ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7057

MARKELLE SETH,

Appellant,

v.

DISTRICT OF COLUMBIA, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF DISABILITY RIGHTS DC/UNIVERSITY LEGAL SERVICES, QUALITY TRUST, AND WASHINGTON LAWYERS COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

Appellant is Markelle Seth. Appellees are the District of Columbia, the District of Columbia Department of Disability Services, and its Director, Andrew Reese, in his official capacity.

B. Rulings Under Review

The rulings under review are the order of September 28, 2018 (ECF 28) granting the defendants' motion to dismiss, and the order of May 8, 2019 (ECF 36), denying the timely motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59.

C. Related Cases

This civil action is related to the criminal case in which Mr. Seth was found permanently incompetent to stand trial. *United States v. Seth*, 1:14-mj-00608-BAH-GMH-1 (D.D.C.).

CORPORATE DISCLOSURE CERTIFICATE

University Legal Services is a non-profit, tax exempt organization incorporated in the District of Columbia. University Legal Services has no parent corporation and no publicly held company has 10% or greater ownership. Disability Rights DC is a division of University Legal Services.

Quality Trust for Individuals with Disabilities (Quality Trust) is a non-profit, tax-exempt organization incorporated in the District of Columbia. Quality Trust has no parent corporation and no publicly held company has 10% or greater ownership.

Washington Lawyers Committee for Civil Rights and Urban Affairs is a non-profit, tax-exempt organization incorporated in the District of Columbia. It has no parent corporation and no publicly held company has 10% or greater ownership.

D.C. CIRCUIT RULE 29(d) CERTIFICATE

Amici understand that other organizations intend to file briefs in support of Appellant. This brief addresses the capability of the District of Columbia agencies to assume responsibility for the care, custody and treatment of Appellant, as contemplated by 18 U.S.C. § 4246(d), drawing on the experience of *amici* with the

operation of the local system of care for persons with intellectual disabilities. My understanding is that other anticipated *amicus* briefs will address different topics: the *Olmstead* standard; the appropriateness of prison confinement for Mr. Seth; and the academic research on the appropriate treatment of persons with intellectual disabilities. A separate brief is necessary to present information specific to the District's ability to provide custody appropriate to risks that Appellant may present if released from federal custody in light of the federal commitment order.

/s/ *David A. Reiser*
David A. Reiser

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

GLOSSARY

ADA Americans with Disabilities Act

DBH District of Columbia Department of Behavioral Health

DDA District of Columbia Developmental Disabilities Administration

DDS District of Columbia Department on Disability Services

INTERESTS OF *AMICI CURIAE*

Amici are District of Columbia non-profit corporations responsible for advocacy on behalf of persons with intellectual disabilities, under the District's settlement of institutional reform litigation, under federal law, and as part of a mission to promote equality and civil rights. *Amici* are knowledgeable about the services available in the District of Columbia to provide care, custody and treatment to persons with disabilities who have been charged with criminal offenses and might present a risk to the community if released without adequate community supervision. The extensive experience of *amici* with the array of services available to persons with intellectual disabilities under the auspices of the District of Columbia Department on Disability Services (DDS) in particular supports the allegations in Mr. Seth's amended complaint that DDS is fully capable of providing appropriate care, and that Mr. Seth's continued confinement in a federal prison facility is unnecessary and therefore discriminatory.

Disability Rights DC is a division of **University Legal Services** and serves as the federally-mandated Protection and Advocacy Program for D.C. residents with disabilities. *See* 42 U.S.C. §§ 15043(a) (establishing Protection and Advocacy programs to advocate for individuals with developmental disabilities as a condition for receiving federal funding), 10802 (same for individuals with mental illness). Through individual representation, litigation and policy initiatives,

Disability Rights DC advocates for the rights of D.C. residents with disabilities to receive quality services and supports in their communities and to be free from abuse, neglect and discrimination. Disability Rights DC has represented hundreds of individuals who receive services from the D.C. Department on Disability Services and was class counsel in the longstanding *Evans v. Bowser* class action litigation. *See* 87 F. Supp. 3d 1 (D.D.C. 2015).

