ORIGINAL

IN THE SUPREME COURT OF OHIO

Patricia Hulsmeyer, Appellee/Cross-Appellant, vs. Hospice of Southwest Ohio, Inc., et al. Appellants/Cross-Appellees.	No. 2013-1644 and No. 2013-1766 (Consolidated) On Appeal from the Court of Appeals of Ohio, First Appellate District Hamilton County, Ohio Case No. C 120822

MERIT BRIEF OF AMICI CURIAE DISABILITY RIGHTS OHIO, AARP, NATIONAL SENIOR CITIZENS LAW CENTER (NSCLC), NATIONAL HEALTH LAW PROGRAM (NHeLP), AND NATIONAL DISABILITY RIGHTS NETWORK (NDRN) SUPPORTING THE POSITION OF APPELLEE/CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. STATEMENTS OF INTEREST 1

A. The Ohio Disability Rights Law and Policy Center, Inc. 1

B. AARP 1

C. National Senior Citizens Law Center 2

D. National Health Law Program 2

E. National Disability Rights Network 2

II. STATEMENT OF FACTS 3

III. ARGUMENT 3

A. Proposition of Law 1 - Under the plain language of R.C. 3721.24, the making of a report or the intention to make a report of suspected abuse or neglect of a resident is protected activity. R.C. 3721.24 is unambiguous and its protection should not be limited by R.C. 3721.22 to persons who make or intend to make such reports only to the Director of Health. 3

B. If R.C. 3721.24 protects only employees or other persons who make reports of suspected abuse or neglect of a resident to the Director of Health, then persons who make such reports to an employer, to a family member of the resident, to law enforcement, or to other appropriate persons or entities must be permitted to assert claims for retaliation in violation of public policy. 3

C. Elder Abuse and Abuse of Individuals with Disabilities are Chronically Underreported Despite Having Devastating Consequences 4

1. Elder Abuse 4

2. Abuse of Individuals with Disabilities 8

D. Because Caregivers are Often in the Best Position to Report Abuse, Reporters Must Be Protected from Retaliation 10

E. Ohio Law and Public Policy Protect Whistleblowers from Retaliation 12

1. R.C. 3721.24 Protects Whistleblowers Like Ms. Hulsmeyer. 13

2. Ohio Public Policy Protects Whistleblowers Like Ms. Hulsmeyer. 14

IV. CONCLUSION **17**

CERTIFICATE OF SERVICE **18**

TABLE OF AUTHORITIES

Cases

Lark v. Montgomery Hospice, Inc., 414 Md. 215, 232-42, 994 A.2d 968, 978-984 (2010)..... 14
Proctor v. Kardassilaris, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 871, ¶ 22 13
Thompson v. Merriman CCRC, 9th Dist. No. 23229, 2006-Ohio-6008, ¶ 15 14
Wilson v. Kasich, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 40 13

Ohio Statutes

R.C. 3721.24 ..... i, 3, 11
R.C. 3721.01 8
R.C. 3721.22 ..... i, 3, 13
R.C. 3721.24 ..... i, 3, 12, 13, 16
R.C. 5123.60 1

Federal Statutes

29 U.S.C. 732 1
42 U.S.C. 15041 et. seq. 1
42 U.S.C. 12102(1)(A) 1

Federal Regulations

42 C.F.R. 51.45(a)(1)(iii) 16
45 C.F.R. 1386.22(e)(3) 16

Other Authorities

AARP Public Policy Institute, *At the Crossroads: Providing Long-Term Services and Supports at a Time of High Demand and Fiscal Constraint* 5
AARP Public Policy Institute, *The Aging of the Baby Boom and the Growing Care Gap: A Look at Future Declines in the Availability of Family Caregivers* 5
Acierno, et. al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, Am. J. Pub. Health (Feb. 2010) 6
Ansello, et al, *Abuse, Neglect and Exploitation, Considerations in Aging with Life Long Disabilities*, 22:1-2 J. Elder Abuse & Neglect 105 (2010) 9
Baladerian, et al, *Abuse of People with Disabilities: Victims and Their Families Speak Out* 8, 10, 11
Black's Law Dictionary (9th Ed.2009) 14
Castle, *Nurse Aides' Reports of Resident Abuse in Nursing Homes*, J. of App. Gerontology, 31(3) (Nov. 2013) 6
Centers for Medicare and Medicaid Services, *Nursing Home Data Compendium 2012 Edition* 8
Elder Justice and Protection: Stopping the Abuse: Hearing Before the Subcomm. on Aging of the Comm. on Health, Educ., Labor, and Pensions, 108th Cong. (Aug. 20, 2003) 7
Hassouneh-Philips, et al, *Abuse of Women with Disabilities: State of the Science*, 45:2 Rehabilitation Counseling Bulletin 96 (2002) 9
Hughes, et al, *Prevalence and Risk of Violence Against Adults with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies*, Lancet 9

