IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND SHALL ISSUE, INC., *et al.*	*	
Plaintiffs,	*	
v.	*	Civil Action No.: 1:22-cv-00865-SAG
ANNE ARUNDEL COUNTY, MD	*	
Defendant.	*	

* * * * * * * * * *

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF PLAINTIFFS' EXPERT GARY KLECK

In its opening brief, the County explained why the opinion of Plaintiffs' expert Gary Kleck is irrelevant, unreliable, and speculative. As to relevance, the question before this Court on summary judgment is whether the suicide prevention pamphlet's statement that access to a gun is a "risk factor" for suicide is factual and uncontroversial. Yet Plaintiffs' expert offers an opinion disputing whether firearm access *causes* suicide—an assertion found nowhere in the literature's text. Plaintiffs concede as much in their opposition, arguing instead that Kleck's testimony addresses a message that they contend the County's literature "implicitly effectively" carries. But Plaintiffs' hunt for "implicit" or "effective" messages only underscores the fact that they must add words to the County's literature to create an issue for their expert to dispute.

Plaintiffs' proposed reading also requires deleting words from the pamphlet. Although Plaintiffs assert that the term "associated with" never appears in the pamphlet, they are mistaken. The pamphlet in fact uses these exact words on the first page of text, to explain how risk factors are "associated with" suicide. Here too, there is an irreconcilable gulf between the pamphlet's

actual text and the imagined statement about "causes" that Plaintiffs' expert contests. For these reasons, his opinion should be excluded as irrelevant.

But even if an expert opinion about causation were somehow relevant, Plaintiffs fail to meaningfully respond to the County's arguments that their proposed opinion is unreliable and speculative. Their opposition brief contests none of the flaws laid out in detail in the County's opening brief, and instead argues that they go to the opinion's weight rather than its admissibility. But that misapprehends the Court's gatekeeping role under Rule 702, not to mention the serious defects in Kleck's methodology. Accordingly, the Court should exclude Kleck's opinion as inadmissible for these independent reasons as well. In the alternative, to the extent the Court thinks the opinion is potentially relevant, the County requests a *Daubert* hearing to more fully assess Kleck's credibility before deciding whether his opinion is entitled to any weight on summary judgment.

I. Kleck's opinion concerns a statement that the County's literature does not make, while ignoring the literature's actual text.

To determine whether Plaintiffs' expert opinion is relevant, the Court need go no further than the text of the suicide prevention pamphlet itself. The pamphlet begins by asking "What Leads to Suicide?" and answers that question without reference to firearms. *See* Miller Decl. Ex. 5, at 2, ECF No. 45-7.[1] The pamphlet goes on to state that "Some People are More at Risk for Suicide than Others," and lists "[a]ccess to lethal means including firearms and drugs" as one of many such "factors." *Id.* at 4. These risk factors, the pamphlet continues, "increase the chance" of suicide. *Id.* Neither party disputes that this is the relevant language; instead, Plaintiffs raise semantic arguments that these statements about probability are really veiled claims that access to

[1] All exhibits are attached to the Declaration of James Miller in support of the County's cross-motion for summary judgment and motion in limine to exclude the testimony of Plaintiffs' expert.

guns *causes* suicide. *See, e.g.*, Pls.' Opp'n at 1. This misreads the pamphlet for reasons detailed below, but it also misses the bigger—and undisputed—point that the pamphlet uses virtually the exact same words as do leading public health authorities and a "vast quantity," *id.*, of relevant empirical research.

