No. 20-5166

IN THE

Supreme Court of the United States

J.J.H.,

Petitioner,

v.

WAUKESHA COUNTY,

Respondent.

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

BRIEF IN OPPOSITION

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INTRODUCTION

The Court should decline to review the civil temporary protective placement order that placed J.J.H. at the Winnebago Mental Health Institute for 30 days and permanently expired on October 15, 2017. That order was the result of a probable cause hearing that, because J.J.H.'s counsel did not request an adjournment, took place on September 15, 2017. Under Wisconsin's non-punitive Mental Health Act ("MHA"), the hearing was statutorily mandated to take place no more than 72 hours after a three-party petition was filed, which contained sworn allegations by J.J.H.'s mother, grandfather, and a citizen advocate. The three-party petition averred that J.J.H. was an adult, deaf, developmentally disabled, mentally ill, exhibited physical agitation and threats of harm to herself and others, and in need of treatment for her mental illness. Despite the presiding court's efforts to locate a certified sign-language interpreter in Wisconsin, Illinois, and Minnesota, a certified interpreter was not available for the hearing. With J.J.H.'s refusal to postpone the hearing, and no safe, alternative placement options where J.J.H. could have received effective treatment, the court proceeded to take testimony from J.J.H.'s treating physician and concluded that temporary placement for 30-days was necessary to protect J.J.H.'s mental health and safety.

For at least two basic reasons, this Court should decline to review expired 2017 order, and it should decline to answer the overly broad question J.J.H. presents. First, because the order is expired, the dispute between J.J.H. and Waukesha County is moot, and there is no live case or controversy to satisfy Article

III's jurisdictional requirement. There is no reasonable expectation that J.J.H. will again encounter a 30-day protective placement order that flows from a probable cause hearing where the same, unique circumstances repeat themselves from 2017. J.J.H. does not assert that such circumstances ever occurred before September 2017, nor in the three years since. Further, there are no signs in the record that the expired order carried with it concrete, real collateral consequences that would constitute an ongoing controversy between J.J.H. and Waukesha County three years later. Additionally, the cumulative circumstances of the 2017 hearing were so unique that they are wholly unlikely to repeat themselves, and, even if they did, procedural safeguards are in place to ensure they are addressed on appellate review.

Second, the sweeping due process question J.J.H. places before the Court is not answerable based the record in this case and the scattered legal framework on which J.J.H. relies. The lower court and all parties involved in the 2017 hearing weighed and considered J.J.H.'s liberty interest in conjunction with her right to participate in and understand what was happening at the hearing. There was no dispute that J.J.H. had a right to participate in and understand the proceedings. Rather, the court did not view that right in a vacuum, and instead considered it along with many other important rights and interests to be weighed at the hearing, including J.J.H.'s statutory right to treatment. Wis. Stat. § 51.001. Further, even assuming the record supported the question presented, J.J.H. has not provided the Court with any logical or legal basis on which to consider a sweeping ruling that

would potentially upend every state's statutory scheme for every variety of civil commitment. J.J.H. relies heavily on case law interpreting criminal defendants' Fifth and Sixth Amendment rights, without acknowledging that Wisconsin's Mental Health Act is explicitly non-punitive and civil in nature. She thus fails to provide the Court with any appropriate constitutional footing on which to take up the question presented, let alone answer it.

For these reasons, as more fully explained in this Brief in Opposition, Waukesha County respectfully requests that the Court deny the Petition for Writ for Certiorari.

STATEMENT OF THE CASE

I. Facts and Proceedings Before the Circuit Court for Waukesha County, Wisconsin.

Chapter 51 of the Wisconsin Statutes contains Wisconsin's MHA, which permits involuntary, civil commitments and assures "the provision of a full range of treatment and rehabilitation services in the state for all mental disorders and developmental disabilities and for mental illness, alcoholism and other drug abuse." Wis. Stat. § 51.001(1). The MHA establishes "a unified system of prevention of such conditions and provision of services which will assure all people in need of care access to the least restrictive treatment alternative appropriate to their needs . . . ." *Id.* The MHA expressly protects personal liberties by prohibiting involuntary treatment for anyone who may be "treated adequately outside of a hospital, institution or other inpatient facility . . . ." *Id.* § 51.001(2).

On September 12, 2017, J.J.H.'s mother, grandfather, and citizen advocate filed a three-party petition for examination ("Three-Party Petition") pursuant to the MHA's involuntary commitment statute, Wis. Stat. § 51.20(1)(a).[1] The Three-Party

[1] That subsection states in relevant part:

> **(1) Petition for examination.** (a) Except as provided in pars. (ab), (am), and (ar), every written petition for examination shall allege that all of the following apply to the subject individual to be examined:
>
> 1. The individual is mentally ill or, except as provided under subd. 2. e., drug dependent or developmentally disabled and is a proper subject for treatment.
>
> 2. The individual is dangerous because he or she does any of the following:
>
> a. Evidences a substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.
>
> b. Evidences a substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm. . . . .
>
> c. Evidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself or herself or other individuals. . . . .
>
> d. Evidences behavior manifested by recent acts or omissions that, due to mental illness, he or she is unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue unless the individual receives prompt and adequate treatment for this mental illness. . . . .
>
> e. For an individual, other than an individual who is alleged to be drug dependent or developmentally disabled, after the advantages and disadvantages of and alternatives to accepting a particular medication or treatment have been explained to him or her and because of mental illness, evidences either incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives, or

Petition contained sworn allegations that J.J.H., who was 19 years old at the time, had been cognitively delayed since age two, she had been diagnosed with a mood disorder and anxiety, she was developmentally disabled, deaf, unable to care for herself and required "24/7 care." (Pet'r's App. 50a, 70a–73a); *see also* Wis. Stat. § 51.20(1)(b) and (c) (requiring at least one petitioner to have personal knowledge of the subject individual's conduct, and requiring that the petition be sworn). The three petitioners also alleged that J.J.H.'s "communication sign language skills [were] limited," as she used her own style of sign language and wrote on a pad of paper. (Pet'r's App. 70a.)

The sworn Three-Party Petition stated that J.J.H.'s mother was unable to provide the care she believed J.J.H. needed due to challenges with J.J.H.'s developmental disabilities, J.J.H.'s increased agitation, and J.J.H.'s threats. (*Id.* at 70a.) J.J.H.'s mother continued to "ask for help and services to no avail." (*Id.*) She had been trying to get J .J.H. into "a more structured residential treatment facility for some time and ha[d] undergone a long process through other services that ha[d] not been helpful." (*Id.* at 71a.) In the recent past leading up to the Three-Party

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> substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness in order to make an informed choice as to whether to accept or refuse medication or treatment; and evidences a substantial probability, as demonstrated by both the individual's treatment history and his or her recent acts or omissions, that the individual needs care or treatment to prevent further disability or deterioration and a substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety and suffer severe mental, emotional, or physical harm that will result in the loss of the individual's ability to function independently in the community or the loss of cognitive or volitional control over his or her thoughts or actions. . . . .

