IN THE SUPREME COURT OF OHIO

BRIGHT HORIZONS CHILDREN'S CENTERS, LLC, *et al.*,	:	Case No. 2022-2089
Appellees/Cross-Appellants,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
HALEY ANDERSON,	:	Court of Appeals, Case No. 20-AP-291
Appellant/Cross-Appellee.	:	

COMBINED MEMORANDUM IN RESPONSE TO MEMORANDUM IN SUPPORT OF JURISDICTION FILED BY APPELLANT/CROSS-APPELLEE HALEY ANDERSON

–and–

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLEES/CROSS-APPELLANTS BRIGHT HORIZONS CHILDREN'S CENTER, LLC AND CARRIE DELANEY

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I. RESPONSE TO APPELLANT/CROSS-APPELLEE HALEY ANDERSON'S EXPLANATION OF WHY THE CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

Appellees/Cross-Appellants Bright Horizons Children's Centers, LLC ("Bright Horizons") and Carrie Delaney ("Delaney") (collectively "Bright Horizons") establish in their Memorandum in Support of Jurisdiction that this case is one of public or great general interest with respect to Appellant/Cross-Appellee Haley Anderson's ("Anderson") "regarded as" disability discrimination claim. However, that claim differs from the issues Anderson seeks to appeal in her Memorandum in Support of Jurisdiction, which are not of public or great general interest.

Anderson, who was born with a congenital heart defect that was surgically corrected when she was an infant, initiated this action against her former employer, Bright Horizons, and her former supervisor, Delaney, asserting *inter alia* disability discrimination under Ohio law. She argued she was disabled under the first definition of disability in R.C. § 4112.01(A)(13) because her condition substantially limits her cardiovascular and circulatory systems. The Franklin County Court of Appeals, Tenth Appellate District ("Court of Appeals") properly rejected Anderson's argument because R.C. § 4112.02(A)(13) does not include the operation of bodily systems in the statutory definition of major life activities, only the federal Americans with Disabilities Act ("ADA") does.[2] *Anderson v. Bright Horizons Children's Ctrs., LLC,* 10th Dist. Franklin No. 20AP-291, 2022-Ohio-1031, ¶¶ 24-28. The Court of Appeals held it could not "engraft onto R.C. 4112.01(A)(13) a second category of major life activities for major bodily functions." *Id.* at ¶ 27.

[2] The ADA was amended in 2008 by the Americans with Disabilities Amendments Act ("ADAAA") to include a second category of major life activities for major bodily functions. *See* 42 U.S.C. § 12101(2)(B). However, there has been no such amendment to the Ohio statute. Bright Horizons may use the terms "ADA" and "ADAAA" interchangeably herein.

In reaching this decision, the Court of Appeals did not "substantially undermine Ohio's disability discrimination law" or make it impossible for Ohioans with Down's Syndrome, Cerebral Palsy, or Multiple Sclerosis to obtain protection from discrimination under R.C. Chapter 4112. (Anderson's Memorandum in Support of Jurisdiction ("Anderson Memo."), p. 1). Likewise, the Court of Appeals' decision does not conflict with this Court's precedent or with the decision of another Ohio appellate district. Finally, while this case does involve an issue of public or great general interest with respect to Anderson's "regarded as" disability discrimination claim, as detailed in Bright Horizon's Memorandum in Support of Jurisdiction, it does not involve a substantial constitutional question.

II. RESPONSE TO ANDERSON'S ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

A. Response To Proposition Of Law No. 1: Ohio Courts Can Look To The ADA To Interpret Ohio Law Only Where The ADA Is Consistent With Ohio Law Or Where Ohio Law Leaves A Term Undefined

The Court of Appeals did not err when it refused to apply the ADA to Anderson's claim that her condition met the first definition of a disability under Ohio law. Rather, the Court of Appeals properly declined to follow the ADA because it is not consistent with Ohio law and Ohio law included the definitions necessary to address Anderson's claim.

In *City of Columbus Civ. Serv. Comm'n v. McGlone*, 82 Ohio St.3d 569, 697 N.E.2d 204 (1998), this Court observed that given the similarity between the ADA and Ohio law, "[w]e can look to regulations and cases interpreting the federal Act for guidance in our interpretation of Ohio law. *Id.* at 573 (citations omitted). However, the Court later clarified it is only appropriate to do so when the terms of the federal statute are consistent with Ohio law or when R.C. Chapter 4112 leaves a term undefined. *Genaro v. Cent. Transport*, 84 Ohio St.3d 293, 298, 1999-Ohio-353, 703

N.E.2d 782 (1999). Under this standard, the Court Appeals properly declined to follow the ADA and related guidance.

Here, the language of the ADA is *inconsistent* with the Ohio statute because the ADA, as amended by the ADAAA, recognizes a second category of major life activities for "major bodily functions" while R.C. § 4112.02(A)(13) does not. *Compare* 42 U.S.C. § 12102(2)(B) and R.C. § 4112.02(A)(13). As a result, the Court of Appeals held that it could not "engraft onto R.C. 4112.01(A)(13) a second category of major life activities for major bodily functions." *Anderson*, 2022-Ohio-1031, at ¶ 27. Rather, it had to determine whether Anderson met the first definition of disability in R.C. 4112.02(A)(13) by applying the language of the differing Ohio statute.

R.C. § 4112.01(A)(13) provides in relevant part that "disability" means "a physical or mental impairment that substantially limits one or more major life activities, including the function of caring for one's self, performing manual tasks, walking, hearing speaking, breathing, learning, and working . . . ." *Id.* Anderson did not present any evidence that she was limited in any of these major life activities, which required the Court of Appeals to affirm the trial court's finding that she was not disabled under the first definition of disability.[3] *Anderson*, 2022-Ohio-1031, at ¶ 28.