While Plaintiffs labor to recast the pamphlet's statements about probability and risk, they do not contest that every relevant public health authority—including the CDC, the National Institute of Mental Health, the Maryland Department of Health, and others—uses these very same terms to describe firearm access as a "risk factor" that makes it "more likely" that someone will die by suicide. *See*, *e.g.*, Ex. 12, at 8 (CDC technical package, describing availability of lethal means as a "risk factor" for suicide), ECF No. 45-14; Ex. 14 (Maryland Department of Health fact sheet, stating that risk factors like easy access to firearms "make it more likely" a person will die by suicide), ECF No. 45-16; *see also* County's Br. at 2 n.2 (listing other public health authorities), ECF No. 44-1. Plaintiffs also fail to contest that the pamphlet's language mirrors the conclusions of the "vast quantity" of peer-reviewed research that the County and its experts have assembled, Pls.' Opp'n at 1. *See, e.g.*, Ex. 32, at 204 ("[A]ccess to and familiarity with firearms serves as a robust risk factor for suicide."), ECF No. 45-34; *see also* Miller Decl. App. 1, at 1-4, 8 (quoting language from studies attached as Exhibits 32, 35, 36, 41, 47, 48, 52, 74, each of which describes firearm access as a "risk factor" or something that "increase[s] risk" of suicide), ECF No. 45-2. Simply put, it is undisputed that the suicide prevention pamphlet's description of firearm access as a "factor" that increases the risk of suicide is the same formulation used by public health authorities and backed by a wealth of peer-reviewed social science.

It is also beyond dispute that nowhere within the text of the County's literature does it say that access to firearms (or any other risk factor, for that matter) "causes" suicide.[2] This creates an intractable problem of relevance for Plaintiffs' expert, who takes issue only with this causal claim that appears nowhere in the pamphlet's text. To paper over this absence, Plaintiffs spend the bulk of their opposition arguing that the pamphlet "implicitly effectively state[s]" something about causation. Pls.' Opp'n at 1. But Plaintiffs' resort to searching for implied messages hidden in the County's pamphlet only further highlights that the message their expert tries to contest appears nowhere in the actual text. Indeed, Plaintiffs argue that the suicide prevention pamphlet contains an "implicit" or "effective" message on no less than seven separate occasions. *See id.* (objecting to what the pamphlet "implicitly effectively state[s]"); *id.* at 2 (objecting to what "this pamphlet effectively states," including "implicit" message and "implied" recommendation about firearms); *id.* at 4 (objecting to what the pamphlet "implies" about risk factors); *id.* at 6 (objecting to "implication of a causal connection"); *id.* at 7 (objecting that the pamphlet "implies … a causal effect" and "impl[ies] an erroneous causal connection"). The Court need not hunt for a new meaning of the term "risk factor" when there is no dispute that this is precisely how public health experts and social science research describe the relationship between firearm access and suicide.

Plaintiffs cannot convert the phrase "risk factor" into a statement about causation without both adding to and deleting from the text of the pamphlet. This is perhaps most obvious in the pamphlet's opening paragraph, on page 2, where the pamphlet expressly states that depression—one of the many other "risk factors" listed alongside access to firearms on page 4—is "the most

[2] Plaintiffs are incorrect to assert that the County does not dispute Kleck's opinion about a supposed lack of scientific evidence to support the proposition that firearm access *causes* suicide. *See* Pls.' Opp'n at 5-6. On the contrary, the County argued in its opening summary judgment brief that this type of causal statement would be factually accurate. *See* County Summ. J. Br. at 23 n.27, ECF No. 43-1. But the Court need not reach that empirical question, because—as explained herein—it is not what the suicide prevention pamphlet says.

common health condition *associated with* suicide." Ex. 5, at 2, 4 (emphasis added). The suicide prevention pamphlet thus makes clear that a risk factor is something "associated with suicide." *Id.* at 2.

Bizarrely, Plaintiffs base their textual analysis around the counterfactual claim that "[t]he terms 'correlation' or 'associated with' are simply not found anywhere in the pamphlet." Pls.' Opp'n at 4. This apparent error on Plaintiffs' part is repeated twice and is the lynchpin of their textual analysis. *See id.* at 3 ("these terms [correlated or associated with] are not used in the pamphlet"). It is also demonstrably false: as noted above, the words "associated with," which Plaintiffs claim are "not found anywhere," in fact appear on the pamphlet's first page of text. Ex. 5, at 2. Plaintiffs' textual analysis thus requires deletion of this key phrase, which negates Plaintiffs' entire theory. The Court should decline Plaintiffs' invitation to edit the text of the pamphlet so that Plaintiffs' expert can create a dispute over a statement the County's literature does not contain.