Wis. Stat. § 51.20(1)(a).

Petition, J.J.H. had "pulled knives on" her mother, threatened to kill her mother, and threatened to kill their dog. (*Id.*) Her "elopements from the house" were also becoming more frequent, and her degree of agitation seemed to increase in the month leading up to the Three-Party Petition, which coincided with an increase in her medications. (*Id.*)

The three petitioners went on to allege that, although J.J.H. was becoming increasingly agitated, she had nonetheless agreed to be voluntarily admitted to a psychiatric hospital. (*Id.*) However, when J.J.H. and her mother went to the hospital the day before the Three-Party Petition was filed, J.J.H. refused voluntary admission and stated that she was going to hurt herself. (*Id.* at 71a.) As J.J.H.'s mother was attempting to drive them back home from the hospital, J.J.H. refused to go to school, began kicking the windshield, smashed in the radio, and threw a water bottle and pen at her mother, nearly striking her in the face. (*Id.*) J.J.H.'s mother drove to the police station, where J.J.H. was arrested for domestic disorderly conduct. (*Id.*)

The Three-Party Petition stated that J.J.H.'s mother felt unsafe with J.J.H. at home and that she was unable to continue to care for J.J.H. (*Id.*) The three petitioners described the September 11, 2017 incident at the hospital as part of a "continuous cycle" of J.J.H. becoming "agitated, refus[ing] to seek voluntary treatment, and thr[owing] items at mom." (*Id.*) The three petitioners felt that J.J.H. needed a "medications wash," that she had not been appropriately assessed, and that her needs were not being met. (*Id.*)

At the time the Three-Party Petition was filed, J.J.H. was detained in the Waukesha County Jail on an alleged criminal offense. (*Id.* at 70a.) Her guardian at the time of the Three-Party Petition was her mother, with whom she also resided prior to her hospitalization. (*Id.* at 42a, 72a.) Between 5:30 p.m. and 6:00 p.m. on September 12, 2017, J.J.H. was taken into protective custody and served with a notice of rights and a notice of a hearing "to determine whether there [was] probable cause to believe the allegations made" in the Three-Party Petition. (*Id.* at 66a–69a, 73a); Wis. Stat. § 51.20(7)(a).[2] The probable cause hearing typically triggers a new deadline to hold a final hearing as to the subject's longer-term involuntary commitment, and the probable cause hearing can result in the subject's detention, pending the final hearing. Wis. Stat. § 51.20(7)(c), (8)(b).

In accordance with Wis. Stat. § 51.20(7)(a), the probable cause hearing was required to take place within 72 hours of J.J.H.'s placement in custody and was set for September 15, 2017 ("Probable Cause Hearing"). (Pet'r's App. 67a.) J.J.H. was appointed counsel through the Wisconsin State Public Defender's Office on September 13, 2017, and, by then, she had been removed from the Waukesha

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[2] That subsection states as follows:

> **(7) Probable-cause hearing.** (a) After the filing of the petition under sub. (1), if the subject individual is detained under s. 51.15 or this section the court shall schedule and hold a hearing to determine whether there is probable cause to believe the allegations made under sub. (1)(a) within 72 hours after the individual is taken into custody under s. 51.15 or this section, excluding Saturdays, Sundays and legal holidays. At the request of the subject individual or his or her counsel the hearing may be postponed, but in no case may the postponement exceed 7 days from the date of detention.

Wis. Stat. § 51.20(7)(a) (underlined emphasis added).

County Jail and placed in protective custody at the Winnebago Mental Health Institute ("Winnebago") based on an order to detain, pending the results of the Probable Cause Hearing. *See* (Pet. Writ. Cert. 3); (Pet'r's App. 66a); Wis. Stat. § 51.20(2)(a).[3] J.J.H. has not challenged or criticized her removal her from the Waukesha County Jail pursuant the order to detain.

The Probable Cause Hearing proceeded on September 15, 2017. *See* (Pet'r's App. 13a–55a.) J.J.H. was present at the hearing, represented by two assistant state public defenders, and Waukesha County appeared by counsel from corporation counsel's office. (*Id.* at 13a.) Also present were J.J.H.'s grandparents, J.J.H.'s citizen advocate, and J.J.H.'s mother, along with her attorney. (*Id.* at 13a–14a.) The hearing began before Waukesha County Circuit Court Commissioner Sara Scullen, who immediately addressed the potential for securing a certified interpreter for J.J.H.: "It's my understanding that multiple [certified interpreter] services were called, including every possible interpreter service that is available to [the court] out of state, out of county including Madison, [Wisconsin,] Chicago, [Illinois], Minnesota, and there are no available interpreters today." (*Id.* at 16a.)

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[3] That subsection states as follows:

> **(2) Notice of hearing and detention.** (a) Upon the filing of a petition for examination, the court shall review the petition within 24 hours after the petition is filed, excluding Saturdays, Sundays, and legal holidays, to determine whether an order of detention should be issued. The subject individual shall be detained only if there is cause to believe that the individual is mentally ill, drug dependent or developmentally disabled and the individual is eligible for commitment under sub. (1)(a) or (am) based upon specific recent overt acts, attempts or threats to act or on a pattern of recent acts or omissions made by the individual.

Wis. Stat. § 51.20(2)(a).

Recognizing the importance for J.J.H. to understand the proceedings, Commissioner Scullen turned to counsel for J.J.H. for suggestions on how to proceed. (*Id.* at 16a–19a.)

J.J.H.'s counsel objected to proceeding with the Probable Cause Hearing absent a "certified sign interpreter." (*Id.* at 18a–19a.) And although Wis. Stat. § 51.20(7)(a)[4] permitted J.J.H. or her attorney to request that the Probable Cause Hearing be postponed for up to seven days after J.J.H.'s detention, J.J.H.'s counsel objected to adjourning the Probable Cause Hearing, citing J.J.H.'s right to a hearing within 72 hours from the time of her detention. (*Id.* at 18a–19a.)

Commissioner Scullen explained that these unique circumstances put the court in "quite a predicament," as it recognized the importance of J.J.H.'s ability to understand what happened in the Probable Cause Hearing, while also recognizing J.J.H.'s potential continued detention. (*Id.* at 20a.) Specifically, Commissioner Scullen believed that there was a need for sufficient proofs on the record to continue J.J.H. in detention status. (*Id.*) After conferring with counsel about possible options, Commissioner Scullen briefly took a recess and, due to scheduling issues, Waukesha County Circuit Court Judge Lloyd Carter took over as the presiding official for the Probable Cause Hearing. (*Id.* at 22a–24a.)

