ORIGINAL

IN THE SUPREME COURT OF OHIO

ANITA HAUSER, Plaintiff-Appellee, vs. CITY OF DAYTON POLICE DEPARTMENT AND MAJOR E. MITCHELL DAVIS Defendants- Appellants.	:	CASE NOS. 2013-0291 & 2013-0493 On Appeal from the Montgomery County Court of Appeals, Second Appellate District Case No. CA 24965

BRIEF OF AMICI CURIAE OHIO EMPLOYMENT LAWYERS ASSOCIATION, OHIO NOW EDUCATION AND LEGAL DEFENSE FUND, AND THE OHIO POVERTY LAW CENTER IN SUPPORT OF APPELLEE ANITA HAUSER

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

I. STATEMENT OF INTEREST 1

II. INTRODUCTION AND SUMMARY OF ARGUMENT 3

III. STATEMENT OF FACTS AND THE CASE 4

IV. LAW AND ARGUMENT 5

Proposition of Law: Revised Code Chapter 4112 expressly imposes liability on management employees of political subdivisions who engage in unlawful discrimination, which means, pursuant to Revised Code Section 2744.03(A)(6)(c), that such management employees are not entitled to political subdivision immunity for their illegal acts.

A. The Plain Language of the Ohio Civil Rights Act, Chapter 4112, Lists Employees of Political Subdivisions among the "Employers" Who are Potentially Liable for Unlawful Discrimination. 5

1. As This Court Recognized Fourteen Years Ago in *Genaro v. Central Transport, Inc.*, the Definition of "Employer" for Purposes of Liability for Discrimination Includes Managerial Employees. 5

2. The Cases Appellant Cites that Applied Immunity as to Statutory Claims Were Interpreting Statutes without Chapter 4112's Specific Language Imposing Liability on Political Subdivisions or Their Employees. 7

3. The Liability of Supervisors in Chapter 4112 Is "Express," Not Implied, As It Arises Directly from the Language of the Statute, Not from the Common Law or Some Other Source of Authority. 9

B. *Genaro*'s Holding Is Consistent with the General Assembly's Intent to Hold Individuals Accountable for Unlawful Discrimination in the Workplace, Instead of Applying Liability Solely to Their Companies. 11

1. The General Assembly's Choice of Words in Chapter 4112 Supports the Personal Responsibility of Supervisors for Unlawful Discrimination. 11

2. Genaro Is Settled Law, and Has Been Ratified by the General Assembly, Which Has Chosen Not to Alter the Definitions in Chapter 4112. 15

C. Independent of Genaro, Managers and Supervisors of Political Subdivisions Lack Immunity with Respect to Unlawful Discriminatory Acts. 16

1. Revised Code Section 4112.02(J) Provides an Even More Obvious Abrogation of Political Subdivision Immunity for Individual Managers and Supervisors than Does Section 4112.02(A). 16

2. The Exception to Immunity for Malicious, Bad-Faith, Wanton, or Reckless Acts Inherently Applies to Intentional Acts of Discrimination. 17

V. CONCLUSION 19

Certificate of Service 19

TABLE OF AUTHORITIES

Cases

Anderson v. Massillon, 134 Ohio St. 3d 380, 2012-Ohio-5711, 983 N.E.2d 266 17

Campolieti v. Cleveland, 184 Ohio App.3d 419, 2009-Ohio-5224 ..... 8, 9

Cramer v. Auglaize Acres, 113 Ohio St. 3d 266, 2007-Ohio-1946 ..... 7, 8

Genaro v. Central Transport, Inc. (1999), 84 Ohio St. 3d 292, 703 N.E.2d 782 ..... *passim*

Illinois Controls v. Langham (1994), 70 Ohio St. 3d 512, 526, 639 N.E.2d 771 16

Manofsky v. Goodyear Tire & Rubber Co.
(9th Dist. 1990), 69 Ohio App. 3d 663, 591 N.E.2d 752 15

Marshall v. Montgomery County Children Services Board
(2001), 92 Ohio St. 3d 348, 750 N.E.2d 549 ..... 7, 8

O'Toole v. Denihan, 118 Ohio St. 3d 374, 2008-Ohio-2574, 889 N.E.2d 505 ..... 7, 8

Proctor v. Kardassilaris, 115 Ohio St.3d 71, 2007-Ohio-4838 14

State v. Porterfield, 106 Ohio St. 3d 5, 2005-Ohio-3095 14

Wathen v. Gen Elec. Co. (6th Cir. 1997), 115 F.3d 400 ..... 12, 13

Western Reserve Mut. Cas. Co. v. OK Café & Catering, Inc. (3d Dist.), 2013-Ohio-3397 18

Statutes

Ohio Revised Code Section 2151.421 8

Ohio Revised Code Section 2744.03 ..... *passim*

Ohio Revised Code Section 2919.22 8

Ohio Revised Code Section 3721.10-17 7

Ohio Revised Code Sections 4112.01, 4112.02, & 4112.99 ..... *passim*

42 United States Code Section 2000e 12-13

I. STATEMENT OF INTEREST

The Ohio Employment Lawyers Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA and OELA strive to protect the rights of their members' clients, and regularly support precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity.

