

No. 20-5166

IN THE
Supreme Court of the United States

J.J.H.,

Petitioner,

v.

WAUKESHA COUNTY, WISCONSIN

Respondent.

On Petition for Writ of Certiorari
to the Court of Appeals of Wisconsin

MOTION FOR LEAVE TO FILE AND BRIEF OF
THE NATIONAL ASSOCIATION OF THE DEAF
AND DISABILITY RIGHTS WISCONSIN AS
AMICI CURIAE IN SUPPORT OF THE
PETITIONER

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**MOTION FOR LEAVE TO FILE BRIEF AS
AMICI CURAE IN SUPPORT OF PETITIONER**

Pursuant to Supreme Court Rule 37.2(b), the National Association of the Deaf and Disability Rights Wisconsin respectfully move for leave to file the attached brief as *amici curiae* in support of the Petitioner. All parties were timely notified of *amici's* intent to file the attached brief as required under Rule 37.2(a). This motion is necessary because counsel of record for Respondent has withheld consent to the filing of this brief. Counsel of record for Petitioner has consented to the filing of this brief.

Amici are nonprofit organizations dedicated to the preservation, protection, and promotion of the rights of those with developmental or other permanent physical disabilities or impairments and, in the case of *amicus* National Association of the Deaf, to the advancement of the rights of deaf and hard of hearing individuals in particular. As organizations dedicated to the protection of the rights of deaf and hard of hearing persons and concerned with those areas of the law that fail to guarantee to such persons rights afforded to their hearing counterparts, *amici* have a particular interest in this case.

The decision below disregarded Petitioner's argument that, as a deaf person, she had a Fifth and Fourteenth Amendment right to an interpreter during her civil commitment proceedings—proceedings in which Petitioner could not meaningfully participate and

yet which resulted in her being ordered into protective placement at a state psychiatric hospital.

The denial and disregard of Petitioner's rights is both out of line with this Court's due process jurisprudence and emblematic of the outcome often delivered to deaf and hard of hearing litigants in civil proceedings. Existing state and federal law fails to guarantee interpreters, and thus meaningful participation, to such litigants, and a clear pronouncement by this Court is required. *Amici*, as organizations that respectively advocate for the rights of the deaf and hard of hearing and for Wisconsin residents with permanent physical disabilities, have significant experience addressing the due process rights of such litigants and are uniquely positioned to comment on the challenges that these litigants face in meaningfully participating in court proceedings.

Amici offer a useful perspective on the issue before the Court. *Amici* therefore respectfully request that the Court grant this motion for leave to file the attached brief in support of Petitioner.

August 19, 2020

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*¹

The National Association of the Deaf (“NAD”), founded in 1880, is the oldest civil rights organization in the United States, and is the nation’s premier organization of, by, and for deaf and hard of hearing individuals. The mission of the NAD is to preserve, protect, and promote the civil, human, and linguistic rights of over 48 million deaf and hard of hearing individuals in the United States. The NAD endeavors to achieve true equality and full access for its constituents in all aspects of society, including education, employment, and governmental programs and services.

Disability Rights Wisconsin (“DRW”) is the statewide non-profit organization designated by the Governor of the State of Wisconsin to act as the congressionally mandated protection and advocacy system for Wisconsin residents with mental illness, developmental disabilities, and other permanent physical disabilities or impairments, pursuant to Wis. Stat. § 51.62; 29 U.S.C. § 794e; 42 U.S.C. § 15041 *et seq.*; and 42 U.S.C. § 10801 *et seq.* Through the pursuit of administrative, legal, and other appropriate remedies,

¹ Under Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Under Supreme Court Rule 37.2(a), counsel of record for all parties received timely notice of the intent to file this brief. Counsel for Petitioner consented to this filing, but counsel for Respondent did not; *amici curiae* have accordingly moved for leave to file this brief.

DRW seeks to address the issues facing people with disabilities in Wisconsin and to ensure their rights.

SUMMARY OF THE ARGUMENT

This Court should recognize that deaf people have a constitutional due process right to understand and participate meaningfully in their judicial proceedings—particularly those in which significant liberty interests are at stake.

Deafness is a varied and nuanced condition, and ensuring the right to understand and participate in judicial proceedings will look different for different deaf people. Currently, deaf people in the United States are left to rely on federal and state statutes to try to obtain interpretive services for their court proceedings. These statutes, however, vary in effectiveness and frequently fall short of ensuring the interpretive aids needed for the deaf to have true access to the courts.

