1150. A delay of twelve months or more should be considered per se excessive[13] and therefore

[13] As detailed in the amicus brief of the Maine Commission on Indigent Legal Services, a presumptive deadline on the order of no more than 12 months is consistent with Maine's practices and precedents dating back to the 1820s, when Maine's constitutional right to a speedy trial was enacted. For purposes of calculating the delay in trial, the relevant data points are the moment in which the right to counsel attaches, *see State v. Babb*, 2014 ME 129, ¶ 10, 104 A.3d 878, 881 (holding that the right to counsel attaches "when the State initiates adversary judicial proceedings" (quotation omitted)), and the moment at which the right to protection from double jeopardy attaches, *see State v. Nielsen*, 2000 ME 202, ¶ 5, 761 A.2d 876, 878 (holding that the right to be free from double jeopardy "attaches when the jury is impaneled in a jury trial").

presumptively in violation of the speedy trial right, unless the State meets its burden to establish mitigating circumstances (such as, for example, that the defendant caused or acquiesced in the delay).[14]

In the *Cadman* decision, itself a speedy trial case, this Court squarely recognized that it must "forbear from ruling on federal constitutional issues before consulting our state constitution." *Id.* at 1150. Applying the primacy approach, the Court independently construed Maine's constitutional right to a speedy trial, relying on its own precedent rather than deferring to federal interpretations of the Sixth Amendment. *Id*. at 1150-51. The Court's analysis of the state right differed from the Supreme Court's analysis of the federal Sixth Amendment right (and from the trial court's analysis in this case) in two critical ways. First, the *Cadman* Court observed that a "conspicuously excessive delay would, **in itself**, be sufficient to violate the speedy trial guarantee, unless the State could establish mitigating circumstances." *Id*. at 1151 (emphasis added). In other words, the defendant has the initial burden to show an excessive delay and this establishes a presumptive constitutional violation; the burden then shifts to the State to show mitigating circumstances that would defeat that presumption (such as, for example, explanations for the delay). The *Cadman* test is far more protective than the

[14] For the reasons explained in the amicus curiae brief of MCILS, the State's lack of systemic resources should not be considered a permissible mitigating circumstance that excuses otherwise excessive trial delays.

Supreme Court's *Barker* test, under which even a showing of excessive delay is not enough; instead, even after the defendant establishes excessive delay, they still bear the burden to prove actual prejudice as part of a four-factor test: the length of delay, the reason for the delay, the defendant's assertion of the right, and actual prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530–31 (1972). Second, the *Cadman* Court explained that even absent an excessive delay, a speedy trial violation could be found based on a showing of some "additional circumstances that indicate absence of a speedy trial." *Cadman*, 476 A.2d at 1150. In contrast, under the less protective *Barker* test, the length of the delay is "a triggering mechanism" and if there is no excessive delay, the defendant automatically loses: "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 470 U.S. at 531.

In short, the Supreme Court's Sixth Amendment speedy trial analysis puts the burden on criminal defendants to show prejudice twice: first, defendants must make a threshold showing that the length of delay is so excessive it is "presumptively prejudicial"; and second, even if defendants make this showing based on excessive delay, they still bear the burden to show actual prejudice under the fourth factor of the required four-factor test. *Id*. at 530-31. But under this Court's independent interpretation of Maine's speedy trial right, there is no such

double burden on defendants. Instead, the Court permits a criminal defendant to show *either* presumptive prejudice based on a "conspicuously excessive" length of delay alone, *or* actual prejudice based on other individual circumstances. *Cadman*, 476 A.2d at 1150. Unlike the federal court's burdensome test requiring a double-showing of prejudice, this Court has applied a more flexible analysis, recognizing that "[t]he right to a speedy trial under our Constitution is necessarily a relative matter; whether such a trial has been afforded must be determined from the circumstances of the particular case." *Cadman*, 476 A.2d at 1150 (citing *Couture*, 163 A.2d at 655).

Similarly, about a decade before *Barker* was decided, this Court conducted an in-depth analysis of the Maine Constitution's speedy-trial right and held that an excessive delay was, in itself, enough to make out a violation and defendant was *not* required to make a separate showing of actual prejudice. *Couture*, 163 A.2d at 655 (reasoning that "[i]t can readily be seen that long delay, such as existed in this case [there, 8 months], might well be prejudicial to a person charged with crime"). As in *Cadman*, the *Couture* Court outlined a flexible, fact-sensitive analysis for the Maine speedy-trial right: "No general principle fixes the exact time within which a trial must be had to satisfy the requirement of a speedy trial. The right to a speedy trial is necessarily relative; it is consistent with delays, and whether such a trial is

afforded must be determined in the light of the circumstances of each particular case as a matter of judicial discretion."

