IN THE

COURT OF APPEALS OF MARYLAND

September Term, 2010

No. 115

DEBRA PARKS,
Petitioner,

v.

ALPHARMA, INC, *et al.,*
Respondents.

On Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF OF PUBLIC JUSTICE CENTER, MARYLAND EMPLOYMENT LAWYERS ASSOCIATION, AND METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AS *AMICI CURIAE*

Jessica Weber
Francis D. Murnaghan
Appellate Advocacy Fellow
Public Justice Center
One North Charles Street, Suite 200
Baltimore, MD 21201
(410) 625-9409

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

Employees who report employer conduct that contravenes public policy should be protected from retaliatory discharge, regardless of whether they raise their concerns internally or externally. An employee who "blows the whistle" by notifying a supervisor of his or her concerns furthers the same interest in preventing employers from engaging in conduct that threatens public health or safety as does an external whistleblower. Indeed internal reporting may be preferable to external reporting in achieving a speedy, cost-effective resolution to problematic employer conduct. Courts and legislatures throughout the country have embraced internal whistleblowing as a critical method of protecting the public by including internal reporting as protected activity under state and federal whistleblower laws. Regardless of whether a state protects whistleblowers by common law, statutes, or some combination of both (as in Maryland), the result is the same because an employee need only show that she reported conduct, either internally or externally, which she reasonably believed violated an important public policy in order to prevail. Given the recognition of the importance of internal whistleblowing in recent Maryland case law, internal whistleblowers who seek to vindicate important public policies should be protected through the tort of wrongful discharge.

In addition, employees who are terminated by employers who believe they are preparing to report the employer's wrongful conduct must be protected by the tort of wrongful discharge as well. Without such protection, employers could easily chill virtually all reporting of unlawful conduct simply by terminating anyone suspected of imminently reporting. For this reason, nearly all federal whistleblower laws relating to

health and safety protect employees who are about to report employer misconduct. Many state whistleblower laws also extend protection to employees even as they begin the process of whistleblowing by informally investigating and questioning their employer.[1]

Amici do not suggest that every employee who raises an internal question or complaint about the employer's conduct is a protected whistleblower. Rather, to fall within the parameters of the tort of wrongful discharge in violation of public policy, the employer's conduct must, consistent with this Court's well-established precedent, concern a broader public interest, a clear mandate of important public policy, such as a threat to public health or safety, or violation of a law, rule, or regulation. This limits the scope of the tort to employees who have acted to defend the greater public good.

In pleading a causal nexus between the employee's protected activity and an alleged retaliatory discharge, it should be sufficient if the employee alleges a close temporal proximity between the whistleblowing and the retaliation. This is the predominant view among federal courts, and some state courts have come to the same conclusion. This minimal pleading standard is particularly appropriate in cases brought by former employees given the informational asymmetries inherent in the employer-employee relationship. This imbalance makes it difficult, if not virtually impossible, for

[1] Given that the policy rationale in support of protecting external whistleblowers applies equally to internal whistleblowers and those preparing to imminently report externally, *Amici* urge this Court to embrace both internal reporting and imminent external reporting as protected activity. If the Court decides that internal reporting cannot support a wrongful discharge claim, however, it should still allow employees terminated because of their activities in anticipation of reporting externally to be protected through a wrongful discharge action. As discussed below, protecting employees as they prepare to report externally is critical to safeguarding and encouraging external whistleblowing.

former employees to access evidence that might shed light on the employer's motives prior to discovery. Thus this Court should permit wrongful discharge plaintiffs to plead a causal nexus simply by alleging close temporal proximity.

Finally, in analyzing whether an existing remedy is available to an employee asserting a wrongful discharge claim, courts should not consider remedies untethered from the specific public policies upon which the employee relies. Thus to preclude a wrongful discharge claim, it is not enough for the existing cause of action to provide *any possible* remedy for the plaintiff; instead, the remedy must relate to the public policy the plaintiff seeks to vindicate and specifically remedy the discharge itself, rather than other wrongful employer conduct. As this Court has explained though, the fact that an existing remedy addresses the same conduct as the wrongful discharge claim does not disrupt the wrongful discharge claim if the public policies underlying the two causes of action are distinct. Accordingly, wrongful discharge claims should only be precluded if both the underlying policy and the wrong to be remedied overlap with the existing legal remedy.

INTEREST OF *AMICI*

The Public Justice Center (PJC), a non-profit civil rights and poverty law organization founded in 1985, has a longstanding commitment to ensuring that persons harmed by their employers, in particular low-wage workers, are not denied a judicial remedy. The PJC has submitted or joined in briefs of *amicus curiae* in recent cases involving claims by individuals faced with illegal employment actions. *See, e.g., Jordan v. Alternative Res. Corp.*, 467 F.3d 378 (4th Cir. 2006); *Ocheltree v. Scollon Productions,*

Inc., 335 F.3d 325 (4th Cir. 2003); *Lark v. Montgomery Hospice, Inc.*, 414 Md. 215 (2010); *Haas v. Lockheed Martin Corp*., 396 Md. 469 (2007); *Porterfield v. Mascari II, Inc.*, 374 Md. 402 (2003). The PJC has an interest in this case because this Court's interpretation of the tort of wrongful discharge will have a dramatic effect on employees' ability to report dangerous conduct without fear of losing their jobs in retaliation.