Quality Trust for Individuals With Disabilities (Quality Trust). Quality Trust is an independent, non-profit advocacy organization focused on improving the lives of children and adults with disabilities and their families in the District of Columbia and beyond. Quality Trust was founded as part of a settlement in *Evans v Bowser*, the class action lawsuit that closed Forest Haven, the District's institution for people with intellectual and developmental disabilities. Quality Trust was incorporated, and its Board of Directors was appointed by the Mayor in 2001. Quality Trust works with and on behalf of people with developmental disabilities through its monitoring, lay advocacy, and legal services programs. Its monitoring program focuses on people receiving supports and services from the Developmental Disabilities Administration (DDA) of the D.C. Department on Disability Services (DDS). Quality Trust monitors visit people where they live and spend their days to collect data and ensure that the required supports are in place.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs is a non-profit civil rights organization established to eradicate discrimination and poverty by enforcing civil rights laws through litigation and public policy advocacy in the District of Columbia, Virginia and Maryland. In furtherance of this mission, The Washington Lawyers' Committee represents some of the most vulnerable persons and populations. The Washington Lawyers' Committee has an active docket of cases and matters related to the conditions of confinement of persons with mental illness and intellectual disabilities in prisons, jails and hospitals.

All parties have consented to the filing of this brief, which is therefore authorized by Rule 29(a)(2) of the Federal Rules of Appellate Procedure.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress intended commitment to a federal prison facility under 18 U.S.C. § 4246 to be a last resort for persons who have been found permanently incompetent to stand trial for a federal offense and dangerous, if and only if a State (including, for these purposes, the District of Columbia) will not assume responsibility for the person's care custody and treatment despite reasonable

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

efforts by the Attorney General to cause the State to assume that responsibility. Federal commitment is not a reason for a state to decline to provide care, custody or treatment to one of its residents.

Yet, in the face of an amended complaint alleging violation of the District's obligations under the Americans with Disabilities Act and the Rehabilitation Act supported by declarations, expert reports and other exhibits, the district court dismissed Markelle Seth's allegations of discrimination, conclusively attributing that decision instead to "the dangerousness finding by the warden at FMC Butner and by the Eastern District of North Carolina." Mem. Op., JA 60 (May 8, 2019); Mem. Op., JA 37 (Sept. 28, 2018) (earlier ruling referring to "FMC Butner Warden's Certificate of Dangerousness"). But those determinations by the warden and the district court with territorial jurisdiction over Federal Medical Center Butner cannot explain away the District's refusal to take custody of Mr. Seth, because the District's array of services for persons with intellectual disabilities is designed to, and does, provide care, custody and treatment for people like Mr. Seth who would be a danger without intensive supervision and support. Moreover, there is nothing inconsistent with the district court's determination in the federal commitment case that Mr. Seth would be a danger if he were released into the

community without support and concluding that he would not be danger under the program developed by the District's own experts and contractors.[2]

Thanks in no small measure to the long-term oversight of the federal courts in the *Evans* litigation,[3] the District of Columbia now has a system that is capable of providing effective care, custody and treatment for persons with intellectual disabilities. The District can, and often does, provide 1:1 and even 2:1 or 3:1 staffing when needed as part of an individualized behavioral support plan to assure community safety. The allegations of the amended complaint and the impressive and uncontradicted array of expert reports attached to and incorporated in the amended complaint preclude accepting the federal dangerousness finding as a basis for the District's refusal to accept state custody of Mr. Seth.

The District's reliance on a legally and factually invalid rationale for refusing to provide services to Mr. Seth strengthens his case for discrimination, because "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional

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[2] *See* Tr., *United States v. Seth*, No. 5:17-HC-02090-BR at 22 (May 24, 2018) (noting Mr. Seth's personal lack of release plans); *id.* at 25 (understanding "that there is no state placement available" for Mr. Seth); *id.* at 44 (government requesting the court to find "that state placement is not available in this case"); *id.* at 46 (judicial finding "that state placement is not available").

[3] *See, e.g., Evans v. Williams*, 206 F.3d 1292 (D.C. Cir. 2000); *Evans v. Fenty*, 701 F. Supp. 2d 126 (D.D.C. 2010); *Evans v. Bowser*, 87 F. Supp. 3d 1 (D.D.C. 2015).

discrimination, and it may be quite persuasive." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (analyzing employment discrimination under the ADEA). "In an appropriate case, '[t]he factfinder's disbelief of the reasons put forward by the defendant' will allow it to infer intentional discrimination.'" *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). The district court was obligated to accept as true the discrimination allegations of the amended complaint—not the District's contrary explanation—for purposes of deciding whether it was subject to dismissal under Rule 12(b)(6). But even if the district court had been weighing the District's proffered explanation against evidence of discrimination on summary judgment under Rule 56 (as in *Aka*) or on a motion for judgment as a matter of law under Rule 50 (as in *Reeves*), dismissal would be improper when the District's explanation is factually and legally invalid and therefore supports an inference of discrimination.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING THE AMENDED COMPLAINT AS FUTILE BECAUSE OF THE FEDERAL COMMITMENT.