As an organization focused on protecting the interests of workers who are subjected to workplace discrimination, including workers for Ohio municipalities and other political subdivisions, OELA has an abiding interest in ensuring that employers and managers who engage in discriminatory conduct are held accountable at law for their illegal conduct. Individuals who subject their subordinates to unlawful discrimination while working for a political subdivision are no less culpable and should not face less scrutiny or liability because of they hold public office. OELA files this amicus brief to call attention to the impact the decision in this case may have on preserving equal opportunity workplaces and protecting the rights of employees when they suffer unlawful discrimination at work.

Ohio NOW Education and Legal Defense Fund is a nonprofit corporation originally founded in 1981 by the Trustees of the Ohio Chapter of the National Organization for Women. The NOW Legal Defense and Education Fund provides assistance to bring women into full participation in all activities of American life and conducts research and education concerning

discrimination in our society. As part of its activities, the NOW Legal Defense and Education Fund provides legal counsel or other support to victims of employment discrimination and conducts regular programs to prevent discrimination. It and the Ohio NOW Chapter have participated as *amici curiae* in cases before this Court and Ohio's Courts of Appeals. Ohio NOW Education and Legal Defense Fund files this amicus brief in order to support the accountability of individual managers and supervisors, including those working within public agencies, who commit unlawful acts of discrimination and harassment against women.

The Ohio Poverty Law Center (OPLC) is the legal services state support center in Ohio. The OPLC provides assistance to the six regional legal services (legal aid) programs in Ohio and advocates on systemic legal and public policy issues that significantly impact Ohio's low-income population by, *inter alia*, the filing of *amicus curiae* and appellate briefs, co-counseling major cases with local legal aid programs, legislative and rulemaking advocacy, and community outreach and education. One of the OPLC's highest priorities is employment law. The erosion of the social safety net, and the need for low-income Ohioans to attain economic self-sufficiency have highlighted the importance of anti-discrimination laws and other employment protections for maintaining stable employment and a sustainable income for Ohio's low-income families and households. OPLC files this brief because any effort to maintain and strengthen employment protections for low-income workers in Ohio depends on ensuring personal responsibility and accountability for those who would commit unlawful discrimination.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The definition of "employer" used in the Ohio Civil Rights Act, Chapter 4112 of the Ohio Revised Code, explicitly includes "any political subdivision of the state" as well as "any person acting directly or indirectly in the interest of an employer." Section 4112.02(A) includes "any employer" among those prohibited from committing unlawful discriminatory acts, and Section 4112.99 imposes civil liability for any such acts. The General Assembly has stripped individual employees of Ohio political subdivisions of any claim to immunity for actions that are subject to an express imposition of civil liability by any Ohio statute.

It really is that simple. The plain language of these two Ohio laws, read together, prevent individual managers and supervisors of political subdivisions from claiming immunity against claims of unlawful employment discrimination. And as if that were not enough, there are two other statutory provisions that accomplish the same thing: Section 4112.02(J), which imposes liability on "any person" (with "person" defined to include political subdivisions and their employees) who aids, abets, coerces, or compels the commission of an unlawful discriminatory act; and Section 2744.03(A)(6)(c), which strips employees of political subdivision immunity for acts that are committed "with malicious purpose, in bad faith, or in a wanton or reckless manner"—a definition that inherently includes intentional acts of unlawful discrimination.

Yet the Appellant, a high-ranking supervisor in the Dayton Police Department, claims he should be granted the cloak of immunity for alleged intentional discriminatory acts, because these statutory provisions are somehow "ambiguous." This supposed "ambiguity" arises from a case decided by this Court over fourteen years ago, *Genaro v. Central Transport, Inc.* (1999), 84 Ohio St. 3d 293, 300, 703 N.E.2d 782. *Genaro* held that not only did Chapter 4112's definitions of "employer" and "person" impose direct liability on managers and supervisors for their

unlawful discriminatory acts, but that these definitions were "clear and unambiguous." *Id.* But *Genaro* was not unanimous, so the Appellant asks this Court to disregard it, in part based on the fact that federal courts have rejected individual liability under Title VII of the Civil Rights Act of 1964. In other words, the Appellant wants this Court to disregard its own, longstanding precedent, relying instead on a definition explicitly rejected in *Genaro*, based on the reasoning of different courts, interpreting a different statute, passed by a different legislature, using a differently worded definition of "employer." This, despite fourteen intervening years in which the General Assembly has repeatedly declined to amend the statute in response to *Genaro*.