This Court's due process jurisprudence establishes that the Constitution guarantees individuals the right to access, understand, and participate in one's own judicial proceedings. *Amici* ask the Court to recognize the extension of these rights to the deaf, who require effective interpretation assistance for that right to be realized.

This case presents an ideal vehicle for the Court to recognize this right and simplify the statutory disarray that currently fails to guarantee to the deaf the right to participate meaningfully in commitment hearings. Here, Petitioner—who is undisputedly deaf—was denied

interpretive services at her commitment hearing, despite her counsel's insistence that Petitioner could not understand or meaningfully participate without those services. Petitioner reiterated this argument on appeal, but was again denied. In this case, the Court need not determine every way that meaningful participation can be achieved for deaf litigants—*amici* ask only that the Court recognize that this right exists and that the egregious facts of this case offend it.

ARGUMENT

I. To Be Meaningfully Present In Court Proceedings, Deaf Litigants Require Effective Interpretation.

Though the right to be present for and participate in legal proceedings affecting one's liberty is a fundamental tenet of due process, courts often fail to provide deaf people with this right by failing to provide adequate accommodations. Just like anyone else, deaf people are entitled to be informed of the substance of their proceedings, in real time, and to advocate on their own behalf. Though the ability to communicate is key to securing this right, deafness presents obstacles to communication that state and federal laws too often fail to address, either by failing to provide any accommodation at all or by providing an accommodation that is inadequate to meet a deaf person's specific communication needs. These failures arise from underlying misunderstandings and misconceptions concerning the needs and capabilities of deaf people.

A. Deaf Persons Constitute a Unique and Diverse Community That Is Neither Well Understood Nor Well Accommodated by the Hearing Population.

Deafness is a varied and nuanced condition that the majority of people outside of the deaf community have little exposure to or true understanding of. Deaf persons are best understood as members of a linguistic minority with its own distinct culture. *See* Jeremy L. Brunson, *Your Case Will Now Be Heard*, 13 J. Deaf Stud. & Deaf Educ. 77, 78–79 (2008). These communicational and cultural differences meaningfully shape a deaf person’s perception of the world. Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can’t Talk to the Judge?*, 26 Ariz. St. L.J. 163, 165–66 (1994).

Within the deaf community itself, there are substantial variations in linguistic abilities. Those outside the deaf community often expect deaf persons to not only be fluent in American Sign Language (“ASL”), but also to read and write English fluently. In fact, language competency exists on a complex continuum among the deaf population just as it does with the hearing population. ASL is only one of many sign-language systems and 75% of individuals who identify as deaf never learn ASL. Deirdre M. Smith, *Confronting Silence: The Constitution, Deaf Criminal Defendants, and the Right to Interpretation During Trial*, 46 Me. L. Rev. 87, 96 (1994). There is also a common misconception that ASL is simply a visual word-for-word translation of English, when in fact ASL is an entirely distinct language from English with its own structure, syntax,

grammar, and vocabulary. Moreover, written English, despite being visual, can be extremely difficult for a non-hearing person to learn because they lack the foundation of spoken language. See Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language, and Due Process*, 2003 Wis. L. Rev. 843, 854. A hearing person learns to read first by learning spoken language and then by learning to map those sounds onto letters, which are essentially arbitrary symbolizations of sounds. A deaf person must learn to connect written words to the sign language system they use, a remarkable feat given the mismatches in construction between spoken languages and visual languages.

Beyond the considerable range of deaf persons' natural and inherent capacities for language, the age at which an individual loses their hearing also plays a large role in their later language acquisition. Those who are "prelingually deaf," meaning they lost their hearing before age three, likely never had the opportunity to develop English language skills. Even if these individuals are able to learn ASL and study English later on, English will always functionally be a second language that the individual must mentally translate into their native language in real time in order to facilitate understanding. Those who are "prevocationally deaf," meaning that they lost their hearing prior to completing their education, may struggle to fully master either language to the point of fluency. Because these individuals have their language development disrupted, they often struggle to expand their English skills beyond the capacity they had attained at the time of hearing loss, but also miss the

window for learning ASL via natural language acquisition processes.