Before taking testimony, Judge Carter recognized the court's efforts to secure interpreter services, noting that the clerk's office "investigated . . . the entire State of Wisconsin for a sign language interpreter, extended that search into Illinois and . . . to the State of Minnesota, [but] was unable to locate any certified sign

[4] *See* note 2, *supra*.

language interpreter to assist" the court on the date of the Probable Cause Hearing. (*Id.* at 26a.) Further, the court noted that, even without knowing J.J.H.'s level of reading comprehension, the court attempted to obtain a real-time court reporter that could transcribe the proceedings for J.J.H., but could not find an available reporter. (*Id.*)

J.J.H.'s counsel again objected to adjourning the 72-hour time period for the Probable Cause Hearing, and reiterated the objection to proceeding without an interpreter. (*Id.* at 27a.) The court confirmed that there were no viable, alternative placement options for J.J.H. at that time, as even sending J.J.H. home was not an option because there was a no-contact order between J.J.H. and her mother as a result of a bond condition in J.J.H.'s criminal prosecution. (*Id.* at 28a, 49a.) Moreover, the medical witness, Dr. William Pinkonsly was not available later in the day due to a scheduling conflict. (*Id.*) Based on the totality of these circumstances, the court proceeded with the hearing.

Waukesha County called Dr. Pinkonsly, who testified under oath in the course of the Probable Cause Hearing, and stated that he had been a licensed physician since 2000, and board certified since 2011. (*Id.* at 29a.) He was familiar with J.J.H., as she was his patient at Winnebago. (*Id.*) Dr. Pinkonsly had evaluated J.J.H. and consulted collateral information as part of that evaluation, including a police report and briefly speaking with J.J.H.'s mother. (*Id.*)

As a result of his evaluation, Dr. Pinkonsly found J.J.H. to have congenital hearing loss, and to be mentally ill with a working diagnosis of intellectual

disability and an unspecified mood disorder. (*Id.* at 30a.) Dr. Pinkonsly testified that J.J.H.'s mental illness amounted to a substantial disorder of her thought, mood, perception, orientation, or memory, and that it interfered with her judgment, behavior, and ability to participate in the ordinary affairs of life. (*Id.*) He further found that J.J.H. was incompetent, could not care for herself, and was under a permanent guardianship. (*Id.* at 30a–31a.)

Dr. Pinkonsly additionally testified that J.J.H. did not have the ability to receive and evaluate information, or to make or communicate decisions as necessary to meet her daily needs. (*Id.* at 31a.) He testified that J.J.H.'s disability impaired her judgment such that her abilities to attend to the activities of daily health and safety were negatively affected, and that J.J.H.'s impairment rendered her incapable of providing for her own care and safety. (*Id.*) He further testified that J.J.H. did not have the ability to avail herself of voluntary services in the community, that she had a primary need for residential care and custody, and that he recommended she be treated at Winnebago. (*Id.* at 32a.–33a.) As such, Dr. Pinkonsly opined that J.J.H. needed temporary protective placement, and that she needed to remain in a locked psychiatric setting, as no setting that was less restrictive was available or appropriate at that time. (*Id.* at 35a.)

Relying on a police report that indicated J.J.H. tried to harm her mother by throwing objects at her, Dr. Pinkonsly opined that J.J.H. had an impairment in her functioning that rendered her incapable of providing for her own care and custody, and to such an extent that it created a substantial risk of serious harm to J.J.H. or

others. (*Id.* at 33a–35a.) Dr. Pinkonsly concluded that J.J.H. was a proper subject for treatment with psychotropic medications, and he confirmed that he had discussed the advantages, disadvantages, and alternatives of medications with J.J.H., although she could neither express nor apply an understanding of those advantages, disadvantages, and alternatives. (*Id.* at 35a–36a.)

At the time of the Probable Cause Hearing, J.J.H. was prescribed Risperidone, which Dr. Pinkonsly identified as a psychotropic medication, as well as Lamictal, which he identified as a mood stabilizer. (*Id.* at 36a–37a.) Dr. Pinkonsly testified that these medications were therapeutic for J.J.H., and would not unreasonably impair her ability to prepare for or participate in future court proceedings. (*Id.* at 37a.) He then testified that all of his findings and opinions were expressed to a reasonable degree of psychiatric and professional certainty. (*Id.*) Dr. Pinkonsly's written report, dated September 13, 2017, was filed with the circuit court. (*Id.* at 75a.)

Following Dr. Pinkonsly's testimony on direct examination, he responded to ten questions by counsel for J.J.H. on cross-examination, as well as a question by the presiding judge. *See* (*id.* at 38a–41a.) Waukesha County did not call any of the three petitioners to elaborate on the sworn statements in their Three-Party Petition, and counsel for J.J.H. did not exercise her right to call adversely any of the petitioners to cross-examine their sworn statements. (Pet. Writ Cert. 5); *see also* Wis. Stat. § 51.20(5)(a).[5]

[5] That subsection states as follows:

Counsel for J.J.H. did not call any witnesses, and there is no indication in the record that J.J.H.'s counsel intended to call J.J.H. or any other witnesses to testify. The court made a record of the fact that one of J.J.H.'s attorneys who knew sign language, but was not a certified interpreter, had been communicating with J.J.H. throughout the Probable Cause Hearing. (Pet'r's App. 47a–48a.) Although counsel "was not interpreting the court proceedings[,] . . . [she] was explaining as an attorney to [her] client what was happening." (*Id.* at 48a.)

At the conclusion of the hearing, the parties and the court discussed how to proceed, as J.J.H. was potentially amenable to some type of protective placement, but objected to going to Winnebago. *See* (Pet'r's App. 42a–45a.) However, due to J.J.H.'s bond condition, her undisputed need for treatment, and the lack of placement options available, Waukesha County moved the court to convert the matter to an order for temporary protective placement, pursuant Wis. Stat. § 51.67.[6] (*Id.* at 42a–45a, 49a.) Thus, Waukesha County sought not for the court to

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> **(5) Hearing requirements.** (a) The hearings which are required to be held under this chapter shall conform to the essentials of due process and fair treatment including the right to an open hearing, the right to request a closed hearing, the right to counsel, the right to present and cross-examine witnesses, the right to remain silent and the right to a jury trial if requested under sub. (11). The parent or guardian of a minor who is the subject of a hearing shall have the right to participate in the hearing and to be represented by counsel. All proceedings under this chapter shall be reported as provided in SCR 71.01.

Wis. Stat. § 51.20(5)(a).

[6] That statute states in full:

> **Alternate procedure; protective services**
>
> If, after a hearing under s. 51.13(4) or 51.20, the court finds that commitment under this chapter is not warranted and that the subject

find probable cause to detain J.J.H. pending a final hearing for involuntary commitment, but instead to enter a temporary protective placement order whereby her guardian would place her at Winnebago for 30 days, at which time the order would automatically and permanently expire. (*Id.* at 42a, 44a–45a.)

