No. 124019
IN THE
SUPREME COURT OF ILLINOIS

LAKEWOOD NURSING &, REHABILITATION CENTER, LLC,	)	On Appeal from the Appellate Court of Illinois, Third Judicial District
Plaintiff-Appellee,	)	No. 3-17-0177
v.	)	There Heard on Appeal from the Circuit Court for the
THE ILLINOIS DEPARTMENT OF PUBLIC HEALTH, and DIRECTOR LAMAR HASBROUCK,	)	12th Judicial Circuit Will County, Illinois No. 14-MR-1184
Defendants-Appellants,	)	
and HELEN SAUVAGEAU,	)	The Honorable JOHN C. ANDERSON,
Defendant.	)	Judge Presiding.

BRIEF AND ARGUMENT OF *AMICI CURIAE* LAF, LEGAL COUNCIL FOR HEALTH JUSTICE, & EQUIP FOR EQUALITY

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POINTS AND AUTHORITIES

STATEMENT OF INTEREST OF *AMICI* LAF, LEGAL COUNCIL FOR HEALTH JUSTICE, & EQUIP FOR EQUALITY

AMICUS LAF

Amicus LAF is a not-for-profit organization that provides free legal representation and counsel in civil cases to the elderly and people living in poverty in Cook County. Each year LAF's lawyers and non-lawyer advocates represent thousands of clients in a wide range of civil legal matters. LAF's areas of practice include long-term care resident rights, public benefits, consumer, immigration, employment, family and housing.

As part of its practice, LAF houses the Long Term Care Ombudsman program for suburban Cook County (except Evanston) and Lake County, Illinois. As the Ombudsman program for this area, LAF advocates for the rights of residents of long-term care facilities. LAF and its predecessor organization have maintained, managed and staffed the Ombudsman program in suburban Cook County for over 30 years. The Ombudsman program only represents residents, and it is resident-directed – Ombudsmen take direction exclusively from the long-term care resident, or, if the resident is not capable of giving direction, a guardian or agent under a power of attorney. In its capacity as the Ombudsman, LAF routinely represents residents in involuntary discharge hearings before the Illinois Department of Public Health. LAF has represented hundreds of residents in the involuntary discharge hearing process, often negotiating successful settlements, and

taking many cases to evidentiary hearings. Those successful settlements are often made possible by securing Medicaid eligibility for the resident. LAF assists residents in applying for Medicaid for their long-term care, and often represents residents in appeals of adverse Medicaid decisions before the Illinois Department of Human Services and the Illinois Department of Healthcare and Family Services.

LAF is currently the only Ombudsman Program in Illinois housed in a legal services organization. As such, LAF possesses unique insight into the legal issues involved in the involuntary discharge hearing process, its inherent practical challenges, and its effect on vulnerable residents. Also, under federal regulations, skilled nursing facilities that accept Medicare or Medicaid funding are required to send the Ombudsman program notices of involuntary discharge when they are provided to residents. Therefore, LAF's program receives all involuntary discharge notices from skilled facilities in the area complying with the regulation, providing the Ombudsman invaluable data regarding the range of issues residents face. LAF has a compelling interest in ensuring that long-term care residents do not face wrongful procedural barriers to protecting their legal rights in the context of involuntary discharge hearings.

AMICUS LEGAL COUNCIL FOR HEALTH JUSTICE

Amicus Legal Council for Health Justice is a 30-year-old nonprofit public interest law organization that engages in litigation and policy

advocacy to advance access to quality healthcare and protect the legal rights of people facing barriers due to illness or disability. In May 2018, Legal Council attorneys filed a motion in the U.S. District Court for the Northern District of Illinois, seeking to enforce an existing consent decree entered in *Cohen v. Quern, et al.*, 79-cv-2447, that requires, *inter alia*, that the State of Illinois determine eligibility for Medicaid within federal timelines (45 or 90 days). Legal Council has a compelling interest in ensuring that people whose Medicaid applications are languishing are not involuntarily transferred, discharged, or otherwise penalized for the State's ongoing processing delays.

AMICUS EQUIP FOR EQUALITY

Equip for Equality ("EFE") is a nonprofit civil rights organization for people with disabilities and serves as the governor-designated protection and advocacy system for the State of Illinois. EFE's mission is to advance the human and civil rights of children and adults with physical, sensory, developmental and mental disabilities. To this end, EFE provides information, referral, self-advocacy assistance, and legal representation to people with disabilities throughout the state, including in cases where individuals with disabilities face improper discharge from long-term care facilities.

The State of Illinois lists EFE on the Notice of Involuntary Transfer or Discharge form as an advocacy resource for individuals with disabilities. EFE provides representation where the proposed discharge poses a risk of harm to

the individual, or where the facility has failed to properly engage in discharge planning. EFE also prioritizes cases where a discharge may jeopardize an individual's rights through the consent decrees in *Colbert v. Rauner* and *Williams v. Rauner*, cases that allow residents of long-term care facilities to move into less restrictive settings, such as apartments in their community. Accordingly, EFE has a compelling interest in protecting people with disabilities who face improper discharge from long-term care facilities.

