ORAL ARGUMENT NOT YET SCHEDULED

CASE NO. 19-7057

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

MARKELLE SETH,

Plaintiff-Appellant,

v.

DISTRICT OF COLUMBIA, D.C. DEPARTMENT ON DISABILITY SERVICES, and ANDREW REESE,

Defendants-Appellees.

Appeal from the United States District Court for the
District of Columbia, Case No. 18-1034
Honorable Beryl A. Howell

CORRECTED BRIEF OF *AMICI CURIAE* AUTISTIC SELF ADVOCACY NETWORK, CENTER FOR PUBLIC REPRESENTATION, CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, AND JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, all *amici curiae* state that they are private 501(c)(3) non-profit organizations, that they are not publicly held corporations or other publicly held entities, and that they have no parent corporations. No publicly held corporation or other publicly held entity owns ten percent (10%) or more of any *amicus* organization.

CERTIFICATE OF PARTIES, RULINGS, RELATED CASES, AND FILING OF SEPARATE BRIEF

Counsel for amici curiae hereby certify as follows:

A. Parties, Intervenors, and Amici Curiae

All parties and amici curiae who appeared before the district court appear in Appellant's brief. The parties appearing in this Court include those listed in Appellant's brief, amici listed herein, and any other amici who have not yet entered an appearance in this Court.

B. Ruling Under Review

References to the ruling at issue appear in Appellant's brief.

C. Related Cases

This case is related to United States v. Seth, No. 1:14-mj-00608-BAHGMH-1 (D.D.C. filed Oct. 15, 2014), in which Mr. Seth was found permanently incompetent to proceed.

D. Separate Brief

All parties have consented to the filing of this *amicus* brief.[1] Pursuant to District of Columbia Circuit Rule 29(d), *amici* certify that this separate brief is necessary because it reflects a perspective not found in the parties' briefs or in any of the other *amicus* briefs. *Amici* are six national disability rights organizations with extensive and substantial expertise in advocating for the inclusion and civil rights of people with disabilities, including people with intellectual disability. In particular, *amici* have substantial experience in the integration of people with disabilities into the community as required by the Americans with Disabilities Act, Rehabilitation Act, and the Supreme Court's ruling in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

DATED: December 27, 2019

ROSEN BIEN GALVAN & GRUNFELD LLP

By: */s/ Sanford Jay Rosen*
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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), 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. No person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

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STATEMENTS OF INTEREST OF *AMICI CURIAE*

Amici curiae have extensive expertise in advocating for the inclusion and civil rights of people with disabilities, including people with intellectual disability. *Amici* also have substantial experience in the integration of people with disabilities into the community as required by the Americans with Disabilities Act, Rehabilitation Act, and the Supreme Court's ruling in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). *Amici curiae* include:

The **Autistic Self Advocacy Organization** (ASAN) is a national, private, nonprofit organization, run by and for autistic individuals. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals and others with disabilities to participate fully in community life and enjoy the same rights as others without disabilities.

The **Center for Public Representation** (CPR) is a public interest law firm that has been assisting people with disabilities for more forty years. It is both a statewide and national legal backup center that provides assistance and support to

public and private attorneys who represent people with disabilities in Massachusetts, and to the federally-funded protection and advocacy programs in each of the States. CPR has litigated systemic cases on behalf of persons with disabilities in more than twenty states, and submitted *amici* briefs to the United States Supreme Court and many of the courts of appeals in cases seeking to enforce the constitutional and statutory rights of persons with disabilities, including the right to be free from discrimination under the ADA.

The **Civil Rights Education and Enforcement Center** (CREEC) is a national nonprofit membership organization based in Colorado whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC's efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have full and equal access to and receive equal treatment in the justice and carceral systems.

Disability Rights Advocates (DRA) is a non-profit, public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, and housing. DRA's clients, staff and board of directors include people with various types of disabilities. With offices in

New York City and Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities nationwide.

The **Disability Rights Education & Defense Fund** (DREDF), based in Berkeley, California, is a national nonprofit law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by the community it represents. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal civil rights laws protecting persons with disabilities.

