Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss **No. SJC-12481**

THIS BRIEF CONTAINS NO IMPOUNDED MATERIAL

SOLOMON CARTER FULLER MENTAL HEALTH CENTER

v.

M.C.

Brief of the Judge David L. Bazelon Center for Mental Health Law, the American Association of People with Disabilities (AAPD), the Association of University Centers on Disabilities (AUCD), and the National Council on Independent Living (NCIL)

Amicus Curiae in Support of the Appellant M.C.

Mark I. Bailen
BBO #636825
Elizabeth B. McCallum
BAKER & HOSTETLER LLC
1050 Connecticut Ave. NW
Suite 1100
Washington, DC 20036
202-861-1500
mbailen@bakerlaw.com
emccallum@bakerlaw.com

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ISSUE PRESENTED

In February 2018, this Court solicited input from interested parties on the following question presented by this case:

> Whether the respondent's due process or equal protection rights were violated when his involuntary commitment hearing took place at the hospital rather than at the courthouse where, he argues, the hospital lacked reliable recording equipment, unauthorized recording devices were substituted, and large portions of the hearing were, as a result, not recorded.

INTEREST OF AMICI CURIAE

The **Judge David L. Bazelon Center for Mental Health Law** is a national nonprofit advocacy organization that provides legal assistance to individuals with mental disabilities. The Center was founded in 1972 as the Mental Health Law Project. Through litigation, policy advocacy, training and education, the Center promotes the rights of individuals with mental disabilities to participate equally in all aspects of society, including housing, employment, education, health care, community living and other areas. The Center has devoted much of its resources to ensuring that individuals with disabilities have opportunities to live in their own homes with the services necessary to succeed. It has

litigated numerous cases to enforce the ADA's integration mandate and the *Olmstead* decision, has engaged in policy advocacy to promote the availability of services that enable individuals with disabilities to live in their own homes, and has served as a resource for lawyers and advocates addressing these issues across the country. It has also litigated cases concerning the due process rights of individuals subject to civil commitment proceedings, including *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

The **American Association of People with Disabilities ("AAPD")** works to increase the political and economic power of people with disabilities. A national cross-disability organization, AAPD advocates for full recognition of the rights of over 56 million Americans with disabilities.

The **Association of University Centers on Disabilities ("AUCD")** is a nonprofit membership association of 130 university centers and programs in each of the fifty States and six Territories. AUCD members conduct research, create innovative programs, prepare individuals to serve and support people with disabilities and their families, and disseminate information about best practices in disability

programming, including community integration and prevention of needless institutionalization.

The **National Council on Independent Living ("NCIL")** is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of centers for independent living, state independent living councils, people with disabilities and other disability rights organizations. NCIL's mission is to advance the independent living philosophy and to advocate for the human rights of, and services for, people with disabilities to further their full integration and participation in society

NOTICE

Counsel in this case drafted this brief pro bono, without any charge or reimbursement, on behalf of The Judge David L. Bazelon Center for Mental Health Law, the American Association of People with Disabilities (AAPD), the Association of University Centers on Disabilities (AUCD), and the National Council on Independent Living ("NCIL"). Neither the Committee for Public Counsel Services (CPCS) nor any of its employees read or commented on this brief in draft or

influenced it in any way. CPCS is submitting its own brief in this matter.

SUMMARY OF ARGUMENT

Amici advocate for the rights of people with disabilities, and submit this brief in support of M.C.'s argument that he was entitled under the Americans with Disabilities Act ("ADA") to have his civil commitment hearing in a courtroom, not the hospital where he was already confined. The ADA forbids the unnecessary isolation and segregation of people with disabilities, directing they should ordinarily not be barred from participating in public life just like every other citizen does. As the Supreme Court has found, segregating people with disabilities "perpetuat[es] unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Olmstead v. L.C.*, 527 U.S. 581, 583 (1999).