Deficiencies in our nation's educational system further exacerbate these issues by failing to consistently and effectively provide access to language education for deaf individuals. *See* LaVigne & Vernon, *supra* at 852. Though the methodologies for deaf education have improved over time, special education is still a significantly under-resourced area. Moreover, many deaf persons have "secondary disabilities" and require further specialized support to help them acquire either ASL or written English. Even for deaf students with a high capacity for language acquisition, their progress can be stymied by the low expectations that many educators set for deaf students. Still others' language acquisition is impeded by factors such as a lack of family support or community resources or an inaccurate diagnosis early in their development. *See* Carla M. Mathers, Nat'l Consortium of Interpreter Educ. Ctrs., *The Deaf Interpreter in Court* 8 (2009).

B. Adequate Accommodation of These Variations in Linguistic Capabilities Requires a More Sophisticated Approach to Interpretation Than What Many Courts Currently Offer.

Despite these nuances, courts typically and mistakenly frame interpretation for deaf litigants in terms of the spoken language interpretation model. Within this framework, a hearing interpreter translates spoken English into ASL in real time, the same way that a non-English interpreter would translate for a non-

English speaker. For a deaf litigant who is not fluent in ASL, this form of interpretation is often no better than no interpretation at all. *See* Smith, *supra* at 95. Even for those who do use ASL, legal concepts are often abstract in nature and are best contextualized by shared cultural understandings. But the variations, nuances, and subtleties of deaf culture and experience can make it easy for a judge to misconstrue a deaf person's body language and vice versa. LaVigne & Vernon, *supra* at 915-16. At bottom, even where the interpreter is certified and both parties are fluent in ASL, straight translation from spoken English is often ill-suited for meaningfully communicating legal concepts.

For deaf persons who are not fluent in ASL, interpretation sufficient to achieve their meaningful presence in a proceeding may be best facilitated through the provision of a deaf-hearing interpreting team. This framework involves an interpreter, who is deaf herself, working in tandem with a hearing interpreter to assist in facilitating communication. Deaf interpreters are in a better position to assess a deaf person's linguistic capacity and to adjust accordingly: A deaf interpreter can parse ASL into whatever form of communication is necessary to communicate concepts, whether that be a simpler form of ASL, another formalized visual-gesture system, or pantomime. McAlister, *supra* at 168 n.34. A deaf interpreter will also share cultural experiences and knowledge with a deaf person and will be able to draw upon those connections when framing more abstract concepts. *See* Phyllis Wilcox, *Dual Interpretation and Discourse Effectiveness in Legal Settings*, 7 J. Interpretation 89, 90-92 (1995). This method is not only

widely endorsed in the deaf community, *see* Mathers, *supra* at 10, but is also recognized by some state statutes, *e.g.*, Ga. Code § 24-6-656; Me. Rev. Stat. tit. 5, § 48-A(2); *see also* LaVigne & Vernon, *supra* at 926.

II. Current State and Federal Statutes Address the Right to Effective Interpretation to Varying Degrees and with Inconsistent Results.

Current state and federal laws offer an inconsistent legal patchwork which fails to guarantee effective interpretation to deaf defendants in civil commitment hearings. This failure deprives deaf defendants of meaningful participation in those proceedings.

At the federal level, for example, interpreter rights are provided in part by the Court Interpreters Act, 28 U.S.C. §§ 1827-1828 (“Interpreters Act”), which recognizes that fair and just outcomes cannot obtain without providing interpreters to parties who require them to communicate effectively. *See United States v. Hasan*, 526 F.3d 653, 666–67 (10th Cir. 2008) (Gorsuch, J.) (stating that district courts err by refusing interpreters where doing so materially debases “comprehension of the proceedings and the ability to effectively communicate”). But the Interpreters Act’s scope is limited, and its protections fall far short of a guarantee that deaf respondents and defendants will receive effective interpretation where required to ensure their meaningful participation.

In criminal and certain civil proceedings, the Interpreters Act provides a number of procedural protections for those with limited English proficiency

who require interpreters to communicate effectively. For one, if an interpreter is “unable to communicate effectively,” then the presiding judge must “dismiss” the deficient interpreter and obtain an effective replacement. 28 U.S.C. § 1827(e)(1). In addition, while any party may waive the Act’s right to an interpreter in whole or in part, such waiver must be: (1) approved by the presiding judge; (2) made expressly on the record; (3) made after an opportunity to consult with counsel; and (4) made after the presiding judge has explained, using an interpreter, the nature and effect of the waiver. 28 U.S.C. § 1827(f)(1). Because of these safeguards, courts of appeals have repeatedly affirmed district courts’ use of discretion in rejecting attempted waivers.²