Jenkins, *Zero Tolerance of Abuse of People With Intellectual Disabilities: Implications for Nursing*, 17:22 J. Clinical Nursing (2007) 11
Joyce, *An Audit of Investigations Into Allegations of Abuse Involving Adults with Intellectual Disability*, 47:8 J. Intellectual Disability Research (2003) 10, 11
Justice for All: Ending Elder Abuse, Neglect and Financial Exploitation: Hearing Before the S. S. Comm. on Aging, 112th Cong. (2011) 7
Lifespan of Greater Rochester, Inc., et. al., *Under the Radar: New York State Elder Abuse Prevalence Study* (2011) 8
Lund, *Community-Based Services and Interventions for Adults with Disabilities Who Have Experienced Interpersonal Violence: A Review of the Literature,* 12:4 Trauma, Violence & Abuse 171, 172 (2011) 9, 10
Luu & Liang, *Clinical Case Management: A Strategy to Coordinate Detection, Reporting, and Prosecution of Elder Abuse*, 15 Cornell J.L. & Pub. Pol'y 165 (2005) 11
Meirson, *Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State*, 60 Hastings L.J. 431, 434 4
Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect-The Legal Framework*, 31 Conn. L. Rev. 77, 89-97 (1998) 12
National Center for Health Statistics, *Long-Term Care Services in the United States: 2013 Overview* 5
National Center on Elder Abuse, *The 2004 Survey of State Adult Protective Services: Abuse of Vulnerable Adults 18 Years of Age and Older* (Mar. 2007) 6
National Research Council, *Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America*, The National Academies Press (2003) 7
OIG Supplemental Compliance Program Guidance for Nursing Facilities, 73 Fed. Reg. 56, (September 30, 2008) 12
Powers, et al, *End the Silence: A Survey of Abuse Against Men with Disabilities*, 74:4 J. Rehabilitation 41, 45-46, 50-52 (2008) 9
Pritchard, *Good Practice in Safeguarding Adults: Working Effectively in Adult Protection* 133, Jessica Kingsley Publishers (2008) 11
Robert Wood Johnson Foundation, *Long-Term Care: What Are the Issues?* 4
Saxton, et al, *Bring My Scooter So I Can Leave You: A Study of Disabled Women Handling Abuse by Personal Assistance Providers* 7:4 Violence Against Women 393, 407-408 (2001) 9, 10
U.S. Administration on Aging, *Projected Future Growth of the Older Population* 4
U.S. Government Accountability Office, *Nursing Homes: Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weaknesses*, Publication GAO–08-517 (2008) 6
World Health Organization, *World Report on Violence and Health* 7
Written Remarks of Kathy Greenlee, Administrator, Administration for Community Living (June 14, 2013) 7

Other Statutes

320 ILCS § 20/4.1 12

I. STATEMENTS OF INTEREST

A. The Ohio Disability Rights Law and Policy Center, Inc.

The Ohio Disability Rights Law and Policy Center, Inc. (d/b/a Disability Rights Ohio) is the federally-mandated system to protect and advocate for the rights of people with disabilities in Ohio and the Client Assistance Program under the Rehabilitation Act. R.C. 5123.60; *see* 42 U.S.C. 15041 et. seq.; 29 U.S.C. 732. Disability Rights Ohio is a 501(c)(3) not-for-profit corporation chartered under the laws of Ohio. Under both state and federal law, Disability Rights Ohio investigates abuse, neglect, and rights violations affecting people with disabilities, and pursues administrative, legal, and policy remedies to those violations. As the protection and advocacy system (P&A) for Ohio, Disability Rights Ohio attorneys have represented hundreds of people with disabilities before administrative bodies and in the courts.