In Massachusetts, civil commitment proceedings are the only type of judicial proceedings that are not routinely held in courthouses. Rather, the governing standards provide that civil commitment hearings are "normally" to be held in the hospital where the respondent is already being held. District Court Administrative Regulation No. 4-79, *Promulgation of Standards of Judicial Practice, Civil Commitment and*

Authorization of Medical Treatment for Mental Illness at 4.00(Dec. 2011) [hereinafter "*Standards of Judicial Practice*"]. Such a policy, which puts the burden on the respondent to convince a judge that he or she deserves a courtroom hearing, violates the ADA's requirement of integration. Requiring hearings in hospitals perpetuates the unwarranted assumptions that the *Olmstead* Court warned against, reinforcing assumptions that the respondent belongs in a hospital, cannot fully participate in the adjudication of his or her own freedom and medical care, and is thus "incapable or unworthy of participating in community life." 527 U.S. at 583. Conducting a hearing about whether to continue institutional confinement in the very institution where the person would be confined, with the respondent in the role of "patient," also may lead to unconscious biases in decision making towards continuing that confinement. And finally, on a very basic level courtrooms are where judicial decisions in our society take place, and people with disabilities deserve and are entitled to the dignity and respect of a courtroom hearing just like everyone else.

ARGUMENT

In the ADA, Congress established an "integration mandate" – directing that people with disabilities cannot be needlessly segregated and isolated from our communities, including our judicial system, because of those disabilities. After considering weeks of testimony and an extensive fifty-state study, Congress found that "society has tended to isolate and segregate individuals with disabilities," and such isolation and segregation continue to be "a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). Such segregation extends to "access to public services," Congress found, and includes "overprotective rules and policies." *Id.* § 12101(a)(3), (5). Congress set a goal, therefore, of assuring individuals with disabilities would have "equality of opportunity" and "full participation," to guarantee their "right to fully participate in all aspects of society." *Id.* § 12101(a)(1), (7).

In Title II of the law, Congress expressly forbade any "department, agency, . . . or other instrumentality of a State" from excluding a qualified individual with a disability, by reason of that disability, from "participation in" or denial of the

benefits of "the services, programs, or activities of a public entity." *Id.* § 12131(a)(1), 12132. The regulations under Title II of the ADA, similarly, direct that "[a] public entity shall administer services, programs, and activities ***in the most integrated setting appropriate*** to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (emphasis added). The "most integrated setting appropriate" means "a setting that enables individuals with disabilities to interact with non-disabled persons ***to the fullest extent possible***." *Id.* pt. 35, App. A, p. 450 (emphasis added). Moreover, the public entity must "make reasonable modifications" to accomplish the integration mandate, unless those modifications would "fundamentally alter" the nature of the service, program, or activity. *Id.* § 35.130(b)(7).

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court confirmed the ADA's promise of societal inclusion. In holding that the plaintiffs, two institutionalized women with mental illnesses, had the right to appropriate community-based care, the Court vividly described the invidiously dehumanizing and stigmatizing effect of segregating and isolating

individuals based on their disabilities. There are two principal harms caused by excluding people with disabilities from community life, the Court explained. First, such isolation "perpetuat[es] unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Id.* at 583. Indeed, the Court compared this stigma with the "stigmatizing injury often caused by racial discrimination," which the Court had previously found was "one of the most serious consequences of discriminatory government action. *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)). Second, unnecessary isolation "diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id. See also Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring) (ADA is intended "to advance equal-citizenship stature for person with disabilities").