The **Judge David L. Bazelon Center for Mental Health Law** is a national legal advocacy organization founded in 1972 to advance the rights of individuals with mental disabilities. Through litigation, policy advocacy, public education, and training, the Bazelon Center promotes equal opportunity for individuals with mental disabilities in all aspects of life, including community living, health care, housing, employment, education, parental and family rights, voting, and other areas. The Bazelon Center has litigated numerous cases involving the Americans with Disabilities Act's integration mandate across the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

Markelle Seth is a 26-year-old D.C. resident with intellectual disability.[2] He was charged with a crime, but was found incompetent to stand trial and incapable of being restored to capacity under the Insanity Reform Defense Act ("IDRA"). Multiple disability services professionals – including several affiliated with defendants – have concluded that he can safely live and receive appropriate disability support services including supervision in the community, rather than spend years, if not decades in a federal correctional institution. Despite this, defendants refuse to provide such services, with the result that Mr. Seth is incarcerated in a federal prison, hundreds of miles from his family. Requiring a person with a disability who has not, and cannot, be tried and convicted of a crime to endure indefinite incarceration due to the failure to provide an appropriate placement violates the integration mandate of the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act ("Rehabilitation Act"), and the Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). Mr. Seth's Complaint set forth these facts and many others in great detail, and thus stated claims under the ADA and the Rehabilitation Act; the district court's decision to the contrary was error.

[2] Factual representations are taken from Mr. Seth's Complaint, proposed Amended Complaint, and associated exhibits, which are presumed true given the procedural posture of the litigation.

Mr. Seth has been detained in correctional institutions since he was charged at age 20 in October 2014,[3] and is currently held in a Bureau of Prisons (BOP) correctional facility in Massachusetts. Mr. Seth will not be eligible for release at any foreseeable time without defendants' offering a placement in D.C. because he has been civilly committed under the procedure set out in 18 U.S.C. § 4246. In federal prison, Mr. Seth is frequently disciplined and has been housed almost continuously in segregation due to his disability-related difficulties complying with institutional rules and instructions.[4]

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[3] Mr. Seth was arrested and charged with the production of child pornography using his cell phone and involving children in his household. There is persuasive evidence that his actions were intertwined with his intellectual disability and a lack of intervention and supervision at the time. Matthew Mason, Ph.D., an expert in treating individuals with intellectual disability who present problematic sexual behavior, evaluated Mr. Seth and found no evidence of a paraphilic disorder (pedophilia). Dr. Mason opined: "In the absence of such evidence, and based on the nature of the sexual contact that has been alleged, it is more likely that Mr. Seth's sexual contact with children was due to restricted opportunity for sexual contact with age appropriate peers, along with deficiencies in judgment and impulse control, all of which in turn are a consequence of his intellectual disability; furthermore, these problems were exacerbated by a lack of appropriate intervention and supervision…." Proposed Amended Complaint, Exhibit 14, No. 1:18-cv-01034-BAH, ECF 29-15 at 7-8 (D.D.C. Oct. 26, 2018).

[4] Deficits in cognitive and adaptive functioning associated with a diagnosis of intellectual disability can make life in prison excruciatingly difficult. *See* Rebecca Vallas, Cntr. for Am. Progress, *Disabled Behind Bars: The Mass Incarceration of People with Disabilities in America's Jails and Prisons, Center for American Progress* 3 (2016), https://cdn.americanprogress.org/wp-content/uploads/2016/07/18000151/ 2CriminalJusticeDisability-report.pdf; *See also* Margo Schlanger, *Prisoners with Disabilities*, in *Reforming Criminal Justice: Punishment, Incarceration, and Release* 295, 307-308 (E. Luna ed., 2017)

The IDRA provides that an individual in Mr. Seth's position may be transferred from federal to state custody and care, "if such State will assume responsibility for his custody, care, and treatment." 18 U.S.C. § 4246(d). State placements and services are preferable[5] for a number of reasons, including that they: are in the person's place of permanent residence, near family and other supports; allow the individual to receive disability-specific care provided by the state entity charged with the duty to care for and support individuals with disabilities; and rely upon state-funded and state-administered programs designed to meet the particular supervision and disability needs of the person (and, for that reason, may be less segregated and more integrated than a federal prison). For similar reasons, ongoing indefinite federal detention for persons like Mr. Seth is considered a last resort.[6]

Consistent with the IDRA's preference for state custody and care, the ADA and Rehabilitation Act require that public entities provide services for disabled

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(Prisoners with intellectual disability or developmental disability are likely to incur more disciplinary sanctions, including a greater loss of privileges.)

[5] *See United States v. Volungus*, 595 F.3d 1, 10 (1st Cir. 2010) (IDRA expresses "clear preference for state placement, if and when available, of those committed federally").