Anderson now twists the Court of Appeals' decision, claiming the court construed the list of major life activities listed in R.C. § 4112.01(A)(13) to be the only categories of major life activities recognized under Ohio law. (Anderson Memo., p. 3). The Court of Appeals already determined this was a misstatement of its decision when it denied Anderson's April 8, 2022, Application for *En Banc* review. *Anderson v. Bright Horizons Children's Centers, LLC*,

[3] Anderson admitted that her medical condition has never really impacted her. (R. 281, Plf. Dep. 241:1-4, 242:5-15, 243:5-7, 244:14-16; R. 292, Delaney Ex. 18). This makes it unlikely that her condition substantially limits her in any of these major life activities.

Memorandum Decision, 10th Dist. Franklin No. 20AP-291, ¶ 7 (May 17, 2022). The Court of Appeals clarified that it did not hold "that Ohio courts can never look to the ADAAA's description of 'major life activities' when determining what activities constitute 'major life activities' under R.C. 4112.01(A)(13). We held that we could not import the text of 42 U.S.C. 12102(2)(B) into R.C. 4112.02(A)(13), thus creating a second category of major life activities." *Id.*

Anderson misplaces her reliance on cases purportedly standing for the proposition that "federal and state courts in Ohio have continued to analyze claims under the ADA and R.C. Chapter 4112 ***as identical***." (Anderson Memo., pp. 11-12) (emphasis added). The statutes are not "identical," as detailed above. Moreover, the cases upon which Anderson relies are inapposite because none involve the application of the ADAAA's broader definition of major life activities to include major bodily functions to a discrimination claim brought solely under Ohio law:

- *King v. Steward Trumbull Mem'l Hosp.*, 30 F.4th 551 (6th Cir. 2022). The plaintiff had asthma and alleged her employer failed to accommodate her in violation of R.C. § 4112. *Id.* at 560. The employer did not dispute that asthma qualified as a disability under Ohio law. *Id.*

- *Siewertsen v. Worthington Indus*., 783 Fed. Appx. 563 (6th Cir. 2019). The parties did not dispute the deaf plaintiff was disabled under Ohio law and the ADA. *Id.* at 565.

- *Anderson v. AccuScripts Pharm., LLC*, 8th Dist. Cuyahoga No. 110261, 2022-Ohio-1663. The court looked to the major life activities listed in R.C. § 4112.01(A)(13) to determine if the plaintiff with epilepsy met the first definition of disability. *Id.* at ¶¶ 56-57. Because the term "substantially limits" is not defined in the Ohio statute or regulations, the court looked to the ADA's definition for guidance—an approach that complies with this Court's instruction in *Genaro*. *Id.* at ¶49. Using the more lenient standard for "substantially limited" in the ADAAA, the court found that where an impairment is episodic, "it constitutes a disability if it would substantially limit a major life activity when active." *Id.* at ¶ 57. The court concluded the plaintiff's epilepsy, when active, substantially limited her in the major life activities of working, seeing, speaking, hearing, and sometimes breathing—the major life activities set forth in R.C. 4112.01(A)(13)—and she therefore met the first definition of disability under Ohio law. *Id.* at ¶¶ 57-58.

- In *Creveling v. Lakepark Indus*., 6th Dist. Huron No. H-20-013, 2021-Ohio-764, the court also looked to the ADAAA's definition of "substantially limits" to determine if the plaintiff, who suffered a workplace injury to his right hand, was disabled under R.C. § 4112.01(A)(13). *Id.* at ¶¶ 10-13, 42. The plaintiff asserted he had "significant grasp difficulties" and "difficulty handwriting, performing household chores, opening doors, and buttoning his shirt." *Id.* at ¶ 43. Citing R.C. § 4112.01(A)(13), the court found "[t]hese difficulties correspond to major life activities such as caring for one's self, performing manual tasks, and working." *Id.* The court found even under the more lenient ADAAA standard, the plaintiff was not disabled because there was no evidence his impairments "substantially limit[ed] his ability to perform the aforementioned (or any other) major life tasks as compared to most people in the general population." *Id.*

As illustrated by these cases, Ohio courts can and do look to the ADAAA for guidance where R.C. Chapter 4112 does not define a term, but that was unnecessary below because the Court of Appeals applied the specific Ohio law definition of major life activities in R.C. § 4112.01(A)(13). In any event, none of the decisions cited by Anderson adopted the ADAAA's expansive definition of major life activities to include a second category for major bodily functions when analyzing disability discrimination claims under Ohio law.

The Court of Appeals' decision also does not conflict with the decision in *House v. Kirtland Capital Partners*, 158 Ohio App.3d 68, 2004-Ohio-3688, 814 N.E.2d 65 (11th Dist.). There, the Eleventh District Court of Appeal also did not adopt the ADAAA's broad definition of major life activities to include major bodily functions for disability discrimination claims alleged under Ohio law. Rather, the court looked to the ADAAA for guidance in determining whether lifting, kneeling, and sitting should be major life activities under R.C. § 4112.01(A)(13), even though they are not expressly listed, because the list is "non-exhaustive." *Id.* at ¶¶ 31-33. The court found "[t]he common theme linking the activities expressly listed [in R.C. §4112.01(A)(13)] is their necessity . . . those activities that are of central importance to daily life." *Id.* at ¶ 31 (quoting *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002)). The court observed the actions listed in R.C. 4112.01(A)(13) "demonstrate ***manual***

activities that must be performed on almost a daily basis, without impediment, to sustain a normal way of life." *Id.* (emphasis added). It then found lifting, kneeling, and sitting—which are recognized as major life activities under the ADAAA—are the type of manual tasks that are an "unavoidable necessity of daily life." *Id.* at ¶¶ 31-33. Accordingly, the court determined that lifting, kneeling, and sitting are major life activities under R.C. § 4112.01(A)(13). *Id.*

The Eleventh District then found the plaintiff, who injured her back in a car accident, experienced physical discomfort when lifting, kneeling, and sitting; however, that discomfort did not rise to the level of severe restriction. Accordingly, the court concluded the plaintiff was not disabled under Ohio law. *Id.* at ¶¶ 3, 42. Had Anderson offered evidence she is substantially limited in a manual activity of central importance to daily life, then, according to the decision in *House*, she may have met the first definition of disability in R.C. § 4112.01(A)(13). But, absent such evidence—which she did not present—the Court of Appeals could not reach that conclusion as a matter of law.