Following a brief recess to review the evidence presented, Judge Carter discussed his review of the sworn Three-Party Petition, Dr. Pinkonsly's testimony, and the procedure permitted under Wis. Stat. § 51.67. (*Id.* at 48a–53a.) After

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> individual is a fit subject for guardianship and protective placement or services, the court may, without further notice, appoint a temporary guardian for the subject individual and order temporary protective placement or services under ch. 55 for a period not to exceed 30 days. Temporary protective placement for an individual in a center for the developmentally disabled is subject to s. 51.06(3). Any interested party may then file a petition for permanent guardianship or protective placement or services, including medication, under ch. 55. If the individual is in a treatment facility, the individual may remain in the facility during the period of temporary protective placement if no other appropriate facility is available. The court may order psychotropic medication as a temporary protective service under this section if it finds that there is probable cause to believe the individual is not competent to refuse psychotropic medication and that the medication ordered will have therapeutic value and will not unreasonably impair the ability of the individual to prepare for and participate in subsequent legal proceedings. An individual is not competent to refuse psychotropic medication if, because of serious and persistent mental illness, and after the advantages and disadvantages of and alternatives to accepting the particular psychotropic medication have been explained to the individual, one of the following is true:
>
> (1) The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting treatment and the alternatives.
>
> (2) The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her serious and persistent mental illness in order to make an informed choice as to whether to accept or refuse psychotropic medication.

Wis. Stat. § 51.67.

making relevant findings on the record, the court entered a temporary protective placement order for J.J.H.'s treatment at Winnebago for 30 days ("TPPO"). (*Id.*) The TPPO expressly expired 30 days from the date of the Probable Cause Hearing, on October 15, 2017. *See* (*id.* at 6a, 53a, 76a.)

On October 15, 2017, the TPPO expired. (*Id.*) J.J.H. has not been subject to the TPPO for nearly three years. (*Id.*)

II. Proceedings Before the Wisconsin Court of Appeals.

J.J.H. appealed the TPPO, and on February 1, 2019, the Wisconsin Court of Appeals dismissed her appeal as moot. (Pet'r's App. 2a.) That court noted that the underlying Wis. Stat. § 51.67 order entered in the case had expired on October 15, 2017, and the plain language of Wis. Stat. § 51.67 does not allow for any extension of the order, mandating dismissal after 30 days. (*Id.* at 4a.)

The court of appeals considered Wisconsin's mootness doctrine and held that no exceptions applied to J.J.H.'s appeal, describing the facts in this case as "unique." (*Id.* at 4a–5a.) Relying on *City of Racine v. J-T Enters. Of Am., Inc.*, 221 N.W.2d 869 (Wis. 1974), the court reasoned that it was not persuaded that the precise situation arises so frequently that a definitive decision on the merits of J.J.H.'s appeal was necessary to guide Wisconsin trial courts. (*Id.*) Further, the court of appeals was not persuaded by J.J.H.'s citation to *Sibron v. New York*, 392 U.S. 40 (1968), for the proposition that the TPPO carried the same types of collateral consequences as a criminal conviction. (*Id.*)

The court of appeals further noted that the unwillingness of J.J.H.'s counsel to postpone the Probable Cause Hearing pursuant to Wis. Stat. § 51.20(7)(a) added to the unlikelihood of the specific facts in the case being repeated. (*Id.* at 5a.) The court of appeals observed, "[w]e do not think such a singular fact pattern is prone to repetition." (*Id.*)

III. Proceedings Before the Wisconsin Supreme Court.

Following the court of appeals' decision, J.J.H. attempted to petition the Wisconsin Supreme Court for review, but missed the filing deadline. *See* (Pet. Writ Cert. 8.) The Wisconsin Supreme Court rejected the Petition for Review as untimely. *See* (Pet'r's App. 12a.) Subsequently, J.J.H. filed a Petition for a Writ of Habeas Corpus with the Wisconsin Supreme Court concerning an entirely different case that did not involve Waukesha County. *See* (*id.* at 9a.) In its order granting J.J.H.'s Petition for Writ of Habeas Corpus in the separate case, the Wisconsin Supreme Court also reinstated her Petition for Review as timely filed, granted it, and set a full briefing schedule relating to J.J.H.'s challenge of the TPPO. (*Id.* at 9a–10a.) On February 27, 2020, after having reviewed the parties' briefs and receiving oral argument, the Wisconsin Supreme Court issued a per curium opinion dismissing J.J.H.'s Petition for Writ of Review as improvidently granted. (*Id.* at 7a–8a.)

J.J.H. then filed the present Petition for Writ of Certiorari seeking this Court's review of the Wisconsin Court of Appeals' decision from February 1, 2019.

REASONS THE COURT SHOULD DENY THE PETITION

I. This Case is Clearly Moot.

This case is moot because there is no live controversy between the parties that the Court can resolve. "Article III, § 2, of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' which restricts the authority of federal courts to resolving "'the legal rights of litigants in actual controversies . . . .'" *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885))). To avail herself of this Court's jurisdiction, J.J.H. must show that she "possesses a legally cognizable interest, or personal stake, in the outcome of the action." *Id.* (internal quotations omitted). "This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved." *Id.* In kind, "throughout the litigation, [J.J.H.] must have suffered, or be threatened with, an actual injury traceable to [Waukesha County] and likely to be redressed by a favorable judicial decision." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (internal quotations omitted).

J.J.H. contends that the alleged controversy between the parties—her due process challenge to the Probable Cause Hearing that resulted in the long-expired TPPO—is not moot for three overarching reasons: (1) she "could" be the subject of

an involuntary commitment proceeding in the future where an interpreter is not available; (2) the expired TPPO carries with it collateral consequences that create a lingering controversy between the parties; and (3) the nature of temporary protective placement orders in general makes them elusive to appellate review. A straightforward application of this Court's longstanding mootness doctrine shows why all three of J.J.H.'s arguments are nonstarters.

A. It is speculation to presume that J.J.H. will be involved in future temporary protective placement hearings where an interpreter is unavailable.

J.J.H. first relies on *Washington v. Harper*, and argues that she "could" be the subject of an involuntary commitment proceeding in the future, and Waukesha County or another hypothetical county "could easily" deny her access to interpreters. 494 U.S. 210 (1990); (Pet. Writ. Cert. 10.) From there, she presumes that the lack of an interpreter in such proceedings is a per se due process violation, and argues that only this Court can prevent such hypothetical due process deprivations by revisiting the expired TPPO and issuing a sweeping declaration that "a deaf person undergoing an involuntary commitment has a due process right to understand and participate in her hearing." (Pet. Writ. Cert. i., 10.)