[6] *See United States v. Foy*, 803 F.3d 128, 138 (3d Cir. 2015) ("ongoing detention under § 4246 after the initial recovery period has elapsed is a last resort -- it is only available if a person poses an ongoing danger to others in the "rare circumstances where [he] has no permanent residence or there are no state authorities willing to accept him for commitment.")

people like Mr. Seth in "the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). These laws further require covered entities to rely upon objective, empirical evidence in any decision to exclude a disabled individual from the community based upon a purported threat or other harms, including objective evidence of the impact of reasonable modifications and supports in mitigating any risks. 28 C.F.R. § 35.139(b). As both Congress and the Supreme Court have recognized, the emphasis on objective standards, including the mitigating effect of accommodations and supports, is critical; the placement and treatment of individuals with significant disabilities is characterized by institutionalization, and fraught with fears and stereotypes.[7]

Here, the safety and feasibility of state custody, and the provision of a less restrictive state residential program for Mr. Seth, has been repeatedly approved by defendants' own retained expert and public health professionals, as well as by Mr. Seth's expert. Disability service providers are prepared to implement the D.C. placement if permitted to do so. Nevertheless, defendants refuse to accept responsibility for the "custody, care and treatment" of Mr. Seth. As the district court summarized, "[t]he defendants do not dispute that they are public entities that

[7] As further discussed infra in Section II, the integral nature of this concept – that the treatment of people with disabilities is fraught with fears and stereotypes – is explicitly acknowledged in *Sch. Bd. of Nassau Cnty v. Arline*, 480 U.S. 273 (1987), and in subsequent statutory elaborations.

denied Seth the benefits of or prohibited Seth from participating in their services." Memorandum Opinion, No. 1:18-cv-01034, ECF 28, at 21 (D.D.C. Sept. 28, 2019). Defendants offered no reason for their change of position regarding Mr. Seth's transfer and placement until they took the position in litigation that Mr. Seth was not qualified.

The refusal to provide Mr. Seth a D.C. placement follows the appointment in September 2016 of defendant Andrew Reese as the new director of the Department on Disability Services, replacing Laura Nuss. Instead of petitioning for civil commitment after Mr. Seth was found permanently incompetent, as promised under Director Nuss's leadership, defendant Reese ordered a new risk assessment of Mr. Seth by Matthew Mason, Ph.D.[8] In his report issued on February 24, 2017, Dr. Mason concluded that Mr. Seth "can be safely and successfully supported … in a highly structured closely supervised" program that would "provide for community safety." Others with expertise agreed.[9] Defendant Reese apparently disregarded or disapproved of the assessment he had ordered; all meetings about Mr. Seth's transfer to a D.C. residential program were thereafter canceled. Mr.

[8] Dr. Mason is a licensed psychologist and certified behavioral analyst, and an expert in individuals with developmental and intellectual disabilities, including individuals with intellectual disability who present sexual behavior problems. His assessment of Mr. Seth included an analysis of various risk assessment instruments, including those designed to assess the risk of sexual violence.

[9] As further discussed *infra* in Section I.

Seth further alleges that others similarly situated with different disabilities—civilly committed individuals with psychiatric disabilities—are provided state placements through residential services and supports in D.C.[10]

Given the disconnect between the risk assessment by Dr. Mason and defendants' position, the availability of the state placement, and the chain of events alleged, the Complaint states plausible claims of disability discrimination, including a plausible violation of the integration mandate, under the standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). The district court erred in finding that Mr. Seth failed to state a cause of action.

ARGUMENT

I. THE INTEGRATION MANDATE OF THE ADA AND THE REHABILITATION ACT APPLIES HERE.

In adopting the ADA, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "discrimination against individuals with disabilities persists in such critical areas as … institutionalization, … and access to public services[.]" 42 U.S.C. § 12101(a)(2), (3). Congress further found that "individuals with disabilities continually

[10] Complaint, ECF 1 at ¶¶ 14, 95, 132; Proposed Amended Complaint, ECF 29-1 at ¶¶ 5, 22, 23, 113, 115, 116, 118, 127-130, 131(c), (d), 164

encounter various forms of discrimination, including … segregation ….” 42 U.S.C. § 12101(a)(5). The U.S. Department of Justice (“DOJ”) regulations implementing Title II further require public entities to “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).