Of significance to this case, the organization's investigators and advocates conduct hundreds of investigations into alleged abuse and neglect of individuals with disabilities, have awareness of allegations of serious abuse or neglect by service providers, and see daily the impact that underreporting of abuse and neglect has on the lives of Ohioans with disabilities. The majority of individuals who reside in long term care facilities are people who have a disability as that term is defined in federal law, in that they have "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. 12102(1)(A). Disability Rights Ohio and the individuals with disabilities that it represents in advocacy have a strong interest in public policy that encourages reports of abuse or neglect and allows for greater transparency in all service settings.

B. AARP

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities, and fights for the issues

that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities, and protection from abuse. Since its founding in 1958, AARP has advocated for quality long-term services and supports for older adults. AARP's interest in this matter is to ensure that older adults receiving long-term services and supports are free from abuse and neglect, which requires that their caregivers be free from retaliation when they report suspected abuse or neglect.

C. National Senior Citizens Law Center

The National Senior Citizens Law Center ("NSCLC") is a nationwide nonprofit organization that advocates for the independence and well-being of low-income older persons. Since 1972, NSCLC has served low-income older persons through advocacy, litigation, and the education and counseling of local legal advocates. We have a strong interest in ensuring that quality care is provided to persons who live in nursing facilities, and believe that whistleblowers help to identify and deter abuse and neglect.

D. National Health Law Program

The National Health Law Program (NHeLP) is a nonprofit organization that protects and advances the health rights of low-income and underserved individuals and families. For over forty years, NHeLP has worked to help individuals and advocates to ensure affordable, quality healthcare. NHeLP's work includes advocacy on the availability, sufficiency, and quality of long-term services and supports that appropriately serve older adults and individuals with disabilities. NHeLP's interest in this matter is to support an individual's right to receive quality care and be free from abuse and neglect.

E. National Disability Rights Network

The National Disability Rights Network ("NDRN"), is the non-profit membership association of protection and advocacy ("P&A") agencies that are located in all 50 states, the

District of Columbia, Puerto Rico, and the United States Territories. As the designated P&A for Ohio, Disability Rights Ohio is a member of NDRN. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination.

II. STATEMENT OF FACTS

Amici adopt the Statement of Facts set forth in Appellee/Cross-Appellant's Merit Brief.

III. ARGUMENT

A. Proposition of Law 1 - Under the plain language of R.C. 3721.24, the making of a report or the intention to make a report of suspected abuse or neglect of a resident is protected activity. R.C. 3721.24 is unambiguous and its protection should not be limited by R.C. 3721.22 to persons who make or intend to make such reports only to the Director of Health.

B. If R.C. 3721.24 protects only employees or other persons who make reports of suspected abuse or neglect of a resident to the Director of Health, then persons who make such reports to an employer, to a family member of the resident, to law enforcement, or to other appropriate persons or entities must be permitted to assert claims for retaliation in violation of public policy.

As the United States population ages, the need for long-term services and supports ("LTSS")—both community-based and facility-based—continues to multiply. Increased need for LTSS combined with decreased oversight has multiplied the risk of abuse, neglect, or financial exploitation to which older adults and individuals with disabilities are subjected. Abuse is a growing problem in Ohio and across the country, but most allegations of abuse and neglect go unreported. As caregivers are well-positioned to report abuse and neglect, it is vital to protect an

individual who takes the risk to report suspected abuse or neglect from retaliation by their employers. Ohio's public policy and the plain language of its anti-retaliation statute would be undermined by limiting protection only to those who submit reports directly to the Ohio Department of Health.

C. Elder Abuse and Abuse of Individuals with Disabilities are Chronically Underreported Despite Having Devastating Consequences

Victims of abuse suffer devastating physical, emotional, and psychological effects. Many studies document the prevalence of abuse of elders and individuals with disabilities, but experts agree that incidents of abuse are greatly underreported. To ameliorate the chronic underreporting of elder abuse and abuse of individuals with disabilities, Ohio sought to protect them by removing barriers to reporting abuse.