By relying on *Harper*, J.J.H. attempts to liken her current procedural status—someone seeking a broad declaration of law by way of the Court's review of a judge's three-years-expired temporary protective placement order—to that of a convicted state prisoner who, while still incarcerated, specifically challenged the constitutionality of the State of Washington's written regulatory policy for

administering involuntary medication to mentally ill prisoners. *See Harper*, 494 U.S. at 213–18, 226. In *Harper*, not only was the prisoner incarcerated for the duration of his lawsuit, there was also an abundance of evidence in the record that he had been treated for a serious mental disorder for nearly 10 years and was twice transferred from prison to a state treatment center, where he was—and, absent appellate review, in all likelihood would again be—subject to the precise involuntary medication policy that he challenged in litigation. *Id.* at 218–19.

By contrast, the sweeping declaration J.J.H. seeks from this Court will not resolve any pending controversy between J.J.H. and Waukesha County, and the record is insufficient to support any belief beyond pure speculation that J.J.H. and Waukesha County will find themselves in a future situation where this Court's ruling on the TPPO will have any applicability. There is no specific evidence in the record showing that, aside from the TPPO, J.J.H. has been or will be the subject of another temporary protective placement hearing in Waukesha County where the presiding judge cannot locate an interpreter, or, alternatively, where the parties cannot come to an agreement to postpone or otherwise resolve the issue at the hearing. The Waukesha County Circuit Court's efforts to secure an interpreter or real-time court reporter suggest that, even in 2017, the court considered J.J.H.'s ability to participate in the hearing at the very least an important statutory right. (Pet'r's App. 26a–27a.) No lower court in this case has held that J.J.H. did not have a right to participate in the temporary protective placement proceeding, and the record contains no evidence that, if J.J.H. were somehow again in the same position

as in 2017, a Waukesha County Circuit Court would not view her ability to participate in such a hearing as protected. Unlike the prisoner in *Harper*, a sweeping declaration from this Court will not provide J.J.H. any relief from the TPPO that expired years ago.

The Court's decision affirming the constitutionality of the involuntary medication policy at issue in *Harper* made an immediate, concrete impact on the prisoner's rights both in relation to past experiences, and in the future, when he would in all likelihood encounter the involuntary medication procedures during the remainder of his incarceration. J.J.H. has not shown that a decision from this Court would provide the same type of immediate, concrete impact on any of her due process rights now or in the future in relation to Waukesha County. Thus, J.J.H.'s reliance on *Harper* is misplaced.

B. Unlike a criminal conviction, J.J.H.'s TPPO does not carry with it collateral consequences that save it from mootness.

J.J.H.'s second argument again attempts to compare her to someone convicted of a crime by asserting that the TPPO carries with it "collateral consequences" that keep alive the alleged controversy between J.J.H. and Waukesha County. This Court's established cases explaining the reasons for the collateral-consequences presumption in cases challenging criminal convictions foreclose J.J.H.'s strained comparison.

In *Spencer*, the Court held that Spencer's petition for a writ of habeas corpus was moot because he sought to invalidate an order revoking his parole—not his underlying conviction—and, by the time the petition was before the Court, "Spencer

ha[d] completed the entire term of imprisonment underlying the parole revocation . . . ." 523 U.S. at 3. Following the hearing revoking his parole, Spencer took to the Missouri state court system to challenge the order, and was rejected at the state's trial court, appellate court, and supreme court. *Id.* at 5. Then, six months before his sentence was set to expire, he filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Missouri, "alleging that he had not received due process in the parole revocation proceedings." *Id.* at 6. While his petition was pending in the district court, Spencer was again released on parole and his sentence subsequently expired. *Id.* The district court thus dismissed his petition as moot, and the Eighth Circuit affirmed. *Id.*

On review, this Court retraced its mootness doctrine in the criminal context, and it drew an important distinction between instances where it presumes the existence of a "concrete and continuing injury" and those instances where it does not. *See id.* at 7–12. In cases like *Sibron v. New York*, 392 U.S. 40 (1968), on which J.J.H. relies, where a convicted criminal challenged his conviction, the Court presumes that a wrongful conviction carries with it continuing "collateral consequences" that make challenging the conviction an ongoing case or controversy even after one's sentence expires. *Id.* at 8 (citing *Sibron*, 392 U.S. 40; *see also* (Pet. Writ. Cert. at 11.) The Court reasoned that "the presumption of significant collateral consequences [in the context of conviction challenges] is likely to comport with reality. . . . [because] it is an 'obvious fact of life that most criminal

convictions do in fact entail adverse collateral legal consequences.'" *Spencer*, 523 U.S. at 12 (quoting *Sibron*, 392 U.S. at 55).

However, the Court clarified, "[t]he same cannot be said of parole revocation." *Id.* Thus, the Court "decline[d] to presume that collateral consequences adequate to meet Article III's injury-in-fact requirement resulted from [Spencer's] parole revocation." *Id.* at 14. Further, the Court was not persuaded that the following four collateral consequences that Spencer alleged resulted from his parole revocation satisfied the mootness exception: (1) "the revocation could be used to his detriment in a future parole proceeding;" (2) "the Order of Revocation could be used to increase his sentence in a future sentencing proceeding;" (3) "the parole revocation . . . could be used to impeach him should he appear as a witness or litigant in a future criminal or civil proceeding;" and (4) the parole revocation "could be used against him directly, pursuant to Federal Rule of Evidence 405 . . . [or the state law equivalent] . . . should he appear as a defendant in a criminal proceeding." *Id.* at 14–16. Unpersuaded that the parole revocation carried such injuries-in-fact with it that were not more than "speculative" in nature, the Court disposed of Spencer's remaining arguments and concluded that his challenge to the parole revocation order was moot. *Id.* at 16–18.

Like Spencer, J.J.H. challenges an expired court order that does not result in collateral consequences that the Court can presume exist, nor that in fact create an ongoing, live controversy under Article III. J.J.H. provides no legal authority or argument to suggest that the Court should stray from its holding in *Spencer* and

presume that the TPPO carries with it collateral consequences sufficient to invoke Article III in the same manner as a criminal conviction. Further, the supposed collateral consequences J.J.H. identifies as resulting from the TPPO are of the same speculative and vague nature as those the Court rejected in *Spencer*. For instance, while J.J.H. argues that "[a]n adjudication of mental illness can be used in future commitment, guardianship, criminal and termination of parent rights proceedings," (Pet. Writ Cert. 11), just as in *Spencer*, such future use of the TPPO is "a possibility rather than a certainty or even a probability," 523 U.S. at 14. The fact that J.J.H. discusses her alleged collateral consequences in vague, speculative terms even after such collateral consequences have had nearly three years to actually manifest themselves is telling.