In *Olmstead v. L.C. ex rel. Zimring*, the Supreme Court held that the anti-discrimination provisions of the ADA provide individuals with mental disabilities a qualified right to live in the community rather than in an institution. *Olmstead*, 527 U.S. at 587. Community placement is in order when it is appropriate, the person does not oppose transfer to the community, and “when the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.” *Id.* Following *Olmstead*, DOJ adopted a regulation explicitly applying the integration mandate to incarcerated and detained individuals. 28 C.F.R. § 35.152(b)(2) (requiring inmates and detainees to be “housed in the most integrated setting appropriate to the needs of the individuals.”). Courts routinely apply the principles of *Olmstead* to claims by individuals with disabilities experiencing unnecessary segregation in prison.[11]

[11] *See Dunn v. Dunn*, 318 F.R.D. 652, 670 (M.D. Ala. 2016) (holding disabled prisoners separately from other prisoners “would be inconsistent with the ADA’s integration mandate”); *McClendon v. City of Albuquerque*, No. 95 CV 24 JAP/KBM, 2016 WL 9818311, at *15 (D.N.M. Nov. 9, 2016) (“Defendants may comply with the ADA by developing community-based programs for subclass

Courts have also repeatedly recognized the application of the integration mandate to the placement and treatment of civilly committed individuals in detention.[12] For example, in *Van Orden v. Schaefer*, the district court found that civilly committed residents detained in the state's Sexual Offender Rehabilitation and Treatment Services ("SORTS") facilities stated claims under integration mandate of the ADA:

> Plaintiffs allege that under the ADA, they have the right to live integrated lives, to not be segregated, to be in the custody of the least restrictive alternative for commitment, and to be treated equally to civilly committed residents of other Department programs with respect to opportunities for release and resources expended for care and treatment. Plaintiffs allege that Defendants violated these rights under the ADA by unjustifiably institutionalizing even those Plaintiffs whom Defendants conceded presented "no apparent risk"…, and by failing to provide Plaintiffs with the same access to funding, treatment, and opportunities for release provided to other Department residents committed for non-sex-related mental disabilities. …
>
> The Court finds that Plaintiffs' allegations that they are being unjustifiably institutionalized even when they present "no apparent risk," without an effective working plan for placing them in less restrictive settings, and that they are not afforded the same access to treatment and opportunities for release as other civilly committed residents, state a plausible claim for disability discrimination under the ADA. …

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members who would benefit from them. …to be 'effective,' those programs must comply with the ADA's integration mandate.").

[12] Mr. Seth has been civilly committed pursuant to 18 U.S.C. § 4246. As discussed in footnote 2, Mr. Seth's expert found that he does not have paraphilia. Mr. Seth has not been civilly committed under any program targeted specifically towards sex offenders.

> Whether Plaintiffs' requests for alterations in funding, treatment, and opportunities for release or transfer to less restrictive settings constitute "reasonable accommodations" to avoid discrimination or are, alternatively, "fundamental alterations" of the state's services and programs are fact-intensive issues that require further development of the record.

Van Orden v. Schaefer, No. 4:09CV00971 AGF, 2014 WL 5320232, at *6-7 (E.D. Mo. Oct. 17, 2014) (internal citation omitted). Although, Mr. Seth is incarcerated by an entity other than defendants, the federal BOP, as the district court held Mr. Seth remains a resident of D.C.[13] He is therefore qualified to receive a state residential program and disability supports in D.C. – with the cooperation and participation of D.C. officials. It is not unusual for people with significant disabilities to be participants in, or qualified for, programs or services that rely upon state and federal coordination.[14] That Mr. Seth is in federal custody does not lessen defendants' responsibilities under the ADA. Holding otherwise would undermine both the federal and state laws' preference for state custody and services and the ADA and Rehabilitation Act's obligation to serve qualified

[13] Mr. Seth is in federal custody because he was charged in federal court, which placed him under the scheme outlined the IDRA, at 18 U.S.C. § 4246. The BOP does not have the facilities or staff to offer a less restrictive state placement. The responsibility for state programs is allocated to the states.

[14] In addition to the IDRA, other examples include services offered pursuant to the Individuals with Disabilities Education Act (IDEA), Medicaid, the Social Security Administration, and state vocational rehabilitation services programs managed by the federal Rehabilitation Services Administration.

individuals with disabilities in the most integrated setting appropriate to their needs.