In practice, however, the Interpreters Act’s protections are less substantial than they appear. The Interpreters Act has no application whatsoever in state proceedings and so does nothing to guard the rights of defendants in state civil commitment hearings. *Costa v. Williams*, 830 F. Supp. 223, 225 (S.D.N.Y. 1993); *accord Guam v. Nuguid*, 959 F.2d 241, 1992 WL 66669 (9th Cir. 1992) (unpublished table decision) (stating that the Interpreters Act is inapplicable to nonfederal Guam

² See *United States v. Henry*, 888 F.3d 589, 604 (2d Cir. 2018) (“[T]he [Interpreters Act does not] grant[] an absolute right to waive use of an interpreter at trial proceedings.”), *cert. denied*, 139 S. Ct. 2615 (2019); *cf. United States v. Osuna*, 189 F.3d 1289, 1292–94 (10th Cir. 1999) (finding failure to apply Interpreters Act was plain error even where defense counsel stated he did not wish to have an interpreter); *United States v. Sun Myung Moon*, 718 F.2d 1210, 1231–32 (2d Cir. 1983) (finding that requiring appellee to use an interpreter against his wishes was permissible, given that it was “reasonably necessary to the achievement of a fair trial”).

courts); *Sabuda v. Kim*, No. 260495, 2006 WL 2382461, at *1 n.2 (Mich. Ct. App. Aug. 17, 2006) (per curiam) (stating that the Interpreters Act is inapplicable to state courts); *State v. Gongora*, 866 S.W.2d 172, 174 (Mo. Ct. App. 1993) (same); *Wei v. State Civ. Serv. Comm’n*, 961 A.2d 254, 258 (Pa. Commw. Ct. 2008) (same). Moreover, protections are limited even in federal courts, where the Act’s procedures are “contingent upon the availability of appropriated funds.” *See* 28 U.S.C. § 1827(g)(2).

The Interpreters Act thus leaves unprotected respondents in state civil commitment hearings. Those respondents, like Petitioner, are subject to serious deprivations of liberty depending on courtroom inquiries into their levels of functioning, such as their ability to provide for their own basic needs—an injury often informed by the respondent’s ability to communicate coherently. *See Mathers, supra* at 5–6, 64.

Similar to the Interpreters Act, the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101–12213, requires that state and local government facilities, including courts, be accessible to individuals with disabilities and provide reasonable accommodations to qualified persons. Although the ADA promises deaf people the meaningful opportunity to participate in court proceedings, the ADA’s exceptions and limitations often allow that promise to go unfulfilled.

ADA Title II and its accompanying regulations require that state and local governments give people with disabilities equal opportunities to benefit from government programs, services, and activities, such as court proceedings. *See* 42 U.S.C. §§ 12131–12165; 28

C.F.R. § 35.101 *et seq.* Title II's operative provision, Section 12132, provides 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." 42 U.S.C. § 12132. Its regulations require state and local governments to communicate with individuals with disabilities as effectively as it communicates with others. 28 C.F.R. § 35.160(a). Those regulations encourage public entities to accomplish these goals by providing "auxiliary aids and services," such as qualified interpreters. 28 C.F.R. §§ 35.104, 35.160(b)(1).

As with the Interpreters Act, however, the ADA does not adequately protect the rights of deaf persons. First, the ADA (like the Interpreters Act) includes an administrative-burden exception that allows state and local governments to routinely deny requests made by those with disabilities. 28 C.F.R. § 35.164 (stating that a public entity need not "take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens").

Second, the ADA does not provide adequate enforcement mechanisms. Where an interpreter right is ignored, the ADA provides a private right of action to sue for monetary damages, but it allows for no structural redress. As such, the wronged individual cannot use the ADA to void the offending decision. For instance, in *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001), a hard of hearing plaintiff brought a Title II claim after a state court denied him real-time transcription

during his marriage-dissolution proceedings. Although his ADA claim against several defendants survived summary judgment, *id.* at 1142, his motion for a new trial in his state-court proceedings was denied, *id.* at 1133. *See Ali v. City of Newark*, No. CV 15-8374, 2019 WL 1326888, at *2, *8 (D.N.J. Mar. 25, 2019) (denying deaf plaintiff equitable relief under the ADA after he was twice denied an ASL interpreter in municipal court proceedings). The ADA is merely a “prophylactic measure” that helps compensate the disabled after the fact. *See Tennessee v. Lane*, 541 U.S. 509, 533 (2004). It fails to guarantee the disabled what the Constitution requires: the meaningful opportunity to participate in judicial proceedings.