The Maryland Employment Lawyers Association (MELA) and the **Metropolitan Washington Employment Lawyers Association (MWELA)** are sister local affiliates of the National Employment Lawyers Association. The joint membership of MELA and MWELA comprises over 300 attorneys who represent and protect the interests of employees under federal and state law. The purpose of MELA and MWELA is to bring into close association employee advocates and attorneys in order to promote the efficiency of the legal system and fair and equal treatment under the law. MELA and/or MWELA have been granted leave to participate as *amicus curiae* in many cases before Maryland state and federal appellate courts. *See, e.g.*, *Alternative Res. Corp.*, 458 F.3d 332, *rehearing en banc den.*, 467 F.3d 378 (4th Cir. 2006); *Addison v. Lochearn*, 411 Md. 251 (2009); *Newell v. Runnels*, 407 Md. 578 (2009); *Hoffeld v. Shepherd Elec. Co., Inc.*, 404 Md. 172 (2008); *Haas v. Lockheed Martin Corp.*, 396 Md. 469 (2007); *Manor Country Club v. Flaa.*, 387 Md. 297 (2005); *Towson Univ. v. Conte*, 376 Md. 543 (2003); *Prince of Peace v. Linklater*, No. 66, Sept. Term 2009 (Md.); *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, No. 24, Sept. Term 2009 (Md.); *Meade v. Shangri-La Ltd. P'ship*, No. 128, Sept. 2008 (Md.). The outcome of this case will have a direct impact upon the ability of MELA and MWELA members and their clients to protect employees' interest

in being protected against abusive discharge for seeking to vindicate important public policies of Maryland law. MELA and MWELA thus have a specific interest in the fair resolution of the issues presented in this appeal.

ARGUMENT

I. Internal Reporting of Conduct in Violation of Well-Established Public Policy is a Critical Tool for Protecting the Public and Should be Safeguarded through the Tort of Wrongful Discharge.

Employees who report their employer's wrongful conduct to a supervisor or other employer representative play a vital role in protecting members of the public. Internal reporting is often preferable to external whistleblowing because it tends to resolve problems more efficiently and without unnecessarily disrupting the employer-employee relationship or damaging the employer's otherwise legitimate business interests. Thus, internal whistleblowers who act to further an important public policy should be protected from retaliation under the tort of wrongful discharge.

A. Maryland Law Does Not Limit the Availability of the Wrongful Discharge Remedy to External Whistleblowers

Under Maryland law, internal whistleblowers are not precluded from seeking relief through a wrongful discharge claim. As argued in Appellant's brief, *Wholey v. Sears Roebuck*, 370 Md. 38 (2002) does not stand for the proposition that internal reporting, or whistleblowing, will never form a sufficient basis for a wrongful discharge claim. Instead, the plurality opinion in *Wholey* was dictated by and limited to the particular public policy at issue in that case. *See Wholey*, 370 Md. at 499 ("Our decision

today is grounded in, and supported by, a legislative enactment from which a public policy mandate clearly emanates.").

Indeed, as further discussed in Appellant's brief, this Court recently limited *Wholey* to its particular facts in *Lark v. Montgomery Hospice, Inc.*, 414 Md. 215 (2010), in which it held that the plaintiff's internal reporting supported her wrongful discharge claim. Although the statute interpreted in *Lark* was held to include internal reporting as protected activity, the *Lark* opinion did not rest on this ground alone. Instead, much of the opinion is devoted to a discussion of the policy reasons supporting the protection of internal whistleblowers, as explained in several out-of-state wrongful discharge cases cited with approval. *See Lark*, 414 Md. at 232-42. Thus, *Amici* agree with Appellant's argument that the Court's basis for its ruling in *Lark* demonstrates that, absent the specific facts unique to *Wholey*, internal whistleblowers may claim the protection of the tort of wrongful discharge in Maryland.

B. The Court's Reasoning in *Lark* is in Line with a Growing Trend in Favor of Protecting Internal Whistleblowers from Retaliation.

Courts and legislatures throughout the country have embraced internal whistleblowing in growing numbers, thereby bolstering the Court's reasoning in *Lark*. *See* Terry Morehead Dworkin, *Whistleblowing, MNCS, and Peace*, 35 Vand. J. Transnat'l L. 457, 463 (2002) (observing that "there has been a shift toward encouraging internal whistleblowing and away from the almost exclusive legislative emphasis on reporting outside the organization"). For example, in *Tartaglia v. UBS PaineWebber, Inc.*, 961 A.2d 1167 (N.J. 2008), the New Jersey Supreme Court expanded the scope of common

law retaliation claims to protect internal whistleblowers by holding that an external complaint was not required to support such a claim. *Tartaglia*, 961 A.2d at 1183 (applying *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980)).

Similarly, Congress has acted to protect internal whistleblowers. Although the relevant food and drug safety laws did not provide whistleblower protection at the time Debra Parks made her concerns known internally, in January 2011, the President signed the FDA Food Safety Modernization Act (the Modernization Act), H.R. 2751, 111th Cong. (2011) into law. In part, the Modernization Act amends Chapter X of Federal Food, Drug, and Cosmetic Safety Act (the Act), 21 U.S.C. § 391 *et seq.*, by providing whistleblower protection to employees of entities that play some role in manufacturing or selling food who report conduct they reasonably believe violates the Act and its accompanying rules and regulations. Notably, the Modernization Act protects employees who report internally to their employers. *See* H.R. 2751 § 402. Congress's decision to protect employees who report health and safety violations internally reflects the growing recognition of internal whistleblowing as critical to safeguarding the public good.

In addition, although most federal whistleblower statutes do not explicitly apply to internal reporting, courts have interpreted these statutes broadly to protect internal whistleblowers, particularly with respect to statutes that protect public health and safety. In *Passaic Valley Sewerage Commissioners*, the United States Court of Appeals for the Third Circuit interpreted the term "proceeding," as used in the Clean Water Act, 33 U.S.C. § 1367, to include both formal government proceedings and internal reporting by an employee. *Passaic Valley Sewerage Com'rs v. United States Dep't of Labor*, 992 F.2d

474, 478 (3d Cir. 1993). The court explained that the statute's protection would be "largely hollow" if limited to external reporting. *Id.*

The United States Court of Appeals for the Fourth Circuit similarly interpreted the Federal Railway Safety Act (FRSA), 45 U.S.C. § 441, which prohibits retaliation because an employee has "filed any complaint or instituted or caused to be instituted any proceeding." *See Rayner v. Smirl*, 873 F.2d 60, 63-64 (4th Cir. 1989). In *Rayner*, the court held that the FRSA protects employees who make purely internal complaints, reasoning that a distinction between internal and external reporting would be "artificial." *Id.* at 64. Other federal appellate courts have ruled accordingly. *See Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 19 (1st Cir. 1998) (interpreting the Safety Transportation Assistance Act of 1982, 49 U.S.C. § 31105, to protect internal reporting by employees); *EEOC v. Romeo Cmty. Sch. Dist.*, 976 F.2d 985, 989-90 (6th Cir. 1992) (interpreting the Fair Labor Standards Act, 29 U.S.C. § 215, to protect employees who complaint to their supervisors); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1513 (10th Cir. 1985) (interpreting the Energy Reorganization Act, 42 U.S.C. § 5851, to protect an employee's internal complaints); *Phillips v. Interior Bd. Of Mine Operations Appeals*, 500 F.2d 772, 779 (D.C. Cir. 1974) (interpreting the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 820, to protect a coal miner's complaints to his foreman).