A. The Amended Complaint Sufficiently Alleged Discrimination in Violation of the ADA.

The amended complaint Mr. Seth sought to file (JA 289-363) (Oct. 26, 2018) alleged:

- "[The responsible agency within DDS] DDA is able to serve individuals whose challenges include physically aggressive behaviors, risk of absconding, and intensive medical and mental health needs. While most individuals served by DDA do not require round-the-clock or one-to-one supervision, DDA can and does provide this level of service to a significant number of individuals." Am. Compl. at ¶ 111.

- "DDA has a virtually unlimited ability to select the environment and staffing level required by the individual's needs." *Id.* at ¶ 112.

- Through coordination between DDS and the Department of Behavioral Health (DBH) the District "provides supervised community-based services to individuals with co-existing diagnoses of mental illness and intellectual disability who have faced similar criminal charges and whose behavioral challenges and corresponding risks are at least equivalent to those posed by [Mr. Seth]. . . . However, DDS refuses to provide such services to individuals, such as [Mr. Seth], who have only a diagnosis of intellectual disability." *Id.* at ¶ 113.

- The District's network of providers of services for persons with intellectual disabilities "is well-prepared to address, and has a track record of serving,

> individuals who present risks similar to and greater than [Mr. Seth]." *Id.* at ¶ 114.

The amended complaint further alleged that the District's failure to provide services to Mr. Seth was a result of "discrimination against [him] due to his intellectual disability." *Id.* at ¶ 127; *see also* ¶¶ 128, 164-65. Those allegations are supported by dozens of pages of reports from experts in the field which are attached to and incorporated into the amended complaint by reference. The proposed amended complaint as a whole amply and with far more specificity than Fed. R. Civ. P. 8(a) requires, alleges that the District *could* provide Mr. Seth with the "custody, care and treatment" in the place of his domicile called for by 18 U.S.C. § 4246(d), but refuses to do so because of his disability. Am. Compl. at ¶ 149 n.17. *See Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) (pleading standard for discrimination under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) framework). That is sufficient to state a disability discrimination claim.[4] *See* Appellant's Opening Br. at 6-7, 33, 43-45.

[4] A disability discrimination claim does not require a comparison of all persons with disabilities on the one hand and all those without disabilities on the other. It is enough that the District is excluding *a person* with a disability from a program without statutorily-recognized grounds for doing so. *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 598-600 (1999); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273-74 (2d Cir. 2003). As Judge Easterbrook noted in *Amundson v. Wisconsin*, 721 F.3d 871, 874 (7th Cir. 2013): "'discrimination' as used in § 12132 includes

B. The Federal Commitment Does Not Preclude Mr. Seth From Receiving Care, Custody and Treatment by the District.

The District of Columbia did not contend that it could not provide appropriate care for Mr. Seth if he was placed in the District's custody rather than in a federal prison facility. Nor did the District dispute that it provides care, custody and treatment to many individuals who, like Mr. Seth, have been found incompetent to stand trial on serious charges. Rather, the District claimed that the federal commitment under 18 U.S.C. § 4246 somehow supplanted the District's authority to provide services to Mr. Seth. JA 202 (claiming that Mr. Seth does not meet the requirement of District residency); *id.* at 203 (claiming that what distinguishes Mr. Seth is being committed to a federal facility and that Mr. Seth would be provided services "in the most integrated setting suitable to his needs" "[u]pon his release and return to the District"); *id.* at 519 ("the District has no legal obligation to provide services to plaintiff or assume custody, care and responsibility for him because he is committed to the U.S. Attorney General").

*** undue institutionalization of disabled persons, no matter how anyone else is treated." (citation omitted). *Accord Davis v. Shah*, 821 F.3d 231, 261 (2d Cir. 2016). This Court recently described the deinstitutionalization requirement in a decision applying that requirement to a class of persons with physical disabilities in *Brown v. District of Columbia*, 928 F.3d 1070, 1077 (D.C. Cir. 2019) ("because 'unjustified isolation of persons with disabilities is a form of discrimination,' the ADA and its implementing regulations 'require placement of persons with mental disabilities in community settings rather than in institutions' under certain circumstances") (internal citation omitted).

The District's position that it cannot take custody of Mr. Seth because of the federal commitment stands the federal statutory scheme on its head. Federal commitment is intended to be a last resort to be invoked if the State of the defendant's domicile cannot provide care, custody and treatment. The law expressly requires the Justice Department to make efforts to arrange for state rather than federal treatment: "[t]he Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility." There is no plausible reading of section 4246(d) as displacing the District's authority to provide care for a defendant who was found incompetent to stand trial on a federal charge and was therefore subject to federal commitment when the state of the defendant's domicile declines to assume responsibility for his custody.