Most states have implemented some sort of statutory regime providing deaf litigants with interpreters in certain civil proceedings,³ with some specifically identifying proceedings on mental health determinations as settings where the deaf are entitled to

³ *See* Ala. Code § 12-21-131; Alaska R. Admin. 6.1; Ariz. Rev. Stat. § 12-242; Cal. Evid. Code § 754; Colo. Rev. Stat. § 13-90-204; Del. Code tit. 10, § 8907; D.C. Code § 2-1902; Fla. Stat. § 90.6063; Ga. Code § 24-6-652; 735 Ill. Comp. Stat. 5/8-1402; Iowa Code § 622B.2; La. Rev. Stat. § 46:2364; Me. Stat. tit. 5, § 48-A; Mass. Gen. Laws ch. 221, § 92A; Mich. Comp. Laws § 393.503; Minn. Stat. § 546.43; Miss. Code § 13-1-303; Mo. Rev. Stat. § 476.753; Mont. Code § 49-4-503; Neb. Rev. Stat. § 20-153; N.H. Rev. Stat. § 521-A:2; N.J. Stat. § 34:1-69.10; N.M. Stat. § 38-9-3; N.Y. Jud. Law § 390; N.C. Gen. Stat. § 8B-2; N.D. Cent. Code § 28-33-02; Ohio Rev. Code § 2311.14; Ohio Sup. R. 88; Okla. Stat. tit. 63, § 2409; Or. Rev. Stat. § 45.285; 42 Pa. Cons. Stat. § 4432; R.I. Gen. Laws § 8-5-8; S.C. Code § 15-27-15; Tenn. Code § 24-1-211; Tex. Civ. Prac. & Rem. Code § 21.002; Utah Code § 78B-1-202; Vt. Stat. tit. 1, § 332; Va. Code § 8.01-384.1; Wash. Rev. Code § 2.42.120; W. Va. Code R. § 5-14A-3; Wyo. Stat. § 5-1-109(a).

interpreters. *See, e.g.*, Mont. Code § 49-4-503(3)(a); N.J. Stat. § 34:1-69.10(c); S.C. Code § 15-27-15(C). That guarantee, however, is far from universal. Nevada and South Dakota fail to give even lip service to deaf civil litigants' need for effective interpretation, recognizing only a discretionary power to appoint interpreters. *See* Nev. R. Civ. P. 43(d) (providing that civil courts *may* appoint interpreters for the deaf); S.D. Codified Laws § 19-3-14 (recognizing a discretionary “inherent power” to appoint interpreters). Several other states ignore the specific linguistic needs of the deaf by including them in general statutes covering interpreters for all non-English languages in civil proceedings. *See, e.g.*, Ind. Code § 34-45-1-3; Haw. R. Cert. Lang. Interp. 1; Wis. Stat. § 885.38.

As a result, the inconsistencies and gaps among these statutes produce widely variable results depending on the state in which a deaf litigant finds herself. But the right of meaningful access to the courts is not state dependent: “The Due Process Clause . . . requires the States”—all of them—“to afford certain civil litigants a ‘meaningful opportunity to be heard’ by removing obstacles to their full participation in judicial proceedings.” *Lane*, 541 U.S. at 523 (citation omitted). States’ formal statutory promises of interpreters for deaf civil litigants belie an incomplete and inconsistent provision of justice and leave the deaf with insufficient remedies when state courts fail to provide interpreters.

In some instances, these statutes succeed in ensuring that deaf persons can communicate effectively in court proceedings when substantial interests are at stake. *See, e.g., Dep’t of Hum. Servs. v. Wickman (In re Wickman)*,