Several states require that employees first report wrongful conduct internally in order to claim the protection of the whistleblower statute. *See* Alaska Stat. § 39.90.110; Colo. Rev. Stat. § 24-114-102; Ind. Code § 22-5-3-3; Me. Rev. Stat. Ann. tit. 26, § 833; Mass. Gen. Laws ch. 149, § 185; N.H. Rev. Stat. Ann. § 275-E:2; N.J. Stat. Ann. §

34:19-1-8; N.Y. Lab. Law § 740; Ohio Rev. Code Ann. § 4113.52; Wis. Stat. Ann. § 230.81. In addition, many states, as well as the District of Columbia, expressly list internal reporting as a form of protected activity under their whistleblower statutes. *See* D.C. Code § 1-615.52; Ga. Code Ann. § 45-1-4; Haw. Rev. Stat.§ 378-62; La. Rev. Stat. Ann. § 30:2027; Me. Rev. Stat. Ann. tit. 26, § 833; Mass. Gen. Laws Ann. ch. 149, § 185; Minn. Stat. § 181.932; N.J. Stat. Ann. § 34:19-3; N.Y. Lab. Law § 740; 43 Pa. Cons. Stat. Ann. § 1423; W. Va. Code § 6C-1-3.

Furthermore, in the absence of an applicable whistleblower statute, many states have protected employees terminated from their jobs because they internally reported wrongful conduct through the tort of wrongful discharge. As noted above, in *Lark*, this Court recognized the strong weight of authority in favor of protecting internal whistleblowing through wrongful discharge claims. *See Lark*, 414 Md. at 232-42. Many other states have interpreted their tort of wrongful discharge to protect internal whistleblowers. *See e.g., Barela v. C.R. England & Sons, Inc.*, 197 F.3d 131, 1317 (10th Cir. 1999) (interpreting Utah law); *Paolella v. Browning-Ferris, Inc.*, 158 F.3d 183, 191 (3d Cir. 1998) (applying Delaware law); *Flores v. Am. Pharm. Servs., Inc.*, 994 P.2d 455 (Colo. App. Ct. 1999); *Thomas v. Med. Ctr. Physicians, P.A.*, 61 P.3d 557, 565 (Idaho 2002); *Petrik v. Monarch Printing Corp.*, 444 N.E.2d 588 (Ill. 1982); *Brenneke v. Dep't of Missouri, Veterans of Foreign Wars*, 984 S.W.2d 134, 139 (Mo. Ct. App. 1998); *Johnson v. Friends of Weymouth, Inc.*, 461 S.E.2d 801 (N.C. Ct. App. 1995); *Tartaglia*, 961 A.2d at 1182; *Harless v. First Nat'l Bank in Fairmount*, 246 S.E.2d 270 (W.Va. 1978).

It should be noted that most laws protecting whistleblowers require employees to report in good faith or with a reasonable belief as to the wrongfulness of the reported conduct to claim protection. As explained by the New Jersey Supreme Court in a decision holding that an employee's internal complaint to supervisors could form the basis of a retaliatory discharge action, "[a]n employer remains free to terminate an at-will employee who engages in grousing or complaining about matters falling short of a 'clear mandate of public policy' or who otherwise interferes with the ordinary operation of the workplace by expressions of personal views on matters of no real substance." Tartaglia, 961 A.2d at 1183; accord Petrik, 444 N.E.2d at 592 ("[I]t is apparent that Petrik's complaint involves something more than an ordinary internal dispute between an employee and his employer. It is equally apparent that the public policy considerations that underlie Palmateer also support Petrik's conduct.") (citing Palmateer v. Int'l Harvester Co., 421 N.E.2d 876 (Ill. 1981)). Thus, consistent with the scope of wrongful discharge as previously explicated by this Court, the Court may wish to be explicit that only internal complaints concerning employer conduct reasonably believed to violate a clear mandate of public policy will give rise to the claim.

C. The Nationwide Shift in Favor or Protecting Internal Whistleblowers is Supported by Sound Public Policy.

Society benefits greatly when employees are able to act to challenge or stop their employers from engaging in wrongful conduct. Employees are often privy to information that outsiders lack and thus may be the first to know about their employers' unlawful practices. For this reason, whistleblowers, both in the public and private context, are

highly regarded in American legal culture. *See* Roberta Ann Johnson, *Whistleblowing: When it Works and Why* 4 (2002); *see also* Curtis C. Verschoor, *Is This the Age of Whistleblowers?*, Strategic Fin., Jan. 2005, at 17 (quoting Public Company Accounting Oversight Board member Charles Niemeier as calling today's business environment "the age of whistleblowers"). In 2003, for example, Time Magazine selected three prominent whistleblowers to collectively represent the magazine's "Person of the Year," as "The Whistleblower." Richard Lacayo & Amanda Ripley, *Persons of the Year: Coleen Rowley, Cynthia Cooper, Sherron Watkins*, Time, Jan. 6, 2003, at 30, 32. As one court has observed, "[w]ithout employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses." *Dolan v. Continental Airlines*, 563 N.W. 2d 23, 26 (Mich. 1997).