In short, there is no reasonable way for the Appellant to claim immunity. The Appellant's efforts to complicate the case should be rejected, not just because adopting the arguments in favor of immunity would require this Court to disregard its own longstanding precedents and strain the words of Chapter 4112 beyond recognition, but also because there is no reason to do it. Putting aside *Genaro* and the plain wording of the definition of "employer," there are other statutory bases for rejecting immunity in every similar case. And even without these provisions, the only purpose served by adopting the Appellant's arguments would be to strip any semblance of accountability or personal responsibility from those supervisors who use the authority they hold within public agencies to commit intentional, unlawful acts of discrimination. That purpose was disclaimed by the General Assembly in adopting the statutes at issue, and it was rejected by this Court fourteen years ago in *Genaro*. This Court should keep this case simple, rely on its own clear precedents, and affirm the holding of the court of appeals.

III. STATEMENT OF FACTS AND THE CASE

Amici curiae OELA, Ohio NOW Education and Legal Defense Fund, and the Ohio Poverty Law Center adopt the Statement of Facts and the Case presented by the Appellee.

IV. LAW AND ARGUMENT

PROPOSITION OF LAW:

Revised Code Chapter 4112 expressly imposes liability on management employees of political subdivisions who engage in unlawful discrimination, which means, pursuant to Revised Code Section 2744.03(A)(6)(c), that such management employees are not entitled to political subdivision immunity for their illegal acts.

A. The Plain Language of the Ohio Civil Rights Act, Chapter 4112, Lists Employees of Political Subdivisions among the "Employers" Who are Potentially Liable for Unlawful Discrimination.

1. As This Court Recognized Fourteen Years Ago in Genaro v. Central Transport, Inc., *the Definition of "Employer" for Purposes of Liability for Discrimination Includes Managerial Employees.*

The words of the statutes at issue provide the proper starting point in answering this question of statutory interpretation. Doing so here leaves no doubt that managerial employees, such as Major Davis, cannot claim political subdivision immunity against allegations of discrimination. Revised Code Section 2744.03(A)(6)(c) states, in relevant part, that "the employee is immune from liability unless *** [c]ivil liability is expressly imposed upon the employee by a section of the Revised Code."

Here, such an express imposition of liability occurs in the Ohio Civil Rights Act, Chapter 4112 of the Revised Code. Section 4112.99 imposes civil liability upon "[w]hoever violates this chapter." Section 4112.02(A) makes it an unlawful employment practice "[f]or any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."

Most important for these purposes, Section 4112.01(A)(2) defines the term "employer" for purposes of the chapter: " 'Employer' includes the state, *any political subdivision of the*

state, any person employing four or more persons within the state, *and any person acting directly or indirectly in the interest of an employer*." (Emphasis added). Notably, the statute also defines "person" to include any "manager" and "the state and *all political subdivisions*, authorities, agencies, boards, and commissions of the state." R.C. 4112.01(A)(1) (emphasis added).

Together, these provisions of the Ohio Civil Rights Act clearly and unambiguously impose civil liability on managers who commit unlawful discriminatory acts while acting on behalf of Ohio political subdivisions. It is hardly surprising, then, that this Court, when faced fourteen years ago with precisely the question of whether Chapter 4112 imposes direct liability on supervisory employees, held that it does. In *Genaro v. Central Transport, Inc.* (1998), 84 Ohio St. 3d 293, 300, 703 N.E.2d 782, this Court answered a certified question as follows:

> [W]e believe that *the clear and unambiguous language of R.C. 4112.01(A)(1) and (A)(2)*, as well as the salutary antidiscrimination purposes of R.C. Chapter 4112, and this court's pronouncements in cases involving workplace discrimination, all evidence that individual supervisors and managers are accountable for their own discriminatory conduct occurring the workplace environment. Accordingly, we answer the certified question in the affirmative and hold that for purposes of R.C. Chapter 4112, a supervisor/ manager may be held jointly and/or severally liable with her/his employer for discriminatory conduct of the supervisor/manager in violation of R.C. Chapter 4112. (Emphasis added).