Similarly, in *Ireland v. Anderson*, individuals who were civilly committed without convictions for sexual offenses brought a case alleging that aspects of the civil commitment system, including the state's "failure to provide adequate treatment in the least restrictive environment…" . *Ireland v. Anderson*, No. 3:13-CV-3, 2014 WL 3732014, at *3 (D.N.D. July 25, 2014). The district court found that the plaintiffs stated a claim under the ADA:

> [P]laintiffs' proposed second amended complaint contains numerous facts suggesting they were denied a public entity's programs and services or were otherwise discriminated against because they are civilly committed as sexually dangerous individuals. … Plaintiffs allege that…[a]fter commitment they have "fewer services, facilities, and privileges" than inmates and more restrictions than other civilly committed individuals. Plaintiffs have pled enough facts to state a plausible claim under Title II of the ADA.

Id. at *10 (citing, *inter alia*, allegations that sexually dangerous individuals' treatment, services and activities are different from other civilly committed individuals, including as to the "denial of … appropriate placements").

In *Kriz v. 12th Judicial Dist. Bd. of Mental Health of Box Butte Cty*., the court considered the claim of a civilly committed individual who alleged that he was qualified to live in "intermediate or residential outpatient treatment" rather than in an institution. *Kriz v. 12th Judicial Dist. Bd. of Mental Health of Box Butte*

Cty., No. 4:05CV3254, 2008 WL 2568270, at *1 (D. Neb. June 25, 2008). Again, the court found that the plaintiff stated a claim:

> Unjustified institutional isolation of persons with disabilities is a form of discrimination that violates Title II of the ADA. Similarly, institutionalization without individual, reasoned professional assessment is discrimination that violates Section 504 of the Rehabilitation Act if it is supported by federal funds. …
>
> Plaintiff [ ] alleges that he has been discriminated against because of his disability. Liberally construed and taken as true, his allegations state claims under the ADA and the Rehabilitation Act.

Id. at **4-5 (internal citations omitted).

Mr. Seth seeks the same opportunity as these other plaintiffs—to have the chance to present his claims in federal court. But defendants argued, and the district court agreed, that Mr. Seth failed to state a claim under *Olmstead* because Mr. Seth "has failed to offer sufficient indications that the defendants believe 'community placement is appropriate' or that 'the placement can be reasonably accommodated.'" ECF 28 at 29-30.[15] The district court erred in so ruling despite well-pleaded factual allegations that must be accepted as true at this stage of the litigation. The Complaint and proposed Amended Complaint allege that numerous disability professionals – including several affiliated with defendants – consider a

[15] *See also* ECF 28 at 30 ("Although the defendants may, at one time, have believed that community-based services would be an appropriate alternative for Seth, their decision not to move forward with accepting responsibility for his custody, care, and treatment indicates that they no longer find community-based treatment appropriate.").

more integrated supervised placement to be appropriate, safe, and feasible. These include: Matthew Mason, Ph.D.;[16] Stephen Hart, Ph.D.;[17] Laura Nuss, director of the D.C. Department on Disability Services until April 2016 (and currently the Deputy Commissioner of the Virginia Department of Behavioral Health & Developmental Services);[18] additional DDS professionals, including Deputy Director Holly Morrison, Program Manager Musu Fofana, and caseworkers;[19] the staff of Benchmark Human Services, a private disability services provider;[20] the staff of Wholistic Services, Inc., a private disability services provider;[21] Marisa C. Brown, M.S.N., R.N., retired director, The DDA Health Initiative at Georgetown University;[22] Robert L. Denney, Psy.D, retired psychologist for the federal BOP;[23] and Nancy Thaler, retired Deputy Secretary of the Office of Developmental Program for Pennsylvania.[24]

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[16] ECF 1 at ¶¶ 52-55 (citing February 12, 2016 service plan report of Mason), ¶¶ 58-65 (citing February 24, 2017 risk assessment evaluation of Mason).

[17] *Id*. at ¶¶ 66-69 (citing June 18, 2017 risk assessment report of Hart).

[18] *Id*. at ¶¶ 43, 48.

[19] *Id*. at ¶¶ 46-50.

[20] *Id*. at ¶¶ 49-52.

[21] *Id*. at ¶¶ 70-74.

[22] ECF 29-6 (Declaration).

[23] ECF 29-4 (Declaration).

[24] ECF 29-3 (Declaration).