No. 270326, 2007 WL 162573, at *1 (Mich. Ct. App. Jan. 23, 2007) (per curiam) (detailing extensive use of interpreters, including intermediary interpreters as provided by Michigan statute, in a termination-of-parental-rights case involving a deaf father and children). But often, state interpreter statutes fail to live up to their promise. For example, California’s statute guarantees that “[i]n a civil or criminal action”—including juvenile and mental health proceedings—in which a deaf person is a party or witness, the “proceeding shall be interpreted in a language that [the individual] understands by a qualified interpreter,” Cal. Evid. Code § 754(b), yet the statute nonetheless fails in practice to ensure an interpreter’s presence in court. In *Santa Clara County Department of Family & Children’s Services v. J.G. (In re A.G.)*, No. H044516, 2018 WL 343774 (Cal. Ct. App. Jan. 10, 2018) (not published), for example, a father with hearing loss appealed the termination of his parental rights after a juvenile court refused to provide an appropriate interpreter. *Id.* at *1, *9. Instead of providing a sign language interpreter, the court offered the father a single earplug, an auditory device for the other ear, and written notes. *Id.* at *9. Because the father had previously found hearing aids insufficient, his attorney requested a continuance until an effective interpreter could be found, but the court refused to adjourn despite concluding that the father “may very well have some hearing problems.” *Id.* at *9–10. On appeal, the state appellate court affirmed the termination of parental rights, finding that the lower court’s failure to provide the requested accommodation did not constitute a due process violation. *Id.* at *12.

In Arizona, a seemingly straightforward statutory directive requiring courts to appoint qualified interpreters for the deaf, *see* Ariz. Rev. Stat. § 12-242(A), fails to deliver for deaf litigants. For example, in *Lopez v. Phoenix Ass’n of the Deaf, Inc.*, No. 1 CA-CV 06-0758, 2008 WL 4069455 (Ariz. Ct. App. Mar. 18, 2008), a trial court denied the Phoenix Association of the Deaf a court-appointed interpreter. *Id.* at *5–6. Although the Arizona statute contains no notice requirement, *see* Ariz. Rev. Stat. § 12-242, the trial court ruled that fourteen days’ notice was required to provide an ASL interpreter, *Lopez*, 2008 WL 4069455, at *6. On appeal, the Phoenix Association of the Deaf argued that the trial court should have provided interpreters *sua sponte*, but the appellate court held that the statute offered no such guarantee. *See id.*

Still other problems abound in other states. Some states place the burden on deaf litigants to request interpreters. *See, e.g., Benjamin S. v. Stephenie S.*, No. S-16007, 2018 WL 669169, at *12 (Alaska Jan. 31, 2018); *cf. Doan v. Medtronic, Inc.*, 560 N.W.2d 100, 107 (Minn. Ct. App. 1997) (placing the burden on litigant to affirmatively request a spoken language interpreter under Minnesota statute covering interpreters for both the deaf and speakers of non-English languages). And others, like Arizona, lack an effective remedy for violations. *See, e.g., Bonner v. Lewis*, 857 F.2d 559, 564 (9th Cir. 1988) (stating that although Arizona’s statute “contains mandatory language,” it “does not create a liberty interest”); *Schreiber v. Pima Cnty.*, No. CV-14-2363, 2017 WL 3446747, at *11 (D. Ariz. Aug. 9, 2017)

(observing that Arizona’s statute “does not provide a private cause of action”).

All told, the state laws contemplating the need for interpreters for deaf civil litigants are uneven and frequently ineffective. They run a spectrum from offering no interpretive guarantee to deaf civil litigants at all (like Nevada and South Dakota), to providing expansive access to interpretive solutions tailored to each deaf litigant’s individual linguistic needs (like Louisiana and Maine). *Compare* Nev. R. Civ. P. 43(d); S.D. Codified Laws § 19-3-14, *with* La. Stat. §§ 46:2361–2372; Me. Rev. Stat. tit. 5, § 48-A. But no matter the promises made by state legislatures to deaf civil litigants, they can go unfulfilled and fail to secure deaf litigants’ due process rights to “full participation in judicial proceedings” and their “meaningful opportunity to be heard.” *See Lane*, 541 U.S. at 523 (internal quotation marks omitted).

A clear pronouncement from this Court, however, would sweep away this insufficient patchwork and replace it with a straightforward constitutional imperative—one that makes clear that effective interpretation is necessary for deaf civil litigants to meaningfully participate in their judicial proceedings.

III. This Court Should Set a Clear Rule That Due Process Requires That Effective Interpretation Be Provided in Civil Commitment Proceedings.

A. The Issue Is Ripe and This Case Is a Good Vehicle.

This case is an ideal vehicle for the Court to decide whether the Fifth and Fourteenth Amendments guarantee interpreters to deaf respondents in civil-commitment proceedings. As Petitioner describes, *see* Pet. at 20, there are no material fact issues at play: No side contests that Petitioner is congenitally deaf, that she needs interpreters to communicate, or that, despite her counsel's requests, her commitment hearing proceeded without effective interpretation. In addition, Petitioner explicitly raised the constitutional issue at each stage below. *Id.* And the issue remains live—Petitioner is still deaf, and she could be subject to a petition for involuntary commitment again. Pet. at 10 (citing *Washington v. Harper*, 494 U.S. 210, 219 (1990) (holding that appeal of constitutionality of involuntary medication order was not moot where appellee could seek such an order again)).