***AMICI*'S POSITION ON THE ISSUE IN THIS CASE**

In light of Amici's experience representing residents in involuntary discharge hearings before the Department of Public Health and in the Medicaid process, LAF, Legal Council, and EFE are deeply concerned about the effect of a decision upholding the appellate court in this case. As more fully described below, the decision would give rise to residents losing their right to an administrative hearing altogether, through no fault of their own. The decision requires hearings to happen so quickly that residents are effectively deprived of due process, because it is impossible to gather necessary documents or subpoena important witnesses in the time allotted. The accuracy of the results of the hearings necessarily suffers, moreover, because residents lack sufficient time to secure counsel or develop the facts of their cases – which inevitably undermines the truth-seeking process, resulting in unjust evictions. As a result, more highly vulnerable residents will be wrongfully forced from nursing homes, frequently suffering the loss of

familial and other support as well.

The decision not only undermines due process, it is based on unsound premises. In particular, the distinction the appellate court draws between Medicaid applicants and recipients reflects a fundamental misunderstanding of the way Medicaid actually functions in the long-term care context. The court's decision effectively requires residents to leave their nursing home, even in cases where Medicaid will almost certainly be approved and the facility will be paid what is owed. The outcome produced is both unjust and senseless.

Finally, the appellate court's holding that the time frame for discharge after a ruling in the IDPH hearing process is mandatory imposes an inflexible expedited pace on the process that reduces efficiency and results in needless cost. The holding contravenes the purpose of the Illinois Nursing Home Care Act, and undermines the discretion necessary to achieving that purpose.

ARGUMENT

I. The appellate court's analysis of the timing requirements fails to account for the statutory and constitutional rights of nursing home residents under state and federal law.

A. Residents of long-term care facilities have rights under state and federal statutes and regulations to be subject to involuntary discharge solely for statutorily defined reasons, and the hearings must protect those rights.

The appellate court's decision disregards the rights of residents in involuntary discharge hearings. The decision requires involuntary discharge

hearings to be held within 10 days of a resident's request. The Illinois Nursing Home Care Act ("NHCA"), the Federal Nursing Home Reform Amendments ("FNHRA"), and the regulations promulgated under the FNHRA secure residents' rights to due process and to be protected from wrongful involuntary discharge by requiring fair hearings. Those protections largely disappear under the mandatory timeline dictated by the *Lakewood* appellate opinion. *Lakewood Nursing & Rehab. Ctr., LLC v. Dep't of Pub. Health*, 2018 IL App (3d) 170177, ¶ 24 (requiring hearing to be held within 10 days of the resident's request).

Both the NHCA and the FNHRA secure residents' rights and protections against wrongful involuntary discharge, and the NHCA contains specific involuntary discharge hearing procedures to safeguard those rights. Both statutes provide a limited number of permissible reasons for which a facility may involuntarily transfer or discharge a resident. Under the NHCA,

> A facility may involuntarily transfer or discharge a resident only for one or more of the following reasons:
> (a) For medical reasons;
> (b) for the resident's physical safety;
> (c) for the physical safety of other residents, the facility staff or facility visitors; or
> (d) for either late payment or nonpayment for the resident's stay
> . . .

210 ILCS 45/3-401. The FNHRA contains a similar, exclusive list of reasons for involuntary discharge. 42 U.S.C. § 1396r(c)(2)(A); 42 C.F.R.

§ 483.15(c)(1)(i).[1] Under both state and federal law,[2] a facility must provide residents with notice of involuntary transfer and discharge, specifying one of the permitted reasons, and if a facility issues such a notice, the resident may appeal through the administrative proceeding laid out in the NHCA. *See* 210 ILCS 45/3-401 *et seq*.

1. Lakewood's mandatory time limit effectively nullifies resident protections under the NHCA and its regulations.

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[1] The regulation implementing FNHRA, 42 C.F.R. § 483.15(c)(1)(i), likewise provides the following requirements with respect to transfer and discharge:

> (1)Facility requirements - (i) The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless -
> (A) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
> (B) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
> (C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;
> (D) The health of individuals in the facility would otherwise be endangered;
> (E) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. Non-payment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for his or her stay. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or
> (F) The facility ceases to operate.

[2] The NHCA's requirements for involuntary discharge apply to skilled nursing facilities that do not accept federal funds as well as to Intermediate Care Facilities for the Developmentally Disabled ("ICF-DDs"), Specialized Mental Health Rehabilitation Facilities ("SMHRFs"), and Shelter Care Facilities. Any skilled nursing facility that accepts federal funds through Medicare or Medicaid must apply the reasons listed in the federal regulations. 42 U.S.C. § 1396a(a)(28)(A).

When construing the meaning of a statute, a court's "primary objective is to ascertain and give effect to the intent of the legislature." *Ready v. United/Goedecke Servs., Inc.*, 232 Ill. 2d 369, 375 (2008). The well-established purpose of the NHCA is to protect the interests of residents:

> The primary purpose of the Act undoubtedly is to protect nursing home residents. The legislature promulgated the Act amid concern over reports of inadequate and degrading treatment of nursing home residents.

Moon Lake Convalescent Ctr. v. Margolis, 180 Ill. App. 3d 245, 255–56 (1st Dist. 1989); *see also Grove Sch. v. Dep't of Pub. Health*, 160 Ill. App. 3d 937, 941 (3rd Dist. 1987) ("[T]he legislative purpose of the Act is to protect nursing home residents from acts of abuse."). Therefore, in interpreting the statute, there is no question that the Court must take the rights of residents into account.

