ORAL ARGUMENT NOT YET SCHEDULED

Case No. 19-7057

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARKELLE SETH,
Appellant

v.

The DISTRICT OF COLUMBIA, et al.,
Appellees.

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

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BRIEF FOR APPELLANT MARKELLE SETH

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellant certifies as follows:

A. Parties

The Appellant is Markelle Seth. The Appellees are the District of Columbia, the D.C. Department on Disability Services ("DDS"), and Andrew Reese.

The following parties intend to file a joint brief as amicus curiae in this case:

(i) University Legal Services;

(ii) Quality Trust for Individuals with Disabilities; and

(iii) Washington Lawyers Committee for Civil Rights and Urban Affairs.[1]

B. Rulings Under Review

The rulings under review are the district court's order of September 28, 2018, granting the Defendants' motion to dismiss and the Court's order of May 8, 2019, denying Plaintiff's motion to alter or amend judgment and Plaintiff's motion for leave to file an Amended Complaint.

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[1] Other amici curiae may file separate briefs with the consent of the parties.

C. Related Cases

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

CORPORATE DISCLOSURE STATEMENT

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.

GLOSSARY

ADA	Americans with Disabilities Act of 1990
BOP	Federal Bureau of Prisons
CIDA	Citizens with Intellectual Disabilities Civil Rights Restoration Act of 2015
DBH	D.C. Department of Behavioral Health
DCHRA	D.C. Human Rights Act
DDS	D.C. Department on Disability Services
FMC	Federal Medical Center
ID	Intellectual Disability

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment dismissing the Complaint. (J.A. 74.) This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Mr. Seth filed a timely notice of appeal following the district court's May 8, 2019 denial of his timely motion pursuant to Fed. R. Civ. P. 59 on June 7, 2019. The district court had subject matter jurisdiction of Mr. Seth's ADA and Rehabilitation Act claims pursuant to 28 U.S.C. § 1331.

INTRODUCTION AND STATEMENT OF ISSUES

This case challenges the District of Columbia's ("D.C.") abandonment of one of its citizens to indefinite confinement in a federal prison. Markelle Seth is a D.C. resident with intellectual disability ("ID") who was charged with a crime in D.C. federal court but found incompetent to stand trial and not restorable to competency. Therefore, he has not been and never will be convicted of that charge. Under these circumstances, the federal government must release Mr. Seth into the custody of his home state, here D.C., unless that state has no suitable arrangements for his care. By its own medical professionals' admissions, D.C. does have suitable arrangements for Mr. Seth's care. But D.C. has abandoned Mr. Seth, a young man found "to have the auditory comprehension of a first-grade student" (J.A. 75.), to languish

in a federal prison without necessary services, often in solitary confinement, for five years, with no hope of release.

Mr. Seth sued the District, its Department on Disability Services ("DDS"), and DDS Director Andrew Reese in his official capacity (together, "Defendants" or "the District"), alleging violations of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 et seq. ("ADA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) ("Section 504"), the D.C. Human Rights Act of 1977, D.C. Code § 2-1401.01 et seq. ("DCHRA"),[2] and the Citizens with Intellectual Disabilities Civil Rights Restoration Act of 2015, D.C. Code § 7-1301.02 et seq. ("CIDA"). He asserted that Defendants are violating his rights under these laws, as well as the Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), to receive public services and treatment in the most integrated setting appropriate to his needs. (J.A. 74.)

Mr. Seth alleged that the District could readily provide him with a highly supervised living arrangement and treatment as part of its existing service system, providing him greater community integration without

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[2] The prima facie case requirements for these claims are identical for purposes of this brief and they will be referred to throughout as the "ADA" claims.

presenting any unreasonable public risk. Fully aware of his criminal charges, the District found Mr. Seth eligible for its community-based services, secured a provider to deliver them, and agreed to provide them, but then revoked its agreement without explanation. DDS' prior director has stated that "the decision by DDS to allow Mr. Seth to languish and regress in federal custody rather than carry out its mission and mandate [is] inexplicable other than as a matter of discrimination." (J.A. 291, 373.) Mr. Seth's legal claim is straightforward: the District violated the ADA by leaving him in federal prison when it could provide him a more integrated living arrangement without any fundamental alteration of its programs or any undue burden.

The district court noted this is a "troubling situation" (*Id.* 11), but nonetheless dismissed Mr. Seth's Complaint with prejudice. The Court acknowledged that a plaintiff need not *plead* a prima facie case of discrimination, but nonetheless ruled that Mr. Seth failed to offer evidence that Defendants engaged in discrimination by reason of Mr. Seth's disability. The Court speculated, instead, that budgetary choices or dangerousness considerations motivated the District's actions. (*Id.* 34-35) The Court held that Mr. Seth's *Olmstead* claim was insufficient because Defendants do not believe community placement is appropriate or that the placement can be

reasonably accommodated. (*Id.* 38-39.) In relying on speculative facts and reasoning, the district court deviated from its obligation, on a motion to dismiss, to take allegations in the Complaint as true.

Compounding its error, the district court refused to allow Mr. Seth to amend his Complaint to address the Court's hypothesized justifications for the District's actions. It improperly held that Mr. Seth's federal civil commitment—which should have *triggered* the District's obligation to assume custody for Mr. Seth—instead *released* the District from its obligations. (*Id.* 39-40.) The Court appeared to believe—wrongly—that the claims here amounted to a collateral challenge to the validity of the federal commitment order. They did not. The federal court that civilly-committed Mr. Seth did not have before it any evidence—and thus did not rule on the issue—of whether he would be too dangerous for a community setting *if provided available services by the District*. Mr. Seth alleged that he would not be; no court has found otherwise. Here, Mr. Seth alleged that the District can provide him with services that will accommodate him and preserve community safety, and that the federal government will transfer Mr. Seth to the District once the District accepts custody. Those allegations should not have been questioned on a motion to dismiss.

QUESTIONS PRESENTED

1. Did the district court err in concluding that Mr. Seth failed to plead facts showing that the District violated his right to receive services in the most integrated setting appropriate under the ADA, Section 504, and the DCHRA?

2. Did the district court err in ruling that Mr. Seth's federal civil commitment excused the District from its obligations under the ADA and *Olmstead*?

3. Did the district court err in failing to accept Mr. Seth's factual allegations as true and instead considering non-discriminatory alternative reasons for the District's actions that were not pleaded in the Complaint?

4. Did the district court err in dismissing Mr. Seth's claims with prejudice and then denying his motion to alter or amend the judgment and file an amended complaint?

STATEMENT OF THE CASE

A. Statutory and Regulatory Background: the District's Obligation To Offer Services in the Community

This lawsuit involves the District's affirmative duty to offer habilitative services in the most integrated setting appropriate to Mr. Seth, a qualified individual with a disability. That duty arises from the integration

mandate of Title II of the ADA, 42 U.S.C. § 12131 et seq., and its implementing regulations, as construed by *Olmstead*. The integration mandate advances one of the ADA's core purposes—ending the isolation and segregation of people with disabilities and ensuring they receive treatment in the most integrated settings appropriate to their needs. *See Olmstead*, 527 U.S. at 588-89 (citing 42 U.S.C. § 12101(a)(2), (3), (5)).

Title II of the ADA prohibits disability discrimination by public entities such as the District in the provision of public services, programs, and activities. 42 U.S.C. § 12132. Specifically, it mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id*. Public entities must administer their programs "in the most integrated setting appropriate to the needs of qualified individuals with disabilities," 28 C.F.R. § 35.130(d). A public entity must also make "reasonable modifications" to its programs unless it demonstrates that such modifications "would fundamentally alter" the programs. 28 C.F.R. § 35.130(b)(7)(i); *see also Brown v. District of Columbia*, 928 F.3d 1070, 1077 (D.C. Cir. 2019).

In *Olmstead*, the Supreme Court applied these requirements, holding

public entities must offer people with disabilities services in the community, rather than in institutions whenever appropriate. It held that "unjustified institutional isolation of persons with disabilities is a form of discrimination," 527 U.S. at 600, and the ADA requires community placement for any person who wants it and is capable of community living. *Id*. at 602.

Olmstead holds that public entities have the affirmative obligation to provide community-based, rather than institutional, care for people with disabilities where they can reasonably do so. A public entity contending it cannot reasonably provide community-based care must demonstrate that as an affirmative defense. *See Brown v. District of Columbia*, 928 F.3d at 1077; *Frederick L. v. Dep't of Pub. Welfare of Pa*., 422 F.3d 151, 157 (3d Cir. 2005); *Sanchez v. Johnson*, 416 F.3d 1051, 1067-68 (9th Cir. 2005); *Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 381-82 (3d Cir. 2005).