This same error infects Plaintiffs' other textual argument, that the phrase "increase[s] the chance" suggests that risk factors are causally related to suicide. *See, e.g.*, Pls.' Opp'n at 2. To the contrary, the text of the pamphlet explains that probabilistic statements like "increase the chance" or "more at risk" or "increase[d] risk" likewise describe associations. Specifically, the pamphlet states that the risk factor depression is "associated with suicide" and then explains that "[c]onditions like depression … increase risk for suicide." Ex. 5, at 2. No one would read this sequence of "associated" equated with "increase[d] risk" and reasonably conclude that this was meant as a statement about causation.

Using "risk factor" and similar probabilistic language to identify things that are associated with—but may or may not cause—a particular health outcome mirrors how this language is used

throughout public-facing health literature. This strongly suggests that the only reasonable reading of these terms is the one that the public is already familiar with—namely, that terms like "risk factor" signal an association and not necessarily a causal relationship. To name just one example, the CDC advises that "[a]ge is the best known risk factor for Alzheimer's disease." *See Alzheimer's Disease*, CDC, https://www.cdc.gov/dotw/alzheimers/index.html. No reasonable person would understand this as a statement that old age in fact causes Alzheimer's disease. Examples like this abound in public health educational materials.[3]

In contrast, when public health officials want to convey that something *causes* a disease or other health outcome, they say so directly, using words like "cause" that the suicide prevention pamphlet omits. *See, e.g.*, 15 U.S.C. § 1333(a)(1) (requiring cigarette packaging to bear labels stating, e.g., "WARNING: Cigarettes cause fatal lung disease" and "WARNING: Cigarettes cause cancer"); *Fetal Alcohol Exposure*, NIH, https://www.niaaa.nih.gov/publications/brochures-and-fact-sheets/fetal-alcohol-exposure ("Prenatal alcohol exposure is a leading preventable cause of birth defects and neurodevelopmental abnormalities in the United States."). While Plaintiffs call it "absurd" to consider how public health authorities use the term "risk factor" in other contexts, *see* Pls.' Opp'n at 4, the widespread use of these terms in public-facing educational materials reflects how the public understands them, and how a reasonable person would interpret them. What is truly absurd is Plaintiffs' suggestion that by using this exact same phrasing in its own educational materials, the County is somehow conveying a different message.[4]

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[3] *See, e.g.*, *Breast Cancer*, *What are the Risk Factors?*, CDC, https://www.cdc.gov/cancer/breast/basic_info/risk_factors.htm (identifying age and physical activity level as among the risk factors for breast cancer); *Eating Disorders*, NIMH, https://www.nimh.nih.gov/health/topics/eating-disorders (stating, under heading "Risk Factors," that "Eating disorders frequently appear during the teen years or young adulthood"). Again, no reader would reasonably believe these educational materials to be asserting that age and lack of exercise cause breast cancer, or that being a teenager causes disordered eating.

[4] Indeed, the County's use of "risk factor" to mean an association between exposure and outcome matches the literal textbook definition of this phrase. *See* CDC, PRINCIPLES OF EPIDEMIOLOGY IN PUBLIC HEALTH PRACTICE: AN

Plaintiffs next argue that the County conveys a belief that firearms are a cause of suicide because it recommends protective measures that include the secure storage of firearms. *See* Pls.' Opp'n at 4-5. This argument fails for several reasons. First, it conflates the County's supposed beliefs about the causes of suicide with the pamphlet's message. Only the latter is relevant to the issue of factual accuracy before this Court; the County's beliefs do not change what the pamphlet says or make it any more or less factual. In addition, Plaintiffs present a false choice: the County must either prove that firearm access *causes* suicide or forfeit the ability to recommend protective measures that can prevent suicide and are supported by a robust body of social science. In reality, the County can recommend ways to prevent suicide that involve firearms without asserting (or proving) that firearm access *causes* suicide, so long as the information provided is factual and uncontroversial.