However, the *Lakewood* appellate decision completely disregards the resident's interest in the case. The appellate court considers only that the "term 'not later than 10 days' in section 3-411 constitutes negative language" in order to find the provision mandatory. *Lakewood*, 2018 IL App (3d) 170177, ¶ 23. The court fails to consider that despite the hearing existing to protect the resident's rights, under its holding, IDPH's purported delay in scheduling the involuntary discharge hearing 68 days after the facility's renewed request results in the resident losing *all* right to that hearing through no fault of her own.

The decision, in other words, allows inaction by IDPH to determine

whether a resident of a skilled nursing facility is accorded any due process of law before being evicted. Under this decision, if IDPH mistakenly schedules the hearing for the 11th day after the resident submits a request for hearing, the IDPH has lost jurisdiction, so that the facility may carry out its involuntary discharge without any hearing at all.

The drastic timeline imposed by the decision also forces IDPH to condense the proceedings so much that residents' rights are threatened or lost. For example, IDPH is required to serve notice of an initial prehearing conference in an involuntary discharge case, either personally or by certified mail. 77 Ill. Admin. Code §§ 100.7(c); 100.10(a). Since the appellate court's decision, IDPH has been forced to schedule the initial prehearing conference either the day before, or on the same day as, the evidentiary hearing, so that both fall within 10 days of the hearing request. Due to the time it takes to receive mail, especially certified mail, residents and their representatives often do not receive the notice of prehearing until just a day or two before the prehearing. In fact, *Amici* know of several occasions since the appellate court decision in which residents or their representatives have not received notice of the evidentiary hearings until after they were scheduled to take place. Under the appellate court's decision, IDPH lacked jurisdiction to reschedule these hearings and the residents lost their rights to one—through no fault of their own and, for that matter, no fault of IDPH.

The *Lakewood* holding also directly conflicts with regulations

promulgated by IDPH under the NHCA. IDPH's hearing regulations reflect that agency's determination of the best practice for hearings, consistent with the governing statute, for the administration of justice. The provisions outline the procedures for, among other things, the discovery process, subpoenas, and the conduct of hearings. *See* 77 Ill. Admin. Code §§ 100.1 to 100.19. Those regulations contemplate that parties will be able to gather documents, subpoena witnesses and otherwise prepare for involuntary discharge hearings. *Id.*

The Illinois Administrative Code requires that each party provide all other parties with a copy of any document that it may offer as evidence and a list of any witnesses who may be called to testify at least *21 days* before the hearing. 77 Ill. Admin. Code § 100.12(b), (c). The Code further provides that, at the hearing, "no document shall be offered into evidence that was not disclosed in accordance with the requirements of Section 100.12(b)" without good cause. *Id.*, § 100.13(l). Because *Lakewood*'s holding creates a mandatory limit of 10 days from the request for hearing to the time it is held, it is impossible for the parties to provide 21 days' notice of exhibits they intend to use and witnesses they intend to call at the hearing. *Lakewood* thus creates a direct conflict with the Illinois Administrative Code governing IDPH procedures.

The Illinois Administrative Code also allows a resident to request documents from the facility, to subpoena documents, and to subpoena

witnesses. Under the Administrative Code, the facility must produce documents, books, records or other evidence within seven days, upon a written request. *Id.*, § 100.12(e). However, under *Lakewood*'s mandatory timeframe, there would almost never be seven days between a resident's notice of a hearing and the hearing date, let alone time to review the often voluminous medical records at issue. The Administrative Code also allows parties to request that the administrative law judge subpoena witnesses and documents. *Id.*, § 100.14(a). Those subpoenas must "be served personally or by certified mail at least seven days before the date on which appearance or production is required." *Id.*, § 100.14(b). A resident will not have time to ask the administrative law judge to issue the subpoena and serve the subpoena at least seven days before a hearing when the resident has only a few days' actual notice. There is no way to provide the due process the Department contemplates for involuntary discharge hearings under the appellate court's mandatory timeframe.

2. *Lakewood* violates federal law by denying residents due process rights, codified in federal law.

The *Lakewood* holding also violates federal law. The court's holding that the time requirements of Section 3-411 of the NHCA are mandatory—and therefore that IDPH loses jurisdiction of any administrative appeal of a proposed involuntary transfer or discharge 10 days after the resident's request for a hearing—deprives residents of procedural rights guaranteed by the FNHRA and its implementing regulations.

Congress enacted the FNHRA in the Omnibus Budget Reconciliation Act of 1987, revising and strengthening provisions of the Social Security Act that regulate all nursing facilities certified to participate in the Medicare or Medicaid programs ("certified facilities"). *See* Pub. L. No. 100-203, §§ 4201-4218, 101 Stat. 1330 (1987) (codified as amended in scattered sections of 42 U.S.C.). FNHRA creates a binding requirement for any state that participates in the Medicare and Medicaid program to ensure "that any nursing facility receiving payments under such [Medicare or Medicaid] plan must satisfy all the requirements of subsections (b) through (d) of section 1396r of this title." 42 U.S.C. § 1396a(a)(28)(A). Subsections (b) through (d) of § 1396r grant various rights to residents of certified facilities, including the right to remain in the facility except where the facility can prove the existence of one of the six limited bases on which a resident can be involuntarily transferred or discharged. *Id.*, § 1396r(c)(2)(A). The statute also requires that a facility provide a resident with a notice of involuntary transfer or discharge, and provides requirements for that notice. *Id.*, § 1396r(c)(2)(B).