Finally, Anderson contends the Court should exercise jurisdiction to resolve what she views as the "differing standards" for disability discrimination claims brought under the ADA, which applies to employers with 15 employees, and Ohio law, which applies to employers with four employees. (Anderson Memo., p. 12). Putting aside that Anderson could have pled a claim for disability discrimination under the ADA and taken advantage of the ADAAA's more expansive definition of disability, it is not the province of the Court to decide whether R.C. § 4112.01(A)(13) should be revised to include a second category of major life activities for major bodily functions. Rather, as the Court of Appeals properly observed, "[w]e must leave it the General Assembly to decide whether to so broaden the definition of 'disability.'" *Anderson*, 2022-Ohio-1031, at ¶ 27.

For these reasons, this is not a case of public or great general interest with respect to the issues Anderson seeks to raise on appeal.

B. Response To Proposition Of Law No. 2: Ohio Courts Are Not Constrained To Follow Only Sixth Circuit Case Law When Analyzing Claims Under R.C. Chapter 4112

The Court does not need to exercise its jurisdiction here to "give clear guidance to the lower courts on the parameters for relying on federal case law to interpret R.C. Chapter 4112." (Anderson Memo., p. 13). This Court has already held that Ohio courts are only bound by decisions of the United States Supreme Court, and not lower federal courts. *State v. Burnett*, 93 Ohio St.3d 419, 423, 2001-Ohio-1581, 755 N.E.2d 857 (2001). While Ohio courts "hold the United States Sixth Circuit Court of Appeals in high regard" and "find their decisions to be the most persuasive," they are not "bound to follow the holdings that they articulate." *State v. Glover*, 60 Ohio App.2d 283, 287, 396 N.E.2d 1064 (1st Dist. 1978). *See also State ex. rel. Yost v. Volkswagen Aktiengesellschaft*, 137 N.E.3d 1267, 2019-Ohio-5084, ¶ 30 (10th Dist.) (Ohio courts are not bound by the decision of a federal court other than the United States Supreme Court, "but we are free to consider the persuasiveness of such decisions."). As a result, the Court of Appeals' decision to look to federal case law from outside the Sixth Circuit to support its denial of Anderson's argument that she had direct evidence of disability discrimination aligns with this Court's precedent and provides no basis for the Court to exercise its jurisdiction here.

C. Response To Proposition Of Law No. 3: Anderson's Due Process Rights Were Not Violated When The Court Of Appeals Rejected Her Attempt To Bootstrap The ADAAA To Ohio Law

This case does not involve a substantial constitutional question of due process because the Court of Appeals did not *sua sponte* raise new arguments. Anderson argued below she was disabled under R.C. § 4112.01(A)(13) by relying ***solely*** on the ADAAA's expansive definition of

major life activities, which includes major bodily functions as a second category of major life activities. As the Court of Appeals explained in denying her Application for *En Banc* review, it had to resolve the preliminary question of whether R.C. § 4112.01(A)(13) encompassed the major life activities listed in 42 U.S.C. § 12102(2)(B) before it could rule on her argument. *Anderson*, Memorandum Decision, 10th Dist. Franklin No. 20AP-291, ¶ 11. To do so, the Court of Appeals had to analyze the differing statutory language between the R.C. § 4112.02(A)(13) and ADAAA, which Anderson's counsel reasonably should have been prepared to address given that ***Anderson*** raised the issue in the first place. *Id.* ("Anderson, in fact, recognized the issue existed as she addressed it in her brief, albeit with a fleeting statement that Ohio courts follow the ADAAA.").

The Court of Appeals recognized "[c]ourts cannot expand the scope of a statute beyond that which the General assembly enacted" and, as a result, correctly concluded that it "cannot engraft onto R.C. 4112.01(A)(13) a second category of major life activities for major bodily functions." *Anderson*, 2022-Ohio-1031, ¶ 27. This conclusion does not "smack of improper judicial activism" (Anderson Memo., p. 5), but was an appropriate application of Ohio law to the facts of the case. Indeed, the Court of Appeals would have acted improperly if it engaged in the type of judicial lawmaking proposed by Anderson. As a result, this case does not involve any substantial constitutional question, and the Court should decline to exercise jurisdiction to hear Anderson's appeal.

III. APPELLEES/CROSS-APPELLANTS' EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

While Anderson's jurisdictional arguments are unavailing, this case does present a critical issue for all Ohio-based employers: whether an employee can meet the third "regarded as" definition of disability under R.C. § 4112.01(A)(13) by merely telling their employer that they have a medical condition or whether something more is required.

This Court has determined it "should review as of public or great general interest doubtful reversals" of orders allowing motions for summary judgment. *See North v. Penn. Rd. Co.*, 9 Ohio St. 2d 169, 171 (1967) (decided under R.C. § 2311.041, which was later promulgated as, and replaced by, Ohio Civ. R. 56). That is precisely what happened here when the Court of Appeals partially reversed the entry granting summary judgment to Bright Horizons on Anderson's claim that Bright Horizons "regarded" her as disabled.[4] Below, the trial court granted summary judgment to Bright Horizons on all of Anderson's claims. With respect to her disability discrimination claim, the trial court held that Anderson did not meet the first definition of disability under R.C. § 4112.01(A)(13) because "[t]here was nothing in the record suggesting [Anderson] was substantially limited in a major life activity." (R. 377, 4/30/20 Entry and Order granting Defendants' Motion for Summary Judgment filed January 7, 2020, p. 10). The trial court further found Bright Horizons "did not regard Anderson as disabled," meaning Anderson could not meet the third definition of disability under R.C. § 4112.01(A)(13).[5] (*Id.* at 12). According to the trial

[4] To further contrast the parties' respective positions on jurisdiction, Anderson is not appealing the reversal of a summary judgment decision in her favor because there was no such decision below.