In recognition of the importance of whistleblowing, legislatures have increasingly acted to encourage and protect this brave conduct. *See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 Am. Bus. L.J. 99, 99 (2000) (observing that "[p]olicymakers' recognition of whistleblowing's potential effectiveness as a mechanism by which to expose wrongdoing has become increasingly widespread in the last fifteen to twenty years"). All fifty states had enacted some type of whistleblower protection statute by 2000. *Id*. at 100. In addition, "[t]he federal government has enacted over twenty-five laws that protect whistleblowers." Stephanie Buck, *Sanctioning Lawlessness: The Need to Apply Whistleblower and Wrongful Discharge Protections to Members of Limited Liability Companies*, 38 U. Tol. L. Rev.

711, 721 (2007) (citing Shawe & Rosenthal, LLP, *Employment Law Deskbook* § 259.04 (2003)).

The widely recognized value of whistleblowing, protecting the public from dangerous or otherwise unethical conduct, is served by both internal and external reporting of an employer's wrongful conduct. *See Belline v. K-Mart Corp.*, 940 F.2d 184, 188 (7th Cir. 1991) (describing the denial of a remedy to employees who report internally, rather than externally, as "a nonsensical distinction"); Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 Wm. Mitchell L. Rev. 627, 690 (1999) (noting that "[e]xternal whistleblowers 'do not differ significantly' from internal whistleblowers") (citing Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 Am. Bus. L.J. 267, 304 (1991)). Both types of whistleblowers risk the same adverse consequences to prevent what they believe to be grave misconduct. *See* Silvia X. Liu, *When Doing the Right Thing Means Losing Your Job: Reforming the New York Whistleblower Statute*, 7 N.Y. City L. Rev. 61, 62 (2004) ("Whistleblowers serve an important function in safeguarding public welfare by disclosing their employers' wrongful conduct that the employers would prefer to conceal. They are people who aim to right the wrongs of their superiors by risking, at the very least, their jobs, health, privacy and sanity.").

Internal whistleblowing does stand out, though, in that it is the much preferred method of reporting wrongful conduct for employees. *See* Ethics Res. Ctr., *2009 National Business Ethics Survey: Ethics in the Recession* 35 (finding that 75% of private sector

employees who report problems do so to their managers within the company, whereas only 4% report to any external authority)[2]; Gerard Sinzdak, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 Cal. L. Rev. 1633, 1653, 1655 (2008) (noting that "not only do employers prefer internal reporting, but … employees also generally prefer to report internally first" and that "most whistleblowers report internally first"). Given that internal reporting is much more prevalent than external reporting, it would be incongruous to deny legal protection against retaliation to the vast majority of employees acting on behalf of the public interest by reporting wrongful conduct.

This is particularly so in light of the fact that the most efficient and cost-effective way to report wrongful conduct is often through the employer's internal channels of communication. The Court in *Lark* acknowledged as much when it observed that once an employer corrects a dangerous activity because of an employee's complaint, "it would make no sense to impose an external reporting requirement that would accomplish nothing other than a drain upon the scarce resources of the [outside enforcement body]." 414 Md. at 242. *See also Clean Harbors*, 146 F.3d at 21 (explaining that protecting employees' internal reporting is "fairer and less wasteful of resources for both the corporate community and the government"); *Passaic Valley*, 992 F.2d at 478-79 (reasoning that "it is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation

[2] *Available at* http://www.ethics.org/nbes/files/nbes-final.pdf.

are initiated, so as to facilitate prompt voluntary remediation and compliance"); Stefan Rutzel, *Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing*, 14 Temp. Envtl. L. & Tech. J. 1, 33 (1995) (observing that internal whistleblowing "has the potential to save costs despite the costs of correcting the wrongdoing, such as fines or counselling costs arising from government intervention"); Sinzdak, *supra*, at 1636 (noting that "information provided by whistleblowers can substantially reduce the cost to the public of detection and investigation of wrongdoing or corruption").

Internal whistleblowing is often more efficient than external reporting because scrupulous employers are best situated to promptly remedy problems within their organization or company. *See* Elizabeth C. Tippett, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law*, 11 Employee Rts. & Emp. Pol'y J. 1, 10 (2007) (citing Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 462-63 (2001)). Furthermore, encouraging internal whistleblowing helps conserve resources when an employee is mistaken in his or her belief of employer misconduct and the employer is able to correct the employee's misapprehension before a costly and unnecessary external investigation occurs. *See* Sinzdak, *supra*, at 1654.

In addition, internal whistleblowing may be preferable to external whistleblowing in that it is usually much less disruptive to workplace relations. Employees typically favor internal reporting because such a route is less likely to damage their careers and livelihood. Bast, *supra*, at 691 (noting that internal whistleblowers may receive "a

positive response from the organization," which could "elevate the status of the whistleblower within the organization"); Sinzdak, *supra*, at 1653 (explaining that employees prefer internal whistleblowing because of "feelings of loyalty to an employer, a belief that the employer can more effectively deal with the problem, fears that an external report could lead to termination, a desire to maintain a positive working relationship with the employer, and a lack of awareness as to the appropriate external recipient"). Similarly, internal reporting is less likely than external whistleblowing to provoke a negative response from the employer and result in retaliation. *See* Sarah M. Baum, *Callahan v. Edgewater Care & Rehabilitation Center: The Illinois Whistleblower Act Does Not Preempt the Common Law Tort of Retaliatory Discharge*, 57 DePaul L. Rev. 161, 187 (2007) (noting that "studies show that external whistleblowers are more likely to be victims of retaliation than internal whistleblowers"). Thus employees may feel safer reporting a problem internally before resorting to outside assistance.

Furthermore, law-abiding employers who seek to remedy their own allegedly improper conduct prefer internal whistleblowing as a means of addressing such problems. *See* Tippett, *supra*; at 10-11; Ethics Res. Ctr., *National Business Ethics Survey 2003: How Employees View Ethics in Their Organization* 39; Elletta Sangrey Callahan, *et al.*, *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 Am. Bus. L.J. 177, 196-97, 201 (2002). Among the benefits of internal reporting accruing to employers are the ability to correct an employee's misperceived violation of the law, faster and more cost-efficient prevention of future wrongdoing, preservation of the

employer's good will, incentive to act ethically if external reporting is threatened, and the avoidance of unnecessary public attention. Bast, *supra*, at 666.

