

IN THE SUPREME COURT OF MARYLAND

BETHESDA AFRICAN CEMETERY COALITION,
REVEREND OLUSEGUN ADEBAYO, DAROLD
CUBA, GENEVA NANETTE HUNTER, and
MONTANI WALLACE

Petitioners,

v.

HOUSING OPPORTUNITIES COMMISSION OF
MONTGOMERY COUNTY

Respondent.

Petition No. _____

September Term 2023

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

Proposed *amicus curiae*, Education Rights Center of Howard University School of Law, respectfully requests this Court to grant a writ of *certiorari* because human decency must have its place in the application of the law. Howard University School of Law is the nation’s first historically Black law school. For more than 150 years since its founding during Reconstruction, the law school has worked to train “social engineers” committed to advancing human rights and social justice. As part of this mission, the Education Rights Center at Howard University School of Law (“the ERC”) works with individual and organizational public and private stake holders globally to develop the theory and practice of education as a tool for the creation of peace, the preservation of the planet, and the empowerment and liberation of historically disadvantaged people.

If Petitioner's writ of certiorari is granted amicus curiae will seek consent of the parties or move for permission to file an amicus curiae brief on the issues before the Court.

The ERC respectfully requests this Court to grant a writ of *certiorari* because this case presents at least three issues of great importance:

First, this case presents an important opportunity for the Court to ensure that proper consideration is given to how to respect the memory and resting place of the dead. The arguments of Petitioners in their Petition for Writ of *Certiorari* are incorporated by reference. In addition, *amicus curiae* note that the Appellate Court's holding that BR § 5-505 is nothing more than a "quiet title" statute, providing landowners with an optional proceeding, suggests that Maryland law recognizes no inherent value in respecting burial grounds. This assertion defies basic human decency and common sense. It is contrary to the societal norms of Maryland and of our nation. Perhaps one of the clearest representations of that value is in the vigilance of the U.S. Army's 3rd Infantry Regiment that keeps constant guard over the Tomb of the Unknown Soldier.¹ Even through storms that may result in flooding, damage to property, and loss of life, the soldiers remain diligently at their post because our values honor veterans not only in life, but also in death and burial.

Respect for people who have died and been buried, is not limited to veterans. This Court has held that people who have been buried should not be disturbed absent due

¹ <https://www.arlingtoncemetery.mil/Blog/Post/13236/Tomb-Guard-Braves-Storm>;
<https://americanmilitarynews.com/2022/01/new-photos-show-tomb-of-the-unknown-soldier-guards-in-rare-blizzard/>

consideration by a court of equity. Dougherty v. Mercantile-Safe Deposit & Tr. Co., 282 Md. 617, 620, 387 A.2d 244, 246 (1978) (“when the duty to furnish proper burial has been discharged, the [spouse’s] right of custody ceases and the body is thereafter in the custody of the law and disinterment or disturbance of the body is subject to the control of a court of equity.”) (*citing* Pettigrew v. Pettigrew, 207 Pa. 313, 56 A. 878 (1904).) This Court quoted Justice Cardozo that “The dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose.” Dougherty, 282 Md. at 620 (*quoting* Yome v. Gorman, 242 N.Y. 395, 403, 152 N.E. 126, 129 (1926)).

The Appellate Court’s decision would strip courts of equity of their custody of the bodies of the dead and make their jurisdiction over disinterment or disturbance optional. Consideration by a court of equity is particularly important in the case of burial grounds of formerly enslaved people and Native Americans because of historical circumstances that have affected the ability of communities to stand guard over ancestral lands. During slavery, laws or practices prohibited literacy among enslaved people,² required scarce record keeping of the lives and activities of enslaved people,³ and resulted in the prolific practices of separating families⁴ and forbidding formal marriage. Consequently, many of

² Tanya Hardy, “Interracial Relations in Antebellum Maryland,” *Essays on Slave Communities*, <http://slavery.msa.maryland.gov/html/antebellum/essay2.html> (“If caught learning, a black could be severely punished”).

³ Adelsia Braxton, “The Slave Community,” *Essays on Slave Communities*, <http://slavery.msa.maryland.gov/html/antebellum/essay3.html> (“when a death occurred, rough box would be made of heavy slabs, and the dead slave would be buried on the same day they died. The ceremony was brief, if there was any, the grieving slaves would sing a few spirituals and then return to their cabins”).

⁴ Desiree Lee, “Childhood in Slavery,” *Essay on Slave Communities*, <http://slavery.msa.maryland.gov/html/antebellum/essay1.html> (“Many slave children were taken from their families as early as three years old. Some stayed with their families as old as seven . . .”).

the societal structures that would protect the final resting place of formerly enslaved people have been diluted. A history that includes the forced removal of many Native American communities has produced a similar effect. Therefore, a court’s jurisdiction is particularly important to the disposition of burial grounds for formerly enslaved people and Native Americans because

[e]ach case must be considered in equity on its own merits, having due regard to the interests of the public, the wishes of the decedent, the rights and feelings of those entitled to be heard by reason of relationship or association, the rights and principles of the religious body or other institution, which granted the right to inter the body at the first place of burial, and determining whether consent was given to the burial in the first place of interment.

Radomer Russ-Pol Unterstutzung Verein of Baltimore City v. Posner, 176 Md. 332, 338, 4 A.2d 743, 746 (1939). The jurisdiction of the court of equity ensures that proper consideration is given to the respect for the dead.