1. Elder Abuse

The number of older Americans continues to grow at a rapid pace nationwide; in Ohio alone, the number of individuals age 65 and older is expected to grow by over 770,000 between 2010 and 2030. U.S. Administration on Aging, *Projected Future Growth of the Older Population*, http://www.aoa.gov/Aging_Statistics/future_growth/future_growth.aspx (accessed June 18, 2014). The ever-increasing population of older adults is particularly vulnerable to abuse because of their "age, health, disabilities, and limited resources." Meirson, *Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State*, 60 Hastings L.J. 431, 434 (2008). An expected 70% of individuals who reach the age of 65 will need long-term supports and services (LTSS) at some point in their lives. Robert Wood Johnson Foundation, *Long-Term Care: What Are the Issues?*, http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2014/rwjf410654 (accessed June 18, 2014). At the same time, the ratio of family caregivers to older adults age 80+ more likely to need LTSS continues to decline from 7-to-1 in 2010 to an estimated 4-to-1 in

2030, thus leaving many individuals in need of LTSS provided by non-family caregivers. AARP Public Policy Institute, *The Aging of the Baby Boom and the Growing Care Gap: A Look at Future Declines in the Availability of Family Caregivers*, http://www.aarp.org/home-family/caregiving/info-08-2013/the-aging-of-the-baby-boom-and-the-growing-care-gap-AARP-ppi-ltc.html (accessed June 20, 2014).

Professional caregiving, including facility-based care, often fills the gap left by an absence of informal and family caregiving. Approximately 1.4 million Americans reside in nursing facilities, 85.1% of whom are adults age 65+. National Center for Health Statistics, *Long-Term Care Services in the United States: 2013 Overview*, http://www.cdc.gov/nchs/data/nsltcp/long_term_care_services_2013.pdf (accessed June 20, 2014) 91. Approximately 650,000 more individuals age 65 and older reside in assisted living facilities. Centers for Disease Control, *NCHS Data Brief Residents Living in Residential Care Facilities:* United States 2010, http://www.cdc.gov/nchs/data/databriefs/db91.pdf (accessed June 20, 2014).

The increased demand for LTSS comes at a time of flat or declining available state revenue for those services. AARP Public Policy Institute, *At the Crossroads: Providing Long-Term Services and Supports at a Time of High Demand and Fiscal Constraint*, 6, http://www.aarp.org/health/health-insurance/info-06-2013/providing-ltss-at-a-time-of-high-demand-AARP-ppi-health.html (accessed June 20, 2014). With fewer funds available for monitoring of LTSS providers, states are less able to monitor the compliance with minimal standards of patient care. When a report of elder abuse comes to the attention of health care authorities, serious incidents of abuse often elude their attention. In a recent study of state investigations of abuse and neglect in LTSS facilities, 70% of state surveys missed at least one

deficiency and 15% of surveys missed actual harm and immediate jeopardy of a nursing home resident. U.S. Government Accountability Office, *Nursing Homes: Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weaknesses*, Publication GAO–08-517 (2008).

Elder abuse is a widespread phenomenon. In a nationally representative study, one in ten older Americans reported being abused or neglected in the past year. Acierno, et. al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, Am. J. Pub. Health (Feb. 2010), 100(2): 292–297. Long term care facility personnel are among the most common perpetrators of abuse among cases reported to Adult Protective Services. National Center on Elder Abuse, *The 2004 Survey of State Adult Protective Services: Abuse of Vulnerable Adults 18 Years of Age and Older* (Mar. 2007), http://www.ncea.aoa.gov/Resources/Publication/docs/APS_2004NCEASurvey.pdf (accessed June 20, 2014). At the same time, long-term care facility staff are among the most likely to observe instances of elder abuse. In a recent survey of nurse aides employed by nursing homes in Pennsylvania, 36% observed some form of verbal abuse against a resident (i.e. verbal arguments, yelling, cursing, etc.), while 28% observed psychological abuse (i.e. intimidation or communicating threats) and 19% observed inappropriate delays in administering medication. Castle, *Nurse Aides' Reports of Resident Abuse in Nursing Homes*, J. of App. Gerontology, 31(3) (Nov. 2013) 402–422.

Elder abuse, like all kinds of abuse of vulnerable people, causes serious harm to its victims. Elder abuse places the victim at greater risk of dying earlier or suffering from poorer health outcomes than their contemporaries who have not been abused. *Justice for All: Ending Elder Abuse, Neglect and Financial Exploitation: Hearing Before the S. S. Comm. on Aging*,

112th Cong., at 7 (2011) (testimony of Marie-Therese Connolly, Senior Scholar, Woodrow Wilson International Center for Scholars and Director, Life Long Justice). The physical effects of elder abuse include "increased bone or joint problems, digestive problems, depression or anxiety, chronic pain, high blood pressure, and heart problems." *Written Remarks of Kathy Greenlee, Administrator, Administration for Community Living* (June 14, 2013), http://www.aoa.gov/AoA_programs/Special_Projects/Global_Aging/docs/ASA_Remarks.pdf (accessed June 17, 2014). Victims of elder abuse generally have much higher levels of psychological distress than older adults who have not experienced abuse. *Id.* Victims of elder abuse often become more isolated from family, friends, and other social contacts. As the World Health Organization has noted, while "it may be obvious that social isolation or lack of support can contribute to abuse or neglect, the sufferers of abuse in these situations are generally unwilling to join [programs] that encourage social interaction." World Health Organization, *World Report on Violence and Health*, 141, http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap5.pdf (accessed June 19, 2014).