The primary responsibility of the District rather than the federal government for Mr. Seth's care, custody and treatment under section 4246 itself is reinforced in this case by the fact that Mr. Seth was originally charged in D.C. Superior Court with a local D.C. Code offense for which Mr. Seth would have been committed under local District of Columbia law if he was found incompetent to stand trial.[5] That charge remains pending in all meaningful respects, notwithstanding that the United States Attorney dismissed the Superior Court charges without prejudice, because that was done with the intention of pursuing the local charges in district

[5] *See* D.C. Code § 7-1303.4.

court if Mr. Seth were found competent or restored to competency.[6] *See* D.C. Code § 11-502(3) (district court has criminal jurisdiction over any local offense "joined in the same information or indictment with any Federal offense."). The unique authority of the United States Attorney for the District of Columbia to shift cases from "state" to federal court does not alter the primacy of state custody under section 4246 for federal criminal defendants who cannot be brought to trial because of incompetency. Congress expressly made federal commitment even for purely federal offenses an option only when there was no state option. Here, the United States Attorney's Office effectively transferred the "state" offense with which Mr. Seth was originally charged at the same time it filed a complaint alleging a federal offense. It would be inconsistent with the Justice Department's obligation under section 4246(d) to encourage the state to assume responsibility to treat the United States Attorney's administrative transfer of local charges from Superior Court to District Court as diminishing the role of the District of Columbia in providing care, custody and treatment to Mr. Seth, much less altogether precluding the District from doing so.

[6] The prosecutor relied on the local charges as support for pretrial detention in federal court and explicitly stated that the government intended to pursue the local charges in federal court if Mr. Seth was restored to competency. *United States v. Seth*, Cr. No. 14-608, Tr. of Initial Appearance at 5 (Oct. 16, 2014).

C. The District Can Provide Appropriate Care, Custody and Treatment.

The District has not claimed it cannot provide care, custody and treatment for Mr. Seth that would require the federal government to terminate his commitment, for good reason. It can. The District emerged from the aftermath of the *Evans* litigation with a highly capable system for providing individualized services to persons with intellectual disabilities without needlessly confining them to institutions, as the District had done for decades. Although the system is no longer under federal court supervision, it continues to receive close scrutiny from *amici* Quality Trust and University Legal Services.[7] The District's capacity to serve persons with intellectual disabilities includes the ability to provide close supervision to residents who might otherwise present a risk, including defendants found incompetent to stand trial on serious criminal charges like Mr. Seth.

[7] Disability Rights DC, a division of *amicus* University Legal Services, "is the federally-designated protection and advocacy program for people with disabilities in the District of Columbia and is the Client Assistance Program under the Rehabilitation Act." http://www.uls-dc.org/protection-and-advocacy-program/disability-rights-dc/. It exercises responsibility under a number of federal laws to advocate for persons with disabilities including specifically persons with intellectual disabilities. Quality Trust was established and funded as part of the settlement of the *Evans* litigation with the responsibility to monitor the quality of the services the District provides for persons with intellectual disabilities. *See* Consent Order, *Evans v. Williams*, No. 76-293, ECF 313 (Dec. 29, 1999) (setting out mission, funding and access to information of Quality Trust).

Indeed, at one time the District planned to provide services to Mr. Seth and its own expert determined that a community program was likely to be effective. JA 310-19, ¶¶ 53-78. Laura Nuss, the former director of the District's Department on Disability Services (DDS), submitted a declaration in support of Mr. Seth's amended complaint. She noted that, "[t]he District through DDS is already successfully serving people with the most complex needs, including those accused of or convicted of sexual offenses." Decl. of Laura Nuss, JA 366 at ¶ 4. DDS uses a federal Medicaid waiver for Home and Community Based Services (HCBS) that "is designed to serve individuals with extraordinary needs." *Id.* at ¶ 5. DDS provides services to "a few individuals who had a history of sexual offenses in community-based settings in the District" and "a few individuals who had been found incompetent to stand trial who were committed to DDS." JA 370 at ¶ 14. DDS also worked with another District agency to provide care to persons with both mental illness and intellectual disability "who had been long-terms patients of St. Elizabeth[s] Hospital, under civil or criminal commitment," including some who "had significant forensic histories and/or a history of violent behavior requiring careful, person-centered planning to ensure a successful transition to a safe setting for the individual and their community." *Id.* at ¶ 15 DDS even had resources to place people with intellectual disabilities in more secure out-of-state facilities in the rare situation where its array of community-based services were insufficient.