Genaro remains good law, and it relies on exactly the same statutory language at issue here, as the General Assembly has not amended the statute in any relevant respect during the fourteen-year period since *Genaro* was decided. This should end the inquiry in this case. The only difference between the question here and the question in *Genaro* is the involvement of a political subdivision, and no one can reasonably argue that *Genaro* would have been decided differently if the defendants had been a political subdivision and its managerial employee. This is because the General Assembly has made it absolutely clear in Section 4112.01 that political subdivisions and their managerial employees are included in the terms "employer" and "person,"

as both definitions explicitly use the term "political subdivision." R.C. §§ 4112.02(A)(1)-(2).[1] Simply put, there is no way, consistent with this Court's holding in *Genaro*, to reverse the determination of the court of appeals that Chapter 4112 expressly imposes civil liability on managers and supervisors of political subdivisions who commit unlawful discriminatory acts.

2. The Cases Appellant Cites that Applied Immunity as to Statutory Claims Were Interpreting Statutes without Chapter 4112's Specific Language Imposing Liability on Political Subdivisions or Their Employees.

The Appellant seeks to complicate this exceptionally simple issue by citing a handful of cases holding that statutes failed to satisfy the immunity exception in Section 2744.03(A)(6)(c): *Cramer v. Auglaize Acres*, 113 Ohio St. 3d 266, 2007-Ohio-1946; *Marshall v. Montgomery County Children Services Board* (2001), 92 Ohio St. 3d 348, 750 N.E.2d 549; and *O'Toole v. Denihan*, 118 Ohio St. 3d 374, 2008-Ohio-2574, 889 N.E.2d 505. These cases are inapposite, as the statutes they analyzed were not nearly as explicit as Chapter 4112 in imposing liability on political subdivision employees, and unlike Chapter 4112, none of these statutes had previously been interpreted by this Court as clearly and unambiguously imposing liability.

In *Cramer*, this Court held that the term "any person," used in the context of the liability of nursing home employees for violating the patient protection statutes in Revised Code Sections 3721.10 through 3721.17, was too vague to impose express liability on the employees of a county-operated nursing home. 2007-Ohio-1946, at ¶ 32. But for purposes of those statutes, the term "person" was not defined. *Id.* Here, Section 4112.01(A)(1) *does* define "person," and it defines it to include, explicitly, the State of Ohio, its political subdivisions, and managers and employees. Similarly, Section 4112.01(A)(2) defines the term "employer," and it explicitly

[1] Oddly, the Appellant's merit brief claims, "R.C. § 4112.01(A)(2) does not expressly impose liability on political subdivision employees. They are not referenced." (Merit Brief, p. 7). This claim is simply false, as indicated in the explicit statutory language quoted above.

includes political subdivisions and those acting on their behalf. There is simply no similarity between the circumstances here and those in *Cramer*, as the key words held to be lacking in *Cramer* are present here, and they impose liability.

The exact same reasoning was used in *O'Toole*, where the Court rejected an abrogation of immunity based upon Section 2919.22, a criminal statute imposing liability on any "person," without defining "person." This case has no applicability to a statute that does define the operative words "person" and "employer."

Nor does *Marshall* have any legitimate impact here. There, this Court simply held that because Revised Code Section 2151.421, addressing child abuse and neglect, imposed liability upon political subdivision employees and others for failing to *report* abuse, but not for failing to *investigate* it, that statute was not sufficient to overcome immunity as to political subdivision employees who were alleged not to have investigated an instance of abuse. 92 Ohio St. 3d at 352-53. There is no similar distinction at issue here, where the statute imposes civil liability for any unlawful discriminatory act by an employer, and it defines employer to include persons acting in the interest of a political subdivision. It is difficult to see why the Appellant even cited this case, except as an unrelated, generic example of this Court applying the immunity statute.

The only other immunity case used to support the Appellant's argument is the case relied upon to create the conflict identified by this Court: the Eighth District Court of Appeals opinion in *Campolieti v. Cleveland*, 184 Ohio App.3d 419, 2009-Ohio-5224. Except for the bare holding itself, there is nothing in *Campolieti* that supports the Appellant's argument. The *Campolieti* court simply stated, in a single sentence, "The statutory basis of appellant's action, R.C. 4112.14, speaks in terms of 'employers.' " It therefore concluded that the statute did not impose express liability on political subdivision employees. The court did not appear to realize

that the term "employer" is specifically defined in Section 4112.01(A)(2), as there is no reference in the case to that provision. Nor did the court acknowledge this Court's binding precedent in *Genaro*, concluding that the definitions in Section 4112.01(A)(1) and (A)(2) clearly and unambiguously imposes personal liability on managers and supervisors. Simply put, this case was wrongly decided. The contrary decisions of the Second, Third, Seventh, and Eleventh Appellate Districts, as well as the federal district court for the Southern District of Ohio, are more thoroughly reasoned, and each of them acknowledges this Court's longstanding precedent in *Genaro*. This Court should reject the holding in *Campolieti* and adopt the majority view.