The integration mandate applies to individuals entangled in the criminal justice system, like Mr. Seth. As the U.S. Department of Justice—

the federal agency tasked with implementing ADA Title II—states:[3]

> States, counties, and cities, which often administer both criminal justice and disability service systems, have obligations under the ADA to ensure people with mental health disabilities or I/DD receive services in the most integrated setting appropriate to their needs. Services such as scattered-site supported housing, Assertive Community Treatment (ACT), crisis services, intensive case management, respite, personal care services, behavior support, nursing care, peer support, and supported employment services can support a jurisdiction's efforts to divert people with these disabilities from the criminal justice system and serve them in their communities.
>
> State and local governments must prevent unnecessary institutionalization of people with disabilities. Governments have complied with this obligation by using community-based treatment services to keep people with disabilities out of the criminal justice system…they ensure that their disability service systems offer sufficient community-based services and support criminal justice entities to coordinate with, and divert to, community-based services.

See also Brown v. District of Columbia, 928 F.3d at 1087 (rejecting concurrence limiting scope of *Olmstead* to particular facts of that case and noting that "*Olmstead* drew the line between 'institutions' and 'community settings,'" *i.e., Olmstead* applies to circumstances broader than the specific facts applicable to the plaintiffs in that case.)

Indeed, in the criminal justice context, *Olmstead* complements the

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[3] U.S. Dep't of Justice, *Examples and Resources to Support Criminal Justice Entities in Compliance with Title II of the Americans with Disabilities Act*(2017), https://www.ada.gov/cjta.html.

analysis set out in *Jackson v. Indiana*, 406 U.S. 715 (1972). In *Jackson*, the Supreme Court held that a criminal defendant committed solely because of incompetency "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." *Id*. at 738. Under a "*Jackson* finding," a defendant incompetent to stand trial and unlikely to become competent in the foreseeable future cannot be confined indefinitely, as this confinement would amount to a life sentence without any criminal conviction and deprive him of equal protection. *Id.* at 730.

In accordance with the *Jackson* and *Olmstead* frameworks, the District has two statutory schemes for civil commitment of individuals with disabilities who have been found incompetent to stand trial. The "Ervin Act" provides for civil commitment and community-based treatment of persons found incompetent and dangerous to themselves or others due to mental illness. D.C. Code § 21-501 et seq. The District's Department of Behavioral Health ("DBH"), which provides services to citizens with mental illness, administers the Ervin Act, and annually petitions for civil commitment of approximately 40 individuals who have been found incompetent and dangerous by virtue of mental illness. (J.A. 108-109.)

CIDA,[4] provides a similar system of civil commitment and community-based services for those with intellectual disability who are found incompetent and dangerous to themselves or others. D.C. Code § 7-1303.04(b-1) ("For a person found incompetent in a criminal case, a written petition by the District may be filed with the Court to have the person committed to a facility"); § 7-1303.12a ("(a) In the case of a person found incompetent in a criminal case, the District shall have no more than 30 days from the date on which the finding is made that the person is incompetent and not likely to gain competence in the foreseeable future in which to file a petition pursuant to § 7-1303.04(b-1).")[5] CIDA aims to ensure that

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[4] CIDA was enacted as the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978. It was renamed in 2015, and recently amended and renamed the Disability Services Reform Amendment Act of 2018. Significantly, the 2018 amendment eliminates civil commitment for most individuals with ID, making services voluntary rather than compulsory, but retains court-ordered commitment for individuals like Mr. Seth who are found incompetent in criminal cases alleging dangerous offenses. D.C. Code § 7-1303.04(a-1)(1) ("Except as provided in subsection (b-1) of this section, no person shall be newly committed under this chapter on or after May 5, 2018."). The statute is referred to as "CIDA" throughout this brief.

[5] Only incompetent defendants charged with the most serious offenses—crimes of violence and sex offenses—are eligible for civil commitment under CIDA. D.C. Code § 7-1301.03(14C). Consistent with the statute's focus on the liberty and dignity of individuals with ID, those charged with less serious crimes must be served in the community without civil commitment.

individuals in precisely Mr. Seth's situation receive needed supports and services in integrated settings while simultaneously preserving public safety. DDS is responsible for serving individuals with ID subject to CIDA.

Civil commitment is typically a state function. *See Ecker v. United States*, 575 F.3d 70 (1st. Cir. 2009). Federal law provides that a federally charged defendant who is found incompetent to stand trial may be civilly committed by the federal government if, and only if, (1) he is found dangerous as a result of a disability, and (2) his home state refuses to take responsibility for his care and custody. 18 U.S.C. § 4246(a). When federal commitment occurs, federal law recognizes an ongoing strong preference for returning the individual to his own state, requiring the Attorney General to "continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment." 18 U.S.C. § 4246(d). Federal civil commitment results in confinement by the federal Bureau of Prisons ("BOP") until the home state accepts care and custody or federal authorities determine it is safe to release the individual.

B. Statement of Facts

1. Mr. Seth's Charges, Commitment, and Incarceration

Mr. Seth is a twenty-six-year-old man with ID. (J.A. 75, 129.) He has remained in federal prison for over five years without any hope of release,

despite never having been convicted of a crime, although he alleges, and the District's medical professionals and others agree, that the District can safely and reasonably provide him supervised living in a more integrated environment.

In 2014, Mr. Seth was charged in federal court with sexual offenses involving children living in the house where he resided. (*Id.* 76).[6] The court ordered an evaluation to determine Mr. Seth's competency to stand trial. (*Id.* 76, 126.) While the evaluation was pending, Mr. Seth applied to DDS for disability-related services. (*Id.* 76.) In early 2015, DDS and its then-Director, Laura Nuss, acknowledged his eligibility for services and the District's duty to provide them. (*Id.* 77, 86.)The District agreed that, once Mr. Seth was found incompetent by the court, the District would "work with your attorneys and the federal authorities in filing for civil commitment…" (*Id.* 88.) The District was aware of Mr. Seth's charges and the public safety risks he might pose. (*Id.* 87-89.) Indeed, "dangerousness" is a legal prerequisite for the civil commitment proposed by the District. D.C. Code §7-

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[6] Mr. Seth was initially charged in D.C. Superior Court. Competence concerns arose immediately, and shortly thereafter the government's motion to dismiss without prejudice was granted and the U.S. Attorney's Office initiated the federal court prosecution. J.A. 292-293.

1304.06a(d).

In July 2015, Director Nuss confirmed that DDS was prepared to address any risks presented by Mr. Seth, including public safety issues. (*Id.* 88.) The following month, DDS identified a service provider, Benchmark Human Services ("Benchmark"), and stated that it would conduct a formal assessment to develop a plan for Mr. Seth. (*Id.* 89.) Dr. Matthew Mason—a licensed Psychologist and Board-Certified Behavior Analyst and expert in individuals with ID presenting sexual behavior problems—evaluated Mr. Seth to identify the components of an appropriate service plan. (*Id.* 89-90.)

Dr. Mason concluded that Mr. Seth would be "responsive to and appropriate for placement in a highly structured and supervised [minimum of one-to-one, round-the-clock supervision] community-based residential program," (*Id.* 90), and determined "that a more restrictive setting would not be necessary." He noted that "Benchmark has safely and successfully served individuals similar to and more behaviorally challenging than Mr. Seth in community settings with appropriate structure, staffing and programming" and observed that his history of abuse and neglect, combined with a lack of consistent intervention and supports for his disability throughout his life, contributed to his behavior. (*Id.* 90-100, 462.) Dr. Mason developed a plan for comprehensive habilitative services available from the District's existing

programs that would meet Mr. Seth's needs and ensure community safety. (*Id.* 90-91.)

In December 2016, Magistrate Judge Harvey found Mr. Seth incompetent to stand trial and incapable of being restored to competency, observing that Mr. Seth "consistently demonstrated that he has the auditory comprehension of a first grade student" and that "having [him] stand trial would be akin to putting a seven-year-old in the courtroom…" (*Id.* 85, 162.) Chief Judge Howell adopted these conclusions and remanded Mr. Seth to federal custody pursuant to 18 U.S.C. § 4246 to determine if Mr. Seth's release would risk harm to another person. (J.A. 86.) He was sent to FMC-Butner for this evaluation. (*Id.*)

In April 2016, Defendant Reese replaced Laura Nuss as Director of DDS, and the District abruptly changed its position. Instead of proceeding with civil commitment, Reese requested a new evaluation from Dr. Mason. (*Id.* 91.) Dr. Mason conducted a comprehensive risk assessment and concluded for a second time that Mr. Seth "can be safely and successfully supported in the community" in a "highly structured, closely supervised community-based program" that would "provide for community safety while ensuring that Markelle has every opportunity to succeed and avoid re-offending." (*Id.* 91, 467.) Dr. Mason concluded Mr. Seth's behavior,

including his sexual misconduct, was not based on an "underlying psychopathic condition" but a "function of inappropriate supervision" while placed in a position of caring for children and was "more opportunistic than predatory in nature, and influenced by his limitations in cognition and self-management." (*Id.* 93.)