[5] Anderson did not argue that she had a record of disability, the second definition of disability under R.C. § 4112.01(A)(13).

court, Bright Horizons' mere knowledge of Anderson's health problems, including medically excused absences, was not enough to support the "regarded as" claim. (*Id*.).

The Court of Appeals likewise found Anderson was not disabled under the first definition of disability because there was no evidence her congenital heart defect substantially limited any major life activity. *Anderson*, 2002-Ohio-1031, ¶ 28. However, the Court of Appeals reversed the trial court and found a genuine issue of material fact existed as to whether Anderson was "regarded as" disabled by Bright Horizons. The Court of Appeals stated, "a question of fact arose regarding whether [Bright Horizons] believed Anderson had a physical impairment once Anderson informed Delaney about her congenital heart defect." *Id.* at ¶ 33. Setting such a low bar for "regarded as" disability claims is inconsistent with both this Court's precedent and federal cases decided under the ADA.

The Court of Appeals' finding stands in stark contrast to the holding in *McGlone*—the only Ohio Supreme Court opinion discussing the standard for "regarded as" disability claims under Ohio law. *McGlone*, 82 Ohio St.3d 569. In *McGlone*, the Court found a nearsighted man who failed a vision test and was denied a position as a firefighter recruit was neither handicapped, nor perceived as handicapped. The Court found that because there was no evidence the city considered his nearsightedness as foreclosing him from a broad class of jobs, it did not regard him as disabled. *Id.* at 572, 574. In other words, to prevail on a "regarded as" claim under the *McGlone* standard, the plaintiff had to show that the employer believed they had a physical impairment *and* that the impairment substantially limited them in a major life activity (*i.e.,* working).

Importantly, the version of R.C. § 4112.01(A)(13) in effect when the cause of action arose in *McGlone* did not prohibit "regarded as" discrimination, so the Court looked to corollary provisions of the Ohio Administrative Code and concluded that "regarded as" discrimination was

within the ambit of conduct prohibited under R.C. § 4112.02(A). *Id.* at 572. In finding the city did not regard the plaintiff as handicapped, the Court looked to the definition of "disability" in the ADA, and the implementing regulations, which defined "disability" as a "physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." *Id.* at 573 (citing ADA, 42 U.S.C. § 12102(2)(A)).

In 1992, the Ohio legislature amended R.C. § 4112.01(A)(13) to include "being regarded as having a physical or mental impairment" as the third definition of disability, which the *McGlone* court recognized. In 2008, after *McGlone* was decided, Congress passed the ADAAA to broaden the scope of protection available under the ADA by similarly amending the definition of "disability." The ADAAA eliminated the requirement that an employee proceeding under a "regarded as" theory must show that the employer mistakenly believed the employee had a physical or mental impairment that substantially limited them in one or more major life activities—the *McGlone* standard. Amid all this change, the Supreme Court of Ohio has not revisited "regarded as" disability claims under Ohio law and has not provided any direction about whether the *McGlone* standard still applies to such claims, or whether Ohio courts should apply the federal ADAAA standard.

The Court of Appeals declined to follow *McGlone*, and instead misapplied the ADAAA standard to Anderson's "regarded as" claim. Correctly applied, the ADAAA standard requires something more than mere knowledge of a medical condition for an employer to regard an employee as disabled under the ADA. There must be some evidence showing the employer believed the employee's condition impaired them in some way. While purporting to apply the ADAAA standard by citing federal case law, the Court of Appeals actually applied an even lower standard, finding a triable issue of fact based solely on Anderson telling her employer she had

a congenital heart defect. The Court of Appeals did not analyze whether the record contained any evidence that Bright Horizons believed Anderson's condition impaired her in any way. Instead, it focused on affidavit testimony from two medical expert witnesses—obtained and produced during litigation—that discussed Anderson's condition, but which were not available to Bright Horizons during Anderson's employment. Had the Court of Appeals properly focused on Bright Horizons' knowledge of Anderson's medical condition during Anderson's employment, it should have affirmed the trial court's finding that the record contained no evidence Bright Horizons regarded Anderson as disabled.

The Court of Appeals' decision, that a plaintiff meets the "regarded as" definition of disability under R.C. § 4112.01(A)(13) by merely disclosing the existence of a medical condition to their employer, expanded the definition of disability beyond what the Ohio legislature intended in amending R.C. § 4112.01(A)(13) and what Congress intended in passing the ADAAA. The decision of the Court of Appeals has public and great general significance because it runs contrary to the Court's longstanding precedent in *McGlone*, misapplies the federal ADAAA standard, and resulted in a dubious reversal of summary judgment. *See North*, *supra*. The decision is also of great general interest to employers and employees because it subjects employers to jury trials on "regarded as" disability claims any time they take an adverse employment action after an employee discloses a medical condition, regardless of whether the employee is actually disabled under the law. The Court should grant jurisdiction to clarify the standard to be applied to "regarded as" claims under Ohio law and to explain the correct way to apply that standard.