Similarly telling is J.J.H.'s reliance on case law from outside of Wisconsin and the Seventh Circuit in support of her speculative argument that, "in some cases," an involuntary commitment may impact one's rights to possess firearms, vote, or marry, or could otherwise adversely impact one's housing or employment consequences. (Pet. Writ Cert. 11.) J.J.H.'s labeling of the TPPO as an "involuntary commitment" and her reference to non-Wisconsin cases is significant, because "involuntary commitment" has specific meaning under Wisconsin law. Wis. Stat. § 51.20 is titled "Involuntary commitment for treatment;" however, J.J.H. was not placed on an involuntary commitment order under Wis. Stat. § 51.20. J.J.H. was placed on a Wis. Stat. § 51.67 order, (Pet. Writ Cert. 7; Pet'r's App. 6a), which by

that statute's terms is specifically *not* an order of involuntary commitment—it is titled, "Alternative procedure; protective services."

Importantly, an involuntary commitment order under Wis. Stat. § 51.20 specifically sets out measures for restricting a subject's access to firearms, extending the length of commitment, and permitting the use of prior commitments as proof in future commitment proceedings. *See* Wis. Stat. § 51.20(1)(am), (13)(cv), and (13)(g). By contrast and in this case, the TPPO under Wis. Stat. § 51.67 does not carry with it the imposition of a firearm restriction, it cannot be extended beyond 30 days, and it cannot be used as a basis for future Chapter 51 commitment orders. In addition, treatment and court records attendant to a Chapter 51 proceeding are, with very limited exceptions, confidential and not subject to disclosure. *See* Wis. Stat. § 51.20(4)(a) and (4)(b). As such, those records are not generally available to the public in the absence of a specific court order, and they are not generally accessible by the public through Wisconsin's Circuit Court Access website.

Thus, in making a bid for the Court to review this case and entertain the mere possibility of some collateral consequences attached to the TPPO, J.J.H. not only invites the Court to engage in crystal-ball levels of speculation, she also asks the Court to ignore the legal realities under Wisconsin law and instead look to the potential collateral consequences flowing from unidentified species of involuntary commitment orders in jurisdictions thousands of miles away, or presumed collateral consequences commonly associated with criminal convictions. This Court's

established case law would have it quickly decline J.J.H.'s invitation, and therefore shows that review is simply not warranted or beneficial in this case.

C. The circumstances surrounding the Probable Cause Hearing defy repetition and do not evade review.

J.J.H. argues that, because temporary protective placements under Wis. Stat. § 51.67 are short, "[t]hey can expire before an appeal is even filed[,] . . . they often expire before an appellate court can issue a decision on the merits[, and s]ignificant errors can escape appellate review and correction." (Pet. Writ Cert. 9.) "[T]he capable-of-repetition doctrine applies only in exceptional situations, . . . where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again . . . ." *Spencer*, 523 U.S. at 17 (internal quotations and citations omitted).

Here, neither of the capable-of-repetition doctrine circumstances are met. First, despite the short timeframe of temporary protective placements, J.J.H. has not shown that temporary protective placement orders are being entered in Wisconsin without the participation of the subjects or without necessary interpreters at any frequency beyond the present case, let alone that such instances are commonly evading review. J.J.H. must show that the "challenged action" is too short in duration to be fully litigated, *Spencer*, 523 U.S. at 17, not merely suggest that any challenge to any aspect of any temporary protective placement order could

be difficult to fully litigate, given the sometimes short duration of temporary protective placement orders.

Further, Wisconsin's rules of civil and appellate procedure specifically provide procedural mechanisms for litigants to seek expedited appeals in Chapter 51 cases, to seek relief during the pendency of appeals, to move appellate courts for summary dispositions, and to move appellate courts to advance the submission of cases. *See, e.g.*, Wis. Stat. §§ 808.07, 809.13, 809.17, 809.20, 809.21, 809.30(2)(j). There is no rule stopping a litigant from seeking such appellate relief immediately following a lower court's entry of a temporary protective placement.

Second, there is no reasonable expectation that J.J.H. will be in another temporary protective placement hearing where there is: no available interpreter in three states; no real-time court reporter available; simultaneous objections by J.J.H.'s advocate counsel to postponing the hearing and to proceeding without an interpreter; a no-contact order between J.J.H. and her mother/guardian; no other viable placement alternatives for J.J.H., as well as a pending criminal charge that could have resulted in J.J.H.'s return to jail; and decisions by J.J.H.'s advocate counsel not to cross-examine the signers of the sworn three-party petition or present any witnesses. (Pet'r's App. 13a, 16a, 18a–19a, 26a–27a, 38a–41a, 66a–73a.)

This unique totality of facts simply defies repetition, and there is nothing in the record to provide a reasonable expectation to the contrary. J.J.H.'s reference to a proceeding in her criminal case that lacked an interpreter contains no additional details about that proceeding such that it cannot provide the sole basis for a

reasonable expectation that the circumstances of the September 15, 2017 hearing could repeat. *See* (Pet. Writ Cert. 10.) More importantly, the record shows that, while a certified sign-language interpreter was not present for that criminal proceeding, there was in fact someone who appeared at the criminal hearing "and provided some sign interpreting" for J.J.H. *See* (Pet'r's App. 46a.)

Thus, even this Court's well established exception to the mootness doctrine shows that this case is not appropriate for review, as it is clearly moot and does not offer any opportunity for the Court to expound on or clarify its mootness doctrine. Accordingly, the Court should deny the Petition.

II. This Case is not the Proper Vehicle for Deciding the Overly Broad Question Presented.

Although J.J.H. asks the Court to grant her Petition in order to decide "[w]hether a deaf person undergoing an involuntary commitment has a due process right to understand and participate in her hearing," (Pet. Writ Cert. i.), the answer to the question presented would reach far beyond the actual circumstances shown in the record of this case. Specifically, J.J.H. argues that her due process rights were infringed during the Probable Cause Hearing because the court—despite its best efforts—could not provide the specific type of sign-language interpreter or real-time court reporter that J.J.H. asserted she needed in order to understand the proceedings. (*Id.* at 3, 12–21.) Moreover, in making her arguments, J.J.H. relies on cases discussing the rights of convicted prisoners, criminal defendants, or parties in civil litigation, rather than cases involving temporary protective placements that expire by operation of law, as was the case with her placement in 2017.

Thus, J.J.H.'s arguments and corresponding citations are detached from the broad question presented, in that she argues due process requires courts to provide interpreters for deaf subjects in all involuntary commitment proceedings, while her question presented asks the Court to broadly declare that deaf subjects have due process rights to understand and participate in such hearings. This detachment between J.J.H.'s specific arguments, the record, and the question presented signifies why this case is not the appropriate vehicle or opportunity for the Court to broadly declare and define a new, inflexible due process right that would be applicable in every civil commitment proceeding across the nation.