Dr. Mason recommended community-based placement for Mr. Seth, including one-to-one staffing on a 24-hour basis; a consistent daily schedule of employment and other meaningful activities; thorough staff training; safeguards to avoid unsupervised contact with minors; and comprehensive plans for behavioral management, crisis management, supportive psychiatric care and counseling, psychosexual assessment and related sexual education, and self-management plans. (*Id.* 93-94.) Dr. Mason concluded: "Based upon my extensive experience with many individuals with a variety of sexual behavioral problems, it is my opinion that Mr. Seth will respond well to supervision and supports. 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 that incorporate effective supervision." (*Id.* 94, 482.)

In February 2017, Wholistic Services, Inc. ("Wholistic") informed the District that it could provide services to Mr. Seth after Benchmark ceased operations. (*Id.* 95-96.) In August 2017, Wholistic provided the District with a "Proposal for Transition, Safety and Support Services" incorporating each of Dr. Mason's recommendations. (*Id.* 96-98,170.)

Despite the opinion of its own expert and a second expert,[7] and the availability of appropriate services from its service providers, the District did not petition for civil commitment. (J.A. 98.) When contacted by the Warden of FMC-Butner about taking custody of Mr. Seth, the District did not respond. (J.A. 98, 309; Official Transcript of Competency Hearing at 46, *United States v. Seth*, Case No. 5:17-HC-02090-BR (E.D.N.C. filed June 7,

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[7] Dr. Stephen Hart, an internationally renowned forensic psychologist, later endorsed Dr. Mason's recommendations. In his June 2017 report, Dr. Hart noted Dr. Mason's proposed risk management plans "reflect a deep understanding of intellectual disability in general and the needs of Mr. Seth more specifically…the management plans are remarkable or noteworthy for being feasible (i.e., available, accessible and affordable), attentive to Mr. Seth's unique risk, need, and responsivity factors (i.e., appropriate), and consented to by Mr. Seth (i.e., acceptable)." (J.A. 95.) Dr. Hart agreed that Mr. Seth's sexual misconduct was not consistent with an underlying psychopathic condition and was more likely attributable to "restricted opportunity for sexual contact with age appropriate peers, along with deficiencies in judgment and impulse control" and were "exacerbated by a lack of appropriate intervention and supervision." (*Id.* 94.)

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2018) [hereinafter 2018 Competency Hearing][8].) Federal authorities, therefore, found that "suitable arrangements for State custody are not available," (J.A. 98), and filed a petition for federal civil commitment under 18 USC § 4246 in the U.S. District Court for the Eastern District of North Carolina. On May 24, 2018, after Mr. Seth's Complaint in the current case was filed, Judge Britt in the Eastern District of North Carolina found:

> Upon the request of the Attorney General, the Court finds that the state placement is not available. This court finds, as I am only able to find, that the Attorney General has sent a letter to the District of Columbia requesting state placement and that letter has not been responded to.

(J.A. 309; 2018 Competency Hearing, *supra* at 46.) Judge Britt made no finding regarding the availability or appropriateness of services in the District's service system or the dangerousness Mr. Seth would pose if such services were made available. (J.A. 309; Order, *United States v. Seth*, No. 5:17-HC-2090-BR (E.D.N.C. filed May 24, 2018).)

As a result, Mr. Seth has been held in federal prison medical centers[9]

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[8] The court may take judicial notice of matters of public record, such as prior court proceedings. *See Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1228 (D.C. Cir. 1993). Accordingly, the Court should take judicial notice of the related proceedings in the Eastern District of North Carolina, *see United States v. Seth*, No. 5:17-hc-2090-BR (E.D.N.C. filed Apr. 28, 2017).

[9] Despite the designation as "Medical Centers," the BOP facilities at Butner, NC, and Devens, MA, are prisons. *See* Bureau of Prisons, FMC

(cont'd)

and has spent the majority of his incarceration in "segregation" (also known as solitary confinement) because his disability makes it challenging for him to follow institutional rules. (J.A. 99-100, 296.) For an individual with ID, solitary confinement is a particularly toxic setting that not only fails to provide equal access to programs, services and activities, but can cause additional harm. (J.A. 100-101, 297.) In contrast to the services Dr. Mason recommended for Mr. Seth in the community, he has received extremely limited services in prison. He has largely been confined to his cell for twenty-two hours per day. (*Id.* 100, 296-297.)

Occasional "pet therapy" has consisted of reaching through the food slot of his cell door to pet a dog and weekly visits from a mental health counselor may involve speaking through the door's window. (*Id.* 101-102, 297.) The District's refusal to take responsibility for Mr. Seth's care thus deprives him of necessary services and forces him to live in an unnecessarily restrictive setting.

Butner Admissions & Orientation Handbook at 1 (2009), https://www.bop.gov/locations/institutions/buh/BUH_ aohandbook.pdf ("The mission of … (FMC Butner) is to provide protection to society by providing confinement services for committed offenders."). They do not provide habilitation programming geared toward people with ID. (J.A. 34, 405-406.)

2. The District's Disability Services System

DDS serves many individuals whose intensive needs present risk to their safety or the safety of the community unless they are appropriately supported and supervised. (*Id*. 332, 365-367, 370-372, 438.) DDS can serve individuals with physically aggressive behaviors, risk of absconding, and intensive medical and mental health needs. (*Id*. 332.) Although most do not require round-the-clock or one-to-one supervision, DDS can and does provide that level of service to a significant number of individuals. (*Id.*) When problems arise, there are a range of mechanisms for responding, including crisis interventions, changing the service plan, or changing the service site. (*Id.*)

Prior to moving to dismiss the Complaint, the District never provided a reason for denying Mr. Seth services. (*Id*. 98, 344-45.) DDS' budget was sufficient to serve Mr. Seth in 2015, when it originally agreed to do so, and has increased every year since. (*Id.* 339, 366.) Programmatic capacity is also not an issue: the District identified providers capable of meeting his needs and at no time during Mr. Seth's incarceration has there been a waiting list for services. (*Id.* 339.)

Mr. Seth's Complaint alleged that, if his incapacity were caused by mental illness instead of—or in addition to—ID, the District likely would

provide him the services he requires. (*Id.* 79, 103.) The District regularly provides community-based services to D.C. residents with mental illness found incompetent to stand trial, but refuses to provide Mr. Seth (and likely others with ID) the very same services. (*Id.*) In just the 2017-2018 fiscal year, DBH filed 40 Ervin Act petitions seeking civil commitment of incompetent defendants with mental illness, and the District currently serves many of those individuals in the community. (*Id*. 80, 334) In coordination with DBH, DDS provides supervised community-based services to individuals diagnosed with both mental illness and ID who faced similar charges and whose behavioral challenges and risks are at least equivalent to those posed by Mr. Seth. (*Id.* 299-301, 332.) Wholistic's proposal identified two individuals whom it has successfully served in the community for many years. (*Id.* 173-74.) One was found incompetent in connection with a charge of murder and the other on charges involving sexual contact with children. Both are diagnosed with mental illness and ID. (*Id.*) The only relevant difference between their situations and Mr. Seth's is that their mental illness diagnoses allowed DBH to coordinate services in conjunction with DDS, whereas DDS alone is charged with providing services to individuals, such as Mr. Seth, with only ID and, left to its own devices, DDS refuses to provide such services.

In the last seven years, the District has filed only two petitions seeking commitment to DDS under CIDA, and both were initiated under unusual circumstances.[10] (*Id.* 334, 342.) The legislative history of the applicable CIDA provision reflects an expectation that one to two individuals per year would be subject to such commitment to DDS (*Id.* 334-335.), Kathy Patterson, Chairperson, Committee on the Judiciary, Bill 14-616, the "Civil Commitment of Citizens with Mental Retardation Amendment Act of 2002" 17-19, Council of the District of Columbia, (June 3, 2002), http://lims.dccouncil.us/Download/329/B14-0616-COMMITTEEREPORT.pdf [hereinafter "D.C. Council Report"].