The judicial process is one of the areas in which equal access to and integration of people with disabilities is critical. For many people, a trip to court – for a marriage, a divorce, an adoption, a

criminal charge or civil suit, or a civil commitment hearing – is an important and life-changing event, for good or for bad. When Congress passed the ADA, barriers faced by people with disabilities to full inclusion in the judicial process were a large part of the problem it intended to address. *See Lane*, 541 U.S. at 525 (finding that a "pattern of unconstitutional treatment in the administration of justice" was part of the "backdrop of pervasive unequal treatment in the administration of state services and programs" underpinning the ADA). The Court cited studies before Congress and cases in which people with disabilities were excluded from courts and judicial proceedings both by physical barriers and because of unwarranted judgments that their disabilities (developmental, hearing, vision) made it impossible for them to participate in such proceedings as witnesses or jurors. *Id.*

The importance of judicial proceedings, and of full access to them for people with disabilities along with all other citizens, has been repeatedly underscored in a number of contexts. As the Court explained in *Lane*, the ADA's integration mandate exists not only to ensure that people with

disabilities are not excluded from court process because of their disabilities, but also to enforce a number of related rights guaranteeing full access to courts. Most pertinent here, "[t]he Due Process Clause . . . requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. *Lane,* 541 U.S.at 523 (citing and quoting *Boddie* v. *Connecticut,* 401 U.S. 371, 379 (1971), and *M. L. B.* v. *S. L. J.,* 519 U.S. 102 (1996)).

Moreover, as the *Lane* Court made clear, the State may need to take affirmative steps to ensure that people have the required "meaningful access" to judicial proceedings. 541 U.S. at 533 (citing the need to provide counsel, waive filing fees, and the like). It explained that "ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts." *Id.* This principle applies equally under the ADA and its requirement that the State make "reasonable accommodations" to ensure that people with disabilities are not excluded from access to judicial proceedings. *Id.*

Here, however, the ***only*** judicial proceedings in Massachusetts state courts that are ***not*** routinely held in courtrooms are civil commitment hearings, as the standards on which the State relies expressly concede. Massachusetts' Standards for civil commitment proceedings provide that "***[u]nlike virtually all other judicial matters***," commitment hearings should "normally" be conducted in hospitals, not courthouses. *Standards of Judicial Practice* at 4.00, Commentary (emphasis added).

A policy that hearings should be "normally" conducted at a hospital, putting the burden on the litigant to demonstrate he or she is entitled to a deviation from the policy to have a hearing in a courtroom, improperly ignores the ADA's integration mandate. Under that mandate, the State is required generally to include, rather than exclude, people with disabilities in all aspects of State-administered programs – including the opportunity to have their civil commitment proceedings in a courtroom, not in a hospital or institution, if circumstances allow. Moreover, the State must make "reasonable accommodation" to allow courtroom hearings to occur. A State's justification cannot simply be that having

proceedings in the courtroom, rather than a hospital, will be more costly and less convenient. "[O]rdinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts." *Lane*, 541 U.S. at 533.

There are a number of reasons why, if the litigant prefers and circumstances allow, a hearing in a courtroom rather than a hospital is required under the ADA. First and foremost, a courtroom is where and how legal issues in our society are adjudicated and resolved. People with disabilities have a right under the ADA as well as basic due process guarantees to have their legal issues resolved in a courtroom when possible just like every other U.S. resident. The importance of the civil commitment hearing, which can result in a "massive deprivation of liberty," forced treatment, and many other adverse consequences, underscores this right. *See Humphry v. Cady*, 405 U.S. 504 (1972).

Second, requiring civil commitment hearings to be held in an institution rather than a courtroom perpetuates exactly the kind of "unwarranted assumptions that persons so isolated are incapable or

unworthy of participating in community life" that the *Olmstead* Court warned about. 527 U.S. at 583. The Supreme Court has found it "indisputable" that "commitment to a mental hospital "can engender adverse social consequences to the individual" and "[whether] we label this phenomena 'stigma' or choose to call it something else ... we recognize that it can occur and that it can have a very significant impact on the individual." *Vitek v. Jones*, 445 U.S. 480, 492 (1980) (citing *Addington v. Texas*, 441 U.S. 418, 425-426 (1979)). The assumption that an individual who is fighting commitment to a mental hospital "normally" must have his or her hearing in that same hospital plays into this stereotype.