A. J.J.H.'s cited authority does not provide the Court with a legal framework to declare the broad, new due process right that J.J.H. seeks.

J.J.H. first directs the Court to case law outlining due process and Sixth Amendment rights of criminally accused persons with English language restrictions, arguing that the Court should make it a Fifth Amendment due process requirement for any deaf person subject to any involuntary commitment proceeding to be provided an interpreter. (Pet. Writ. Cert. 12–18) (citing *Felts v. Murphy*, 201 U.S. 123 (1906); *Perovich v. U.S.*, 205 U.S. 86 (1907); *U.S. ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970)). However, her quick, high-level summation of the general due process right to participate in one's criminal trial fails to appreciate the important differences and public interests between criminal prosecution and civil commitments. As the Court recognized in *Addington v. Texas*, "a civil commitment proceeding can in no sense be equated to a criminal prosecution," and

due process in civil commitment proceedings requires "the balance between the rights of the individual and the legitimate concerns of the state." 441 U.S. 418, 428 (1979).

In *Addington*, the Court held that the "beyond a reasonable doubt" burden of proof applicable to criminal cases via the Due Process Clause of the Fourteenth Amendment was not constitutionally required in indefinite civil commitment proceedings, even though, at the time of that decision, some states had chosen to adopt the more stringent criminal law standard. *Id.* at 419–20, 430–31. Holding that due process in indefinite commitment cases required a standard equal to or greater than the "clear and convincing evidence" standard, the Court noted that some states' adoption of the criminal law standard gave "no assurance that the more stringent standard of proof is needed or is even adaptable to the needs of all states." *Id.* at 431, 433. While the Court recognized the significant liberty interest at stake in indefinite civil commitment proceedings, it also appreciated "that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum." *Id.* at 431. Thus, rather than setting a single, specific nationwide burden of proof in indefinite civil commitment cases, the Court held that the precise burden "equal to or greater than the 'clear and convincing' standard . . . is a matter of state law which we leave to" the states to decide. *Id.* at 433.

Seven years after *Addington*, the Court held that the Self-Incrimination Clause of the Fifth Amendment did not apply to a subject's compelled answers to psychiatrists' questions during an examination pursuant to Illinois' Sexually Dangerous Persons Act because proceedings under that act were non-punitive and civil in nature, rather than criminal. *Allen v. Illinois*, 478 U.S. 364, 366, 368–71 (1986). Looking to Illinois case law, the Court determined that proceedings under the Sexually Dangerous Persons Act were not punitive in nature, and thus not criminal within the meaning of the Fifth Amendment's guarantee against self-incrimination. *Id.* at 368–69, 373–75. Further, the Court declined to hold that the Fourteenth Amendment's Due Process Clause, on its own, required the application of the privilege against self-incrimination in noncriminal proceedings where, as was the case under the Illinois act, the claimant is protected against his compelled answers in any subsequent criminal cases. *Id.*

Addington and *Allen* are instructive examples of the Court's thoughtful rejection of invitations to apply the criminal-specific provisions of the Fifth Amendment and overly sweeping due process interpretations to states' civil commitment proceedings. J.J.H. has not provided any authority from this Court indicating its recognition of a right to an interpreter under the Fifth or Sixth Amendments in criminal cases, and her request to do so in all civil commitment cases should be met with the same level of caution as in *Addington* and *Allen*.

Commitments under Chapter 51 of Wisconsin's statutes, like the Illinois Act in *Allen*, are expressly civil proceedings focused on treatment, not punishment. *See*

In re Mental Commitment of Mary F.-R., 839 N.W.2d , 581, 587 (Wis. 2013) ("Wisconsin Stat. § 51.20 is a civil statute that governs involuntary commitments[,]" and "[t]he legislative approach to Chapter 51 is to provide treatment to individuals in the least restrictive setting that is available to meet each individual's needs. Wis.Stat. § 51.001(1)."); *J.K. v. State*, 228 N.W.2d 713, 716 (Wis. 1975) (noting that the purpose of commitment under Wisconsin's MHA does not "involve[ ] imposition of penalty or punishment"); *In re Commitment of Burgess*, 654 N.W.2d 81, 92 (Wis. App. 2002) ("The actions of persons committed under ch. 51 are often not criminal . . . ."); *see also Addington*, 441 U.S. at 428 ("In a civil commitment state power is not exercised in a punitive sense.").

Thus, the Chapter 51 proceeding in which J.J.H. was a subject in 2017 is the precise kind of civil proceeding to which this Court has declined to apply stretched meanings of the Due Process Clause or criminal-specific rights, like right against self-incrimination. J.J.H. has provided the Court with no logical or precedential basis for revisiting the textual-rooted reasoning in cases like *Addington* and *Allen*, and her reliance on this Court's criminal and prisoner case law does not bridge the analytical gap between the broad question presented, and the alleged due process deprivation at the Probable Cause Hearing.

Additionally, J.J.H.'s citations to *Vitek v. Jones*, 445 U.S. 480 (1980), *Strook v. Kedinger*, 766 N.W.2d 219 (Wis. App. 2009), and *Ramierz v. Young*, 906 F.3d 530 (7th Cir. 2018), fail to connect the dots. (Pet. Writ Cert. 16–17.) *Vitek*, decided thirty years ago, stands for the basic proposition that "the involuntary transfer of

a . . . state prisoner to a mental hospital implicates a liberty interest that is protected by the Due Process Clause." 445 U.S. at 487–94. The Court held that Nebraska's statutory scheme for transferring state prisoner's to mental hospitals was constitutionally inadequate, as the Due Process Clause required: written notice of the potential transfer and the evidence supporting the reasons for the transfer; a hearing overseen by an independent decision-maker; an opportunity to present testimony and cross-examine witnesses at the hearing; a written statement by the factfinder as to the evidence relied on and reasons for the transfer; availability of counsel; and notice of rights. *Id.* at 494–95. *Vitek* is silent on the notion of interpreters at civil probable cause hearings or accommodations for deaf persons. Further, *Vitek* does not discuss the Fifth or Sixth Amendments in relation to civil commitment proceedings at all.

Even generously using *Vitek* as an analytical framework, J.J.H. has not specified any aspect of the Probable Cause Hearing that was deficient under *Vitek*. Nothing in the record suggests that the Waukesha County Circuit Court violated any of the express due process protections outlined in Wis. Stat 51.20(5)(a)[7] at the Probable Cause Hearing, and that statute mirrors and goes beyond the minimal due process protections recognized in *Vitek*.