Supporting individuals with ID charged with criminal offenses—including sexual offenses—in the community is "common practice throughout the United States." (J.A. 388-389.) (a national expert in serving individuals with ID). The District's existing service system can serve Mr. Seth safely, as attested to by its own expert (Dr. Mason) (*Id.* 89-94, 501.), its former director (Ms. Nuss) (*Id.* 364.), and a national expert on ID services

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[10] Under CIDA, petitions for commitment are filed in the name of the District and typically are filed on behalf of DDS. D.C. Code § 7-1303.04. One of those cases was filed by the Office of the Attorney General over DDS's objections. In the other, the respondent was already a DDS client at the time he was charged with the offense for which he was found incompetent.

(Ms. Thaler). (*Id.* 378.) Yet, the District refuses to serve him. The District's refusal is "contrary to decades of evidence-based research and successful practice in the field of disability services, to the District's own capabilities, and to its own goals for serving people with [ID] in the community." (*Id.* 292, 370, 378, 380, 386, 385-387, 391, 405-406.)

C. Procedural History

On May 1, 2018, Mr. Seth sued Defendants, alleging that, by failing to provide the community-based services he needs, Defendants violated the ADA, Section 504, the DCHRA, and CIDA. Specifically, Mr. Seth alleged that the District (1) failed to serve him in the most integrated setting appropriate, (2) failed to reasonably modify its policies and practices to accommodate him, (3) treated him differently from similarly situated individuals with mental illness, and (4) utilized eligibility criteria that have a discriminatory disparate impact on individuals with ID. (*Id.* 74.)

Defendants moved to dismiss, arguing that their failure to serve him was not due to discrimination but rather was because Mr. Seth was committed under the federal statute. (*Id.* 201.)

The district court granted Defendants' motion to dismiss with prejudice, ruling that Mr. Seth failed to state a claim. The court acknowledged that at the motion to dismiss stage a plaintiff need not prove a

prima facie case of discrimination and need only allege that he is a qualified individual with a disability; that the public entity denied him the benefits of or prohibited him from participating in the entity's services; and that denial or prohibition was by reason of his disability. (*Id*. 29.) Nonetheless, the court ruled that Mr. Seth had "failed to sufficiently establish that the defendants engaged in any of these purported forms of discrimination 'by reason of his disability.'" (*Id.* 30.)

The court further ruled Mr. Seth's *Olmstead* claim was insufficient because he "failed to offer sufficient indications that the defendants believe 'community placement is appropriate' or that 'the placement can be reasonably accommodated.'" (*Id.* 38-39 (emphasis added).) The court then speculated: "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." (*Id.* 39.)

The court stated that Mr. Seth had "offered no *evidence* that the defendants' decision not to initiate commitment and custody proceedings was made based on his disability." (*Id.* 37 (emphasis added).) Instead, it speculated that "budgetary choices made by the new [DDS] leadership or

FMC Butner's Certificate of Dangerousness" motivated the District's actions. (*Id.* 35.)

Without citing legal authority, the court focused on Mr. Seth's federal civil commitment as overriding the District's civil rights obligation to serve Mr. Seth: "[Plaintiff's] argument rests on the assumption that 'the defendants are obligated to provide services to [Seth] despite his being in federal custody and his federal civil commitment.'…No such obligation exists." (*Id.* 39.) Although the Attorney General's conduct is not at issue in this case, the court also noted: "the Attorney General is not required to release a civilly committed person to the District in the absence of the District's willingness to assume responsibility for that person's custody, care, and treatment." (*Id.* 40.)

Pursuant to Federal Rule of Civil Procedure 59(e), Mr. Seth filed a motion to alter or amend the dismissal with prejudice, requested leave to file an Amended Complaint, and submitted a proposed Amended Complaint setting out additional allegations that responded to the speculative nondiscriminatory bases for Defendants' actions identified by the Court. (J.A. 526.) Specifically, Mr. Seth's Proposed Amended Complaint alleged: dangerousness was not a barrier to the District's civil commitment and services (indeed, the District was aware of the public safety issues when it

determined that he was eligible and appropriate for civil commitment and community-based services), (*Id.* 269, 310, 312, 316, 338, 343; the District faced no budgetary or programmatic capacity barriers to serving Mr. Seth, (*Id.* 339); and additional facts demonstrating the disparate impact of the District's policies on residents with ID found incompetent versus those with mental illness in similar circumstances. (*Id.* 263, 289.) Mr. Seth included in his proposed Amended Complaint (*Id.* 289.), declarations supporting his allegations from Laura Nuss (*Id.* 364); Nancy Thaler (*Id.* 378); Dr. Robert Denney (former BOP psychologist) (*Id.* 403); and Marisa Brown (former director of the District's Developmental Disabilities Administration Health Initiative) (*Id*. 433).

The district court denied Mr. Seth's motion, finding the "central reason" Mr. Seth's claims failed was that "he could not allege sufficient facts suggesting that he was denied DDS services due to his disability, rather than due to the fact…that he had been deemed by a federal court, by clear and convincing evidence, to be a danger to the community." (*Id.* 60.) In rejecting Mr. Seth's new allegations, the court relied on Judge Britt's finding of dangerousness—made after Mr. Seth's Complaint was filed—as an overriding nondiscriminatory basis for the District's decision. (*Id*. 60-61.) The court stated "this fact, which remains unchallenged in the Eastern

District of North Carolina, 'undermines any allegation—that was pled or could be pled—suggesting that the District failed to act for plaintiff . . . because he has an intellectual disability.'" (*Id.* 60 (emphasis added).) It continued: "Seth has failed to offer evidence supporting an inference that DDS's refusal to accept responsibility for Seth's care was because of his disability, as opposed to concerns…in light of Seth's dangerousness finding." (*Id.* 70 (emphasis added).) "In light of [Judge Britt's] finding, by clear and convincing evidence, that Seth's release to the community would pose a substantial risk of causing bodily injury and that state placement was not available, Seth could allege no facts that the state's treatment officials had determined that community placement was now appropriate or could be reasonably accommodated." (*Id.* 60-61.) The court concluded that "whatever quarrel Seth has with DDS's 'unilateral[]' decision that state placement is not appropriate, …, this assessment was ratified by the Complex Warden at FMC Butner and [Judge Britt]." (*Id*. 61 n.2 (citation omitted).)

Finding, therefore, that amending the complaint would be futile, the court denied the motion.

SUMMARY OF ARGUMENT

Mr. Seth alleged that the District violates the ADA by leaving him, a citizen with intellectual disability found incompetent to stand trial, in federal

prison when it could provide him a more integrated living arrangement with appropriate services. The district court erred by dismissing Mr. Seth's Complaint with prejudice for failing to provide evidence that was not Mr. Seth's burden even to allege at the motion to dismiss stage.

Mr. Seth's Complaint more than sufficiently alleged discrimination under the ADA, Section 504, and DCHRA. Mr. Seth alleged that the District could readily arrange for community-based care for him, utilizing its existing service system and without presenting any unreasonable public risk, but chooses not to do so. Further, he alleged that the District found him eligible for its community-based services, secured a provider to deliver those services, and agreed to civilly commit him and provide those services, but then revoked its agreement without explanation, all of which demonstrates that the services he seeks are reasonable. The court's dismissal with prejudice was based on several erroneous legal premises.

First, the court erred in concluding that Mr. Seth failed to plead facts showing the District violated his right to receive services in the most integrated setting appropriate. Mr. Seth properly pleaded that he is unnecessarily confined in a federal prison when he could reasonably be served in the community with the services deemed necessary by the District's medical professionals. In finding otherwise, the court resolved at

the pleading stage the essential factual questions the parties are disputing, i.e., whether the District can meet Mr. Seth's needs in its current programs. Further, the court erroneously found dispositive that the Defendants, D.C. officials, did not believe community-based treatment was appropriate. But the question is whether qualified medical professionals—not District officials—have determined that community-based services are appropriate based on their medical expertise. Otherwise, the *Olmstead* "right" to receive care in the least restrictive environment that medical professionals deem suitable would be meaningless, as state political officials could simply decide that treatment is not appropriate. The court also erroneously shifted the burden to Mr. Seth to allege facts demonstrating that serving him would not constitute an undue burden, fundamental alteration, or direct threat when these are affirmative defenses for which the District bears the burdens of production and persuasion.

Second, the court erred in finding that the federal civil commitment of Mr. Seth excuses the District from its obligations to him. Not so. By refusing to respond to the federal government's request for state placement, the District denied the North Carolina court the opportunity even to consider whether Mr. Seth could be safely served in the community. The district court improperly gave dispositive weight to the Judge Britt's finding of

dangerousness, relying on this decision rather than accepting Mr. Seth's allegations as true. In doing so, the court misunderstood Mr. Seth's allegations, which challenged the District's failure to provide Mr. Seth with community-based services and did not contend that the U.S. Attorney General failed to make reasonable efforts to return him to District custody.