JA 370-71 at ¶¶ 16-17. Former DDS-Director Nuss opined that "[t]he plan developed by Wholistic [to care for Mr. Seth] is comprehensive and includes services from a psychiatrist, a therapist and behavior specialist in addition to intensive staff supervision. The District also has available crisis intervention services should that be necessary, although Mr. Seth's clinical profile suggests that well trained staff should be successful in their own right." JA 372 at ¶ 21. Her bottom-line conclusion: "Providing appropriate, closely supervised, residential, vocational and therapeutic services in a community setting can be accomplished while assuring the safety of the community in the District." JA 373 at ¶ 25.

Likewise, Nancy Thaler, the former Deputy Secretary of Pennsylvania's Office of Developmental Programs agreed that "state systems, such as [DDS] can serve people with IDD and complex behavioral needs, including problematic sexual behaviors, such as Markelle Seth, in a fashion that allows them to live successfully in the community while simultaneously ensuring community safety." Decl. of Nancy Thaler, JA 380 at ¶ 3. Drawing on research concerning the disproportionate sexual abuse of persons with intellectual disabilities, the ensuing trauma, and "confusion about what is appropriate sexual behavior," (JA 387 at ¶ 21) she opined that "[p]ersons with IDD who have committed sexual offenses can live successfully in the community, without presenting harm to others. They

can learn appropriate sexual behavior. The keys to success are supervision, treatment and training." *Id.* at ¶ 22.

Turning specifically to the District, Ms. Thaler opined that DDS "has services available within its system to provide the necessary components of a successful service plan for a person with IDD and inappropriate sexual behaviors such as Mr. Seth." JA 390 at ¶ 29. The specific plan for Mr. Seth "offers the necessary components of a successful service plan" for him. *Id.* at ¶ 30. That includes 1:1 staffing, and even 2:1 staffing "in the initial months until they know Mr. Seth and can reliably predict his behavior pattern." *Id.*[8]

The former director of Georgetown University's DDA Health Initiative, Marisa Brown, evaluated Mr. Seth's suitability for treatment within DDS in light of her extensive experience with the services available in the District. Decl. of

[8] As part of its mission under the *Evans* decrees, *amicus* Quality Trust reviews the use of "restrictive controls" by DDS, including the use of staffing ratios of 1:1 or more. *See* n.7, *supra* 12; *see also*, Quality Trust, Third Quarter Monitoring Summary, April 1, 2019-June 30, 2019 (describing review of Restrictive Control Review Committee records).

Its preliminary analysis of fiscal year 2019 data shows DDS' Restrictive Control Review Committee approved at least 282 behavioral service plans approved with a staffing ratio of 1:1 or more. Thirty-six plans were approved for a staffing ratio of 2:1. Three plans were approved for a 3:1 ratio. Twelve plans included a combination of 1:1 and 2:1 staffing. Similarly, records produced by DDS in response to a D.C. Freedom of Information Act request confirm that many behavioral support plans for persons in DDS custody who have been convicted, found not guilty by reason of insanity, or found incompetent to be tried for serious crimes including sex offenses provide for 1:1 or more staffing.

Marisa C. Brown, JA 434-41. She noted that DDS successfully transitioned several men with intellectual disabilities and histories of sexually inappropriate behavior who had been confined at Forest Haven into community-based care. JA 438 at ¶ 24. Based on her interactions with him, in her opinion, "the system as it currently exists is entirely capable of meeting the needs of an individual like Markelle Seth." *Id.* She noted that "It is not unusual" for DDS to provide the 1:1 round the clock staffing called for in the plan for Mr. Seth. JA 440 at ¶ 34. "There are a number of people for whom DDA provides this level of supervision to ensure their safety and the safety of the community." *Id.* Her "extensive professional experience with DDS and I/DD services and [her] knowledge of Markelle and his record lead [her] to conclude that he is well-suited for community placement." JA 441 at ¶ 41.