IV. APPELLEES/CROSS-APPELLANTS' STATEMENT OF THE CASE AND FACTS

Anderson worked as a teacher for a childcare center ("the Center") operated by Bright Horizons for four months, from March 2017 until July 2017. (R. 281, Plf. Dep. 164:20-23; R. 282, Plf. Ex. 7; R. 281, Plf. Dep. 372:9-18, 21; R. 286, Plf. Ex. 46; R. 279, Ritter Dep. 30:12-21, 48:14-23; R. 273, Martin Dep. 46:2-4). During Anderson's brief tenure, she struggled to regularly attend work. Between April 10 and June 29, 2017, she missed eight scheduled days of work due to illness. (R. 281, Plf. Dep. 205:8-207:11, 208:5-14, 213:16-214:1, 215:23-216:22, 217:8-20, 218:13-219:10, 219:20-24, 220:1-20, 221:6-24, 222:9-17; R. 283-284, Plf. Dep. Exs. 21, 23-27; R. 388, BHCC 30(B)(5) Dep. 103:3-104:25, 105:12-17; R. 271, Newcomb Afd. ¶ 3, Tab A). Anderson submitted notes from medical providers to cover these absences, which Bright Horizons accepted. (R. 281, Plf. Dep. 205:5-15, 207:7-14, 207:24, 208:1-8, 213:16-214:1, 217:8-15, 219:8-10, 219:23-24, 220:1-5, 220:10-20, 221:6-11, 222:9-17; R. 283-284, Plf. Dep. Exs. 21, 23-27; R. 338, BHCC 30(B)(5) Dep. 105:13-25; BHCC 30(B)(5) Dep. Exs. 13-14).

None of the notes Anderson presented stated she was absent due to a congenital heart defect, nor did they provide any information about the reason for her absence. (R. 281, Plf. Dep. 207:15-17, 207:20, 214:2-5, 214:8, 216:23-217:1, 217:4, 219:11-14, 220:21-23, 221:2, 222:18-20, 222:23; R. 283-284, Plf. Dep. Exs. 21, 23-27). Rather, Anderson explained her illnesses to Center Director Delaney as acute sinus or ear infections, which in Delaney's experience was not uncommon for employees new to the childcare setting. (R. 281, Plf. Dep. 206:21-207:6, 208:9-14, 216:8-10, 220:6-9, 221:21-24, 268:4-8, 268:10-11; R. 289, Delaney Dep. 77:7-22). All of Anderson's absences were considered excused, and none of the notes placed any restrictions on Anderson's ability to work. (R. 281, Plf. Dep. 229:14-18, 261:3-11, 273:9-14, 307:5-13, 307:15,

316:8-12, 316:16, 378:7-9, 378:11, 378:19, 378:23, 379:9-11; R. 285, Plf. Ex. 34; R. 278, Truax Dep. 50:7-51:5).

On Monday, July 10, 2017, Anderson missed work again. (R. 281, Plf. Dep. 232:9-11, 232:19, 233:10; R. 284, Plf. Ex. 30). That day, she treated at an urgent care and was diagnosed with an "acute upper respiratory infection unspecified." (R. 281, Plf. Dep. 233:11-13, 234:1-4, 236:15-20, 236:24-237:4, 237:19-24 238:17-20; R. 277, Plf. Ex. 31; R. 284, Plf. Ex. 30). After she left urgent care, Anderson called Delaney and said:

> Um, I was trying to get a hold of you because I went to the doctor today and ***I have not disclosed with anybody before because it's never really impacted me.*** I do have a congenital heart defect and I found out today that that ***may*** be a reason why ***my immune system*** may not be as built up.

(R. 281, Plf. Dep. 241:1-4, 242:5-15, 243:5-7, 244:14-16; R. 292, Delaney Ex. 18) (emphasis added). Anderson told Delaney she had been written off work for two days and asked if she was going to be fired. (R. 292, Delaney Ex. 18). Delaney reassured Anderson that if the doctor had written her off, this absence would be considered excused. (R. 281, Plf. Dep. 251:2-5; R. 292, Delaney Ex. 18). Nevertheless, Delaney said they would discuss Anderson's attendance going forward when she returned to work. (R. 281, Plf. Dep. 251:20-23; R. 292, Delaney Ex. 18).

On Wednesday, July 12, 2017, Anderson returned to work. (R. 281, Plf. Dep. 255:18-19, 256:16-18). Delaney and Assistant Center Director Lyndsay Truax ("Truax") met with Anderson to offer solutions to improve her attendance, including a leave of absence, an adjustment to her work schedule, a move to the sub-pool, or some other accommodation. (R. 281, Plf. Dep. 261:12-19, 263:9-19, 263:21; R. 285, Plf. Ex. 34; R. 278, Truax Dep. 55:4-19, Delaney Afd. ¶ 3). However, Anderson asked for nothing. (R. 281, Plf. Dep. 262:15-16, 262:19; R. 278, Truax Dep. 55:9-13; R. 279, Ritter Dep. 57:20-58:5, Ritter Ex. 5; R. 272, Delaney Afd. ¶ 3).

Anderson was next scheduled to work on Friday, July 14, 2017. (R. 281, Plf. Dep. 290:5). That day, Anderson allegedly reported to work but then left because she was "having a severe panic attack," which was not associated with the congenital heart defect. (*Id.* at 290:9-10, 292:16-293:8). Anderson tried to call Delaney but could not reach her, so she asked her mother to call. (*Id.* at 294:1-13, 312:3-7, 314:3-5). Anderson's mother called Delaney and advised that Anderson was seeking medical treatment in the emergency room. (R. 281, Plf. Dep. 327:23-328:5, 328:13-18, 330:11-16; R. 280, M. Anderson Dep. 73:12-21, 74:2-4). She reiterated that Anderson had a congenital heart defect, had undergone surgery as an infant, and that her condition may negatively affect her immune system. (R. 280, M. Anderson Dep. 74:23-24, 75:1-3, 79:1-24, 80:1; R. 285, Plf. Ex. 41). Anderson's mother did not ask Delaney to do anything for Anderson and did not say when Anderson would return to work. (R. 281, Plf. Dep. 354:18-19, 354:22-24, 355:1-2; R. 280, M. Anderson Dep. 74:5-24, 75:1-24, 76:1-9, 78:2-7, 78:11-12, 83:5-8).