It is manifest that internal whistleblowers perform the same service to the public, face the same retaliatory risks, and have the same motivations for their acts as external whistleblowers. Policymakers and society as a whole have recognized these truths and have acted accordingly by offering protection to both internal and external whistleblowing. When determining the scope of its common law tort of wrongful discharge, therefore, this Court should protect employees who internally report employer conduct that contravenes established public policy.

II. Maryland's Tort of Wrongful Discharge Should Protect Employees Who are Terminated Because Their Employers Fear that They Will Imminently Report Their Employer's Wrongful Conduct to Outside Authorities.

"Disclosing wrongdoing on the part of one's firm, commonly known as 'blowing the whistle,' is one of the most difficult decisions that an employee will have to make," especially for at-will employees whose employment is not contractually protected. Frank J. Cavico, *Private Sector Whistleblowing and the Employment-at-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. Tex. L. Rev. 543, 545 (2004). Thus, to be certain that the conduct which they are about to report is unlawful, many employees will conduct some degree of investigation and fact-gathering prior to reporting their employers' wrongful conduct. In so doing, employees who question their supervisors in an effort to substantiate their good-faith belief that misconduct is afoot, risk retaliation as much as employees who actually report the problematic conduct. *See*,

e.g., Johnston v. Del Mar Distrib. Co., 776 S.W.2d 768, 771 (Tex. App. 1989) ("[I]t is reasonable to expect that if an employee has a good faith belief that a required act might be illegal, she will try to find out whether the act is in fact illegal prior to deciding what course of action to take. If an employer is allowed to terminate the employee at this point, the public policy exception [to at-will employment] … would have little or no effect.").

Indeed employers may be more willing to terminate an employee suspected of imminently reporting misconduct than they would employees who have already reported, as a way of nipping a potential "problem" in the bud and chilling reporting by others. This is particularly true for employers concerned with their public image, who would prefer to take action against a "meddlesome" employee before she actually reports the wrongful conduct and has drawn public ire. Employees believed to be on the verge of complaining externally of wrongful conduct are thus particularly vulnerable to retaliation and therefore require the protection of the tort of wrongful discharge as much as, if not more than, any actual whistleblower.

In addition, protecting employees suspected of imminent reporting through the tort of wrongful discharge serves the same policy goal as protecting actual whistleblowers: encouraging those with inside information about an employer's harmful conduct to come forward to help remedy the conduct. If employers are free to terminate employees they believe are about to report them to outside authorities, employers will act swiftly to try to eliminate employees before they file complaints, thereby discouraging all employees from speaking out. Perhaps in recognition of this problem, the Court in *Lark* quoted with approval an Oregon case explaining why a wrongful discharge claim brought by a

plaintiff who "had only 'threatened' to report the [employer's] conduct" was actionable. *Lark*, 414 Md. at 242 (quoting *Love v. Polk County Fire District*, 149 P.3d 199, 206-07 (Or. Ct. App. 2006)). The Oregon court explained that "[t]here is no reason that an employe[e]'s protection should depend on whether the employer acts before or after the employe[e] is able to file a complaint." *Love*, 149 P.3d at 207 (internal quotation marks omitted).

Legislatures in several states have responded to the need to protect employees prior to filing complaints against their employers by expressly protecting employees who are perceived as being on the verge of reporting suspected unlawful activity. *See* Alaska Stat. § 39.90.100 (prohibiting retaliation against an employee who "is about to report to a public body a matter of public concern"); Haw. Rev. Stat. § 378-62 (prohibiting retaliation against an employee "about to report" suspected legal violations to the employer or to a public body); 740 Ill. Comp. Stat. 174/20.1 (prohibiting retaliation against employees "attempting to disclose" wrongdoing); La. Rev. Stat. Ann. § 30:2027 (prohibiting retaliation against an employee who "threatens to disclose" an employer's violation of environmental law); Mass. Gen. Laws ch. 149, § 185 (prohibiting retaliation against an employee who "threatens to disclose" an employer's suspected unlawful conduct); Mich. Comp. Laws § 15.362 (prohibiting retaliation against an employee who "is about to report" suspected legal violations); N.J. Stat. Ann. § 34:19-3 (prohibiting retaliation against an employee who "threatens to disclose" wrongdoing); N.Y. Lab. Law § 740 (prohibiting retaliation against an employee who "threatens to disclose" employer wrongdoing); N.C. Gen. Stat. § 95-241 (prohibiting retaliation against an employee who

threatens to report employer misconduct); Ohio Rev. Code Ann. § 4113.52 (prohibiting retaliation against an employee "as a result of the employee's having made any inquiry or taken any other action to ensure the accuracy of" information of employer wrongdoing to be reported); 43 Pa. Cons. Stat. Ann. § 1423 (prohibiting retaliation against an employee who is "about to report" employer wrongdoing); R.I. Gen. Laws § 28-50-3 (prohibiting retaliation against employees "about to report" employer misconduct); Tex. Lab. Code Ann. § 451.001 (prohibiting retaliation against an employee who "is about to" testify in a proceeding); W. Va. Code § 6C-1-3 (prohibiting retaliation against employees "about to report" employer wrongdoing).