Elder abuse remains a seriously underreported phenomenon. Elder Justice and Protection: Stopping the Abuse: Hearing Before the Subcomm. on Aging of the Comm. on Health, Educ., Labor, and Pensions, 108th Cong. (Aug. 20, 2003) (statement of Sen. Christopher S. Bond, Chairman, Subcomm. on Aging). Nationwide studies estimate that for every one report of elder abuse that comes to the attention of authorities, another five incidents go unreported. National Research Council, *Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America*, 383, The National Academies Press (2003). Local data from certain states suggest that the problem of underreporting may be even more widespread. *See* Lifespan of Greater

Rochester, Inc., et. al., *Under the Radar: New York State Elder Abuse Prevalence Study* (2011) (finding that the elder abuse incidence rate in New York State was nearly 24 times greater than the number of cases referred to social service, law enforcement or other legal authorities). As discussed in Section III D, chronic underreporting of elder abuse can only be remedied by protecting employees who report suspected abuse and neglect from retaliation, regardless of the recipient of that report.

2. Abuse of Individuals with Disabilities

Although many older individuals have disabilities, disability may occur at any age. The Ohio anti-retaliation statute at issue in this case applies to nursing homes and residential care facilities, which provide services to individuals of any age who require personal care services and/or skilled nursing care. R.C. 3721.01(A)(6) and (A)(7). In Ohio, 18% of nursing home residents are under the age of 65. Centers for Medicare and Medicaid Services, *Nursing Home Data Compendium 2012 Edition*, 156. http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/nursinghomedatacompendium_508.pdf (accessed May 27, 2014).

Unfortunately, abuse of individuals with disabilities is also widespread. In one recent study, 70% of survey respondents with disabilities reported that they had been victims of abuse. Baladerian, et al, *Abuse of People with Disabilities: Victims and Their Families Speak Out,* 3. http://www.disabilityandabuse.org/survey/survey-report.pdf (accessed May 27, 2014) (hereinafter, *Abuse of People with Disabilities*). Furthermore, over 63% of parents and immediate family members reported that their loved one with a disability had experienced abuse. *Id.* Multiple studies also show that individuals with disabilities suffer abuse and neglect at significantly higher rates than individuals without disabilities. Hassouneh-Philips, et al, *Abuse of Women with Disabilities: State of the Science*, 45:2 Rehabilitation Counseling Bulletin 96, 96

(2002); Powers, et al, *End the Silence: A Survey of Abuse Against Men with Disabilities*, 74:4 J. Rehabilitation 41, 45-46, 50-52 (2008); Hughes, et al, *Prevalence and Risk of Violence Against Adults with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies*, Lancet, 2 (Feb. 28, 2012). Several factors are cited for the increased risk of abuse for individuals with disabilities: exclusion from education and employment, the need for personal assistance with daily living, reduced physical and emotional defenses, communication barriers that hamper the reporting of violence, societal stigma, and discrimination. *Id.* at 3; Saxton, et al, *Bring My Scooter So I Can Leave You: A Study of Disabled Women Handling Abuse by Personal Assistance Providers,* 7:4 Violence Against Women 393, 407-408 (2001); Lund, *Community-Based Services and Interventions for Adults with Disabilities Who Have Experienced Interpersonal Violence: A Review of the Literature,* 12:4 Trauma, Violence & Abuse 171, 172 (2011). Abuse is even more likely to occur at institutions like nursing homes and residential care facilities due to extreme power and control inequities between staff and clients, isolation where caregivers work alone and unobserved, dehumanization and detachment, and clustering—keeping people with disabilities away from people who do not have disabilities so they do not learn the skills that could help them prevent victimization. Ansello, et al, *Abuse, Neglect and Exploitation, Considerations in Aging with Life Long Disabilities*, 22:1-2 J. Elder Abuse & Neglect 105, 115 (2010).