Third, the court erred in dismissing Mr. Seth's claims based on speculation that the District's actions could have been motivated by non-discriminatory factors, such as budgetary limitations, FMC Butner's Certificate of Dangerousness, or the North Carolina civil commitment order. The court misapplied well-established pleading standards, which required the court to take Mr. Seth's factual allegations as true and construe all inferences in his favor, and misunderstood the substantive elements of disability discrimination claims. The court believed the District could only have violated the ADA if its discrimination was motivated by Mr. Seth's disability, but no such motivation is required to establish liability. Under the ADA, an alleged non-discriminatory reason for the defendant's actions *begins* the inquiry rather than *ends* it and, regardless, none of these factual questions can be resolved at the motion to dismiss stage.

Fourth, the court erred in dismissing Mr. Seth's claims with prejudice and denying his motion to alter or amend the judgment. The standard for

dismissing a complaint with prejudice is extraordinarily high. Even if the court had correctly identified alternative nondiscriminatory bases for the District's actions, it incorrectly denied Mr. Seth leave to amend to address those alternatives. He presented sufficient facts to support all of the allegations the court found lacking.

This Court should vacate the district court's judgment and remand for further proceedings.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT MR. SETH FAILED TO PLEAD FACTS SHOWING DEFENDANTS VIOLATED HIS RIGHT TO RECEIVE SERVICES IN THE MOST INTEGRATED SETTING APPROPRIATE.

The district court erred in dismissing this case on the pleadings. "To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *see also Harris v. D.C. Water & Sewer Auth.*, 791 F.3d 65, 68 (D.C. Cir. 2015). In assessing whether a plaintiff has alleged a claim that is plausible on its face, the court must accept as true all

the well-pleaded allegations in the complaint and "draw all inferences in [the plaintiff's] favor." *Harris v. Ladner*, 127 F.3d 1121, 1123 (D.C. Cir. 1997).

With respect to allegations of disparate treatment, under the *McDonnell-Douglas v. Green*, 411 U.S. 792, 802-04 (1973), framework for establishing racial discrimination,[11] this Court has held that a plaintiff can "raise an inference of discrimination by showing 'that she was treated differently from similarly situated employees who are not part of the protected class.'" *Brown v. Sessoms*, 774 F.3d 1016, 1022 (D.C. Cir. 2014) (citation omitted). If the plaintiff establishes a prima facie case, the burden then shifts to the employer to articulate "some legitimate, nondiscriminatory reason" for the action, which the plaintiff can still rebut by proving the employers' justification is "merely pretext for discrimination." *Id.* at 1022-23 (citation omitted); *see also Gordon v. U.S. Capitol Police*, 778 F.3d 158, 161–62 (D.C. Cir. 2015).

This Court has been clear that "[a]t the motion to dismiss stage, the district court cannot throw out a complaint even if the plaintiff did not plead the elements of a prima facie case." *Brown v. Sessoms*, 774 F.3d at 1023

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[11] *See, e.g.*, *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50-52 (2003) (applying the *McDonnell-Douglas* burden-shifting framework in the context of the ADA).

(citation omitted). Mr. Seth's Complaint adequately stated a claim that the District's failure to petition for civil commitment and provide him available community-based services pursuant to its own treating professionals' opinions violated the ADA. Contrary to the court's assumption, Judge Britt's finding that Mr. Seth was subject to federal civil commitment did not ratify the District's failure to serve him and does not stand in the way of his civil rights claims. The District's failure to serve Mr. Seth constitutes discrimination on the basis of his disability under unjustified segregation, disparate treatment, disparate impact, and reasonable modification theories of discrimination under the ADA. Any budgetary or capacity constraints or dangerousness concerns are affirmative defenses unsuitable for resolution at the motion to dismiss stage.

A. Mr. Seth Sufficiently Alleged that the District Failed to Serve Him in the Most Integrated Setting Appropriate

Mr. Seth properly pleaded a claim that he is unnecessarily confined in a federal prison when he could reasonably be served in the community. In finding otherwise, the district court improperly resolved at the pleading stage the essential factual question at issue in this case, i.e., whether the District can appropriately meet Mr. Seth's needs in its current programs. The court appeared to believe that the North Carolina court already resolved that question in the District's favor, but it did not.

To plead unnecessary segregation under *Olmstead*, a plaintiff must show that (1) "treatment professionals have determined that community placement is appropriate;" (2) "the transfer from institutional care to a less restrictive setting is not opposed by the affected individual;" and (3) "placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Olmstead*, 527 U.S. at 587. Mr. Seth met each of those elements. As a preliminary matter, all parties agree that the second element—Mr. Seth's non-opposition to transfer—was met. (J.A. 38.)

This Court recently agreed with the conclusion that "[t]he District has little to be proud of regarding its historic inability to comply with *Olmstead's* integration mandate." *Brown v. District of Columbia*, 928 F.3d at 1084 (quoting *Brown v. District of Columbia*, 322 F.R.D. 51, 96 (D.D.C. 2017), *rev'd*, 928 F.3d 1070 (D.C. Cir. 2019)). Here, the District has the capacity to serve Mr. Seth, but simply refuses.

B. Violation of *Olmstead* does not Require Allegations that Defendants' *Officials* (As Opposed to *Treating Professionals*) Believe Community-Based Services to be Appropriate

With respect to the first element, Mr. Seth pleaded that the District's own treating professionals determined that Mr. Seth can and should be

served in a community placement. (J.A. 86–99.) That should have ended the analysis at the pleading stage.

The court erroneously found it dispositive that the *named defendants*—i.e., people who are *not* treating medical professionals—"no longer find community-based treatment appropriate." (*Id.* 39.) The Complaint did not—and need not— allege the Defendants' beliefs. More fundamentally, even if their views had been alleged, the views of unidentified District officials or attorneys cannot override the views of treating professionals.

Olmstead itself makes that principle crystal clear. There, state officials objected all the way to the Supreme Court to the plaintiffs being served in the community. The Supreme Court found it improper to defer to these uninformed views, reasoning: "When 'a disabled individual's *treating professionals* find that a community-based placement is appropriate for that individual, the ADA imposes a duty to provide treatment in a community setting—the most integrated setting appropriate to that patient's needs.'" 527 U.S. at 595 (emphasis added) (quoting *L.C. ex rel. Zimring v. Olmstead*, 138 F.3d 893, 902 (11th Cir. 1998), *aff'd in part, vacated in part, remanded by*, *Olmstead* , 527 U.S. 581 (1999)). The question is whether qualified *medical professionals* have determined that community-based services are

appropriate for an individual based on their medical expertise. *See id*. If it were otherwise, *Olmstead*'s "right" to receive care in the least restrictive environment would be dependent on a state's political whims, *i.e.*, it would be no right at all.

In this case, Defendants' own medical professionals made the determination—repeatedly, and so far unchallenged with competent evidence—that Mr. Seth can be appropriately served in an integrated setting. The district court erroneously believed that Dr. Kristina Lloyd—the BOP (not the District) psychologist who testified in the federal civil commitment proceeding—found otherwise, but she did not. Dr. Lloyd's assessment did not challenge Dr. Mason's recommendations regarding how Mr. Seth could be safely served in the community with appropriate support from the District (nor would it be expected to, since that court was not presented with that question). Even if Dr. Lloyd's opinion were relevant to the *Olmstead* analysis (it is not), it would merely create a disputed question of material fact, not a basis for dismissal.

The unsupported, hypothetical opinions of unidentified state officials with no apparent medical qualifications, and the incorrectly presumed opinion of a BOP psychologist with no basis to assess the District's

available services, in no way justify dismissing Mr. Seth's claims. Yet, the court found those opinions determinative as a matter of law.

C. Mr. Seth Properly Pleaded the District Can Accommodate his Needs in a More Integrated Setting.

Mr. Seth pleaded that the District can reasonably provide him necessary public services (*i.e.*, supervised care that ensures public safety) in a more integrated setting pursuant to CIDA, which was designed to serve individuals precisely in Mr. Seth's situation. Among other things, the Complaint alleged that the District's treating professional—Dr. Mason—found (following a comprehensive assessment) that Mr. Seth is not a predator, that he would be "responsive to and appropriate for placement in a highly structured and supervised [minimum of one-to-one, round-the-clock supervision] community-based residential program," and that "a more restrictive setting would not be necessary." (J.A. 90.) Mr. Seth further alleged that providers with appropriate experience and expertise in D.C. are willing to serve him, that the District's own expert found these services could reasonably address any public safety concerns, and that the District agreed to provide such services before inexplicably changing its mind. (*Id.* 98.) Thus, Mr. Seth sufficiently alleged that the requested community-based services are reasonable and available.