Second, Plaintiffs' argument ignores the practical reality that public health authorities must often make judgment calls about how to protect the public in the absence of perfect certainty. Exercising professional medical judgment that a given policy is likely to improve public health outcomes based on available evidence is not "junk science," as Kleck dismissively calls it. *See* Pls.' Opp'n at 5. It is the reality of protecting public health against persistent threats—as the County is doing here based on numerous studies indicating that secure firearm storage will likely prevent some suicides.[5] Tellingly, Kleck makes this pronouncement without any relevant

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INTRODUCTION TO APPLIED EPIDEMIOLOGY AND BIOSTATISTICS (3d Ed.), Glossary at 17 (2012), https://www.cdc.gov/csels/dsepd/ss1978/SS1978.pdf (defining "risk factor" as "an aspect of personal behavior or lifestyle, an environmental exposure, or a hereditary characteristic *that is associated with an increase in the occurrence* of a particular disease, injury, or other health condition" (emphasis added)).

[5] Studies that support this conclusion about the likely efficacy of firearm storage and/or removal methods include, but are not limited to, Exs. 36, 45, 49, 52, 54, 68, and 72, ECF Nos 45-38, 45-47, 45-51, 45-54, 45-56, 45-70, 45-74; *see also* Miller Decl. App. 1 (listing study findings).

The CDC's public messaging about Alzheimer's disease is again illustrative of this principle. Although scientists still do not know what causes Alzheimer's, the CDC nonetheless recommends a variety of preventative steps, explaining that "maintaining healthy behaviors and preventing and managing certain chronic health conditions may also reduce

background, qualifications, or experience in medicine or public health—a fact that the County pointed out in its opening brief and which Plaintiffs do not dispute. *See* County's Br. at 8.

Plaintiffs argue that Courts have rejected efforts to prove causation through evidence of correlation, *see* Pls.' Opp'n at 5, 9, but these cases are irrelevant because the County is not using studies finding correlation to establish causation. Rather, the County uses these studies (*see supra* at 3) to establish that the statement in the pamphlet is accurate, i.e., that firearm access is a "risk factor" for suicide (as "risk factor" is properly understood). Regardless, none of Plaintiffs' cases involve the factual accuracy of a compulsory commercial disclosure, which is the standard at issue here. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799-800 (2011) (studies with "significant, admitted flaws in methodology" did not establish effect of violent video games on children to level required under strict scrutiny to justify "a restriction on the content of protected speech"); *United States v. Valencia*, 600 F.3d 389, 424-26 (5th Cir. 2010) (admitting expert testimony that went to materiality of alleged fraudulent trade reports in criminal prosecution for wire fraud); *Verisign, Inc. v. XYZ.COM LLC*, 848 F.3d 292, 301 (4th Cir. 2017) (affirming exclusion of damages expert in Lanham Act unfair trade practices case, where expert testified solely about "a temporal link" between defendant's statements and plaintiff's alleged damages tied to a drop in ".net registrations").

Finally, Plaintiffs' argument distorts the pamphlet's message beyond recognition. The suicide prevention pamphlet—co-authored by the NSSF, the firearm industry's own trade association—plainly does not convey the message "don't own a gun," as Plaintiffs misleadingly insist. *See* Pls.' Opp'n at 2. Instead, it conveys to readers how to recognize the variety of risk

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your risk for cognitive decline," and noting research findings that "addressing modifiable risk factors may prevent or delay up to 40% of dementia cases." *See Alzheimer's Disease*, CDC, https://www.cdc.gov/dotw/alzheimers/index.html.

factors and warning signs for suicide, and advises them about the range of protective steps and other resources available to mitigate risk that they identify in themselves or others—by, e.g., "trust[ing] your gut," "[t]alking about suicidal thoughts and showing concern" for someone believed to be at risk, and securing firearms if the reader thinks that they or someone in their household may attempt suicide. *See* Ex. 5 at 4-7. The pamphlet does not say that mere ownership of firearms should prompt readers to take these recommended steps, but rather that the reader should act if they are "concerned about a loved one" (or themselves) based on the constellation of risk factors and warning signs identified in the pamphlet. *Id.* at 6.