3. The Liability of Supervisors in Chapter 4112 Is "Express," Not Implied, As It Arises Directly from the Language of the Statute, Not from the Common Law or Some Other Source of Authority.

The Appellant grudgingly acknowledges *Genaro*'s directly applicable holding, and even disclaims any request that it be overruled. But the Appellant nevertheless argues that *Genaro* is insufficient for purposes of the exception to political subdivision immunity in Chapter 2744.03(A)(6)(c) because, the Appellant claims, Chapter 4112's imposition of civil liability is not sufficiently "express" to meet the requirements of the immunity exception. This argument is not well founded, for two simple reasons.

First, the term "express" in Section 2744.03(A)(6)(c) appears to be intended to distinguish directly stated rights of action against political subdivision employees from implied rights of action. So, for instance, a statute that creates a general right of action against anyone who commits a particular unlawful act might implicitly include employees of political subdivisions in its scope, but this is not enough to overcome immunity. Only those statutes that explicitly include subdivision employees in their scope meet that burden. Chapter 4112, by explicitly including managerial employees of political subdivisions in the definitions of both

"employer" and "person," does not merely imply a right of action against those managers; it explicitly, directly states that they are civilly liable for unlawful discriminatory acts.

Second, if the term "express" in Section 2744.03(A)(6)(c) is not intended to exclude implied rights of action, but instead means "unambiguous," as the Appellant claims, there is still no question that Chapter 4112's imposition of liability is "express."[2] The Appellant devotes significant energy to explicating the supposed ambiguity of Chapter 4112's definition, but these efforts are futile. *Genaro* itself plainly states, in its holding, that the definitions in divisions 4112.01(A)(1) and (A)(2) are "clear and unambiguous." The *Genaro* majority did not rely on Chapter 4112's liberal construction rule to construe an ambiguous definition based on the admittedly strong public policy in favor of holding supervisors accountable for their discriminatory acts. Rather, it held that the definitions of "employer" and "person" were "clear and unambiguous." *Genaro*, 84 Ohio St. 3d at 300. The opinion does reference the statute's strong policy in favor of non-discrimination and the accountability of supervisors, and this does help explain the General Assembly's likely purpose in crafting the statute, but these references are not necessary to the Court's holding. Once again, consistent with *Genaro*, these definitions cannot be considered anything other than "clear and unambiguous"—and therefore "express" even according to the Appellant's narrow definition of that term.

But the Appellant's claim that Chapter 4112's imposition of liability on political subdivision managers is "ambiguous" is not actually based on the words of the statute. Instead, it relies on two arguments that have nothing to do with the General Assembly's use of language.

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[2] The Appellant quotes a dictionary definition of "express" as "unambiguously; in a way that shows clear intention or choice." (Merit Brief, p. 7). Other definitions are broader, and include the meaning "directly stated." *E.g.*, Black's Law Dictionary (7th Ed. 1999) (defining "express" as "Clearly and unmistakably communicated; *directly stated.* *** Cf. IMPLIED" (emphasis added)). Although this second definition fits the context of Section 2744.03 more readily, as noted, the direct, unambiguous language of Chapter 4112 easily satisfies either definition.

First, the Appellant argues that Sections 4112.01(A)(1) and (A)(2) are "ambiguous" because *Genaro*, which held that these provisions were "clear and unambiguous," was not unanimous. This argument should be given no weight. The mere existence of a dissent cannot negate the effect of an opinion of this Court that a statute's words are unambiguous. This is simply a disingenuous effort by the Appellant to convince this Court to ignore its own binding precedent.

Second, the Appellant insists that Chapter 4112's definition of "employer" is ambiguous because federal courts, interpreting a differently worded provision of Title VII of the Civil Rights Act of 1964, reached a different conclusion. As discussed below, the *Genaro* Court had sound reasons for distinguishing Ohio's Civil Rights Act from Title VII in this regard, and the federal courts' reasoning in interpreting Title VII is itself questionable. But more important, it would defy logic to conclude that otherwise clear language in an Ohio statute could be rendered ambiguous by the existence of a differently worded provision passed by a different legislature and interpreted by different courts without the authority to construe Ohio law. The question of whether or not Chapter 4112 is ambiguous can be answered only by this Court, and the answer must be found within the four corners of the statute. This Court has already answered that question, and it has held that the statute clearly and unambiguously imposes direct liability on managerial employees who commit unlawful discriminatory acts.