Later that afternoon, Truax emailed the work schedule for the week of July 17, 2017, to the Center staff, including Anderson. (R. 281, Plf. Dep. 339:16-21; R. 285, Plf. Ex. 43). Because Anderson had not advised about her return to work, Truax could not definitively put her on the schedule, although Anderson's schedule had been the same for months and it was generally understood that she would report at the same times each day unless she told her supervisors otherwise. (R. 281, Plf. Dep. 354:18-19, 354:22-355:2; R. 278, Truax Dep. 22:15-25, 70:6-10, Truax Ex. 1). When Anderson received the schedule and did not see her name, she assumed she had been fired even though no one told her that or suggested that was the case. (R. 281, Plf. Dep. 343:5-10, 349:5-10, 351:14-22, 351:24-352:3, 427:22-428:1). Anderson made no effort to confirm her assumption. She did not report to work on Monday, July 17, 2017—her regularly scheduled workday. (R. 281, Plf. Dep. 340:15-17; R. 278, Truax Dep. 70:11-14). Anderson claims she called

the Center several times, but never spoke to Delaney or Truax and did not leave a voice mail. (R. 281, Plf. Dep. 340:18-341:15, 341:21-24, 342:1-11, 352:13-15, 352:19-21). She also did not email anyone at the Center or go there in person to inquire about her status. (*Id.* at 349:20-350:15, 351:9-22, 351:4-6, 351:9-21, 352:16-18, 427:16-18, 427:22-24, 428:1). Anderson did not report to work the entire week of July 17, 2017, and never communicated with anyone at the Center about a plan to return to work. (R. 281, Plf. Dep. 349:20-24, 350:3-15, 351:6-19, 352:4-6, 352:9-21, 354:18-19, 354:22-355:2, 355:5-9, 360:12-13, 360:15-16).

If an employee of Bright Horizons fails to report to work for two consecutive workdays and fails to follow the procedure for notifying a supervisor of their absence, Bright Horizons will consider the employee to have voluntarily resigned under the attendance policy. (R. 281, Plf. Dep. 189:21-190:16; R. 283, Plf. Ex. 18). On July 20, 2017—after four days without any communication whatsoever from Anderson about her intentions to return to work—Bright Horizons sent Anderson a standard template letter advising that it deemed her no call/no show a voluntary resignation, which it was accepting. (R.281, Plf. Dep. 372:9-18, 372:21; R. 286, Plf. Ex. 46; R. 279, Ritter Dep. 30:12-21, 48:14-23; R. 273, Martin Dep. 46:2-4). Anderson, who states she never resigned and never quit, also never contacted anyone at the Center to say she wanted to return to work and/or needed an accommodation to do so. (R. 281, Plf. Dep. 375:1-8, 375:11-14, 375:17-21, 375:24-376:10, 376:17, 376:20). Instead, she filed the underlying action alleging disability discrimination based on her childhood medical condition that was surgically corrected when she was two weeks old and has never impacted her in any way.

The trial court granted summary judgment to Bright Horizons, dismissing Anderson's claims for disability discrimination, failure to accommodate disability discrimination, and aiding and abetting unlawful discrimination alleged under R.C. § 4112.02. Anderson appealed.

On appeal, the Court of Appeals affirmed in part and reversed in part. *Anderson*, 2022-Ohio-1031. The Court of Appeals affirmed the trial court's finding that Anderson did not meet the first definition of disability under R.C. § 4112.01(A)(13). *Id.* at ¶¶ 22, 28. However, it reversed the trial court's finding that Appellants did not regard Anderson as disabled—the third definition of disability under R.C. § 4112.01(A)(13). *Id.* at ¶ 36.

The Court of Appeals found that to meet the "regarded as" definition of disability, "the plaintiff need only present evidence the employer believed the plaintiff had a 'physical or mental impairment,' as that phrase is defined in R.C. 4112.01(A)(16)." *Id.* at ¶ 30. However, the Court of Appeals deviated from its stated standard, which is supposed to focus on what the employer believed at the time of the adverse employment action. In doing so, it found Anderson presented evidence (e.g., affidavit testimony from two medical experts) that her congenital heart defect is a physiological condition that affects her cardiovascular system, which Bright Horizons did not dispute. *Id.* at ¶¶ 2-3, 31. The Court of Appeals further found that because Anderson's supervisor Delaney admitted knowing that Anderson had a surgically corrected congenital heart defect before Anderson's employment with Bright Horizons ended, a question of fact exists regarding whether Bright Horizons believed Anderson had a physical impairment. *Id.* at ¶ 32. Accordingly, the Court of Appeals remanded Anderson's "regarded as" disability discrimination claim and her derivative claim for aiding and abetting unlawful discrimination. *Id.* at ¶¶ 62, 75.

In support of its position, Appellants present the following argument.