In sum, Plaintiffs offer this Court no substantive grounds to depart from the plain text of the pamphlet, which describes firearm access as a "risk factor" for suicide in line with an undisputed wealth of supporting experts and research. The pamphlet never states that firearms cause suicide as Plaintiffs contend; rather it explicitly states the opposite: that "risk factors" are "associated with" suicide. Plaintiffs' effort to infer an "implied" message based on the pamphlet's recommendations for readers who believe they or a family member are at risk of suicide fails too. Because Plaintiffs' expert offers an opinion solely on a statement about causation that the County's literature does not make, his opinion fails the threshold test of relevance and must be excluded.

II. Plaintiffs fail to address the substantive flaws in Kleck's methodology.

While Plaintiffs spend the lion's share of their opposition arguing about relevance, they have comparatively little to say about the substantive flaws in Kleck's methodology and source data. In fact, they make almost no effort to contest the fundamental defects identified by the County. Instead, Plaintiffs argue that Kleck's opinion is admissible because of his supposed "renown[]" as an expert who has testified against gun laws in numerous other unrelated cases. *See* Pls.' Opp'n at 9. Ignoring that the burden of establishing admissibility falls on the party seeking admission of expert testimony, *see* County's Br. at 10, Plaintiffs improperly ask this Court to

abdicate its gatekeeping function under *Daubert*. *See* Pls.' Opp'n at 10; *see also UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres*, 949 F.3d 825, 832 (3d Cir. 2020) ("[T]he gatekeeping obligation imposed on trial courts under … Rule 702 applies whether the trier of fact is a judge or a jury.").

Plaintiffs' proposal that the Court avoid deciding questions of reliability and admissibility is unwarranted by either the facts or the law. As to the facts, Plaintiffs are virtually silent as to the substantive problems identified in the County's opening brief. It is therefore unrebutted and uncontested that:

- Kleck did not conduct any meaningful search for, or analysis of, social science research published after the 2019 book chapter and article that he copied verbatim into his report. *See* County's Br. at 7, 10-13.
- Kleck made no attempt to identify or analyze relevant studies that predate the 2019 book chapter and article copied in his report but overlooked in these 2019 source materials. *See id.* at 10-12.
- Kleck's report fails to consider or address at least 25 relevant studies that undercut his findings. This includes an entire category of contemporary research design—longitudinal and quasi-experimental studies—that his report overlooks. *See id.* at 13-14.
- Of the 19 supposedly "confounding variables" that form the basis of Kleck's criticism of social science, 15 are variables for which Kleck either has no empirical data or for which his only supporting data shows that the variables behave in the opposite way from how he theorizes (and thus do not nullify the observed relationship between gun access and suicide). *See id.* at 17-18.
- Kleck ignores several recent studies that undercut his theory that suicidal intent is a significant confounding variable. Instead, he relies solely on a pair of 30-year-old studies of small populations of pediatric psychiatric patients, rather than a representative sample of the general population. *See id.* at 19.
- Kleck's theory requires the effects of supposed confounding variables to be added together, but he has never tried to do this or to quantify the extent to which these variables are colinear (and thus have overlapping, rather than additive, effects). He can therefore only speculate whether the combined effects of these variables can explain away the observed relationship between gun access and suicide. *See id.* at 20-21.

- Kleck's opinion contesting the likely efficacy of the County's suicide prevention efforts fails to cite any study concluding that suicide attempters do actually substitute their method of suicide based on availability, or that such substitution always results in the choice of a method of similar or greater lethality. *See id.* at 17.

Any one of these independent defects is sufficient grounds to exclude Kleck's report as unreliable. Taken together, they provide clear and unrebutted evidence that Kleck's analysis is little more than results-driven cherry-picking of research, layered with speculation to bridge the gap between observed reality and Plaintiffs' desired conclusion.

As to the law, Plaintiffs have failed to cite any case that provides a basis to disregard these foundational problems and admit Kleck's flawed opinion. Simply put, none of the problems with the expert opinions in those cases bears even a passing resemblance to the defects in Kleck's data and methodology. For example, Plaintiffs rely on *Bresler v. Wilmington Trust Co.*, 855 F.3d 178 (4th Cir. 2017), where the Fourth Circuit affirmed rejection of a *Daubert* challenge that boiled down to mere "disagreement with the values [plaintiffs' expert] chose to assign to certain variables." *Id.* at 195; Pls.' Opp'n at 11. But the County is not asking this Court to exclude Kleck because it disputes the values he assigned to his confounding variables—it is asking for exclusion because (among other things) Kleck made no effort to assign or calculate *any values at all*. As a result, Kleck's opinion is unreliable because he can only speculate whether or not his theory provides a bona fide alternative explanation for the mountain of empirical evidence compiled by the County and its experts. *See* County's Br. at 20-21.