B. *Genaro*'s Holding Is Consistent with the General Assembly's Intent to Hold Individuals Accountable for Unlawful Discrimination in the Workplace, Instead of Applying Liability Solely to Their Companies.

1. The General Assembly's Choice of Words in Chapter 4112 Supports the Personal Responsibility of Supervisors for Unlawful Discrimination.

Putting aside the procedural impropriety of relying on *Genaro*'s dissenting opinions, instead of the majority opinion of this Court, there is a better reason for this Court to apply *Genaro*'s holding directly to the question at issue here: *Genaro* correctly assessed the General

Assembly's unmistakable intent. The words of Chapter 4112, particularly its definitions of "person" and "employer," plainly state that managers may be held directly liable for unlawful discrimination. Indeed, as the Court held in *Genaro*, this language is "clear and unambiguous."

The controversy surrounding *Genaro*, at least at the time—i.e., before the General Assembly ratified its holding through fourteen years of preserving the statutory definitions in exactly the same form—was based on one concept: the fact that the federal Sixth Circuit reached a different conclusion in interpreting Title VII of the Civil Rights Act of 1964. The *Genaro* Court acknowledged the Sixth Circuit's rejection of individual Title VII liability. *Genaro*, 84 Ohio St. 3d at 299 (citing *Wathen v. Gen Elec. Co.* (6th Cir. 1997), 115 F.3d 400). The Court also acknowledged that Ohio courts generally incorporate federal case law as to Title VII into their interpretation of Chapter 4112. But it did not just blindly follow the Sixth Circuit's lead.

Wathen, like other federal appellate decisions,[3] rejected individual liability despite a provision in Title VII stating that the term "employer" means "a person engaged in an industry affecting commerce who has fifteen or more employees *** and any agent of such person." 115 F.3d at 405 (quoting 42 U.S.C. § 2000e(b)). The *Genaro* Court reached a different conclusion because it recognized that the language of Chapter 4112 defining "employer" was "markedly different" from that of Title VII. *Genaro*, 84 Ohio St. 3d at 298. The interpretation of Title VII to exclude individual liability is based primarily on the idea that by referencing "any agent" of an employer, Congress merely intended to import the agency principle of *respondeat superior*. In contrast, the Ohio Civil Rights Act makes no reference to the term "agent," and instead states "any person acting directly or indirectly in the interest of an employer." R.C. § 4112.01(A)(2). Although this difference amounts to only a few words, they are the operative words at issue. The

[3] This question has not yet been addressed by the U.S. Supreme Court.

question was whether the General Assembly intended the words of Section 4112.01(A) to mean exactly what they say, or were instead using these words as a coded reference to a principle of agency. The presence or absence of the word "agent" was obviously essential to that question.

Indeed, the path followed by the *Genaro* Court would have been correct even if the language of Title VII and Chapter 4112 were identical. The general principle that federal case law is applicable to this Court's interpretation of Ohio's own, similar civil rights law is just that: a *general* principle, used by this court as a matter of convenience. This Court has not ceded its constitutional authority to construe the laws of Ohio to the federal courts. When the federal courts construe Title VII in a way that does not correspond to the intent of the General Assembly in enacting Chapter 4112, this Court cannot be required to follow it, and it should not do so.

In interpreting Title VII, the federal courts have created a legal fiction to work around what they have deemed inconvenient statutory wording. They have never explained why Congress would use a definition that appears to include direct liability for individuals if it actually meant to apply *respondeat superior* instead—particularly since the principle of *respondeat superior* would seem to apply to Title VII and Chapter 4112 even without such language. Even the Sixth Circuit admitted that the words of the statute, on their face, hold individuals directly liable. But it applied the canons of statutory construction anyway, and held that the statute means the opposite of what it says. See *Wathen*, 113 F.3d at 405 ("We concede that 'a narrow, literal reading of the agent clause in § 2000e(b) does imply that an employer's agent is a statutory employer for purposes of liability.' However, it is well-settled that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " (citations omitted)).