The ADA does not require a formal recommendation for community placement by the state's own professionals. Rather, it allows for evidence regarding the appropriateness of a less restrictive placement to come from a "variety of sources." *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 259 (E.D.N.Y. 2009), vacated on other grounds sub nom. *Disability Advocates, Inc. v. New York Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012).[25] Regardless, the question of a whether treatment professionals have determined that a less restrictive placement is appropriate is a question of fact. *See, e.g., Pennsylvania Prot. & Advocacy, Inc. v. Pennsylvania Dep't of Pub.*

[25] While an *Olmstead* plaintiff must present evidence to show that a less restrictive placement is appropriate, the plaintiff is not limited solely to evidence showing a formal determination by a "treatment provider". *See Joseph S. v. Hogan*, 561 F.Supp.2d 280, 291 (E.D.N.Y.2008) (finding that no eligibility determination from the "state's mental health professionals" is required, and noting that "it is not clear whether *Olmstead* even requires a specific determination by any medical professional that an individual with mental illness may receive services in a less restrictive setting, or whether that just happened to be what occurred in *Olmstead*"); *Frederick L. v. Department of Public Welfare*, 157 F. Supp.2d 509 (E.D. Pa. 2001) (declining to read *Olmstead* as requiring "a formal 'recommendation' for community placement," and noting that "*Olmstead* does not allow States to avoid the integration mandate by failing to require professionals to make recommendations regarding the service needs of institutionalized individuals with mental disabilities"); *see also Long v. Benson*, No. 08-cv-26 (RH/WCS), 2008 WL 4571904, at *2 (N.D. Fla. Oct. 14, 2008) (noting that the State "cannot deny the right [to an integrated setting] simply by refusing to acknowledge that the individual could receive appropriate care in the community. Otherwise the right would, or at least could, become wholly illusory.").

Welfare, 402 F.3d 374, 385 (3d Cir. 2005) (Whether a community placement is appropriate is 'a factual issue subject to substantial evidenti[ary] review'…) (internal citations omitted.) And whether a placement can be reasonably accommodated is a question of fact for which defendants bear the burden. *Brown v. D.C.*, 928 F.3d 1070, 1077 (D.C. Cir. 2019) ("[T]he State bears the burden of proving the unreasonableness of a requested accommodation once the individual satisfies the first two requirements [in *Olmstead*]."). A defendant's *refusal* through inaction to provide disability services in the most integrated setting is not synonymous with a determination by treatment professionals that such services and supports are not appropriate, or with a finding of fact that an appropriate residential setting cannot be reasonably accommodated. This conflation would end virtually every *Olmstead* case at the motion-to-dismiss stage. Here, Mr. Seth has alleged in sufficient detail that treatment professionals support his transfer to a supervised state disability program, and that the proposed placement could be reasonably, feasibly, and safely implemented.

While the district court noted that the federal commitment order found that "release from institutional care would 'create a substantial risk of bodily injury to another person or serious damage to the property of another'" (ECF 28 at 30), the outcome of the federal civil commitment proceeding is not dispositive here. The Eastern District of North Carolina only assessed whether Mr. Seth was eligible to

be released outright, that is, unconditionally and without supervision.[26] The state residential program proposed for Mr. Seth at issue here, by contrast, is "a highly structured and supervised [minimum of one-to-one, round-the-clock supervision] community-based residential program." ECF 1 at 17.[27]

Thus, the situation here is comparable to that in *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999), Mr. Seth's two statuses—meeting the standards of commitment under 18 U.S.C. § 4246, and being qualified for a less restrictive, supervised state placement—"comfortably exist side by side." *Id.* at 803. One status (commitment under 18 U.S.C. § 4246) considers Mr. Seth *without* the supervision and authority of a civil commitment under D.C. statute, and the other (release to a "state placement") considers Mr. Seth *with* such supervision and

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[26] *See United States v. Seth*, No. 5:17-HC-2090-BR, Order, ECF 32 (E.D.N.C. May 25, 2018) (finding "that the respondent is presently suffering from a mental disease or defect as a result of which his **release** would create a substantial risk of bodily injury to another person or serious damage to the property of another.") (emphasis added); Transcript, ECF 34 (E.D.N.C. May 24, 2018) (testimony of Dr. Kristina Lloyd: "[O]ne of the most concerning parts of Mr. Seth's potential release to the community is his lack of release plan. … [A]ll of the [risk assessment] measures that were used indicate that Mr. Seth poses a significant risk of harm if released to the community unconditionally. … [W]e did send a letter requesting placement at the state level for Mr. Seth, but ultimately they have not provided us with the location for him.").