The court erred in relying on the North Carolina court's dangerousness finding, apparently on the erroneous assumption that this determination made it impossible for Mr. Seth to plausibly plead that he can safely receive services in a more integrated setting. (*Id.* 61.) The court erroneously required Mr. Seth to prove that serving him would not be an undue burden or fundamental alteration and would not constitute a direct threat—affirmative defenses on which the District bears the burdens of production and persuasion. *See, e.g.*, *Steimel v. Wernert*, 823 F.3d 902, 916 (7th Cir. 2016) (fundamental alteration); *Lovejoy–Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 220-21 (2d Cir. 2001) (direct threat and undue burden); *E.E.O.C. v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571 (8th Cir. 2007) (direct threat); *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 840-41 (7th Cir. 2001) (direct threat); *Nunes v. Wal–Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999) (direct threat).

As this Court has held:

> Although the [*Olmstead*] Court did not expressly declare that the State bears the burden of proving the unreasonableness of a requested accommodation once the individual satisfies the first two requirements, we believe it does…A State that cannot demonstrate it has [an adequate *Olmstead*] plan in place….*must* make every modification to its policies and procedures requested by an institutionalized disabled individual who wishes to, and could, be cared for in the community, *unless* the modification would be so costly as to require an unreasonable transfer of the State's limited resources away from other

> disabled individuals…The district court's formulation led it to require Plaintiffs to meet a burden they should not have been made to shoulder.

Brown v. District of Columbia, 928 F.3d at 1077-79 (emphasis in the original).

Indeed, were the District actually concerned that Mr. Seth poses a direct threat[12] to the health or safety of others, the ADA requires the District to

> 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(b).

The district court, rather than hold the District to its burden, placed the burden on Mr. Seth and ignored his allegations—clarified in the proposed Amended Complaint—that a dangerousness finding not only does not extinguish the District's obligation to civilly commit and serve him, but was, in fact, a *predicate* to the District's ability to civilly commit him under

[12] Defined as a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures." 28 C.F.R. § 35.104(4).

CIDA. A person with ID cannot be civilly committed in the District (or under 18 U.S.C. § 4246) unless it is proven he or she is dangerous. D.C. Code § 7-1304.06a ("(d) If the Court or jury finds that the person does not have an intellectual disability or that the person is not likely to cause injury to others as a result of the person's intellectual disability if allowed to remain at liberty, the Court shall dismiss the petition.") The District consistently expressed awareness of a potential federal dangerousness finding throughout Mr. Seth's eligibility determination and planning process and nevertheless repeatedly indicated its willingness to serve him in the community in line with Dr. Mason's recommendations. The subject of the current case is the availability of appropriate services that will allow Mr. Seth to return safely to his community and the District's ADA obligation to provide them, utilizing the mechanism CIDA created precisely for this situation.

As alleged in the Complaint, the District's expert already concluded *twice* that Mr. Seth poses no such threat, provided he receives the reasonable supports and services readily available within the District's existing service system. Judge Britt's order regarding dangerousness did not conclusively determine this factual dispute.

D. The Federal Civil Commitment Does Not Excuse the District from its Obligations to Mr. Seth.

The court determined that Judge Britt's civil commitment order "ratified" and precluded any challenge to the District's decision not to serve Mr. Seth. According to the court, Judge Britt's dangerousness finding required dismissal of Mr. Seth's unjustified isolation claim, as it "undermines any allegation—that was pled or could be pled—suggesting that the District failed to act for plaintiff . . . because he has an intellectual disability." (J.A. 60 (citing Defs.' Opp'n 5)). The court ruled that Judge Britt's findings were so inconsistent with Mr. Seth's allegations, they justified refusing to accept those allegations' truth. No such inconsistency exists.

Judge Britt did not rule on the questions posed in this case. To the contrary, the District, by refusing to respond to the federal government's request, precluded Judge Britt from considering whether Mr. Seth could be safely served in the community. Accordingly, Judge Britt did not contemplate, much less rule on, Mr. Seth's dangerousness if provided the services available in the District's system. And BOP authorities would be obligated by statute to return Mr. Seth to the District if it were prepared to take responsibility for his care and treatment. 18 U.S.C. § 4246(d).

All Judge Britt found, on the limited facts before him, three weeks after Mr. Seth filed his Complaint in the current case, was that (i) no state placement had been made available, and (ii) Mr. Seth's release (in the absence of such state placement) created a potential for risk. He made no substantive finding about whether the District *could* suitably serve Mr. Seth, but rather found that no suitable state placement *was* available, based on the FMC-Butner Warden's certification that DC did not respond to his letter. Order, *United States v. Seth*, Case No. 5:17-HC-02090-BR (E.D.N.C. filed May 17, 2018) [hereinafter "Order Denying Stay"]; 2018 Competency Hearing, *supra* at 25, 45-46.

Nor did Judge Britt make any finding that Mr. Seth would be a danger to the community if appropriate community-based services were provided to him by the District. Indeed, because of the District's failure to respond to the Warden's inquiries, the court had no evidence before it of the availability of appropriate District services, of their effect on dangerousness, or of the District's obligations under the ADA and CIDA. Order Denying Stay, *supra* at 3.[13]

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[13] Nor could Mr. Seth plausibly bring evidence of the effect of available services to Judge Britt's attention in the absence of the District's willingness to provide them.

The district court appeared to believe Mr. Seth's claims were a collateral challenge to Judge Britt's finding and to the Attorney General's decision not to release Mr. Seth unsupervised. (J.A. 60-61.) The court misunderstood Mr. Seth's allegations, which challenged the District's failure to provide him with services in the most integrated setting appropriate and did not contend that the *Attorney General* acted improperly.

The district court misunderstood the import of Judge Britt's dangerousness finding, which *triggered* D.C.'s obligation to serve Mr. Seth under the federal civil commitment scheme and CIDA rather than *extinguish* it. The federal civil commitment statute expresses a clear preference for states to assume responsibility for their citizens, and, if the state does so, requires the federal government to transfer custody. 18 U.S.C. § 4246(d). CIDA provides the District the authority to take such custody through civil commitment.

And the ADA requires the District to affirmatively ensure that its citizens receive public services in the most integrated setting appropriate. The statutes do not contemplate that a state, by refusing to respond to federal requests, can wash its hands of any obligation; if states were permitted to do so with impunity, the federal civil commitment scheme would not work as intended and the rights of people with disabilities to be served in the most

integrated setting appropriate would be violated, as Mr. Seth's were here.

II. THE DISTRICT COURT ERRED IN FAILING TO ACCEPT MR. SETH'S FACTUAL ALLEGATIONS AS TRUE AND DRAW ALL INFERENCES IN HIS FAVOR AND INSTEAD BASING DISMISSAL ON FACTUAL DEFENSES

Mr. Seth's Complaint and Proposed Amended Complaint comprehensively described how Defendants' violated his rights under statutes that protect individuals with disabilities. The district court failed to accept his allegations as true and draw all inferences in his favor. Worse, rather than shifting the burden to Defendants to provide nondiscriminatory bases for their actions (the validity of which should be adjudicated later in the case), the court imagined hypothetical non-discriminatory reasons for the District's actions and then dismissed the Complaint based on them.

To state a claim for violation of Title II of the ADA, "a plaintiff must allege: (1) that he is a "qualified individual with a disability"; (2) who "was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity"; and (3) that "such exclusion, denial of benefits, or discrimination was by reason of his disability." *Abdus-Abdus–Sabur v. Hope Village, Inc.*, 221 F. Supp. 3d 3, 8 (D.D.C. 2016) (quoting *Lee v. Corr.*

Corp. of Am., 61 F. Supp. 3d 139, 142–43 (D.D.C. 2014))[14] Mr. Seth properly alleged each element.

The court found that Mr. Seth failed to plead discrimination "because of disability," but it did not properly apply that standard. Instead, the court essentially required Mr. Seth to plead animus, which is not required by the ADA. Discrimination "because of disability" can take several forms under the ADA. In addition to unjustified segregation, discrimination may be shown through evidence of: (1) failure to reasonably modify policies, practices, or procedures as necessary to avoid discrimination on the basis of disability, 28 C.F.R. § 35.130(b)(7); (2) disparate treatment, 28 C.F.R. § 35.130(b)(1) (prohibiting public entities from excluding, denying benefits, or providing unequal benefits on the basis of disability);[15] or (3) disparate impact, 28 C.F.R. § 35.130(b)(3) (prohibiting public entities from utilizing criteria or methods of administration that have the effect of discriminating on the basis of disability) and (b)(8) (prohibiting public entities from

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[14] To state a claim under Section 504, a plaintiff must also allege that the defendant is a recipient of federal financial assistance. *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 266 (D.D.C. 2015).