This Court, unlike the federal courts, does not apply arcane canons of construction when faced with unambiguous statutory language. See, e.g., *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, at ¶ 12 ("Statutes that are plain and unambiguous must be applied as written without further interpretation. *** Rules for construing the language *** may be employed only if the statute is ambiguous."); *State v. Porterfield*, 106 Ohio St. 3d 5, 2005-Ohio-3095, at ¶ 11 ("Only when a definitive meaning proves elusive should rules for construing ambiguous language be employed. Otherwise, allegations of ambiguity become self-fulfilling." (citations omitted)). It would not be consistent with Ohio law to adopt the interpretation a federal court has reached by ignoring the principles Ohio courts use to construe statutes. That is particularly true when interpreting the Ohio Civil Rights Act, a law with an extensive history independent of federal law, as it predates the federal Civil Rights Act of 1964 by several years.

The different approaches of the federal and Ohio courts to statutory construction were not the only basis for the *Genaro* Court's conclusion. The Court also concluded, 84 Ohio St. 3d at 296-97, that the General Assembly chose its definition of "employer" because it was consistent with its intent to hold perpetrators of discriminatory acts accountable:

> A majority of this court have, time and time again, found that there is no place in this state for any sort of discrimination no matter its size, shape, or form or in what clothes it might masquerade. This, of course, includes discrimination in the workplace. *** By holding supervisors and managers individually liable for their discriminatory actions, the antidiscrimination purposes of R.C. Chapter 4112 are facilitated, thereby furthering the public policy goals of this state regarding workplace discrimination.

The *Genaro* Court was correct that the General Assembly has consistently sought to hold individuals accountable for their personal role in discrimination. As noted below, it has even gone so far as to enact a separate provision, not found in Title VII, imposing direct liability for any person who aids, abets, or compels discrimination by others. R.C. § 4112.02(J). The General

Assembly also used the term "any person," instead of "any employer," when enacting the retaliation provision in Section 4112.02(I).[4] Note that if the Appellant's view were adopted, this would mean a supervisor could be held directly liable for retaliating against an employee who complains of discrimination, but not for committing the underlying discriminatory act.

In addition, in earlier iterations of the Ohio Civil Rights Act, the principal remedy for discrimination under Chapter 4112 was a criminal sanction. See *Manofsky v. Goodyear Tire & Rubber Co.* (9th Dist. 1990), 69 Ohio App. 3d 663, 669, 591 N.E.2d 752 (noting 1987 expansion of remedies from criminal sanction to full range of civil remedies). Given how much better suited the criminal justice system is to addressing individuals than corporations, the General Assembly's use of this remedy emphasized both its complete refusal to tolerate discrimination and its intent to apply the provisions of Chapter 4112 to individual actors.

2. Genaro *Is Settled Law, and Has Been Ratified by the General Assembly, Which Has Chosen Not to Alter the Definitions in Chapter 4112.*

If there were any question at the time about whether the *Genaro* Court correctly assessed the intent of the General Assembly, that question can no longer be seriously raised. The General Assembly has had ample opportunity to overrule *Genaro* through legislation, and it has not done so, even after fourteen years and numerous changes in the makeup and partisan affiliation of its members. After nearly a decade and a half of such legislative ratification, *Genaro* is settled law. If the General Assembly ever determines that it disagrees with the Court's precedent regarding the proper scope of Chapter 4112, it is perfectly capable of modifying that scope. This Court's function is to construe the law, and it has already done so. The task of *changing* the law, as the Appellant seeks to do, falls to the General Assembly.

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[4] The use of "any person" instead of "any employer" in Divisions (I) and (J) does not imply that Division (A) was intended to exclude individuals. Divisions (I) and (J) could not use the term "employer" because they address housing and public accommodations as well as employment.

C. Independent of *Genaro*, Managers and Supervisors of Political Subdivisions Lack Immunity with Respect to Unlawful Discriminatory Acts.

1. Revised Code Section 4112.02(J) Provides an Even More Obvious Abrogation of Political Subdivision Immunity for Individual Managers and Supervisors than Does Section 4112.02(A).

The Appellant, Major Davis, is alleged to have engaged in a series of intentionally discriminatory acts against the plaintiff. According to *Genaro*, this makes him jointly and severally liable with the City, as he was an "employer" directly engaged in discrimination for purposes of Section 4112.02(A). But his actions also fit within the broader language of Section 4112.02(J), which states, "It shall be an unlawful discriminatory practice: *** (J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice."[5]

The language of Division (J) is rarely used or even remarked upon by courts, but it is, on its face, a powerful indicator of the General Assembly's intent to hold *anyone* accountable who engages in or participates in discrimination. Notably, no such provision is found in Title VII. More important, by its plain language, it has a powerful practical effect: it covers virtually any circumstance in which a person aids his or her employer in committing discrimination, compels the employer to do so, or even prevents the employer from complying with the law. Regardless of whether individuals are included in the definition of "employer," Division (J), in conjunction

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[5] The impact of R.C. § 4112.02(J) is an appropriate matter for this Court to address regardless of whether the plaintiff included an explicit reference to that provision in her pleadings, as the complaint's factual allegations clearly fall within the scope of Division (J). See *Illinois Controls v. Langham* (1994), 70 Ohio St. 3d 512, 526, 639 N.E.2d 771 (stating that plaintiffs need not plead legal theories, but must merely state the facts underlying their claims).

with the broad definition of "person" in Section 4112.01(A)(1) and the enforcement provision of Section 4112.99, encompasses all culpable individuals and expressly imposes liability on them.