The FNHRA also requires that any state participating in the Medicare or Medicaid program "provide for a fair mechanism, meeting the guidelines established under subsection (f)(3) of this section, for hearing appeals on transfer and discharges of residents" of certified facilities. *Id.*, § 1396r(e)(3). Subsection (f)(3) directs the Secretary of Health and Human Services to

establish guidelines for the minimum standards which a state's appeal process must meet. *Id.*, § 1396r(f)(3). Through the Centers for Medicare and Medicaid Services (CMS), the Secretary has promulgated such regulations. *See* 42 C.F.R. §§ 431.200 to 431.250. The regulations require that a state's hearing system meet the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970), as well as other standards specified in the regulations. 42 C.F.R. § 431.205(d). The specified minimum standards include the resident's procedural right to examine, before the hearing, all documents and records to be used by the nursing facility at the hearing; bring witnesses; establish all pertinent facts and circumstances; and present an argument without undue interference. *Id.*, § 431.242.

Goldberg held that "[t]he fundamental requisite of due process of law is the opportunity to be heard . . . at a meaningful time and in a meaningful manner," making clear that such process requires a fair hearing before the government may deprive a recipient of an important benefit. 397 U.S. at 267 (citations omitted). Recognizing that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard," the Court held that the person seeking redress must have

> timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Id. at 267-69. The Department of Health and Human Services, pursuing its statutory mandate to create procedures consistent with *Goldberg*,

promulgated 42 C.F.R. § 431.205(d), which requires each state's administrative process to meet these minimum requirements. Likewise, the General Assembly and IDPH designed the process set forth in Argument I(A)(1), above, to meet these requirements.

3. It is impossible to comply with the state and federal regulations for involuntary discharge hearings under the timeline imposed by *Lakewood*.

Even without the mandatory timelines imposed by the *Lakewood* court, residents face inherent disadvantages in the hearing process, as the facility controls a great deal of relevant evidence and employs the staff who usually serve as witnesses. The facility creates and maintains most, if not all, of the resident's medical and billing records at the facility. The facility may have the resident's clinical record entered into evidence at the hearing without proof of foundation or authentication. 77 Ill. Admin. Code § 100.13(j)(1). Where the facility alleges a resident's behavior endangers safety, the facility employs most of the witnesses to the claimed behaviors; where the facility claims it cannot provide needed care, it likewise employs or refers patients to most of the witnesses with knowledge of the claims. Unlike the resident, the facility can therefore call most, if not all, of its witnesses without resorting to subpoenas. Furthermore, residents are generally in skilled nursing facilities for a reason – they tend to be facing major health challenges requiring skilled care. Often, those challenges make it more difficult for residents to act as witnesses on their own behalf and participate

fully in the hearing process.

In order for involuntary discharge hearings to give rise to accurate determinations of relevant facts, it is imperative that the resident be able to use the processes available through the Illinois Administrative Code and required by the federal regulations to develop the factual record. The resident must be able to gather the facility's documents – not just the documents the facility intends to use in the hearing. For involuntary discharge grounds that rely on medical records, the resident may also need to subpoena or gather medical records from outside providers and persuade or subpoena those providers to participate as witnesses.

The *Lakewood* holding functionally negates these required procedural protections. Like the state regulations, federal regulation § 431.242 provides residents the right to review all documents and records to be used by the facility at the hearing. 42 C.F.R. § 431.242. Medical documentation is, by its nature, complex and voluminous; it typically involves hundreds or thousands of pages of dense and technical information. The scant amount of time afforded by *Lakewood*'s interpretation of Section 3-411 will, in many cases, make meaningful review of this information before the hearing impossible. Likewise, while the federal regulations secure the right to bring witnesses and present evidence, it will often be impossible to procure witnesses and evidence on such an accelerated timeline. Under *Lakewood's* rushed procedure, residents are deprived of the opportunity to "establish all

pertinent facts and circumstances," as required by 42 C.F.R. § 431.242. They lose the chance "to be heard . . . at a meaningful time and in a meaningful manner." *Goldberg*, 397 U.S. at 267. The General Assembly could not have intended to mandate a deadline that would effectively deprive residents of such important rights.

B. The appellate court's interpretation of Section 3-411 fails to protect the constitutional due process interests of residents.

As explained in argument I(A)(2) above, the appellate court's decision in this case undermines federal law designed to protect residents' due process rights under *Goldberg*. Necessarily, then, the decision runs afoul of *Goldberg* itself, as well as subsequent cases that articulate the requirements of due process in similar contexts. In keeping with *Goldberg*'s mandate that due process be tailored to the capacities of those whose rights are at stake (*see Goldberg*, 397 U.S. at 268-69), the Court has observed that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). To determine the dictates of due process in any given case, courts must consider the nature of the interest affected, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[3] *Mathews v. Eldridge*, 424 U.S. 319, 335

[3] Under *Mathews*, the value of the procedural protection sought is also supposed to be weighed against the government's interests, considering "the fiscal and administrative burdens that the additional or substitute procedural requirement

(1976). In cases of residents who face involuntary transfer or discharge from a nursing facility, the nature of the interest involved is the residents' right not to be discharged other than for one of the listed causes, an important interest enshrined in both federal and state law, as explained above.