V. ARGUMENT IN SUPPORT OF APPELLEES/CROSS-APPELLANTS' PROPOSITION OF LAW

PROPOSITION OF LAW NO. 1: A plaintiff must show more than an employer's mere knowledge of a medical condition to create a triable issue of fact on a "regarded as" disability discrimination claim, and must offer evidence that, at the time

> **of the alleged adverse employment action, the employer believed the employee's condition impaired at least one of the body systems listed in R.C. § 4112.01(A)(16).**

The Court of Appeals found that, to prove her "regarded as" disability discrimination claim, Anderson had to offer evidence that Bright Horizons perceived her as having a physical or mental impairment ***"as that phrase is defined in R.C. § 4112.01(A)(16)."*** *Anderson*, 2022-Ohio-1031, at ¶ 30 (emphasis added). R.C. § 4112.01(A)(16)(a)(i) defines a "physical or mental impairment" to be "[a]ny physiological disorder or condition . . . ***affecting*** one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin and endocrine." (emphasis added). According to the Court of Appeals, however, a triable issue of fact arose "once Anderson informed Delaney about her congenital heart defect." *Anderson*, 2022-Ohio-1031, at ¶ 33. In other words, Anderson did not have to submit evidence to show what, if anything, Delaney understood about Anderson's surgically corrected congenital heart defect or whether it actually affected one of the body systems listed in R.C. § 4112.01(A)(16). Nor did she have to submit any evidence to show Delaney believed Anderson was limited or impaired in any way by the surgically corrected congenital heart defect. Rather, it was enough for Anderson to vaguely reference her medical condition to Delaney, without providing any additional details, for Anderson's "regarded as" disability claim to survive summary judgment.

The Court of Appeals also found that "Anderson presented evidence that her congenital heart defect is a physiological condition that affects her cardiovascular system," which Bright Horizons did not dispute. *Anderson*, 2022-Ohio-1031, at ¶¶ 2-3, 31. But this finding ignores an essential component of "regarded as" claims—that they are based on what the employer believed at the time of the alleged adverse employment action. *Id.* at ¶ 32. Here, the "evidence" referenced

by the Court of Appeals was affidavit testimony of two medical experts retained by Anderson during litigation and submitted to the trial court in opposing summary judgment. This evidence did not exist during Anderson's employment and, prior to filing suit, Anderson had never presented anything to Bright Horizons or Delaney suggesting her condition affected her cardiovascular system. *Id.* at ¶ 33 (noting that Anderson never presented any documentation to Bright Horizons to substantiate her condition). Thus, the Court of Appeals improperly relied on post-litigation expert affidavits to impute non-existent, pre-litigation knowledge to Bright Horizons.

The Court of Appeals also overlooked the fact that neither Anderson nor her mother told Delaney that Anderson's condition impacted her *cardiovascular* system. Rather, they both told Delaney the condition *may* impact Anderson's immune system, but Anderson also told Delaney that the condition never really impacted her, which is why she did not disclose it earlier. (R. 281, Plf. Dep. 241:1-4, 242:5-15, 243:5-7, 244:14-16; R. 292, Delaney Ex. 18; R. 280, M. Anderson Dep. 74:23-24, 75:1-3, 79:1-24, 80:1; R. 285, Plf. Ex. 41). Importantly, the immune system is not a bodily system listed in R.C. § 4112.01(A)(16)(a)(i), which is phrased as exhaustive and not merely inclusive. The Court of Appeals acknowledged that "[i]n interpreting statutes, courts cannot extend a statute beyond what is written because it is the duty of the court to give effect to the words used in the statute, not to delete words used or insert words not used." *Anderson*, 2022-Ohio-1031, at ¶ 27 (internal citations omitted). Yet, it ignored this canon when considering Anderson's "regarded as" claim. Accordingly, even if Delaney knew about Anderson's medical condition, there was no evidence from which the Court of Appeals could conclude that Delaney believed Anderson had a physical impairment as that phrase is defined in R.C. § 4112.01(A)(16) at the time of the alleged discriminatory act. *See, e.g., Creveling*, 2021-Ohio-764, at ¶ 46 (mere awareness of a medical condition, even with work restrictions, does not establish that an employer

regarded an employee as disabled). As a result, the Court of Appeals erred in finding a triable issue on Anderson's "regarded as" disabled claim. *Anderson*, 2022-Ohio-1031, at ¶¶ 32, 36.

The decision of the Court of Appeals fares no better if the federal ADAAA standard is correctly applied to Anderson's Ohio claims. Under that standard, the plaintiff still must offer evidence that the employer perceived them as being impaired in some way, although that perception does not need to rise to the level of believing the employee is substantially limited in a major life activity. Merely disclosing the existence of a medical condition is not enough to create a triable issue of fact on a "regarded as" disabled claim under the ADAAA.

For example, in *Neely v. Benchmark Family Servs*., 640 Fed. Appx. 429 (6th Cir. 2016), the plaintiff claimed to have problems sleeping, which he disclosed. Thereafter, he was demoted and terminated for performance issues. *Id.* at 430-431. He filed suit alleging disability discrimination. *Id.* at 431. The district court dismissed the claim, finding the plaintiff was not disabled within the meaning of the ADA. *Id.* On appeal, the Sixth Circuit affirmed. *Id.* at 436. With respect to the "regarded as" definition of disability, the Court explained "it is not enough that the employer is simply aware of the plaintiff's symptoms; rather the plaintiff must show that the employer regarded the individual as 'impaired' within the meaning of the ADA." *Id.* at 435-436. The Court found that even under the relaxed standards of the ADAAA, the plaintiff could not make this showing. The plaintiff offered evidence a supervisor told him to take supplements "so [his sleeping problems are] not an issue," that he should "hurry up" with his self-medication for his sleep problems and rolled his eyes when the plaintiff tried to explain his sleep disorder. However, this evidence did "not suggest that Benchmark regarded him as physiologically 'impaired' within the meaning of the ADA." *Id.* at 436.