In short, the lower courts did not need to rely on *Genaro*. Except for the fact that *Genaro* is a longstanding precedent that has been repeatedly preserved by the General Assembly, while Division (J) is less used and less familiar, it may be that many or all plaintiffs could forego reliance upon *Genaro* entirely. But at minimum, this Court can conclude that Chapter 4112 expressly imposes liability upon any manager who directly or indirectly causes his or her employer to commit an unlawful discriminatory act—either under Section 4112.02(A) or (J).

2. The Exception to Immunity for Malicious, Bad-Faith, Wanton, or Reckless Acts Inherently Applies to Intentional Acts of Discrimination.

Similarly, there is little purpose in confronting the longstanding precedent of *Genaro* in this context, when the real question is not what *Genaro* means, but whether or not Major Davis is entitled to political subdivision immunity. The answer is clearly no. Section 2744.03(A)(6) contains not one, but three immunity exceptions, and at least two apply here. First, there is the provision directly at issue, division (c), which denies liability when it is expressly imposed by statute. But there is another provision that denies liability to a political subdivision employee when "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. § 2744.03(A)(6)(b). The acts made unlawful by Chapter 4112—including Divisions (A), (I), and (J) of Section 4112.02—nearly always involve intentional discriminatory conduct.[6] Such intentional conduct inherently meets, at the very least, the standards established by this Court for recklessness. See *Anderson v. Massillon*, 134 Ohio St. 3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶¶ 33-35 (defining "reckless conduct" and citing authority for the fact that "intentional conduct would suffice to prove recklessness").

[6] The only conceivable exception is the "disparate impact" theory, which is not implicated here.

This provision was not discussed below. There was no reason to discuss it, given that both the trial court and the court of appeals agreed with the Appellee's contention that Chapter 4112 expressly imposes liability. But it may be simpler and more expedient for this Court to conclude that intentional discrimination claims under Chapter 4112 inherently satisfy the requirements of Division (A)(6)(b) than to engage in the more complex issues of legislative intent and statutory construction that would be required in order to credit the Appellant's argument and set aside the plain meaning of the words in Chapter 4112. Such consideration of issues not addressed by the lower courts is perfectly appropriate in the interests of justice and judicial economy. See, e.g., *Western Reserve Mut. Cas. Co. v. OK Café & Catering, Inc.* (3d Dist.), 2013-Ohio-3397, at ¶ 12, n.4 (noting authority to consider issues not raised on appeal pursuant to Ohio Rule of Appellate Procedure 12(A)(2)).

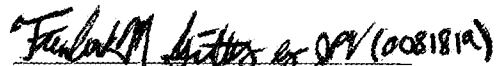
Even without directly addressing Section 2744.03(A)(6)(b), this Court can recognize that this additional exception to immunity undermines the Appellant's contention that the General Assembly intended to shield political subdivision managers from liability for unlawful discrimination. In fact, the General Assembly expressly imposed liability in two ways: first, by expressly imposing direct liability within Chapter 4112 itself; and second, by explicitly removing immunity from individual political subdivision employees who engage in bad faith, malicious, wanton, or reckless misconduct—which necessarily includes unlawful discrimination.

The Appellant asks this Court to engage in indefensible judicial gymnastics regarding the meaning and scope of perhaps Ohio's most important remedial statute, Chapter 4112, even though other provisions applicable to this case not only reinforce, but independently allow for the Appellant's liability. This Court should decline that invitation and uphold the lower courts' the denial of immunity on any or all of the grounds provided by the General Assembly.

V. Conclusion

For the reasons stated above, *amici curiae* OELA, Ohio NOW Education and Legal Defense Fund, and the Ohio Poverty Law Center urge this Court to affirm the judgment of the court of appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August 2013, a copy of the Brief of Amici Curiae Ohio Employment Lawyers Association, Ohio NOW Education and Legal Defense Fund, and the Ohio Poverty Law Center in Support of Appellee Anita Hauser was served by postage-paid U.S. Mail upon the following:

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