[27] *See also* ECF 1 at 17-18 ("Dr. Mason's proposal also recommended that Markelle be provided with other services available in the community, including, in particular, sexuality education tailored to the needs of a person with his disability[.]").

authority. As a matter of law and logic, one does not determine the other. The district court below erred in relying on the federal commitment order to reach a separate and distinguishable assessment: whether Mr. Seth can reasonably, safely and feasibly be transferred to a supervised state placement. Mr. Seth sufficiently alleged that he can, and thus has stated a claim federal disability laws.

II. UNDER THE ADA AND REHABILITATION ACT, COVERED ENTITIES MUST CONDUCT AN INDIVIDUALIZED ASSESSMENT BASED ON OBJECTIVE EVIDENCE, WITH CONSIDERATION OF MITIGATING SUPPORTS AND ACCOMMODATIONS.

A central and longstanding principle of disability rights jurisprudence is that covered entities must rely upon objective, empirical evidence in deciding to exclude a disabled individual. In *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273 (1987), the Supreme Court considered whether Gene Arline was qualified to be an elementary school teacher, despite her history of tuberculosis. The Court ruled that, to avoid disability discrimination, this determination required an "individualized inquiry" with "appropriate findings of fact" and "based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." *Arline*, 480 U.S. at 287-88.

Congress codified this direct threat analysis into both the Rehabilitation Act, 29 U.S.C. § 705(20)(D), and the ADA, 42 U.S.C. § 12182(b)(3).[28] Regulations adopted by the DOJ implementing Title II of the ADA set out the direct threat standard from *Arline*:

> In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

28 C.F.R. § 35.139.

The question of whether and how individuals with disabilities who are perceived to be a threat can live safely in a community often comes up in the zoning context. In this context, as well, challenges brought to the exclusion by people with disabilities require an objective, fact-intensive analysis that includes the effects upon risk of reasonable modifications. In *Bay Area Addiction*

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[28] *See also* House Comm. On Education and Labor, H.R. Rep. No. 485(II), 101st Cong., 2d Sess., 1990 WL 10079988 (1990), at 34 ("The standard to be used in determining whether there is a direct threat is whether the person poses a significant risk to the safety of others or to property, . . . and that no reasonable accommodation is available that can remove the risk. … Making such a determination requires a fact-specific individualized inquiry resulting in a 'well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives.'"); Senate Comm. On Labor and Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess., 1989 WL 1176422 (1989), at 25 (same).

Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725 (9th Cir. 1999), the Ninth Circuit described the application of the *Arline* test to a disputed zoning determination that excluded a methadone clinic:

> The court must first determine whether an individual poses a significant risk. If he does, the court must then ask whether there is a reasonable modification that would counteract the risk. If there is, the individual is qualified for purposes of § 12131. …
>
> Without speculating on the kind and quality of evidence needed to establish a significant risk, we note that in assessing the evidence, courts must be mindful of the ADA's express goal of eliminating discrimination against people with disabilities.

Id. at 736-37.

In reviewing the exclusion of disabled people, courts must consider all of the evidence and opinions of relevant experts, and should not simply defer to the administrative decisions of local officials, particularly where such decisions are contrary to the recommendations of disability professionals. In *Innovative Health Sys., Inc. v. City of White Plains*, the court found that "[a]lthough the City certainly may consider legitimate safety concerns in its zoning decisions, it may not base its decisions on the perceived harm from such stereotypes and generalized fears." *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997). In *Innovative Health*, both the district court and appellate court noted that while the zoning board denied any discriminatory intent, it disregarded the guidance of the Commissioner of Building, and that this was among the factors indicating

disability discrimination. *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 243 (S.D.N.Y. 1996); *Innovative Health Sys.*, 117 F.3d at 42 ("Absent in their discussion, however, was any reference to the zoning ordinance or the Commissioner's interpretation.").

Here, Mr. Seth similarly seeks to show that local officials are excluding him from the community on the basis of his disability, contrary to the guidance of subject matter experts, including Dr. Mason who was retained by the defendants, and without due consideration of the mitigating impact on risk of the supervision, supports, and other characteristics of the proposed state placement. By dismissing the Complaint on the pleadings, the district court disregarded the careful factual development and analysis required under disability rights jurisprudence.