The trial judge's comments on the record in this case show how this kind of unwarranted assumption may operate even in the best-intentioned of people. The judge stated that "I, as a member of the judiciary of the Commonwealth of Massachusetts, feel that these hearings should not be conducted at a courthouse." Addendum to M.C.'s Br, Decision at 18. He explained that litigants in civil commitment hearings were "heavily medicated" and could have "a seizure" on the way to the courthouse or in the proceeding itself.

Id. He further expressed a concern about "where would the patient be kept? Under what circumstances would the patient be kept?" *Id.*

Without suggesting in any way that the trial judge intended to express any discriminatory intent or animus, that statement illustrates precisely the kind of "unwarranted assumption" *Olmstead* was concerned with. The message is that a person who is in a hospital because of a mental illness is incapable of being safely transported from the hospital to the courthouse and is further incapable of participating appropriately and peacefully in judicial proceedings once he or she is there. That is the essence of the kind of generalized and unwarranted assumption that Congress found that society has made for far too long about people with disabilities. It is also without evidence to back it up, as the judge acknowledged in the same statement that there ***are*** instances in which civil commitment hearings are held in courthouses, when convenience dictates. *Id.* at 19.[1]

[1] Moreover, the trial court judge appears to have assumed incorrectly that M.C. consented to having his hearing held in the hospital (Addendum to M.C.'s Br., Decision at 20), which is not the case. A.028 (affidavit of M.C.).

Commentators have likewise recognized the potentially stigmatizing effect of holding civil commitment hearings in institutions rather than courthouses: Hospital hearings, "'with the patient dressed in hospital garb, may introduce an element of unfairness,' reinforcing the idea 'that the individual should be in the hospital, and [reducing] his already shaken self-confidence.'" *See Developments in the Law – Civil Commitments of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1281 n. 107 (Apr., 1974). *Accord* John Parry, 4 *Treatise on Health Law* ¶ 2004(e)(i) ("The arguments against treating the hearing as a medical rather than a legal proceeding have been much more persuasive, and remain so," so "[a] number of jurisdictions mandate that all commitment hearings be held in a regular courtroom."); *CPCS Mental Health Proceedings in MA: A Manual for Defense Counsel (MCLE)* § 3.3.5 (a "major concern" of many respondents "is to be respected, heard, and taken seriously by the one institution that can be trusted to be impartial and fair: the court.").

Third, requiring civil commitment hearings to be held in institutions rather than regular courtrooms raises a danger of prejudice to litigants given the

specific nature of the civil commitment proceeding. The civil commitment hearing determines whether an individual stays in an institution. Requiring a hearing about whether a person stays in an institution to occur ***in the institution itself*** raises the potential that the setting and the patient's status as an institutionalized individual might put a thumb on the scale towards a conclusion that institutionalization is required. The factfinder in such a hearing will see a litigant who is already hospitalized, in a hospital setting, and with the best will in the world may nonetheless be predisposed to find that continued hospitalization is appropriate. Indeed, the State's standards for civil commitment hearings acknowledge the potential for such bias based on the trappings of a hospital hearing: "Sufficient security is essential at commitment hearings. The court must not, of course, draw any adverse inferences from extensive protective measures or perceived staff concerns, but must base its commitment decision solely on the evidence presented at the hearing." *Standards of Judicial Practice* at 4.00, Commentary.

The little empirical evidence that is available confirms that when a civil commitment hearing is held

in a courthouse, the results tend to be better for the patient. One study of civil commitments in Virginia concluded that "[w]hen the hearing was held at a location other than the hospital, involuntary commitments for inpatient treatment tended to occur less often." *A Study of Civil Commitment Hearings Held in the Commonwealth of Virginia During May 2007*, A Report to the Commission on Mental Health Law Reform, at 20 (June 30, 2008). For instance, twenty-five percent of the proceedings held in courthouses were dismissed, as opposed to 14.7% of hearings held in hospitals, and involuntary commitments to in-patient treatment occurred in 45.8% of the courthouse hearings as opposed to 50.5% of the hospital hearings. *Id.* at 21 & Fig. 19.