In such cases, the probable value of allowing IDPH flexibility in timing the administration of its hearing process is great. If a resident lacks adequate time to procure and examine evidence and secure the attendance of witnesses in this process, a serious risk of an erroneous decision, based on incomplete and one-sided information, certainly results.

Consider the following illustrative example, which presents a representative composite of many cases that *Amici* have seen. A resident, "Mr. Parsons," received a Notice of Involuntary Discharge from a skilled nursing facility alleging that he endangered the safety of other residents. The facility issued the notice immediately after an incident in which Mr. Parsons suddenly became aggressive toward another resident; he shouted, made threats, and pushed over a table. Mr. Parsons immediately filed an appeal with IDPH. Over the following days, nursing home staff reported that he continued to show signs of aggression and belligerence.

Mr. Parsons was evaluated by his primary care doctor one week after

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would entail." *See Mathews*, 424 U.S. at 335. In this case, the appellate court interpreted the NHCA to prohibit the protection that IDPH had already been according to nursing home residents. That protection therefore could not be deemed unduly burdensome or costly—in fact, it is *removing* IDPH's flexibility that imposes additional costs and burdens on it.

the incident (the soonest he could see his doctor[4]). Upon examination, the doctor suspected that Mr. Parsons may have a urinary tract infection ("UTI"), which can cause significant and abrupt alterations in behavior, including uncharacteristic aggression. *See* Ellen Carbonell, *Sudden Change in Behavior? Urinary Tract Infection Could Be the Cause*, Alzheimer's Association (October 21, 2011), https://www.alz.org/blog/alz/october_2011/sudden_change_in_behavior_urinary_tract_infection.

To confirm this diagnosis, the doctor ordered a urine test for Mr. Parsons. The urine sample went to a lab, and the lab reported its results to the doctor three days later (10 days after the incident). The following day (11 days after the incident), Mr. Parsons's doctor called him to explain that the test confirmed that he had a UTI, and that, in the doctor's opinion, this most likely accounted for his uncharacteristically aggressive behavior. The doctor prescribed a course of antibiotics. After four days of taking antibiotics (15 days after the incident), Mr. Parsons's UTI had resolved, and staff did not report any further signs of aggressive behavior in Mr. Parsons from that point on.

Under the appellate court's mandatory interpretation of Section 3-411's time limits, IDPH would have held the hearing on Mr. Parsons's appeal of the facility's decision before his doctor even received the results of the

[4] This would not be an uncommon time frame; nursing home residents typically cannot travel outside the facility for medical appointments, and therefore depend on seeing a doctor when that doctor visits the facility, which may be only twice a month.

urine test. Mr. Parsons would have been required to proceed to a final hearing without this information, creating a significant risk that an Administrative Law Judge would have deprived Mr. Parsons of his right to continue living at the facility. This would have been an erroneous result, because, in fact, there was a simple and treatable medical explanation for Mr. Parsons's uncharacteristic behavior. To successfully present his case, however, Mr. Parsons needed: 1) the results of his urine test; 2) testimony from his doctor regarding how a UTI might cause sudden changes in behavior; 3) evidence that Mr. Parsons had been treated for this UTI and it was no longer present; and 4) evidence that he had not displayed aggression toward others since the UTI was treated. Given the timeline (typical of such a situation), it would be impossible to present this information until at least 15 days after the incident (and possibly longer). Thus, in this illustration, as in so many real cases that *Amici* have seen, due process demands that IDPH have some flexibility with respect to the date of the hearing; otherwise, residents may be deprived of a meaningful opportunity to be heard and may be erroneously deprived of the right to continued residency, an important interest codified in both federal and state law.

Under *Goldberg*, the "extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss." *Goldberg*, 397 U.S. at 262–63 (internal quotation marks omitted). For those facing an involuntary transfer or

discharge from a nursing home, the potential harm that would come from an erroneous negative result is indeed grievous. Many nursing home residents who face an involuntary discharge have lived at the facility for years, sometimes over a decade. If a resident is abruptly forced from a nursing home, she may lose her social relationships, her continuity of medical care and the physical environment to which she has adjusted. Furthermore, the residents and their families have often taken great care to choose a facility based on important personal factors, most notably proximity and accessibility to the family and other community members, such as clergy. But in an involuntary discharge, residents often have little say about what location they are sent to; LAF has seen cases in which a nursing home has attempted to discharge a resident from a facility in the Chicago suburbs to a facility in Energy, Illinois, over 300 miles away. Such a resident would be effectively exiled from family and friends, and deprived of what may be one of few remaining satisfactions and joys in life—visits from loved ones.

Furthermore, for the many nursing home residents with dementia, Alzheimer's, or other cognitive impairments, a drastic change in physical environment is particularly harmful. "Transfer trauma," also sometimes called "relocation stress syndrome," describes the harmful effects experienced by those with dementia when they change living environments, effects which can include a risk of "isolation and depression, anxiety, resistance to care, and similar behavior disturbances." *See* Kim Warchol, *How to Reduce*

Transfer Trauma for a Person with Dementia, Crisis Prevention Institute (June 15, 2015), https://www.crisisprevention.com/Blog/November-2010/A-Real-Issue-for-Many-Individuals-With-Dementia; *see also* Terri D. Keville, *Studies of Transfer Trauma in Nursing Home Patients: How the Legal System has Failed to See the Whole Picture*, 3 Health Matrix 421 (1993) (reviewing studies on transfer trauma and its effects). The appellate court's interpretation of Section 3-411 would inevitably lead, in some instances, to erroneous outcomes that would have devastating consequences for residents who are wrongfully discharged. Due process demands adequate safeguards against such results.