Unlike the burdensome *Barker* test, the approach taken by this Court in *Couture* and *Cadman* is consistent with the text of the constitutional right itself, Maine's longstanding public policy, and historical court precedents on the right to a speedy trial. The text of Section 6 of Maine's Declaration of Rights is straightforward: it broadly guarantees the right to "a speedy. . . trial" in "all criminal prosecutions." Maine Const., Art. 1, sec 6. There is no textual basis whatsoever in the Maine Constitution for *Barker*'s requirement that the accused must show, as a "triggering mechanism," that the delay was so extreme as to be presumptively prejudicial, let alone its additional requirement that even in cases of extreme delay, the accused bears the burden to make an additional showing of actual prejudice.

This Court's inquiry in *Couture* and *Cadman* is likewise faithful to the long-held values and public policy that animate Maine's right to a speedy trial. As this Court observed over sixty years ago, "It is fundamental law that a person charged with crime is guaranteed a speedy trial by the Constitution. This constitutional guaranty extends to all persons accused of crime; and a person accused of crime is entitled to a discharge or dismissal, if his right to a speedy trial is violated." *Couture*, 163 A.2d at 655 (citation omitted). Moreover, the Maine Constitution's

guarantee to a speedy trial is "self-executing, and if his right is violated accused is entitled to be discharged or to have the proceedings dismissed." *Id*. (citation omitted). The overlapping prejudice requirements imposed by *Barker* are inconsistent with these fundamental values, acting as doctrinal traps that prevent defendants from enforcing their speedy trial rights.

The *Couture/Cadman* inquiry is likewise far more consistent with the Law Court's own historical precedents. Based on our review, before the Supreme Court decided *Barker* in 1972, none of this Court's speedy trial decisions had required defendants to make a showing of actual prejudice in order to prevail. *See, e.g.*, *State v. Slorah*, 118 Me. 203, 106 A. 768 (1919); *Woods v. Perkins*, 119 Me. 257, 110 A. 633 (1920); *State v. Kopelow*, 126 Me. 384, 138 A. 625 (1927).[15]

This Court should re-establish its traditional view, as expressed in *Couture* and *Cadman*, that whether the speedy trial right has been violated "must be

[15] Other state courts have applied a similarly flexible analysis to their own state constitutional speedy trial rights, rejecting the burdensome *Barker* requirements that defendants establish both presumptive prejudice based on length of delay and actual prejudice based on their individual circumstances. In New York, for example, the state's highest court has expressly rejected a separate requirement of actual prejudice, and has instead adhered to "the now traditional view in this court that where under the circumstances delay is great enough there need be neither proof nor fact of prejudice to the defendant." *People v. Wiggins*, 31 N.Y.3d 1, 18, 95 N.E. 3d 303, 314-15 (N.Y. 2018) (cleaned up). The court likewise took a broad, flexible view of prejudice, explaining that it is "not confined to the possible prejudice to his defense," and include the prejudice that results from the interference with the defendant's liberty, disruption to his employment, draining of his financial resources, and anxiety. *Id*.

determined from the circumstances of the particular case," and that a violation is presumptively established based on a "conspicuously excessive" length of delay alone. Once the defendant has established presumptive prejudice based on excessive delay, they bear no additional burden to show actual prejudice based on other individual circumstances. Instead, the burden shifts to the State, which may then defeat the claim by producing evidence of mitigating circumstances that rebuts the presumption of prejudice.

CONCLUSION

For the foregoing reasons, Amicus Curiae urges this Court to hold that the trial court erred as a matter of law by interpreting the speedy trial right under the Maine Constitution as co-extensive with the federal Sixth Amendment right and holding, in reliance on federal law, that to prevail on his speedy trial claim Winchester has the burden to show *both* presumptive prejudice based on the length of delay *and* actual prejudice based on his particular circumstances. Trial Court Opinion at 20-21.[16] We respectfully request that this Court re-establish its

[16] The trial court held, in reliance on the Supreme Court's federal Sixth Amendment jurisprudence, that "In *Barker v. Wingo,* 407 U.S. 514, 530-533 (1972), the Supreme Court indicated four factors to be considered in evaluating an alleged denial of the right to a speedy trial: the length of delay, the reasons for delay, the assertion of his right, and prejudice to the defendant arising out of the delay. *Id.* The *Barker* analysis is necessary, however, only when the length of the

traditional view that defendant may establish a violation of the Maine constitutional right to a speedy trial by a "conspicuously excessive" length of delay alone, at which point the burden shifts to the State to rebut the presumptive violation through evidence of mitigating circumstances.

Respectfully submitted, ,

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delay is so presumptively prejudicial as to warrant consideration of the three remaining factors in the balancing process."

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on July 29, 2022, she caused to be sent by email and mail a copy of the above Brief of Amicus Curiae to counsel for Plaintiffs and Defendants, by depositing two copies of said brief to them by mail, at their respective mailing and email addresses:

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