The District's system is now designed to identify and meet the needs of persons with intellectual disabilities who, like Mr. Seth, may pose a risk of harmful behavior through individual behavioral support plans, as called for in the *Evans* litigation. *See* Dir.'s Certificate of Compliance, *Evans v. Gray*, No. 76-293, ECF 1487-1 (D.D.C. Sept. 5, 2014); Order approving Certificate of Compliance, *Evans v. Gray*, No. 76-293, ECF 1496 (D.D.C. Oct. 20, 2014).[9] The elements of a plan, including intensive staffing, are readily available from DDS and are reimbursable

[9] DDS Policy No. 2013-DDA-POL008, § 6.A (1). (Sept. 3. 2013).

services under the District's Medicaid Home and Community-Based Waiver for Individuals with Intellectual Disabilities. D.C. Mun. Regs., Tit. 29 § 1919 (2017). Funding from the Medicaid Waiver allows DDS to offer more intensive staffing to support persons with intellectual disabilities than DBH can provide to persons with mental illness in community settings, making the District's refusal to provide care, custody and treatment to Mr. Seth because of dangerousness particularly untenable when it provides care under the Ervin Act to persons with mental illness who present similar or greater risks.

DDS uses a rigorous process to develop and implement behavioral support plans. A psychologist first conducts a functional assessment of the target behaviors to help understand why an individual engages in problematic behavior and whether there are any triggers to such behavior. The behavioral support plan lays out the target behaviors and the steps required of DDS and provider staff to keep both the individual and the community safe, including the staffing levels, duties and skills needed to implement the plan. The plan must be developed by a qualified expert. All staff working with individuals subject to a behavioral support plan receive training specific to the individual, and DDS requires evidence the

assigned staff have achieved the necessary level of competence after training required to support the individual's needs. [10]

DDS conducts comprehensive annual reviews of individual plans to ensure they are appropriate and meet the agency's requirements, including continued staff training.[11] Staff must collect data on the individual's behavior including any significant changes in behavioral functioning, including an unusually high or low frequency of problematic behaviors or a behavioral crisis and regularly forward that behavioral data to the developer of the plan. The behavioral support plan developer must draft a quarterly report that addresses the person's progress, review of the behavioral data and clinical justification for continuing to restrict the individual. DDS Procedure No. 2013-DDA-PR013 at § 3.E.(3) (Sept. 3, 2013). In addition to the oversight required by providers and the oversight from the provider's internal review process, DDS' service coordinators monitor the services provided in an individual's home and day programs to ensure that the necessary behavioral supports are in place. DDS requires that significant issues be reported to supervisors and entered into the agency's Issue Resolution System. DDA can

[10] *See* DDS Procedure No. 2013-DDA-H&W-PR016 § 3.C (7) (Sept. 3, 2013); *Id.* at § 3.C (12); DDS Policy No. 2013-DDA-POL008 § 6.K (Sept. 3, 2013); DDS Procedure No. 2019-DDA-PROC-01 § 3.B (1-3) (Mar. 8, 2019); *id*. at § 3.B(6).

[11] DDS Procedure No. 2013-DDA-PR013 § 3.C.(1) (Sept. 3, 2013). The provider must submit evidence to DDS' RCRC, documenting that staff have been trained. DDS Procedure No. 2013-DDA-PR014 § 3.H (3) (Sept. 3, 2013).

sanction providers who do not comply with the requirements related to behavioral service plans, including staff training, data collection and proper implementation of the plans.[12]

DDS retained Dr. Matthew Mason to "conduct a risk assessment for the purposes of determining Mr. Seth's risk for reoffending and the recommended conditions that would be necessary to safeguard against his reoffending while being served in the community." Risk Assessment Report, JA 468. Dr. Mason conducted an extensive evaluation and concluded that "Mr. Seth's child sexual abuse charges stem, in part, from a lack of supervision by responsible adults and from having been affirmatively placed in a position of caring for children." JA 482. He found from psychological testing as well as other data that "Mr. Seth's prior and current behavior does not appear to be based in an underlying psychopathic condition, and his sexual misconduct appears to be a function of inappropriate supervision and deficits associated with Intellectual Disability." JA 481. "His sexually inappropriate behavior appears more opportunistic than predatory in nature, and influenced by his limitations in cognition and self-

[12] DDS Procedure No. 2013-DDA-PR013 § 3.E.(2) (Sept. 3, 2013); DDS Policy No. 2018-DDA-POL004 § F(3) (Oct.11, 2018); DDS Procedure No. 2012-DDA-SPCD- PR011 § 5A.(5)(c) (Jan.11, 2013); *id.* at § 5.C.(3) ; DDS Policy No. 2013-DDA-POL008 § 6.S (Sept. 3, 2013) and DDS Procedure No. 2013-DDA-PR013 § 3.H (Sept. 3. 2013).

management." *Id*. [13] Therefore, Dr. Mason concluded, "[c]ontinuous supervision at home, in the workplace and any other place he visits in the community is mandatory," including "ensuring unsupervised access to children does not occur." JA 482.