As with older adults, individuals with disabilities encounter barriers making them less likely to self-report their abuse. Individuals may not have communication skills to describe clearly what had happened to them, or staff may not believe victims or take their complaints seriously. Joyce, *An Audit of Investigations Into Allegations of Abuse Involving Adults with Intellectual Disability*, 47:8 J. Intellectual Disability Research 606, 612 (2003). In many cases,

individuals with disabilities may also depend on their abuser for care and essential activities of daily living, creating major barriers to reporting abuse and preventing future abuse. Saxton, 7:4 Violence Against Women at 408; Lund, 12:4 Trauma, Violence & Abuse at 172.

These barriers explain why a recent study found that only 37% of individuals with disabilities who were victims of abuse said they reported it to the authorities. *Abuse of People with Disabilities* at 3. It is worth noting, however, that the same study found the level of reporting rose to almost 52% when family members learned of the abuse. *Id.* This data shows the importance and benefit of notifying family members of suspected abuse, so those family members can assist the victims in notifying the authorities, remedying the situation, and protecting themselves from future abuse.

D. Because Caregivers are Often in the Best Position to Report Abuse, Reporters Must Be Protected from Retaliation

Appellants claim, without any evidentiary support, that restrictions on the protection of whistleblowers will not reduce protection of elders and individuals with disabilities, but this argument is incorrect. Due to isolation or fear of retaliation, victims of abuse are often afraid to report it themselves. Because victims of abuse are commonly unable or unwilling to report abuse themselves, it is imperative that the healthcare professionals who spend considerable time with older adults and people with disabilities report their own observations of abuse. If those professionals fear that they will be terminated for reporting abuse, they will be less likely to make reports in the first place, leaving many legitimate instances of abuse unreported and overlooked.

Absent routine contact with family members or friends, health care professionals "may be the only people who associate with the victims and thus have the opportunity to recognize and report signs of abuse." Luu & Liang, *Clinical Case Management: A Strategy to Coordinate*

Detection, Reporting, and Prosecution of Elder Abuse, 15 Cornell J.L. & Pub. Pol'y 165, 169 (2005). Staff members should be encouraged to report abuse because reports by staff members are more likely to be acted upon than reports made solely by the individual with a disability. *See Abuse of People with Disabilities* at 4 ("When victims with disabilities did report incidents of abuse to authorities, in 52.9% of cases nothing happened."). In one study, the authors audited 26 cases that were referred for investigation of allegations of abuse. Joyce, 47:8 J. Intellectual Disability Research at 610. Over one-fourth of the cases were initiated by referrals from staff providing care to the alleged victim. *Id.* at 610.

The Ohio statute, R.C. 3721.24, reflects a goal to encourage caregivers to report suspected abuse or neglect by protecting them from reprisals by their employers; if caregivers know that their employers cannot penalize them for making reports of suspected abuse and neglect, they are more likely to make a report. But the opposite also holds true: if caregivers anticipate that they will lose their jobs or suffer other consequences because of a report of abuse or neglect, they will naturally be less likely to report it in the first place. *See* Jenkins, *Zero Tolerance of Abuse of People With Intellectual Disabilities: Implications for Nursing*, 17:22 J. Clinical Nursing 3041, 3045, 3047 (2007). Research on best practices in adult protection services indicates that protection and support for whistleblowers is critical to encouraging staff to report abuse. Pritchard, *Good Practice in Safeguarding Adults: Working Effectively in Adult Protection* 133, Jessica Kingsley Publishers (2008). Leaving reporters without protection from employer retaliation puts actual and potential victims at greater risk for continued abuse.

States across the country, as well as the federal government, have recognized the necessity of protecting employees of long-term care facilities who report suspected abuse or neglect of residents. The Office of Inspector General of the U.S. Department of Health and

Human Services ("OIG") has explained that federally funded health care facilities like nursing homes are required to have procedures in place to make certain that violations of patient rights are reported to the appropriate authorities in a timely fashion. OIG Supplemental Compliance Program Guidance for Nursing Facilities, 73 Fed. Reg. 56, 838-39 (September 30, 2008). According to the OIG, "nursing facilities should make clear to caregivers, facility staff, and residents that the facility is committed to protecting those who make reports from retaliation." *Id.* at 839.