Even in the absence of this express language in the relevant state whistleblower statute, the New Hampshire Supreme Court interpreted the state's Whistleblowers' Protection Act (the Act) to protect employees from the time they begin the process of complying with the Act. *In re Fred Fuller Oil Co., Inc.*, 744 A.2d 1141, 1145 (N.H. 2000). Thus the fact that an employee is terminated before having the opportunity to complete the process of reporting wrongful conduct does not justify withholding the protections of the Act. *Id.* The court reasoned that this interpretation promoted the dual purposes of the whistleblower law: "to encourage employees to come forward and report violations without fear of losing their jobs and to ensure that as many alleged violations as possible are resolved informally within the workplace." *Id.*

Congress has also recognized the importance of protecting employees suspected of imminently reporting their employer's wrongful conduct to outside authorities. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5567(a)(i)

(prohibiting discrimination against an employee who "is about to provide or cause to be provided" information relating to the employer's unlawful conduct); Employee Retirement Income Security Act, 29 U.S.C. § 1140 (prohibiting discrimination against any employee who "is about to testify in any inquiry or proceeding" relating to an employer's legal violation). In particular, Congress has expressly included imminent reporting as protected activity when the wrongful conduct threatens public health or safety. For example, in the recently passed FDA Food Safety Modernization Act, employees are protected from retaliation if they are "about to" provide information, assist or participate in a proceeding, or testify relating to employer conduct they reasonably believe violates federal food safety law. H.R. 2751 § 402 , 111th Cong. (2011); *see also* Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087(a)(1)-(a)(3); Fair Labor Standards Act, 29 U.S.C. § 215(a)(3); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1); Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(1); Energy Reorganization Act, 42 U.S.C. § 5851(a)(1)(C)-(a)(1)(F); Clean Air Act, 42 U.S.C. § 7622(a)(1)-(a)(3); Pipeline Safety Improvement Act, 49 U.S.C. § 60129(a)(1); *see also Special Counsel v. Dep't of Navy*, 46 M.S.P.R. 274, 278 (1990) (finding that Congress intended that protections provided by federal Whistleblower Protection Act apply where retaliatory personnel action is taken against employee believed to have engaged in protected activity even though employee may not actually have done so).

Courts likewise have recognized that employees who are merely suspected of whistleblowing must be protected. *See, e.g.*, *Reich v. Hoy Shoe, Inc*., 32 F.3d 361, 368

(8th Cir. 1994) ("It would be a strange rule, indeed, that would protect an employee discharged because the employer actually knew he or she had engaged in protected activity but would not protect an employee discharged because the employer merely believed or suspected he or she had engaged in protected activity."); *Grosso v. City Univ. of New York*, No. 03-2619, 2005 WL 627644, at *3 (S.D.N.Y. 2005) ("[W]e believe plaintiff states a valid claim for retaliatory discrimination based on culpable behavior by defendants before plaintiff engaged in protected activity to the extent that the behavior was motivated by their belief that plaintiff had already done so."); *Donovan v. Peter Zimmer, Inc.*, 557 F. Supp. 642, 652 (D.S.C. 1982) (involving discharge of three employees because employer could not figure out which of the three had filed an OSHA complaint violates anti-retaliation provisions of OSHA as to all three).

Also protected are employees who are perceived as being on the verge of filing an external complaint. *See, e.g.*, *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993) (holding that action taken against an individual in anticipation of that person filing discrimination complaint constitutes retaliatory discharge in violation of Title VII's anti-retaliation provision); *Gifford v. Atchison, Topeka, & Santa Fe Ry. Co.*, 685 F.2d 1149, 1155-56 n.3 (9th Cir. 1982) (finding that Title VII's anti-retaliation provision protects someone who merely threatens to make a charge). Indeed, courts have recognized that employer "chilling" of protected activity is so detrimental to the vindication of important public policies that employees are protected even if it turns out the employer is mistaken and the employee has not in fact engaged in protected activity. *See, e.g.*, *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 571-72 (3d Cir. 2002) ("[I]f Greg can show, as he

claims, that adverse action was taken against him because Mercy thought that he was assisting his father and thereby engaging in protected activity, it does not matter whether Mercy's perception was factually correct."); *Saffels v. Rice*, 40 F.3d 1546, 1549 (8th Cir. 1994) (holding that employees were protected even though they had not engaged in protected conduct if their employer mistakenly believed they had engaged in such conduct); *Brock v. Richardson*, 812 F.2d 121, 125 (3d Cir.1987) ("[T]he discharge of an employee in the mistaken belief that the employee has engaged in protected activity creates the same atmosphere of intimidation as does the discharge of an employee who did in fact complain of FLSA violations."); *Ortiz v. John O. Butler Co.*, No. 93-1123, 1994 WL 240567, at *3 (N.D. Ill. 1994) (finding that Title VII's anti-retaliation provision protected employee who had not protested against sexual harassment, when employer believed that employee had engaged in complaints about sexual harassment).

By protecting employees suspected of being on the verge of reporting employer misconduct, these federal and state whistleblower laws ensure that employees who diligently investigate or inquire about their employers' wrongdoing before making a formal complaint to outside authorities are protected against retaliation. Without such comprehensive protection, employers could easily chill virtually all employee reporting of wrongful conduct by terminating employees at the first sign of inquiry. Having protected activity include an employee's conduct in advance of reporting, therefore, helps close a major loophole in whistleblower protection law. Thus to encourage employees to report activity in violation of important public policy, this Court should define the common law tort of wrongful discharge to grant the same level of protection to

employees suspected of imminently disclosing employer wrongdoing as it does to employees who actually disclose.

III. For Purposes of Surviving a Motion to Dismiss, Employees Asserting Wrongful Discharge Claims Need Only Plead a Temporal Nexus between Their Actual or Imminent Reporting of Wrongful Conduct and Their Termination.

To state a claim for wrongful discharge, "the employee must be discharged, the basis for the employee's discharge must violate some clear mandate of public policy, and there must be a nexus between the employee's conduct and the employer's decision to fire the employee." *Wholey*, 370 Md. at 50-51. Thus all that an employee asserting a wrongful discharge claim must establish by way of causation is "a nexus" between the employee's conduct and the termination. At the motion to dismiss stage, an employee should be able to demonstrate a nexus simply by alleging a close temporal proximity between the protected activity and the discharge.

As Maryland courts have not specified the minimum threshold for establishing the requisite nexus in wrongful discharge cases, it may be helpful to look to other jurisdictions. Several courts, interpreting their respective state whistleblower laws, have held that evidence of temporal proximity between the protected conduct and the retaliation is sufficient to establish causation for purposes of a motion to dismiss. *See Padron v. Bellsouth Telecomm., Inc.*, 196 F. Supp. 2d 1250, 1255-56 (S.D. Fla. 2002) (holding that "close temporal proximity" between the whistleblowing and the adverse employment action may be sufficient to establish the element of causation under the Florida Whistleblower Act); *Currie v. Industrial Sec., Inc.*, 915 A.2d 400, 406 (Me.