Dr. Mason concluded that "a carefully designed and appropriately staffed community-based program" would have a "high likelihood of success in preventing" Mr. Seth from committing new offenses. JA 481. Specifically, he recommended "at least 1:1 staffing on a 24-hour basis," with careful monitoring to

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[13] The testimony in the federal commitment proceeding was consistent with the view that Mr. Seth's behavior was tied to his disability and was fundamentally different from that of an adult who is sexually preoccupied with children. *See* May 24, 2018 Tr. at 27. Dr. Stephen Hart, an internationally-recognized expert in risk assessment, reviewed the evaluations of Mr. Seth performed by the other evaluators, including the staff at FMC Butner, and explicitly rejected the diagnosis of pedophilia reached by the Butner staff. JA 493-95.

Some researchers describe behavior driven by a low level of sexual knowledge among some persons with intellectual disabilities rather than what are generally classified as paraphilias as "counterfeit deviance." *See* Dorothy Griffin, et al., "'Counterfeit Deviance' Revisited," 26 J. of Applied Research in Intellectual Disabilities 471-80 (Jan. 21, 2013); Yona Lunsky, et al., *Sexual knowledge and attitudes of men with intellectual disability who sexually offend*, 32 J. of Intellectual & Developmental Disability 74-81, 32(2) (June 2007). Dr. Hart noted that in reaching a different conclusion, the Butner staff did not consult the guidelines that have been developed to diagnose paraphilias in persons with intellectual disabilities. JA 493. Dr. Hart also criticized the manner in which the Butner staff administered and interpreted certain psychological tests. *Id.* at 5-6. Cf. Report and Recommendation, *United States v. Seth*, No. 1:14-mj-608-BAH-GMH, ECF 75 at 35 (D.D.C., Dec. 1, 2016) (rejecting scoring and interpretation of test by Butner staff for purposes of evaluating competency).

"prevent any unsupervised contact with minors." JA 482-83. He found "Mr. Seth's sociability, eagerness to please and willingness to create alliances with responsible adults are highly indicative that he will succeed if provided with appropriately designed supportive living and work environments." JA 482.

Dr. Robert Denney, a former Bureau of Prisons psychologist with extensive experience performing risk assessments, agreed that the kind of highly structured program recommended by Dr. Mason and developed for Mr. Seth by Wholistic Services would allow Mr. Seth to be treated in a community setting. Decl. of Robert L. Denney, JA 405 at ¶ 8, 409 at ¶ 24. "Mr. Seth does present risk," he wrote, "but the type of risk he presents is narrow and manageable: he should not have unsupervised contact with children." JA 405 at ¶ 8. With that proviso, Dr. Denney concluded that "this [risk] can be safely and effectively managed in a community setting given the proposed safeguards. It does not require confinement in a federal prison hospital." *Id.*

In fact, the United States Attorney's Office successfully lobbied the District government to create a formal mechanism for assuming custody of persons with intellectual disabilities who had been found incompetent to stand trial and might be a danger to the community if released, but who were not subject to commitment for mental illness under the Ervin Act. *See* D.C. Code § 21-545. The primary impetus

was the then-recent case of an intellectually disabled District resident who was found incompetent to stand trial on charges that he engaged in oral sex with a five-year-old child. D.C. Council, Report on Bill 14-616, the "Civil Commitment of Citizens With Mental Retardation Amendment Act of 2002," at 1-2 (summary of history of the bill), 17-19 (summary of testimony of Assistant U.S. Attorney Patricia Riley) (June 3, 2002).

The exhibits attached to the amended complaint include a proposal by Wholistic Home and Community Based Services, Inc. to provide care, custody and treatment for Mr. Seth under contract with DDS and in response to the requirements identified by Dr. Mason. Proposal for Transition, Safety and Support Services, JA 502-513. The Wholistic proposal describes its successful treatment of two clients with intellectual disabilities who had been found incompetent to stand trial on serious criminal charges. The first, identified as AF, was committed to DDS in 2002 and required to have round the clock supervision and at least 1:1 staffing at all times in light of "charges involving inappropriate and dangerous sexual relations with young children." JA 504. The staff assigned to AF "are trained at least quarterly on key areas of support for AF to include behavior supports." *Id.* "Since his admission to Wholistic [AF] has had no interaction with the criminal justice system." *Id.* Despite his intellectual disability, AF "has

received sexuality education that has helped him to understand that the actions that led to his commitment were wrong." *Id.*

Wholistic also described BB, who "was found incompetent in connection with a murder charge many years ago." JA 505. BB was diagnosed as having a "psychotic disorder" as well as intellectual disability and was treated for a substantial period of time at St. Elizabeths Hospital. *Id.* Like AF, BB "receives 24-hour daily 1:1 staffing services." *Id.* BB attends church, volunteers at a recycling plant, and hopes to obtain work as a janitor. *Id.*

Those examples from the record before the district court confirm that DDS's capability is not merely theoretical. The District operates a robust continuum of services capable of providing effective care, custody and treatment to persons who would present risks if released without proper supervision.