Many other states protect individuals who report suspected elder abuse. Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect-The Legal Framework*, 31 Conn. L. Rev. 77, 89-97 (1998). Some states, like Illinois, protect employees who "make[] any good faith oral or written report of suspected abuse [or] neglect...," without any qualifications on who must make a report and to whom such a report must be directed. 320 ILCS § 20/4.1. Similar state laws reflect a legislative imperative that individuals should not be fearful of losing their jobs for making a report of suspected abuse or neglect in good faith.

E. Ohio Law and Public Policy Protect Whistleblowers from Retaliation

Appellee/Cross-Appellant Hulsmeyer offers this Court two avenues to rule in her favor: she is protected from retaliation under both R.C. 3721.24 and under Ohio public policy. The plain language of the statute protects Ms. Hulsmeyer and other whistleblowers from retaliation in these circumstances. However, if R.C. 3721.24 only narrowly covers those who submit reports to the Ohio Department of Health, then this Court should recognize that Ohio public policy provides broader anti-retaliation protection to whistleblowers. Such a holding would further Ohio's public policy of protecting whistleblowers and advance the General Assembly's purpose in enacting the statute: to protect elders and individuals with disabilities.

1. R.C. 3721.24 Protects Whistleblowers Like Ms. Hulsmeyer.

Because abuse of vulnerable adults is a grave and serious problem, nursing facility staff should be protected for any and every good-faith report that may help to end the abuse as quickly as possible. As written, R.C. 3721.24 provides that protection. Appellants' interpretation of the statute frustrates its objective to encourage reporting of abuse and neglect in facilities.

The plain language of R.C. 3721.24 protects whistleblowers from retaliation when they make a good faith report of suspected abuse or neglect. *See Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 871, ¶ 22 (holding that a statute that is "free from ambiguity and doubt is not subject to judicial modification under the guise of interpretation.") By its unambiguous terms, the statute does not limit the statutory protection to specified reports or particular classes of employees. Appellants spend much of their brief arguing that this Court cannot rule in Ms. Hulsmeyer's favor by adding words to R.C. 3721.24, yet they invite this Court to rule in their favor by adding words to the statute. Appellants correctly note that courts cannot "add[] words to a validly enacted statute." App. Br. p. 12, *citing Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 40. Thus, this Court cannot accept Appellants' invitation to usurp the legislature's act by changing the simple phrase "makes a report" to the more narrow "makes a report to the Ohio Department of Health."

Appellants insist that R.C. 3721.22 and R.C. 3721.24 must be read together, but the practical distinctions between these two statutes are very real. R.C. 3721.22(A) requires a "licensed health professional" to report known or suspected incidents of abuse and neglect by long-term care facility caregivers to the Ohio Director of Health. The "licensed health professional" need not be employed by a facility for this statute to apply. Moreover, the statute does not forbid reports made by a licensed health professional to anyone other than the Ohio Department of Health, nor does it purport to govern the conduct of anyone who is not a licensed

health professional, such as unlicensed facility staff members, family members, or other advocates. By contrast, R.C. 3721.24 forbids a long-term care facility from retaliating against any employee, whether or not they are a "licensed health professional," who makes a report "in good faith" of suspected abuse or neglect of a resident. The statute does not define what constitutes a "report," nor does it specify to whom a "report" must be made. Simply put, these are two distinct, yet harmonious, statutes with different purposes and constructions.

Appellants' tortured reading of the statute also ignores a key element of the statute that discourages frivolous or malicious reports of abuse and neglect: the requirement that the report must be made in "good faith" in order to receive protection under the statute. "Good faith" is commonly defined as "a state of mind consisting in...honesty in belief or purpose [or] faithfulness to one's duty or obligation." Black's Law Dictionary (9th Ed.2009). Other Ohio courts have suggested that the reporter's intent in making the report, not the recipient of the report, determines whether the employee engaged in "protected activity" under the statute. *See, e.g.*, *Thompson v. Merriman CCRC*, 9th Dist. No. 23229, 2006-Ohio-6008, ¶ 15 ("[A]ssuming Appellant made those statements, they served only to disparage the Merriman, not to further the policy of reporting abuse..."). In other contexts, state courts throughout the country have broadly interpreted whistleblower protections by focusing on whether any report was made, not on the recipient of the report. *See Lark v. Montgomery Hospice, Inc.*, 414 Md. 215, 232-42, 994 A.2d 968, 978-984 (2010) (citing cases from New Hampshire, Oklahoma, Massachusetts, Connecticut, Arizona, California, Illinois, Oregon, and the District of Columbia).