C. The appellate court's interpretation of Section 3-411 thwarts residents' ability to reach mutually agreeable settlements and defeats efficiency.

Amici, several of whom have day-to-day involvement with involuntary transfer and discharge proceedings, are uniquely positioned to understand the degree to which the appellate court's decision has already effectively hindered mutually agreeable resolutions of disputes between nursing homes and residents. Prior to the decision, when IDPH received an appeal, it generally scheduled the case for a pre-hearing conference, where the Administrative Law Judge would hear from both sides and either schedule the case for an hearing, setting a date that would allow sufficient time to develop the evidence, or, more often, continue the matter to permit the parties to discuss settlement. LAF, as Ombudsman, was able to conduct

investigation and informal advocacy following such conferences, resulting in amicable resolution of countless cases without hearing.

After the *Lakewood* decision, however, IDPH has been constrained to simultaneously schedule appeals for the pre-hearing conference and evidentiary hearing, setting them on consecutive days or even the same day. With mere hours between the conference and the hearing, parties have little opportunity to reach settlement. The pre-hearing conference seldom yields productive discussion about resolution when conducted in the shadow of a final hearing scheduled immediately after the conference. Now, parties who may have been able to come to a mutually agreeable solution to their disputes are instead rushed into an unnecessary hearing.

Presumably, the General Assembly did not intend to limit IDPH's discretion so severely, and impose deadlines so stringent, that factual development and amicable settlements become impossible and all involved must satisfy themselves with incomplete information and unjust outcomes. The appellate court's interpretation of Section 3-411 must be rejected and its decision reversed.

II. The appellate court erroneously determined that the NHCA does not stay involuntary transfer or discharge of Medicaid applicants who have not yet received a final decision; the NHCA protects appeal rights of *all* residents, including Medicaid applicants.

The NHCA secures rights to all residents whose alleged nonpayment occurs as the result of a Medicaid decision by the DHFS. Section 3-406 states

that when the basis of an involuntary transfer or discharge "is the result of an action by the [DHFS] . . . with respect to a recipient of Title XIX," and the resident has filed a hearing request, "the 21-day written notice period shall not begin until a final decision in the matter is rendered . . . and notice of that final decision is received by the resident and the facility." 210 ILCS 45/3-406. Section 3-411, which the court interpreted in this case, recognizes that this provision essentially creates a stay for residents whose nonpayment results from Medicaid determinations until such decision is final, providing that it applies "when the basis for involuntary transfer or discharge *is other than* action by the [DHFS] with respect to the Title XIX Medicaid recipient." 210 ILCS 45/3-411 (emphasis added).

A. The appellate court misinterpreted Section 3-411 by failing to consider its provisions in their proper context, and by failing to read that Section consistent with its purpose, protecting Medicaid appeal rights secured by federal and state law.

The appellate court stripped away rights intended for all residents whose discharge is "the result of an action by" DHFS, misunderstanding the word "recipient" in this context. The appellate court determined that the nursing home resident was "not considered a Medicaid *recipient* but rather a Medicaid *applicant* during the proceedings," and thus declined to grant her *any* protection under section 3-406. *Lakewood*, 2018 IL App (3d) 170177, ¶ 20. Words in a statute must not be read in isolation. *See Slepicka v. Illinois Dep't of Pub. Health*, 2014 IL 116927, ¶ 21, *as modified on denial of reh'g* (Nov. 24,

2014). Rather, this Court interprets statutes to effectuate the legislature's intent, and "avoids interpreting statutes in a manner that would create absurd results." *Christopher B. Burke Eng'g, Ltd. v. Heritage Bank*, 2015 IL 118955, ¶ 17.

Read as a whole, and informed by the purpose of the provision, Section 3-406 must be interpreted to protect the Medicaid appeal rights of all residents subject to discharge as a result of DHFS action by staying the proceedings until the Medicaid decision becomes final. This right to challenge DHFS must inhere in both active recipients and applicants, as both have appeal rights under state Medicaid law. 305 ILCS 5/11-8. The appellate court's reading would unfairly and arbitrarily negate the appeal rights of applicants, by permitting them to be subjected to adverse action before their Medicaid decisions have become final.

The appellate court's asserted distinction between a Medicaid applicant and recipient in this context is wholly arbitrary, because Medicaid is retroactive in either case. There is thus no difference in risk or liability, from the facility's point of view, that would justify applying a stay to the latter but not the former. When a Medicaid application is approved in Illinois, the resident becomes a Medicaid "recipient" retroactively, as of the date that Medicaid eligibility begins, including three months before the application was filed. 305 ILCS 5/5-2.1d; Department of Human Services ("DHS"), Cash, SNAP and Medical Policy Manual ("PM") 17-02-05-a,

http://www.dhs.state.il.us/page.aspx?item=13473. Thus, if a resident files a Medicaid application the day after receiving a notice of involuntary discharge for nonpayment on April 1, and DHS eventually approves the application going back three months before the application was filed, the resident would then be considered a Medicaid *recipient* as of January 1 of that year. Given the way Medicaid works, treating an "applicant" differently from a "recipient" results in a wholly arbitrary distinction—both are in the same situation vis-à-vis the facility, awaiting a determination that they are eligible, after which the facility will be retroactively paid. It is therefore unsurprising that in this case, both parties agreed that once the resident filed a Medicaid application, that application stayed the discharge hearing. (C.108, 129.)