Second, this case presents an important opportunity for the Court to consider the irreparable harm that destruction of the burial grounds of formerly enslaved people might do to their descendants. Recently, the *Washington Post* reported that scientists “have found more than 41,000 genetic ‘relatives’ of 27 enslaved people who were buried in Maryland’s Catoctin Furnace African American Cemetery about 220 years ago.” (Michael E. Ruane and Carolyn Y. Johnson, “Old African American Cemetery Yields DNA links to 41,000 new ‘relatives’”, *Wash. Post*, Aug. 4, 2023). The findings of experts from Harvard University and the Smithsonian Institution are the result of a new research approach “that could be invaluable to people seeking clues about long-lost

ancestors.” Id. Although most connections are probably collateral relatives, according to Harvard researchers, almost 3000 are close relatives. Id. So, not only do burial grounds hold the bodies and memories of ancestors, but they hold a trove of information with the potential to heal ties that were severed and reconstruct identities lost through the violence of slavery. The Appellate Court’s opinion that a court of equity’s consideration of the preservation of that information is optional and merely a matter of quiet title would do irreparable harm to descendants of formerly enslaved people.

Third, this case presents an important opportunity for the Court to protect the general social welfare by helping to preserve important historical facts from our nation’s history that may be an essential element to future racial healing. The researchers of Maryland’s Catoctin Furnace, for example, uncovered important facts about the way that enslaved people worked and lived in an industrial context, as opposed to an agricultural setting. (Michael E. Ruane, “Faces of the dead emerge from lost African American graveyard,” *Wash. Post*, July 9, 2021). The research reveals facts about the health of people in Maryland, how they worked, and the relationships between enslaved people and white people. For example, the study found that many of the bodies were teenagers, raising the possibility that the harsh work at the furnace resulted in early death. Id. Researchers found a baby, buried with its mother, who had a white father. Id. Evidence of childhood disease, congenital deformities, sickle cell disease, and the toxic and backbreaking nature of the work was also found. Id.

One older man’s back was so severely bent that it had to be broken to get him into his grave, experts said. Another man’s bones had extremely high levels of zinc,

probably from having to clean deposits from the inside of the furnace and suggesting he may have had “fume fever” as a result, the experts said.

Id. These facts are part of Maryland’s history. They help us understand the challenges that we have faced together and what we did to overcome them.

In overturning a statute that would prohibit the burning of crosses, this Court noted that

the State has a compelling interest in protecting the social welfare of all its citizens. Indeed, the promotion of racial and religious tolerance has become not just an interest of Maryland's government but a moral and ethical mission of our entire society, in order both to correct past injustices and to give content to our nation's belief in equality of opportunity. But the Constitution does not allow the unnecessary trammeling of free expression even for the noblest of purposes.

State v. Sheldon, 332 Md. 45, 63, 629 A.2d 753, 763 (1993). This case provides an opportunity for the Court to clarify that a court of equity must consider whether and how historical facts contained in burial grounds that would inform free expression concerning the social welfare should be maintained. Because the decision whether and how to access this information involves a variety of important issues with extensive ramifications, it is properly made under the jurisdiction of a court of equity.

The lessons from the past will guide us -- citizens of our county, our state, our nation, and our world -- to make better choices that foster justice, harmonious existence, and good stewardship. But we cannot learn from those lessons, especially when they are held in the memories of our ancestors, if we continue to allow them to be desecrated, plowed under, paved over, and sold off. Learning from the past means that the former

commodification and sale of Black bodies does not occur in the same callous manner in the present.

In concluding that there is no legal or equitable basis for enjoining the sale of Moses Cemetery or enforcing the requirements of BR § 5-505, the Appellate Court quotes from a pre-Civil War opinion, which pre-dates the Maryland Act of 1868, Ch. 211 (the original predecessor statute of BR § 5-505), concerning the limits of law. Hous. Opportunities Comm'n of Montgomery Cnty. v. Adebayo, 258 Md. App. 137, 197, 297 A.3d 289, 324 (2023) (*citing* Windt v. German Reformed Church, 4 Sanford's Equity Reporter 471, 476, 7 N.Y. Ch. Ann. 1175 (1847)). Perhaps appropriately so because the reasoning of the opinion seems locked in a past, where pleadings of law and equity were strictly segregated and the lives of Black and Native Americans warranted no respect or regard.

This case presents an opportunity for this Court to preserve the jurisdiction of the court in equity over sepulture and affirm the legislature's decision to require appropriate consideration of the import and interests in burial grounds prior to sale. It also presents an opportunity to require consideration by a court prior to potential irreparable harm to descendants of enslaved people and an opportunity to further the general social welfare.

Petitioner's writ of *certiorari* should be granted.

DATED: August 21, 2023

Respectfully submitted,

By: /s/ *elizabeth christ cunningham*

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**CERTIFICATION OF WORD COUNT AND COMPLIANCE
WITH MD. RULE 8-112**

1. This Motion contains 1,848 words, excluding the parts exempted from the word count by Md. Rule 8-503.
2. This Motion complies with the font, spacing, and type size requirements state in Md. Rule 8-112.

/s/ *Jasbir Bawa*

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CERTIFICATE OF SERVICE

I hereby certify that on the **21** day of August, 2023, a copy of the foregoing *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI* was served by via email to:

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