2. Ohio Public Policy Protects Whistleblowers Like Ms. Hulsmeyer.

Aside from the statutory protections, this Court should also recognize a common law claim for wrongful discharge when employers retaliate against whistleblowers who report suspected abuse to individuals or entities other than the Ohio Department of Health. Appellants'

proposed limitations on protection for whistleblowers serve to create a disincentive for reporting suspected abuse and neglect. This limited protection would seriously impair the ability of facilities to receive reports from their own employees, and hamper the ability of law enforcement and patient advocates, such as amicus Disability Rights Ohio, to receive and investigate allegations of abuse.

The Ohio General Assembly has established Ohio's public policy of providing broad protection from abuse and neglect for elders, children, and people with disabilities. Chapters 173 (long term care ombudsman), 3721 (long term care facility reports), 2151 (child welfare), 5101 (adult protective services), 5123 (developmental disabilities, protection and advocacy system for people with disabilities), and 5126 (mental illness) of the Revised Code contain comprehensive statutory schemes to provide protective services for individuals who are often unable to protect themselves from abuse and neglect. These protective systems are less effective if reporters of abuse have to fear retaliation for making reports that would save the life or health of a victim of abuse. The public policy of protecting vulnerable populations and encouraging good faith reports of abuse would be best served by protecting whistleblowers, regardless of the identity of the person receiving a report of abuse or neglect.

If this Court holds that there is no protection for whistleblowers who report concerns to individuals or entities other than the Ohio Department of Health, employers would be free to retaliate against employees who make good faith reports to their own direct supervisors, local law enforcement, and the patient's own physician. By focusing on the identity of the recipient of Hulsmeyer's report, rather than supplying an alternative reason for terminating Hulsmeyer, Appellants essentially concede the fact that Hulsmeyer was terminated because she reported her suspicions of abuse and neglect to anyone. Arguably, under Appellants' construction of the

statute, if Hulsmeyer made a report to both the Ohio Department of Health and, for example, local law enforcement, her employer could retaliate against her and then claim with impunity that the retaliatory actions were not based on the report to the Ohio Department of Health, but rather based on the report to the other individual or entity.

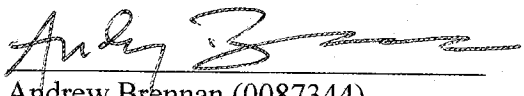
State-designated protection and advocacy (P&A) systems, including amicus Disability Rights Ohio and members of amicus National Disability Rights Network regularly receive reports of suspected abuse and neglect from long-term care facility employees, as do other entities, such as law enforcement. These reports are critical to investigations of abuse because individuals with disabilities are often unable to contact P&A systems or law enforcement to request an investigation. In recognition of the importance of these reports and the risk of retaliation against employees who report abuse to the P&A systems, federal regulations protect the confidentiality of individuals who make reports. *See, e.g.,* 42 C.F.R. 51.45(a)(1)(iii); 45 C.F.R. 1386.22(e)(3).

Many facility employees who contact the protection and advocacy systems still fear retaliation and refuse to provide their names or contact information, despite the confidentiality provisions that shield them from disclosure. Unless the Court holds that these employees are protected from retaliation, it is almost certain that they will stop reporting their concerns to entities that are charged by the Legislature to receive reports of abuse and effectively protect and advocate for these victims of abuse. Therefore, should this Court adopt a narrow interpretation of R.C. 3721.24 that only protects reports made to the Ohio Department of Health, then it must provide that Ms. Hulsmeyer has a claim for wrongful discharge in order to protect Ohio's clear public policy that encourages good-faith reporting of incidents of abuse and neglect.

IV. CONCLUSION

For the foregoing reasons, this Court should uphold the decision of the First Appellate District, and hold that Ohio public policy provides broad anti-retaliation protection for nursing facility employees who make any report of abuse or neglect of residents.

Respectfully submitted,



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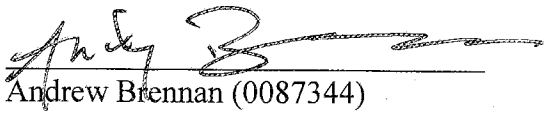
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served via regular U.S. Mail, postage prepaid, upon the following on this the 1st day of July, 2014.



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