[15] Although the court added a claim entitled "intentional discrimination," as discussed below, intent is not required for any form of discrimination under the ADA.

imposing eligibility criteria that screen out or tend to screen out individuals with disabilities). Mr. Seth asserted all three forms of discrimination.

In dismissing Mr. Seth's ADA claims, the court held: "the plaintiff 'must establish that disability actually played a role in the decision making process and had a determinative influence on the outcome.'" (J.A. 33.) While it is true that the ADA prohibits disparate treatment and disparate impact discrimination "on the basis of disability," 28 C.F.R. § 35.130(b)(1), the court confused the requirement that Mr. Seth's disability have a causal influence on the *outcome* with a requirement that the Defendants have *made their decisions* because of his disability. It is sufficient that Mr. Seth alleged he is currently imprisoned in a federal facility because he has ID; he does not need to also plead that his ID motivated the District's inaction.

A. The District Court Improperly Required Mr. Seth to Plead that Defendants' Facially Discriminatory Policy was Carried Out for Intentionally Discriminatory Reasons

The court erred in requiring Mr. Seth to plead that D.C. intentionally treated Mr. Seth worse because of his disability. That is not an element of Mr. Seth's claims.

Mr. Seth alleged that, in addition to violating the *Olmstead* integration mandate, the District's refusal to serve him violated the ADA under theories of disparate treatment, disparate impact, and reasonable modification. In

support of his disparate treatment claim, Mr. Seth alleged the District treats individuals with ID differently from, inter alia, similarly situated individuals with mental illness. (J.A. 69, 72, 95, 116.) Specifically, he alleged the District regularly provides community-based services to residents found incompetent and dangerous due to mental illness—through DBH pursuant to the Ervin Act—but fails to do so for those with ID through DDS pursuant to CIDA. (*Id.* 79.) He alleged that the only relevant differences between these individuals are the disabilities with which they are diagnosed (*Id.* 332-335.) and, accordingly, which District agency is responsible for their care. That is, Mr. Seth alleged that D.C. maintains a facially discriminatory policy, which is the essence of disparate treatment regardless of its subjective motivation.

A plaintiff who challenges a law based on facial discrimination need not allege—or ultimately prove—"malice or discriminatory animus of a defendant." *Cmty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 182 (3d Cir. 2005) (citation omitted). Indeed, "when a policy is 'discriminatory on its face,' the defendant's motive is irrelevant," *Feemster v. BSA Ltd. Partnership*, 548 F.3d 1063, 1070 (2008) (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)) *see also Larkin v. State of Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 290 (6th Cir. 1996) ("the absence of a malevolent motive does not convert a facially discriminatory policy into a

neutral policy with a discriminatory effect." (quoting *Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991))).

Alternatively, Mr. Seth alleged that, even if the District's policy of not providing services to people with ID could be deemed facially neutral, it disparately harms (in the language of the ADA, "has the effect of" excluding) individuals with ID because of their disabilities. (J.A. 74.) The District's policy results in people with mental illness receiving community-based services, while people with ID are relegated to prison. (*Id.* 77 -78, 102-104, 116.) Mr. Seth alleged statistical evidence of such disparate impact. (*Id.* 300, 333-336).

Finally, Mr. Seth alleged that the District refused to reasonably modify its policies and practices to ensure that he would not suffer discrimination because of his disability. Specifically, he alleged that he requested the District to modify its usual practices to allow him access to appropriate services and that these modifications would be reasonable.

The district court erroneously found these allegations insufficient to plead that the District refused to serve Mr. Seth "on the basis of" his disability. The court interpreted "on the basis of" disability to mean the District could only have violated the ADA if its discrimination was

motivated by Mr. Seth's disability. (*Id.* 38-39) (Mr. Seth "failed to offer sufficient indications that the defendants *believe* 'community placement is appropriate' or that 'the placement can be reasonably accommodated.'" (emphasis added)); *id*. 34 (Mr. Seth's Complaint did not provide details about "defendants' *motivations*" for discriminating against him and "Seth has not shown the defendants' *decision* not to seek custody *was made "because* he is handicapped." (emphasis added)); *id*. 37 (Seth "offered no evidence that the defendants' *decision* not to initiate commitment and custody proceedings was made based on his disability." (emphasis added)); *id*. 39 (Seth "failed to offer sufficient indications that the defendants *believe* 'community placement is appropriate' or that 'the placement can be reasonably accommodated." (emphasis added)).

Nowhere do the text, regulations, or judicial interpretations of the ADA require such motivation to establish liability, and governing precedent is to the contrary. The Supreme Court has instructed that Section 504[16] does not require proof of discriminatory intent because "[d]iscrimination against the handicapped was perceived by Congress to be most often the product,

[16] The ADA regulations provide that the ADA "shall not be construed to apply a lesser standard than the standards applied under [Section 504]…" 28 C.F.R. § 35.103(a).

not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Alexander v. Choate*, 469 U.S. 287, 295 (1985); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1259 (D.C. Cir. 2008).

Title II of the ADA merely states that "no qualified individual with a disability shall, *by reason of such disability*, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphasis added). It is enough, per the statute, for the disability to be the *cause* of the exclusion, denial, or discrimination; it need not also be the *motivation*. In particular, the ADA prohibits actions that *have the effect* of excluding, denying benefits or discriminating because of disability. 28 C.F.R. § 35.130(b)(3). The Title II regulation's use of the phrase "on the basis of disability" does not mean a covered entity's action (or inaction) was taken because of disability, or that the entity took action with intent to harm a person with a disability, or even knowledge that a person with disability would be harmed or that its actions would violate the law. Rather, "on the basis of disability" means the result of the defendant's actions was harmful to the plaintiff because of his disability.

The court's error is clear in its citation to *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) (J.A. 33), as the basis for its

view that Mr. Seth needed to establish discriminatory purpose to prevail. *Feeney* is a constitutional equal protection case, not a statutory ADA case like the instant matter. A claim under the ADA, unlike one under the Equal Protection Clause, does not require intent or discriminatory purpose. *See Erickson v. Bd. of Govs of State Colleges & Univs. For Ne. Ill. Univ.*, 207 F.3d 945, 949 (7th Cir. 2000) ("To see this, consider the role of intent. When a state law or practice does not expressly concern a particular characteristic …, but has a disparate impact on persons with that characteristic, the plaintiff in constitutional litigation must establish that the state *intends* to discriminate on the basis of that characteristic. *See, e.g.*, [*Feeney*] …. Things are otherwise under the ADA, which not only demands accommodation (which forces the employer to consider, rather than ignore, disabilities) but also prohibits any rule or practice that has a disparate impact… 42 U.S.C. § 12112(b)(6). … Cases such as *Feeney* and *Davis* hold that the Equal Protection Clause does not forbid laws and practices that have a disparate impact; but the ADA does forbid them." (emphasis added) (citations omitted)).

The court also relied on *Howell v. Gray*, 843 F. Supp. 2d 49, 59 (D.D.C. 2012), for the proposition that disability must "actually play[] a role" or have a "determinative influence on the outcome" to succeed under

any theory of discrimination. (J.A 33.) However, *Howell* is irrelevant here. The plaintiff in *Howell* alleged that, because he had learning disabilities, the ADA required him to be provided more information about available services than was provided to people without disabilities. *Howell* 843 F. Supp. 2d at 52. The *Howell* plaintiff's claim failed because there was no entitlement for *anyone* to receive post-secondary education benefits. *Id*. at 57. In other words, the plaintiff could not allege an ADA violation where the District denied the services at issue to everyone, regardless of disability. Mr. Seth, on the other hand, is alleging that the District *failed* to provide certain services to individuals with ID but *did* provide such services to others, including similarly situated individuals with mental illness.

The district court's error is most clear with respect to the ADA's requirement that covered entities provide reasonable modifications to policies and practices to accommodate disabilities. A plaintiff need not allege that a reasonable modification was denied because of disability. Rather, the modification only must have been needed because of the disability. Such a denial of an accommodation that is needed because of disability (and the resulting exclusion from service) is discrimination "because of disability." *Cf. Henrietta D. v. Bloomberg*, 331 F.3d 261, 274 (3d Cir. 2003) ("[A] public entity is not only prohibited from affording to

persons with disabilities services that are 'not equal to that afforded others,' or 'not as effective in affording equal opportunity,' but also cannot prevent a qualified individual with a disability from enjoying 'any aid, benefit, or service,' regardless of whether other individuals are granted access." (citations omitted)).