2007) (noting that proof of conduct protected by Maine's Whistleblower Protection Act, "followed in close proximity by an adverse employment action, gives rise to an inference that a causal connection is established"); *Maimone v. Atlantic City*, 903 A.2d 1055, 1064 (N.J. 2006) (explaining that the "temporal proximity of employee conduct protected by [New Jersey's Conscientious Employee Protection Act] and an adverse employment action is one circumstance that may support an inference of a causal connection"); *see also Boe v. AlliedSignal Inc.*, 131 F. Supp. 2d 1197, 1204 (D. Kan. 2001) (explaining that under Kansas's retaliatory discharge law, causation can be established by "close temporal proximity … between the whistleblowing activity and the discharge").

Federal courts' pleading standards for retaliation claims asserted under federal law may be instructive as well. In the Fourth Circuit, "very little evidence of a causal connection is required to establish a prima facie case" of retaliation. *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 443 (4th Cir. 1998). "While evidence as to the closeness in time far from conclusively establishes the requisite causal connection, it certainly satisfies the less onerous burden of making a prima facie case of causality." *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541, 551 (4th Cir. 2006) (internal quotation marks omitted). *See also Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1229 (4th Cir. 1998) (noting that "[a]lthough [Plaintiff] presents little or no direct evidence of a causal connection between her protected activity and [Defendant's] adverse action, little is required").

Other federal courts of appeals have similarly held that evidence of close temporal proximity is sufficient to satisfy causation for purposes of establishing a prima facie case

of retaliation. *See Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217, 1228 (10th Cir. 2008) ("For purposes of establishing a prima facie case of retaliation, a plaintiff can establish a causal connection by temporal proximity between the protected activity and adverse action."); *Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 866 (8th Cir. 2006) ("An employee can establish a causal link between her protected activity and the adverse employment action through 'the timing of the two events.'"); *Calero-Cerezo v. United States Dep't of Justice*, 355 F.3d 6, 25-26 (1st Cir. 2004) (finding that the passage of one month between the date on which the defendants learned of the plaintiff's protected activity and the plaintiff's suspension demonstrated sufficient temporal proximity between the protected conduct and the employment action to make out a prima facie case); *Mulhall v. Ashcroft*, 287 F.3d 543, 551 (6th Cir. 2002) ("Temporal proximity, when coupled with other facts, may be sufficient in certain cases to establish the causal-connection prong in a Title VII case."); *Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1119 (11th Cir. 2001), *abrogated in part on other grounds by Crawford v. Carroll*, 529 F.3d 961 (11th Cir. 2008) ("Close temporal proximity between the protected activity and the adverse action may be sufficient to show that the two were not wholly unrelated," thus establishing a causal connection); *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 217 (2d Cir. 2001) (finding that an employee who was fired twenty days after her employer discovered that she had hired an attorney to pursue claims of gender discrimination had a sufficient prima facie case because "[t]he causal connection needed for proof of a retaliation claim can be established indirectly by showing that the protected activity was closely followed in time by the adverse action") (internal quotation marks omitted); *Passantino v. Johnson &*

Johnson Consumer Prods., Inc., 212 F.3d 493, 507 (9th Cir. 2000) (noting that "when adverse employment decisions are taken within a reasonable period of time after complaints of discrimination have been made, retaliatory intent may be inferred" and that "evidence based on timing can be sufficient to let the issue go to the jury, even in the face of alternative reasons proffered by the defendant"); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (finding that under the whistleblower protection provision of the Atomic Energy Act of 1954, "temporal proximity is sufficient as a matter of law to establish the … element [of causation] in a prima facie case of retaliatory discharge"); *Walsdorf v. Board of Comm'rs*, 857 F.2d 1047 (5th Cir. 1988) (adverse action within seven months creates inference of retaliation).

A low threshold for sufficiently pleading causation is particularly appropriate in wrongful discharge cases because of the informational asymmetries inherent in employer-employee relationships. It is highly unlikely, especially at the pleading stage, for an employee to have "smoking gun" evidence in the form of an employer's admission that protected activity motivated the discharge. "Employers often do not provide reasons for their employment decisions, and even when reasons are given, the particular employee may not have access to the comparative information." Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 La. L. Rev. 555, 570 (2001). In addition, in similar legal disputes such as employment discrimination and retaliation cases, plaintiffs typically do not have access to key witnesses employed by the defendant employer or documents held by the employer prior to discovery. *See id*. at 570; *see also* Roy L. Brooks, *Conley and Twombly, A Critical Race Theory Perspective*, 52 How. L.J.

31, 68-69 (2008) (noting that "evidence of discriminatory animus … is typically not revealed to the plaintiff until discovery"); Rakesh N. Kilaru, *The New Rule 12(b)(6):* Twombly, Iqbal, *and the Paradox of Pleading*, 62 Stan. L. Rev. 905, 927 (2010) (arguing that imposing a heightened pleading standard on employee plaintiffs asserting motive-based torts creates "a classic Catch-22: [employees] cannot state a claim because they do not have access to documents or witnesses they believe exist; and they cannot get access to those documents or witnesses without stating a claim").

Thus it is significantly more difficult for former employees to establish employers' motives for terminating them than it is for other plaintiffs whose claims include a causal element. Evidence of a close temporal proximity between the protected conduct and the employee's termination may be the only fact the employee plaintiff has at his or her disposal when alleging wrongful discharge prior to discovery. Therefore, for the purposes of surviving a motion to dismiss, plaintiffs asserting wrongful discharge claims should be able to establish a nexus between their protected activity and their discharge simply by demonstrating close temporal proximity.

IV. To Bar a Wrongful Discharge Claim, the Existing Legal Remedy Available to the Employee Should Relate Directly to the Specific Public Policy Underlying the Wrongful Discharge Claim.