D. The District's Invalid Reliance on the Federal Commitment For Its Refusal to Provide Services to Mr. Seth Supports An Inference of Discrimination.

The district court's ruling that the District's refusal to assume responsibility for his care, custody and treatment is explained by the North Carolina district court's dangerousness finding rather than disability discrimination in violation of *Olmstead* is erroneous. *See* JA 60. The district court ruled it would be futile to allow Mr. Seth to file his amended complaint because "this case would not survive

a motion to dismiss." JA 73. But that conclusion was based on rejecting his discrimination claim on the ground that the District's refusal to provide services was explained by something other than discrimination—the federal dangerousness finding and commitment. Yet neither the federal commitment nor the dangerousness finding is an impediment to treating Mr. Seth in the District. As a matter of law, 18 U.S.C. § 4246(d) favors (rather than precludes) state custody; the North Carolina district court's federal commitment order was based on the unavailability of state custody, not Mr. Seth's unsuitability for care, custody and treatment in the District. As a matter of fact, there is at the very least a disputed issue raised by the amended complaint whether Mr. Seth could be successfully cared for by DDS. The district court's factual findings in no way suggest that the kind of individualized treatment readily available to the District would not be adequate to provide appropriate care custody and treatment for Mr. Seth. The district had no basis for rejecting as a matter of law allegations of the amended complaint that were amply supported by the expert reports attached to and incorporated into the complaint.

Because the federal commitment order cannot explain the District's refusal to assume custody of Mr. Seth, the Court is left with only one explanation for its actions: that the District is denying him participation in a program because of the nature of his disability. When, as in this case, the explanation defendant gives for

an action challenged as discriminatory is not credible, courts applying the *McDonnell Douglas* framework may infer from "disbelief of the reasons put forward by the defendant" that the true explanation for the action is unlawful discrimination. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993); *Aka v. Washington Hosp. Ctr.*, 156 F.3d at 1294. In *Aka*, this Court reversed the grant of summary judgment on ADA-based employment discrimination claims where the evidence allowed a jury to discredit the employer's non-discriminatory explanation and to use that discredited explanation as affirmative evidence of discrimination. This Court applied similar reasoning in overturning the grant of summary judgment on a Title VII retaliation claim in *Geleta v. Gray*, 645 F.3d 408 (D.C. Cir. 2011).[14] Likewise, in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), the Supreme Court overturned the entry of judgment as a matter of law under Rule 50 where the affirmative evidence of discrimination in combination with inferences the jury was permitted to draw if it discredited the employer's proffered explanation for the employment decision supported a verdict in favor of

[14] In *Giles v. Transit Emps. Fed. Credit Union*, 794 F.3d 1 (D.C. Cir. 2015), it was the employee's theory of discrimination (that she had been fired to avoid increases in health insurance premiums rather than for poor performance) that was factually and legally invalid. *Id.* at 10-12 (employer did not know costs of employee's treatment and there is no evidence that her treatment led to increase or that it was temporally connected to her termination). In *Giles*, the employee's attack on the defendant's proffered reason for its action was inconsistency, but the circumstances including the contemporaneous firing of other employees supported the explanation and the other evidence of discrimination was weak. *Id.* at 13-14.

the employee under the ADEA. Thus, the District's unreasonable attempt to attribute its refusal to offer Mr. Seth care custody and treatment to the federal commitment would be sufficient to prove discrimination *at trial*. It is certainly not a basis for dismissing the complaint at the pleading stage as insufficient on the basis of the District's invalid explanation, as the district court did in this case.

CONCLUSION

The judgment should be reversed and the case remanded with instructions to permit Mr. Seth to file and pursue the claims in the amended complaint.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) & 32(a)(7)(B) because it contains 6,221 words, excluding the parts of the brief exempted by 32(a)(7)(B)(iii), and

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using MS Word in Times New Roman 14 Point Font.

/s/ *David A. Reiser*
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CERTIFICATE OF SERVICE

I certify that on December 19, 2019, I caused a true copy of the foregoing brief of *Amici Curiae* to be delivered electronically via the Court's CM/ECF system.

/s/ *David A. Reiser*
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