In contrast, the Sixth Circuit found a triable issue of fact on a "regarded as" disabled claim in *Baum v. Metro Restoration Servs*., 764 Fed. Appx. 543 (6th Cir. 2019). There, the plaintiff was fired a few months after he began having heart problems. *Id.* at 544. He sued for disability discrimination under the ADA and Kentucky law. *Id.* at 545. The district court granted summary judgment to his employer. *Id.* On appeal, the Sixth Circuit affirmed in part and reversed in part. It found that the plaintiff could not show he had a physical or mental impairment that substantially limited him in a major life activity (the cardiovascular and circulatory systems) "because his impairments, unlike more common or less complicated ones, require medical knowledge to understand" and the plaintiff failed to disclose a medical expert. *Id*. at 546. However, the Court found a triable issue of fact as to whether the employer "regarded" him as disabled. The plaintiff cited his supervisor's knowledge that he had a heart catheter implanted, a CAT scan, made a trip to the emergency room, and wore a heart monitor as evidence that he was "regarded as" disabled. *Id.* The Court noted that the supervisor's knowledge of these medical issues—alone—was insufficient to carry the day. *Id.* However, the supervisor's stated reason for firing the plaintiff was "health issues and doctors' appointments." *Id.* The Court found this statement created a factual dispute and that a jury could find the supervisor perceived the plaintiff to have a physical impairment and fired him because of that perception. *Id.*

Similarly, in *EEOC v. West Meade Place, LLP*, 841 Fed. Appx. 962 (6th Cir. 2021), the Sixth Circuit examined a disability discrimination claim brought by the EEOC on behalf of a former laundry assistant. *Id.* at 965. The district court granted summary judgment holding that no reasonable jury could find the plaintiff had a disability as defined in the ADA. *Id.* at 966. The EEOC appealed, arguing that a reasonable jury could find the employer "regarded" the plaintiff as disabled. *Id.* The Sixth Circuit agreed and reversed. *Id.*

The Sixth Circuit reaffirmed that mere knowledge of medical issues is insufficient to prove "regarded as" disability discrimination. *Id.* at 969 (citing *Baum*, 764 Fed. Appx. at 547). Rather, the key question is whether the supervisor who terminated the plaintiff regarded her as having an impairment. *Id.* at 967. The Court found ample evidence that she did. *Id.* at 969. The record showed the plaintiff had an anxiety disorder that caused panic attacks which, at times, caused her to call off work or to leave work early. *Id.* at 964. She also requested intermittent FMLA leave, and the certification paperwork stated her serious health condition would be "ongoing for a lifetime," was being treated with prescription medication, and that the plaintiff was unable to work during "flare-ups." *Id.* Thereafter, the supervisor fired the plaintiff for being "unable to do her job." *Id.* at 965. The Court found that the stated reason for the termination showed not only that the supervisor was aware of the plaintiff's impairment, but that she believed it would inhibit her from performing her job duties. *Id.* at 969. On these facts, the Court found a reasonable juror could find that the employer regarded the plaintiff as having a mental impairment. *Id.*

Even the cases cited by the Court of Appeals in its opinion do not stand for the proposition that an employer regards an employee as disabled merely by the employee disclosing a medical condition. *Anderson*, 2022-Ohio-1031, ¶¶ 30, 33. For example, in *Jakomas v. Pittsburgh*, 342 F.Supp.3d 632 (W.D. Pa. 2018), the Court found a triable issue of fact on the plaintiff's "regarded as" disabled claim. The evidence showed the employer knew about the plaintiff's medical condition before she took medical leave to undergo surgery. After she returned to work, the employer assigned certain tasks to her to assess her fitness for duty. *Id.* at 640. The Court found this evidence supported the inference that the defendant's managers perceived the plaintiff as being impaired by her medical condition. *Id.*

Similarly, in *Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308 (6th Cir. 2019) the Court found a triable issue of fact on the plaintiff's "regarded as" disabled claim. There, the employer was not only aware of the plaintiff's "degenerative retinal condition," but employees expressed concern about the plaintiff's vision including on her job evaluation. *Id.* at 321. The employer's head of personnel asked the plaintiff about her vision and whether she had disability insurance. *Id.* at 321. Thereafter, he advised his colleagues that her vision issues might require them to consult an attorney. *Id.* The Court found, "[t]his is more than enough evidence from which a reasonable juror could find that. . . Maryville genuinely believed Babb had a 'physiological . . . condition' affecting one of her 'body systems,' namely her vision." *Id.* (noting the term "body systems" includes "special sensor organs").

In this case, Anderson did not present any evidence that Delaney perceived her as having a physical impairment. Unlike the cases discussed above, there was no evidence that Delaney made disparaging remarks about Anderson's congenital heart defect, assigned tasks to Anderson to assess her fitness for duty, terminated Anderson for being "unable to do her job," or engaged in *any* conduct suggesting she believed Anderson was impaired. As a result, the Court of Appeals misapplied the federal ADAAA standard, and committed an error of law, when it found a question of fact existed regarding whether Appellants believed Anderson had a physical impairment when they deemed her no call/no show a resignation.

VI. CONCLUSION

The issues Anderson seeks to appeal in her Memorandum in Support of Jurisdiction do not make this case one of public or great general interest, nor do they involve a constitutional question. However, the Court of Appeals' doubtful reversal of summary judgment on Anderson's "regarded as" disability discrimination claim, standing alone, makes this case one of public or great general

interest. *See North*, *supra*. The "regarded as" disabled standard applied by the Court of Appeals is lower than the standard set by this Court in *McGlone* and the ADAAA standard applied by federal courts to claims brought under the ADA. It subjects Ohio employers to jury trials on "regarded as" claims whenever they take adverse action against an employee who merely mentions having a medical condition. As this Court has not had the occasion in the twenty-four years since *McGlone* was decided to review the proper standard for "regarded as" claims under current Ohio law, it should accept jurisdiction to clarify that standard and to demonstrate the correct way to apply it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on this 27th day of July 2022, a copy of this *Combined Memorandum in Response to Appellant/Cross-Appellee Haley Anderson's Memorandum in Support of Jurisdiction –and– Memorandum in Support of Jurisdiction of Appellees/Cross-Appellants Bright Horizons Children's Center, LLC and Carrie Delaney* was served via electronic mail upon the following:

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