In *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 605 (1989), this Court limited the tort of wrongful discharge to cases in which the discharge is "in violation of a clear mandate of public policy which otherwise would not be vindicated by a civil remedy." In analyzing whether an existing remedy is available to an employee asserting a wrongful

discharge claim, however, courts should not consider remedies untethered from the specific public policies upon which the employee relies. Thus if some existing remedy does not actually provide a remedy for the discharge itself or if it is not based on the same public policy underlying the wrongful discharge claim, it should not function to preclude the wrongful discharge action.

The fact that a wrongful discharge plaintiff may be entitled to relief based on employer misconduct apart from the act of retaliatory termination will not bar a wrongful discharge claim. As this Court noted in *Wholey*, "[t]hat *any* remedy exists does not, itself, prohibit this Court from holding that a common law remedy may exist as well." 370 Md. at 494 n.14. The Court explained that it would not look to available criminal or contract remedies when analyzing whether the plaintiff had an existing remedy for the public policy he sought to vindicate through the tort of wrongful discharge. *See id.* Thus the fact that a plaintiff could also recover against the employer under a breach of contract claim would not preclude the plaintiff from pursuing a common law remedy based on her discharge alone. The existing remedy must rectify the termination itself to operate as a bar to a wrongful discharge claim.

Even where an existing cause of action is available to redress the plaintiff's termination, however, it should not preclude the wrongful discharge claim if it relates to a public policy distinct from the policy giving rise to the wrongful discharge claim. *See Watson v. Peoples Sec. Life Ins. Co.*, 322 Md. 467 (1991). In *Watson*, for example, the plaintiff alleged wrongful discharge based, in part, on her filing of a lawsuit against her employer for assault and battery, resulting from sexual harassment. *See Watson*, 322 Md.

at 480. The defendant argued that the plaintiff's wrongful discharge claim was precluded by the availability of a statutory remedy under Title VII and the Human Relations Act for discrimination and retaliation on the basis of sex, which applies to sexual harassment. *See id.* at 484.

The Court, however, held that the remedies under Title VII and the Human Relations Act would not preempt the tort of wrongful discharge because the public policy of prohibiting "sexual harassment," as expressed in these laws, was distinct from the preexisting public policy against assault and battery. *Id.* at 485-86. The Court explained:

> Where right and remedy are part of the same statute which is the sole source of the public policy opposing the discharge, *Makovi* and *Chappell* [*v. S. Maryland Hosp., Inc.*, 320 Md. 483 (1990)] dictate the result that the tort of abusive discharge, by its nature, does not lie. In the instant matter there are multiple sources of public policy, some within and some without Title VII and the Act. By including prior public policy against sexual assaults, the antidiscrimination statutes reinforce that policy; they do not supersede it.

Watson, 322 Md. at 486. Given that the policy behind prohibiting assault and battery is distinct from the policy behind prohibiting sexual harassment (the former relates to public safety concerns, while the latter relates to an interest in stopping sex-based animus in the workplace), the availability of a sexual harassment remedy will not operate to bar a wrongful discharge claim based on assault and battery. *See Gasper v. Ruffin Hotel Corp. of Maryland, Inc.*, 183 Md. App. 211, 30 (2008), *cert. granted*, 408 Md. 149 (2009) (No. 600, Sept. 2008 Term) (holding that the plaintiff's wrongful discharge claim, based on assault and battery that also constituted sexual harassment, was not barred by the existing statutory remedies for sexual harassment because although the plaintiff "seeks two

remedies for the same wrong," the plaintiff "seeks to enforce two distinct public policies"); *see also Higgins v. Food Lion, Inc.*, No. 00-CV-2617, 2001 WL 77696 (D. Md. Jan. 23, 2001) ("[p]ublic policies that are independent and not exclusively derived from a statute that provides its own civil remedy would be another limitation [on *Makovi*]."

Thus under *Watson*, the availability of a remedy that addresses the same conduct at issue in the wrongful discharge claim should not preclude the wrongful discharge claim if the existing remedy seeks to vindicate a public policy that is distinct. Taken together, therefore, *Watson* and *Wholey* stand for the proposition that wrongful discharge claims are not barred under *Makovi* if the existing legal remedy redresses wrongs apart from the actual termination and vindicates a public policy distinguishable from that which underlies the wrongful discharge claim.

CONCLUSION

Given the important role employee whistleblowing plays in protecting the public from harms that might otherwise be undiscoverable, or discoverable only too late, this Court should grant whistleblowers protection from wrongful discharge. By protecting employees who report unlawful conduct internally or inquire internally about such conduct in preparation for imminently reporting the conduct to outside authorities, Maryland law will send a strong message to employees that blowing the whistle on wrongful employer conduct is encouraged and deeply valued and that they will be protected from retaliation at all stages.

In addition, in recognition of the great difficulty in proving an employer's motive for termination prior to discovery, this Court should permit plaintiffs to satisfy the element of causal nexus needed to state a prima facie case of wrongful termination through evidence of close temporal proximity between the protected conduct and the discharge. Finally, wrongful discharge claims should not be precluded simply because of the existence of an alternative remedy serving a distinct public policy and redressing a wrong apart from the actual discharge. These guiding principles will help ensure that courageous whistleblowing employees, fired in contravention of public policy, obtain the justice they deserve.

Respectfully submitted,

_____

Jessica Weber
Francis D. Murnaghan
Appellate Advocacy Fellow
Public Justice Center
One North Charles Street, Suite 200
Baltimore, MD 21201
(410) 625-9409

Counsel for Amici Curiae

Dated: March 7, 2011
Times New Roman, 13-point font

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2011 two copies of the foregoing brief were served by first class mail, postage prepaid, on:

Counsel for Appellant

Angus R. Everton
Robert C. Morgan
Morgan Carlo Downs & Everton P.A.
Executive Plaza IV, Suite 100
11350 McCormick Road
Hunt Valley, MD 21031

Counsel for Appellees

Kevin B. Collins
Thomas S. Williamson, Jr.
Lindsay B. Burke
Covington & Burling LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004

_____
Jessica Weber