B. The appellate court's reading of Section 3-411 will punish Medicaid applicants for delays completely outside of their control.

The right not to be involuntarily discharged while a Medicaid application is pending is particularly important today. DHFS routinely fails to make Medicaid eligibility determinations within the federally-established time limits. According to a November 2018 CMS report, Illinois fails to timely determine about a quarter of all applications it receives:

Month (2018)	Percent of Determinations Processed < 24 hours	Percent of Determinations Processed 1 - 7 Days	Percent of Determinations Processed 8 - 30 Days	Percent of Determinations Processed 31- 45 Days	Percent of Determinations Processed 45+ Days
Feb.	21.5%	15.1%	28.8%	10.1%	24.6%
Mar.	21.0%	14.8%	27.1%	9.7%	27.4%
Apr.	20.5%	14.7%	26.4%	9.3%	29.1%

CMS, Medicaid MAGI and CHIP Application Processing Time Report (Nov. 28, 2018), https://www.medicaid.gov/state-overviews/downloads/magi-and-chip-application-processing-time/magi-application-time-report.pdf.

These delays may even be worse in the long-term care context. DHFS reports show that thousands of Medicaid long-term care applications remain pending for more than 90 days, either awaiting a determination of eligibility, or deemed eligible but not yet officially "admitted" in a DHFS computer system. *See, e.g.*, Long Term Care Report for SNF/SLF ("DHFS LTC Report"), "Pending Application and Admission Detail Summary" (Oct. 4, 2018), https://www.illinois.gov/hfs/SiteCollectionDocuments/LTCMonthlyReport.pdf. The Comptroller issued a staff report in June 2018, concluding that the number of pending applications over federal time limits has been steadily increasing from May 2014 through May 2018, and that there is an unprecedented backlog of unprocessed applications. *See* State of Illinois Comptroller, "Staff report on Medicaid long-term care determinations and pending legislation" (June 28, 2018) at 4, https://illinoiscomptroller.gov/comptroller/assets/File/news_releases/LTCPaper_06252018_%20FINAL.PDF. The DHFS LTC Report and the Comptroller's Report also demonstrate that the State, as opposed to applicants, is the cause of the majority of delays. *See* DHFS LTC Report at Table 4; Comptroller's Report at 2-3.

Amici are concerned that if this Court upholds the appellate court's determination that section 3-406 does not apply to residents with pending

Medicaid applications, innocent applicants caught in the state's monumental and unprecedented application delays will be harmed. *Amici* urge this Court to reverse the appellate court's determination of that issue.

C. The appellate court's analysis fails to account for the practical realities of Medicaid administration and will result in needless transfers of residents whose Medicaid claims are pending on appeal.

When a resident is accepted for Long Term Care Medicaid, it necessarily affects the amount the resident owes the facility. In Illinois, a long-term care resident on Medicaid must generally "spend down" her assets to $2000, and then pay an amount equal to her monthly income, minus $30, per month to the facility.[5] *See* PM 07-02-01, PM 15-04-04; PM 15-08-14. Medicaid pays the rest of the cost of the resident's care, up to a maximum. That maximum is generally thousands of dollars a month less than the rate paid by residents of the same facility who use non-public insurance or other funds to pay, known as "private pay." While, for any month in which the resident is eligible for Medicaid, the resident generally only owes the facility her income (minus $30), facilities often do not adjust their billing until the resident is deemed eligible.

In addition, in Illinois, an application for long-term care Medicaid, if

[5] This is a simplification reflecting the most basic situation. A complex set of other factors actually affects both the amount of assets that must be spent and the amount of the resident's income that must be paid to the facility each month, such as whether the resident has a community spouse, other eligible medical expenses, Medicare premiums, and court-ordered spousal or child support, among other factors. *See* PM 15-04-04.

approved, can pay for a resident's stay at a facility for up to three months prior to when the application was filed. 305 ILCS 5/5-2.1d*; see* PM 17-02-05-a. So while the facility may initially bill the resident $10,000 per month (a typical private pay rate), if the resident's Medicaid application is accepted with backdating for those months, she will only owe the facility the amount of her income (minus $30) for each of those months. The facility may also have billed the resident the private pay rate for the months the application was pending. If so, once approved, the bill would necessarily need to be adjusted for the Medicaid rate. Therefore, a facility's bill for a resident whose Medicaid application is pending does not represent what the resident will owe if the application is accepted.