B. This Court's Due Process Precedents Strongly Support Vacating the Decision Below.

Due process guarantees, at a minimum, the meaningful opportunity to participate in judicial proceedings. The Due Process Clause requires the States to afford certain civil litigants a “meaningful opportunity to be heard” by removing obstacles to their

full participation in judicial proceedings. *Lane*, 541 U.S. at 523 (quotation marks omitted); *see also M. L. B. v. S. L. J.*, 519 U.S. 102, 127–28 (1996).

In *Tennessee v. Lane*, 541 U.S. 509 (2004), several paraplegic plaintiffs required wheelchairs for mobility and so could not access upper floors in Tennessee state courthouses, which lacked elevators. 541 U.S. at 513. Plaintiffs sued the state under Title II for denying them “access to, and the services of, the state court system by reason of their disabilities.” *Id.* Their allegations included the vivid description of plaintiff Lane “crawl[ing] up two flights of stairs to get to the courtroom” for his initial criminal appearance. *Id.* at 514. When Mr. Lane “refused to crawl again or to be carried by officers to the courtroom” for his second hearing, he “was arrested and jailed for failure to appear.” *Id.* At issue for this Court in *Lane* was whether the ADA was a valid use of Congress’ Fourteenth Amendment powers to enforce the Due Process Clause. This Court held that “Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress’ § 5 authority to enforce the guarantees of the Fourteenth Amendment.” *Id.* at 533–34.

The same should be true here. The law can no more penalize a paraplegic man who is absent from a courtroom he cannot access than it can commit a deaf woman who cannot join proceedings she cannot hear. “The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.” *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970). A meaningful opportunity to be heard entails an

opportunity “granted at a meaningful time and in a meaningful manner” that is “appropriate to the nature of the case.” *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (quotation marks omitted). The exact procedural requirements for a hearing may vary, but where, as here, there is a significant liberty interest at stake, the hearing must comply with the “root requirement” that an individual have the meaningful opportunity to participate. *See id.* at 378–79.

To determine “the specific dictates” of due process and the meaningful opportunity to be heard, this Court weighs three factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and third, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see also Zinermon v. Burch*, 494 U.S. 113, 127 (1990) (applying *Mathews* factors in civil commitment case). In civil commitment proceedings, all three factors weigh heavily in favor of a right to effective interpretation for deaf litigants.

For the first factor, this Court has stated clearly that the private interest at stake in civil commitment hearings is “a significant deprivation of liberty that requires due process protection.” *Addington v. Texas*, 441 U.S. 418, 425 (1979). As this Court held in *Addington*, the potential deprivation of liberty from an involuntary, psychiatric commitment hearing is “of such

great weight and gravity” that due process requires the government to prove its case in such hearings by clear and convincing evidence, above and beyond the typical standard for a civil case. *Id.* at 427.

For the second factor, this Court has shown particular attention to whether safeguards are “necessary to guard against the risk of erroneous deprivation” of an important individual right. *Allen v. Illinois*, 478 U.S. 364, 374 (1986); *Addington*, 441 U.S. at 425 (“Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions.”). Especially in civil commitment hearings, the meaningful opportunity to be heard and participate is important to prevent erroneous rulings. The primary inquiry in a civil commitment hearing is whether the individual can function in society without harming herself or others. In these circumstances, the inability to communicate is easily conflated with low-functionality. Indeed, in similar circumstances, this Court has determined that “the risk of error in making the determinations [concerning confinement due to mental illness] is substantial enough to warrant appropriate procedural safeguards against error.” *Vitek v. Jones*, 445 U.S. 480, 495 (1980) (holding that prisoners facing involuntary transfer to a mental hospital are entitled to certain procedural protections, including notice and an adversary hearing, due to grave risk of error). In a proceeding that evaluates whether the state may deprive a person of her liberty because of her mental or emotional state, there is grave risk of erroneous deprivation where that person is unable to participate or even understand the proceedings.