Psychological research (and common sense) further confirms that as humans, we tend to see people in the roles that we are told that they fill. This is known as the "framing effect" – a "cognitive bias[] in which people react to a particular choice in different ways depending on how it is presented." *See* https://en.wikipedia.org/wiki/Framing_effect_(psychology). The classic example is that people tend to choose differently when a choice is framed

positively than if it is framed negatively – for instance when presented with a choice between a medical treatment as having a 30% chance of success (people choose to proceed) or a 70% chance of failure (people choose not to proceed). There is research showing that, although highly educated and informed people are less susceptible to the framing effect and other cognitive biases, it can affect decision making by many professionals, including doctors, real-estate appraisers, engineers, accountants, options traders, military leaders, psychologists, and even lawyers and judges. *See* Guthrie et al., *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*¸ Cornell Law Faculty Publications, Paper 862 (2002), at 44 (finding after a survey of 167 magistrate judges that common cognitive biases, including the framing effect, "influenced their decision-making process"). *Cf.* Chen *et al.*, *Decision-Making under the Gambler's Fallacy*: *Evidence from Asylum Judges, Loan Officers, and Baseball Umpires*, National Bureau of Economics Working Paper No. 22026 (Feb. 2016) (finding "consistent evidence of negative autocorrelation in decision-making that is unrelated to the merits of the cases considered in three separate high-stakes field

settings," including judges' decisions on whether to grant asylum to refugees). Here, when a factfinder tries a civil commitment hearing in a hospital or institution, with the litigant pre-assigned the role of "patient," the framing effect may slant decision-making towards a finding that the respondent should continue to be a patient through a civil commitment.

The State's own judicial Standards providing that civil commitment hearings should "normally" be held in hospitals confirm that all three of these potential harms exist. The standards go to great lengths to instruct that the setting for a hospital hearing must be as "courtroom-like" as possible. Hospital hearings "must be held in rooms of adequate size and appropriate condition for a dignified and impartial judicial hearing," and must "elicit the customary respect accorded court proceedings and parties before the court." *Standards of Judicial Practice* at 4.00, Commentary. This is because, as the Commentary explains, the neutrality and formality of a court setting is important:

> the hearing room must reflect and be conducive to the dignity of the court and the formality and impartiality of judicial proceedings. The physical setting must not convey, especially to the respondent, any suggestion that the hearing

> is merely an administrative proceeding in which the court is somehow subordinate to the facility's authority rather than a ***neutral and independent guardian of constitutional rights***.
>
> The purpose of such formality is not to inhibit the participants, but to remind them that a formal hearing is being conducted. ***Informal settings in mental health proceedings may easily foster other procedural informalities which are unacceptable in court proceedings***. The court should not permit participants to dispense with proper courtroom practice because they are outside the traditional physical setting of a courtroom.

Id. Commentary (emphasis added). This discussion confirms that the formal and dignified and above all else ***neutral*** courtroom setting is important in a civil commitment hearing for a whole host of reasons, including the respondent's dignity and faith in the system. What it doesn't do is justify requiring litigants to have civil commitment hearings in hospitals rather than courtrooms in appropriate circumstances.[2]

The *amicus* brief filed by Aaron Needle and others confirms that the concerns set out above are

[2] The standards further explain that the judge should give serious consideration to respondents who ask for their hearing at a courthouse rather than the hospital, *id. Commentary*, further confirming the importance of a courthouse setting, but also improperly putting the burden on the respondent to ask for and prove he or she is entitled to a courtroom hearing.