As this Court has explained in the employment context,[17] "When a disabled plaintiff alleges a failure to make a reasonable accommodation, … she need not explain why her employer has failed to accommodate her. The failure to accommodate is itself discriminatory. …The employer's motivation for refusing the accommodation plays no part in that analysis, and therefore reasonable-accommodation claims are "not subject to analysis under *McDonnell–Douglas*." *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (en banc) (citations omitted). The same analysis governs here. The District had notice of Mr. Seth's disability, his potential for dangerousness absent supervision and supports, and his need for accommodation, and he pleaded facts that make it at least plausible that the

[17] Reasonable accommodation claims under Title I of the ADA are analogous to reasonable modification claims under Title II. *See, e.g.*, *Etheridge v. FedChoice Fed.Credit Union*, 789 F. Supp. 2d 27, 35 (D.D.C. 2011); *McElwee v. Cty. of Orange*, 700 F.3d 635, 640 & n.2 (2d Cir. 2012).

accommodation was reasonable. *Chenari v. George Washington*, 847 F. 3d 740, 747 (D.C. Cir. 2017). That is all that is required at this stage.

Nor were Defendants' motivations relevant to Mr. Seth's disparate impact claims. Disparate impact discrimination, by definition, is not intentional. *See, e.g.*, *Serrano v. Cintas Corp.*, 699 F.3d 884, 892 (6th Cir. 2012). Rather, the ADA disparate impact regulations merely required Mr. Seth to allege that the District's actions and eligibility criteria for community services "tend to" screen out people with ID because of their disabilities. Only the effect of the challenged policy, not the reason it was adopted, is relevant, and Mr. Seth sufficiently pleaded disparate effect. *Paulson*, 525 F.3d at 1267 ("Where the plaintiffs identify an obstacle that impedes their access to a government program or benefit, they likely have established that they lack meaningful access to the program or benefit."); *see also Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996) (facially neutral quarantine requirement for animals entering Hawaii disparately impacts individuals with disabilities who rely on service animals).

B. The District Court Improperly Relied on Possible Defenses as a Basis to Dismiss Appellant's Complaint

In finding that Mr. Seth failed to show that the District's actions were discriminatory by reason of his disability (J.A. 30, 32, 42), the court suggested the District's actions could have been due to budgetary

limitations, the FMC Butner Certificate of Dangerousness, or Judge Britt's civil commitment order. These are defenses to be alleged and proven by Defendants and are factual questions that cannot be resolved at the motion to dismiss stage. (*Id.* 37-38.)

At the pleading stage, a plaintiff is not required to disprove all possible alternative motivations; he need only plead that defendant's "unfavorable action gives rise to an inference of discrimination." *Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999); *see also Raytheon*, 540 U.S. 44. Mr. Seth is entitled to an opportunity to factually rebut such proposed explanations by showing they are pretextual. *Raytheon*, 540 U.S. 44 (applying the *McDonnell-Douglas* burden-shifting framework in the context of the ADA). And while he was not required to do so, Mr. Seth proposed an Amended Complaint demonstrating that the District in fact had no budgetary or programmatic capacity concerns (J.A. 339, 366.) Even if the District had made these arguments, resolution of such factual disputes is clearly inappropriate at the motion to dismiss stage. [see infra]

Compounding its error, the court failed to understand that, in an ADA claim seeking reasonable modifications, a purported non-discriminatory reason for the defendant's actions *begins* the inquiry rather than *ends* it. A defendant must prove, as an affirmative defense, that it would be an undue

burden to make the requested modification. *See, e.g.*, 28 C.F.R. § 35.130(b)(7)(i) ("A public entity shall make reasonable modifications . . . unless *the public entity can demonstrate* that making the modifications would fundamentally alter the nature of the service, program, or activity." (emphasis added)); 28 C.F.R. § 35.164; *Brown v. Sessoms*, 774 F.3d at 1023; *M.J. v. District of Columbia*, 401 F. Supp. 3d 1, 12-13 (D.D.C. 2019) (at motion to dismiss stage "allegations that defendants failed to provide mandated services, which has the effect of segregating plaintiffs, are sufficient to state a claim of discrimination under *Olmstead*. . . plaintiffs have alleged that compliance with federal law. . . would not require a fundamental alteration to defendants' service system, which is all that is required at this stage.")

It is particularly inappropriate to find, as the court did, that the District acted because of Mr. Seth's perceived dangerousness "instead of" his disability. That is not, in fact, an alternative explanation. Rather, the possibility that Mr. Seth could be dangerous in the wrong environment is the predicate for the relief he requests. Even assuming safeguards are necessary for his care, the real question in this case—which cannot be resolved on a motion to dismiss—is whether the District can reasonably provide those safeguards in the community rather than leaving Mr. Seth in federal prison.

The District's own expert has answered this question unequivocally in the affirmative. At most, Judge Britt's order gave rise to a dispute of fact regarding whether Mr. Seth would be dangerous if provided appropriate services. Thus, dismissal was in error.

III. THE DISTRICT COURT ERRED BY DISMISSING MR. SETH'S CLAIMS WITH PREJUDICE AND DENYING HIS MOTION TO ALTER OR AMEND THE JUDGMENT AND AMEND THE COMPLAINT

The court abused its discretion in denying Mr. Seth leave to amend his Complaint to add the very factual details—ruling out hypothetical alternative reasons for the District's actions—the court found lacking. A district court's denial of a motion for leave to amend under Fed. R. Civ. P. Rule 15(a)(2) is reviewed for abuse of discretion, *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1083 (D.C. Cir. 1998), "bearing in mind that the rule is to be construed liberally." *Belizan v. Hershon*, 434 F.3d 579 (D.C. Cir. 2006). A court's refusal to grant a Rule 59(e) motion is also reviewed for abuse of discretion, a standard that is met where the district court committed a clear error of law or fact. *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996); *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997). Here the court committed clear error by dismissing Mr. Seth's original Complaint with prejudice.

A dismissal with prejudice is warranted *only* when a trial court "determines that 'the allegations of other facts consistent with the challenged pleading *could not possibly cure the deficiency.*'" *Firestone*, 76 F.3d at 1209 (emphasis added) (quoting *Jarrell v. U.S. Postal Serv.*, 753 F. 2d 1088, 1091 (D.C. Cir. 1985)). The standard for dismissal with prejudice is extraordinarily high, as it operates as a rejection of the plaintiff's claims on the merits. *See Firestone*, 76 F.3d at 1209; *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012).

That standard was not met here; the court based its conclusion that amendment would be futile on the erroneous belief that Judge Britt's commitment order contradicted Mr. Seth's Complaint. As discussed above, that conclusion was clear error. (J.A. 73.) The court misunderstood the import of Judge Britt's commitment order, and its ruling cannot be defended.

Here, Mr. Seth's proposed Amended Complaint, far from being futile, addressed the supposed deficiencies in his initial Complaint. The court's initial opinion raised hypothetical nondiscriminatory bases for the District's actions. Although, under the ADA, these arguments are affirmative defenses for which Defendants bear the burden of production and persuasion, Mr. Seth's Proposed Amended Complaint addressed all these possible bases, including (1) correspondence showing District officials were well aware—

when they originally found Mr. Seth eligible, agreed to civilly commit and serve him, and designed his service plan—of the public safety issues that his unsupervised release would pose and of the potential for a finding of dangerousness; (2) the District's budget to provide services continually increased since 2016 and it had sufficient programmatic capacity to serve Mr. Seth; (3) data demonstrating the disparate impact of the District's policies on residents with ID in contrast to residents with mental illness; and (4) declarations from experts demonstrating that the District could serve Mr. Seth safely in the community. (*Id.* 289.) While Mr. Seth was not required to address these possible alternative bases for the District's actions, his proposed Amended Complaint would have negated the need to litigate that point, and he should have been granted leave to file it.

CONCLUSION

For the above reasons, this Court should reverse the district court's decision, vacate its entry of judgment for Defendants, and remand this case for further proceedings.

Respectfully submitted

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REQUEST FOR ORAL ARGUMENT

This appeal involves a complex factual record as well as multiple legal issues. Appellant respectfully submits that oral argument would benefit this Court's consideration of this appeal.

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2019, I electronically filed the foregoing Brief of the Appellant with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I also hereby certify that participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 12,508 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in Times New Roman 14 point.

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