For the final factor, the burden on the government is low; and thanks to improvements in technology, that burden continues to lessen. As the COVID-19 pandemic has shown, courts and litigants alike can adapt to operating by video conference. And while in-person interpretation is the best means of ensuring clear and consistent communication for the deaf, *see Video Remote Interpreting*, Nat'l Ass'n of the Deaf, <https://www.nad.org/resources/technology/video-remote-interpreting/> (last visited Aug. 6, 2020), federal regulations, state governments, and practitioners have long recognized that Video Remote Interpreting, a specialized translation service that uses the internet and an audio-visual connection to connect a deaf party with a remote interpreter, is a satisfactory substitute when in-person interpretation is unavailable.⁴ *See* 28 C.F.R. § 35.104 (recognizing Video Remote Interpreting services as an auxiliary aid that may be used to provide effective communication); *Language Access Plan: Video Remote Interpreting (VRI) Pilot Project and Recommended Guidelines for VRI*, Jud. Council of Cal. 2, 5–6 (Feb. 20, 2019), <https://jcc.legistar.com/View.ashx?M=F&ID=7073170&GUID=9B54E3BD-1C5B-4DF4-A4A4-2B943ADFE512> (gathering data showing pilot VRI project was successful for participants and staff). The costs to provide effective interpretation are reasonable; but even

⁴ Here, Petitioner's counsel requested in advance that Waukesha County arrange Video Remote Interpreters for the commitment hearing, *see* Pet. App. at 61a, but the County apparently only sought out in-person interpreters—which in any setting will be a more limited resource—and the County gave up the effort without securing any interpreter of any kind and when 24 hours still remained in Petitioner's 72-hour detention period, *see* Pet. App. at 65a–66a.

if they were not, this Court has made clear that that “ordinary considerations of cost and convenience alone cannot justify a State’s failure to provide individuals with a meaningful right of access to the courts.” *Lane*, 541 U.S. at 533.

C. There Is Nothing Radical About the Ruling Petitioner Seeks.

The Court has already recognized that involuntary commitment produces “a massive curtailment of liberty,” and thus that “it is undeniable that protected liberty interests would be unconstitutionally infringed” should commitment occur “absent compliance with the procedures required by the Due Process Clause.” *Vitek*, 445 U.S. at 491–92 (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)). Moreover, commitment entails more than the loss of liberty; commitment also engenders stigma, which contributes to problems like unemployment, an inability to live independently, social isolation, depressed likelihoods of seeking future treatment, and even increased symptom severity. See Alexandra S. Bornstein, *The Facts of Stigma: What’s Missing from the Procedural Due Process of Mental Health Commitment*, 18 Yale J. Health Pol’y, L. & Ethics 127, 136–37 (2019); accord *Vitek*, 445 U.S. at 492 (“It is indisputable that commitment to a mental hospital can engender adverse social consequences to the individual.” (internal quotation marks omitted)); *Addington*, 441 U.S. at 426 (same). And in some states, including Wisconsin, commitment carries other significant consequences as well, such as the temporary loss of the legal ability to marry, Wis. Stat. § 54.25(2)(c), to serve on juries, *id.*, and to vote, Wis. Stat. § 6.03(1)(a).

The guarantee of effective interpretation fits neatly within the Court’s existing due process jurisprudence. The “consistent theme” of that jurisprudence has been to guarantee “[m]eaningful access to justice,” *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), which focuses on providing litigants “the basic tools of an adequate defense or appeal,” *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). That inquiry is “flexible and calls for such procedural protections as the particular situation demands.” *Little v. Streater*, 452 U.S. 1, 5 (1981) (citation omitted) (extending meaningful participation rubric to a “quasi-criminal” proceeding). In civil commitment, there can be no meaningful participation, and no “meaningful opportunity to be heard,” *id.* at 6 (citation omitted), when a deaf respondent is denied an interpreter. Without one, she can neither participate nor, in many cases, comprehend the proceedings in real time, thereby subjecting her to a massive curtailment of liberty without her input or even awareness.

The Court’s precedents already demonstrate that such denials offend due process—the Court has simply not yet squarely faced this issue. Now, in Petitioner’s case, the Court has the ideal vehicle to address the issue, simplify the patchwork of state and federal laws that fail to provide the necessary guarantee, and articulate a clear due process protection. *Amici* submit that the Court should accept this opportunity and grant *certiorari* in this case.

CONCLUSION

For the foregoing reasons, *amici curiae* National Association of the Deaf and Disability Rights Wisconsin

request that the petition for a writ of certiorari be granted.

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Respectfully submitted,

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