absolutely real for people who have actually had or may be subject to civil commitment hearings. The people interviewed for that brief described hospital hearings with "a palpably un-public atmosphere" in which all the litigants but the respondent were "on their own turf." Needle *Amicus* Br. at 17-18. They repeatedly voiced concerns about the biasing effect of hearings being in hospitals, i.e., "If they see you in the hospital they'll think you're already there for a reason"; "Everyone else is dressed up – so you stand out as the crazy one"; "there is an inherent bias in seeing people in a hospital setting …" *Id.* at 20, 28, 31. They described "the humiliation of swearing an oath in a hospital gown and non-skid socks." *Id.* at 28. They objected to the message of non-inclusion sent by hospital hearings: A courtroom hearing "gives the person the respect they deserve and makes it a formal proceedings that indicates the very serious nature of such a restriction of … liberty." *Id.* at 30. They described concerns with access to the hearing space being controlled by the hospital, making it difficult to bring in third-party witnesses. *Id.* at 18. And even if they might prefer a hospital

setting, they uniformly wanted a voice in what the setting would be. *Id.* at 37.

Finally, neither of the State's principal justifications for its policy of normally holding civil commitment hearings – convenience and the safety of the patient and others – in hospitals has merit. It may well be more convenient for doctors and staff to have civil commitment proceedings in hospitals, but the ADA requires people with disabilities to be included, not excluded, from the judicial process just like everyone else. It further requires "reasonable accommodation" to ensure inclusion, and "ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts." *Lane*, 514 U.S. at 533. The trial judge's concerns about the safety of the respondent (*see supra* at 12-13, expressing concern about "heavily medicated" respondents who may have seizures) may apply to some individual respondents, but are far from sufficient to justify a blanket decision or policy to hold hearings in hospitals. In fact, the trial judge commented that civil commitment hearings were often held in courtrooms when that was more convenient for

participants, Addendum to M.C.'s Br., Decision at 19, and the judicial standards provide that a respondent's request for a courtroom hearing should be considered very seriously, *Standards of Judicial Practice* at 4.00, Commentary. A policy of requiring hospital hearings based on generalized and vague concerns for patient safety is exactly the kind of "overprotective rules and policies" that Congress found continue to contribute to the segregation of people with disabilities from public life. 42 U.S.C. § 12101(a)(3), (5).

CONCLUSION

For all the reasons stated above, *amici* respectfully urge this Court to hold in favor of M.C. and make clear that people with disabilities are entitled in appropriate circumstances to have their civil commitment hearings in a courtroom.

Respectfully submitted,

/s/ Mark I Bailen
Mark I. Bailen
BBO #636825
Elizabeth B. McCallum
BAKER & HOSTETLER LLC
1050 Connecticut Ave. NW
Suite 1100
Washington, DC 20036
202-861-1500
mbailen@bakerlaw.com
emccallum@bakerlaw.com

CERTIFICATE OF COMPLIANCE
WITH RULES OF COURT PURSUANT TO RULE 16(K)

I, Mark Bailen, certify that the Brief of Amicus Curiae complies with the rules of this Court that pertain to the filing of amicus briefs including, but not limited to, M.R.A.P. 16(h) and 20.

Respectfully submitted

/s/ Mark I. Bailen
Mark I. Bailen
BBO #636825
Elizabeth B. McCallum
BAKER & HOSTETLER LLC
1050 Connecticut Ave. NW
Suite 1100
Washington DC 20036
202-861-1500
mbailen@bakerlaw.com
emccallum@bakerlaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have served Suleyken D. Walker, Counsel for the State, and Debra Kornbluh, Counsel for M.C., with two copies of this brief by U.S. Postal Service on September 17, 2018.

/s/ Mark I. Bailen
Mark I. Bailen
BBO #636825
Elizabeth B. McCallum
BAKER & HOSTETLER LLC
1050 Connecticut Ave. NW
Suite 1100
Washington DC 20036
202-861-1500
mbailen@bakerlaw.com
emccallum@bakerlaw.com