III. APPELLANTS HAVE SATISFIED THE REQUIREMENTS OF RULE 8(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Mr. Seth's Complaint and proposed Amended Complaint more than meet the requirements of Rule 8 of the Federal Rules of Civil Procedure and sufficiently state a claim under the ADA and Rehabilitation Act. In *Swierkiewicz v. Sorema N. A.*, the Supreme Court overturned a dismissal on the pleadings based on a similar theory to that employed by the district court in this case – that "[Mr. Swierkiewicz] ha[d] not adequately alleged circumstances that support an inference of discrimination." *Swierkiewicz*, 534 U.S. at 509; *compare* ECF 28 at 21 ("Seth has failed to sufficiently establish that the defendants engaged in any of these

purported forms of discrimination 'by reason of his disability.'"), 24 ("The plaintiff must [ ] allege some facts of discrimination that tend to show that the complained-of discrimination was based on, or based solely on, his disability.").

Mr. Swierkiewicz alleged that after six years as a chief underwriting officer, he was demoted by his employer, and that a less experienced younger French national was given his work and ultimately promoted to his prior position. *Id.* at 508. After his demotion, Mr. Swierkiewicz contended that he was excluded and isolated by his employer and later terminated after he sent a letter outlining his grievances and requested a severance package and alleged claims of national origin and age discrimination. *Id.* at 509.

The Supreme Court found that Mr. Swierkiewicz's "complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims," as it set out his legal claims and "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." *Id.* at 514; *see also Bell Atl. Corp.*, 550 U.S. at 570 (quoting from same passage and affirming that *Swierkiewicz* remains good law). Therefore, Mr. Swierkiewicz was not required to plead facts establishing a *prima facie* case of discrimination. Moreover, the Court reasoned, the precise requirements of a prima facie case can vary depending on the context noting that "[b]efore discovery has

unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases." *Swierkiewicz*, 534 U.S. at 512.

Here, as in *Swierkiewicz*, Mr. Seth's Complaint gives defendants fair notice of the basis for his claims by detailing the events with relevant dates leading to defendants' refusal to provide a state placement and Mr. Seth's exclusion defendants' programs and services. As in *Swierkiewicz*, the precise formulation of Mr. Seth's affirmative case under discrimination and/or integration theories may depend upon the discovery of relevant facts and evidence. Nevertheless, the Complaint alleges why the proposed state placement was reasonable, safe, and feasible – and supported by treating and consulting professionals – under an *Olmstead* analysis. The Complaint and proposed Amended Complaint allege that Defendant Reese disregarded the determination of Dr. Mason, the very expert it hired to assess the appropriateness and safety of alternative placements. *See Innovative Health Sys.*, 931 F. Supp. at 243 (noting that "defendants inexplicably failed to defer to the Commissioner of Building," and that this was among the "constellation of factors leads to the conclusion that the defendants permitted illegal prejudices to influence their decision-making process, which is all that

plaintiffs are required to show."). The Complaint and proposed Amended Complaint further allege that defendants regularly provide dozens of state placements to similarly situated individuals with a different disability (mental illness), but virtually none to people with Mr. Seth's disability (intellectual disability). Therefore both the Complaint and proposed Amended Complaint are sufficient under Rule 8.

CONCLUSION

For the reasons set forth above, *amici curiae* respectfully request that this Court reverse the judgment of the district court.

DATED: December 27, 2019

Respectfully submitted,

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CERTIFICATE REGARDING LENGTH OF BRIEF AND TYPEFACE

The undersigned counsel provides the following certifications required by the Federal Rules of Appellate Procedure and/or the D.C. Circuit Rules:

1. As required by Rule 32(g) of the Federal Rules of Appellate Procedure, I certify that this brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 6,382 words as calculated by the Microsoft Word 2016 software used to prepare the brief.

2. I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point type.

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CERTIFICATE REGARDING DIGITAL SUBMISSION

I hereby certify that, with respect to the foregoing:

1. The hard copies to be submitted to the Court are exact copies of the version submitted electronically; and

2. The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program.

DATED: December 27, 2019

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CERTIFICATE OF SERVICE

I hereby certify that, on December 27, 2019, this Corrected Brief of Amici Curiae in Support of the Plaintiffs-Appellant and Reversal was served through the Court's ECF system on counsel for all parties.

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