The County is also not seeking exclusion of a methodology that—while outside the mainstream—nonetheless "has widespread acceptance in the [relevant scientific] community, has been subject to peer review, and does not frequently lead to incorrect results." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999) (affirming admissibility of causation

expert in toxic tort case); *see also* Pls.' Opp'n at 10-11 (citing *Westberry*).[6] Rather, Kleck's opinion is unreliable because his practice of cherry-picking research that he agrees with while dismissing and ignoring contrary study results as "junk science" is the opposite of a reliable, peer-accepted methodology. Indeed, Kleck has faced harsh criticism for this very practice in his academic work, too. *See* Ex. 53, at 3 (concluding that Kleck's 2019 study results cannot be reproduced, and accusing Kleck of questionable research practices that "raise serious questions about the reliability of his findings").

Plaintiffs' attempt to analogize to *Maryland Shall Issue, Inc. v. Hogan*, 2021 WL 3172273 (D. Md. July 27, 2021), falls flat for similar reasons. The County is not seeking exclusion of Kleck's opinion simply because the 2019 book chapter upon which he bases much of his opinion is not peer-reviewed—a fact that is nevertheless relevant and that Plaintiffs do not contest. Objectively, the fact that the citations within Kleck's report are broadly self-referential (i.e., he mostly cites himself) and not peer-reviewed is only one among its many problems. Its more fundamental methodological and reliability defects are the ones catalogued at length above and in the County's opening brief, and which remain unrebutted, i.e., that Kleck failed to consider broad swaths of relevant contrary research, and that his theory is belied by its own supporting data and relies on rote speculation to reach his desired, preordained conclusion.

Plaintiffs' only counter to this litany of fundamental shortcomings is to ask the Court to ignore the questions of relevance and reliability and treat all objections as going to "weight not

[6] Plaintiffs' other cases are similarly distinguishable as involving expert methodologies and criticisms with little relevance to Kleck's report here. *See United States v. Moreland*, 437 F.3d 424, 431 (4th Cir. 2006) (affirming admissibility of expert testimony concerning drug testing whose "testing methods were accepted in the relevant scientific community and were subject to quality control measures," even though expert could not recall certain details about the underlying chemistry); *Heckman v. Ryder Truck Rental, Inc.*, No. CIV. CCB-12-664, 2014 WL 3405003, at *3 (D. Md. July 9, 2014) (declining to exclude expert whose testing of strap used to secure freight load failed to fully simulate real-world conditions like adverse weather and road salt).

admissibility." Pls.' Opp'n at 8. But failing to make such findings on a *Daubert* motion would amount to reversible error. *See, e.g.*, *Nease v. Ford Motor Co.*, 848 F.3d 219, 230-31 (4th Cir. 2017) (reversing admission of expert opinion where trial court "did not use *Daubert*'s guideposts or any other factors to assess reliability of [expert's] testimony," and concluding the court "abandoned its gatekeeping function" to "ensure[] that expert evidence is sufficiently relevant and reliable … on the front end"). This is particularly the case where, as here, Kleck's opinion is Plaintiffs' sole basis for contesting the County's evidence that the literature is factual, and thus must be found both relevant and reliable if Plaintiffs are to have any basis for resisting summary judgment in favor of the County.

WHEREFORE, for the reasons set forth in this memorandum and the County's opening memorandum, the County respectfully requests that this Honorable Court grant its Motion in Limine to Exclude Testimony of Plaintiffs' Expert, Gary Kleck. Alternatively, to the extent the Court is considering relying on Kleck's opinions in any way, the County requests a *Daubert* hearing to allow the Court to more fully assess Kleck's credibility and the problems with both his analysis and its foundation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2022, the foregoing motion was electronically filed in the United States District Court for the District of Maryland.

Tamal A. Banton

Tamal A. Banton