For example, a facility issued a notice of involuntary discharge to a resident when her Medicaid application was initially denied. With LAF's help, the resident's application was eventually approved on appeal, and the facility where she lived was paid over $100,000 for the care it provided while the application was pending. If that resident had been forced to go to an evidentiary hearing before her Medicaid appeal was complete, she would have lost (because, at the time of the hearing, she would have appeared to owe money to the facility) and she would have been forced to move. Without the incentive to pay the facility (the resident had no assets that could be collected in a lawsuit), it would have been easier to start a new Medicaid application at her new facility, and the facility that cared for her for years

without compensation would not have been paid at all. The stay of the involuntary discharge hearing benefitted both the resident and the facility.

Finally, many Medicaid denials do not result from a resident's actual ineligibility, but simply from the resident's inability to gather the extensive list of required documents within the time DHS sets. An application for long-term care Medicaid requires a resident to provide up to 5 years of bank statements, title and mortgage information for the resident's house (if she owns one), marriage and divorce records that may be many years old or from foreign countries, as well as financial information for the resident's spouse, even if the resident and her spouse are no longer living together or comingling their finances (but not legally separated). Many Medicaid applications are initially denied only because DHS has not received all of the documents requested by the deadline. However, DHS is required to reopen those cases without an appeal if all the requested documents are provided within 90 days. PM 17-04-02-a; *see also* DHS Policy Memo (Apr. 25, 2016), Update to Reopening Denied Medical Application, https://www.dhs.state.il.us/page.aspx?item=84239; MR #14.19: Reopening Denied Medical Applications (Mar. 21, 2014), https://www.dhs.state.il.us/page.aspx?item=69990. Also, if the resident appeals the denial within 60 days and provides the documents during the appeal, DHS will reopen the application. *See* PM 01-07-03; PM 01-07-08 ("If the client previously failed to provide information or verification, but did not express an intentional refusal to do so, accept the information or

verification when presented during the appeal process. Reverse or modify the Department's action, if the evidence shows the client qualifies for additional benefits."). If the application is reopened through either of these means, Medicaid eligibility still potentially goes back to three months before the application was filed.

DHS's policies requiring it to accept documents during the course of an appeal implicitly recognize the challenges that people who qualify for Medicaid may have in providing satisfactory proof of that eligibility. Residents of long-term care facilities frequently need long-term care because of disabling conditions, such as stroke or dementia, that drastically compound the difficulty of meeting DHFS's documentation requirements. The appellate court's decision arbitrarily excluding Medicaid applicants from stay of the deadlines applicable to an involuntary discharge can wreak havoc on a family's already strained ability to house a loved one safely during this process. The resulting instability ultimately benefits no one, and contravenes the legislature's intent in creating the stay. The court's holding on this point must be roundly rejected.

III. The General Assembly did not intend Section 3-413 to limit IDPH's discretion to stay a resident's discharge.

The NHCA provides that where an involuntary transfer or discharge is authorized, the resident nonetheless "shall not be required to leave the facility *before* the 34th day following receipt of the notice required under Section 3-402, or the 10th day following receipt of the Department's decision,

whichever is later. 210 ILCS 45/3-413 (emphasis added). The Appellate Court determined from this provision that IDPH lacks the authority to delay, by 30 days from its issuance, the effective date of its order authorizing the resident's involuntary discharge, holding that Section 3-413 rendered IDPH's 30-day stay void. This holding contradicts the plain language of Section 3-413, which provides a *minimum*, not a maximum, period for a stay following a decision adverse to the resident. The legislature therefore sought to ensure that residents not be discharged too rapidly—with too little time to prepare a transition. Nothing in the section indicates an intent to limit IDPH's authority to oversee the discharge process. As with the appellate court's interpretation of Section 3-411's time limits, the appellate court's holding inappropriately hamstrings IDPH's ability to exercise discretion, contradicting the legislature's intent.

Section 3-418 of the NHCA gives IDPH broad, discretionary authority to oversee resident transfer or discharge plans "to assure safe and orderly removals and protect residents' health, safety, welfare, and rights." 210 ILCS 45/3-418. To adequately discharge this function, IDPH may, in some cases with extenuating circumstances, need to delay the effective date of an order to ensure resident safety. For instance, nursing homes sometimes attempt to discharge an indigent resident who needs complex medical care to a homeless shelter, rather than to another nursing home; in these cases, if the facility proceeds with its planned discharge, residents may be left in extremely

dangerous situations, facing lack of needed care. In other cases, residents may, due to a temporary condition (such as the resident's immune system being extremely compromised due to illness), be unable to immediately move from one facility to another without serious risk of harm. In cases like those described above, IDPH must exercise its discretionary authority to delay the discharge in order to protect the residents' safety and welfare and prevent death or great harm.

CONCLUSION

The appellate court's decision in this case can only result in serious infringement of the rights of vulnerable residents of long-term care facilities, already at an inherent disadvantage when facing involuntary transfer or discharge. *Amici*, as organizations charged with protecting such residents, urge this Court to reverse the appellate court's decision and restore the process designed to protect their rights.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 33 pages.

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PROOF OF FILING AND SERVICE

I certify that on March 15, 2019, I electronically filed the foregoing Proposed Brief and Argument of *Amici Curiae* LAF, Legal Council For Health Justice, & Equip For Equality with the Clerk of the Court for the Illinois Supreme Court by using the Odyssey eFileIL system.

I further certify that a participant in this appeal, named below, is not a registered service contact on the Odyssey eFileIL system, and thus was served by email on March 15, 2019.

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I certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

March 15, 2019 /s/ Suzanne Courtheoux

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