Similarly, J.J.H.'s reliance on *Strook*, 766 N.W.2d 219, and *Ramierz*, 906 F.3d 530, are also unhelpful in the present context because they do not involve the weighing of complex and conflicting rights at a probable cause hearing in an civil commitment proceeding. In *Strook*, the Wisconsin Court of Appeals held that a

[7] *See* note 5, *supra*.

defendant in civil litigation had a right based in Wisconsin and federal statutes, case law, common sense, and due process to a factual determination of the litigant's need for a sign-language interpreter prior to proceeding with a substantive hearing. 766 N.W.2d at 221–22, 226–27. In *Ramirez*, the Seventh Circuit held the Prisoner Litigation Reform Act's exhaustion requirement did not bar a Spanish-speaking prisoner's civil rights lawsuit where the prison only provided him with English instructions for exhausting administrative remedies. 906 F.3d at 533. Simply put, neither of these cases involve the weighing of due process and statutory rights in the context of a civil commitment proceeding. The same is true with J.J.H.'s references to the Court Interpreters Act and the Americans with Disabilities Act, as those acts recognize rights that are not in dispute in this case, and that do not provide the Court with any reasonable, practical, or legal stepping-off point to declare a sweeping, new due process right for all deaf subjects in all civil commitment proceedings. (Pet. Writ Cert. 17–18.)

In all, J.J.H.'s citations are unremarkable in the context of her question presented. The role of language interpreters in the courtroom is undisputedly recognized in multiple contexts, *see, e.g.*, Wis. Stat. § 885.38, but that recognition does not simplify the broad and complex question J.J.H. presents to the Court via the specific circumstances of her Probable Cause Hearing and TPPO. Whether a deaf, mentally ill subject of any variety of civil commitment proceedings in any number of states can understand and participate in the specific type of hearing set out in such contexts is not resolved simply by citing marginally related case law and

declaring that deaf subjects have a due process right to participate in and understand such proceedings.

Rather, this Court's established due process test sufficiently equips state court judges with the constitutional flexibility to balance the multiple interests at stake at civil commitment hearings. "For all its consequence, 'due process' has never been, and perhaps can never be, precisely defined." *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 24 (1981). "[T]he phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty." *Id.* In deciding what due process requires, courts evaluate and balance against one another three elements, including, "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Id.* at 27 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

As explained below, the traditional elements of due process were implicitly considered at length during the Probable Cause Hearing, as the interests of the various stakeholders at such hearings are codified for the court's consideration. Reviewing the presiding judge's careful analysis of the competing interests, even three years later, shows that J.J.H.'s question to this Court by way of citations to inapplicable case law overlooks what was in fact a due process decision in accord with this Court's longstanding instruction. J.J.H.'s cited authority detracts from the pragmatism of the Court's due process case law and seeks to have the Court

oversimplify unique circumstances that were thoughtfully weighed and considered at J.J.H.'s hearing.

B. The overly broad question presented does not align with the unique circumstances at J.J.H.'s Probable Cause Hearing.

There was no dispute at the Probable Cause Hearing that J.J.H. had a statutory right to understand and participate in the hearing. *See* Wis. Stat. § 885.38. Nothing in the record suggests that any participant the Probable Cause Hearing rejected the notion that J.J.H. should be provided means by which she could directly participate in the hearing, such as an interpreter or a real-time court reporter.

However, there was no dispute at the Probable Cause Hearing that there were also other important statutory rights at stake. For instance, all of the participants in the Probable Cause Hearing agreed that J.J.H. had a statutory right for the hearing to take place no later than September 15, 2017. And despite having the statutory ability to request a postponement to secure a certified interpreter and fulfill J.J.H.'s right to understand the proceedings, J.J.H.'s counsel refused to do so. Wis. Stat. § 51.20(7)(a); (Pet'r's App. 18a–19a.) Further, everyone agreed that J.J.H. also had a statutory right to treatment for her mental illness—as opposed to returning to jail—and there is no dispute in the record that she was mentally ill at the time of the Probable Cause Hearing and in need of treatment. Wis. Stat. § 51.001(1); (Pet. Writ Cert. 10.) J.J.H.'s apparent willingness to voluntarily attend a treatment center other than Winnebago indicates her recognition that the substantive allegations in the Three-Party Petition and in Dr. Pinkonsly's

testimony were not meaningfully in dispute. (Pet. Writ. Cert. 6.) Additionally, there was no real dispute that the public had a safety interest in ensuring that J.J.H. was confined and treated, as the sworn, undisputed allegations in the Three-Party Petition stated that she exhibited dangerous behavior. (Pet'r's App. 71a.)

Thus, despite J.J.H.'s presentation of the question to the Court as simply whether she, a deaf person, had a right to understand and participate in her hearing, the record shows that the question presented requires the Court to view the Probable Cause Hearing with blinders that simply shut out the multiple other important rights at stake at the hearing.

There is no dispute that the Waukesha County Circuit Court weighed all of these important rights, and, aside from the lack of an interpreter's presence in the courtroom, J.J.H. is not specifically critical of the conclusion reached at the Probable Cause Hearing. Judge Carter considered J.J.H.'s liberty interest, her interest in obtaining meaningful treatment for her mental illness, and her interest in understanding the process and outcome of the Probable Cause Hearing. He further considered J.J.H.'s mother's interests, given that she was both J.J.H.'s guardian and also the subject of a no-contact order, were J.J.H. to be released. He also considered the public's interest in obtaining mental health treatment for one of Waukesha County's residents in light of undisputed and unquestioned, sworn statements that J.J.H. had a history of and continued to make threats of harm to herself and her mother. Further, Judge Carter contemplated whether the lack of an interpreter would lead to erroneous decisions, as he more than once consulted with

counsel for all parties to discuss potential placement alternatives, and discussing on the record one of J.J.H.'s attorneys' abilities to partially communicate with her.

Thus, built into Judge Carter's decision and the structure of the Probable Cause Hearing were the due process elements that permit courts to flexibly consider solutions. *See Lassiter*, 452 U.S. at 24, 27. The unique culmination of circumstances at the Probable Cause Hearing made for a difficult on-the-spot decision that nonetheless furthered the MHA's purpose of providing J.J.H. with the treatment she needed in the least restrictive setting possible by ordering such treatment for a limited duration that could not be extended. J.J.H. points to no information in the record showing that the presence of a court interpreter would have allowed her to testify, present witnesses, or otherwise support a defense that had been prepared in the 72 hours leading up to the Probable Cause Hearing. Given this lack of information in the record and the uniqueness of the situation, no answer from this Court to the question presented could have any practical impact on the TPPO.

Indeed, the problem facing Judge Carter was a practical one, not a legal one. The amici curiae brief acknowledges this reality, as it attributes courts' alleged failures to accommodate deaf persons to "underlying misunderstandings and misconceptions concerning the needs and capabilities of deaf people," not from an existing hole in this Court's due process jurisprudence or consistent failures by judges to recognize the rights of deaf persons. (Amici Curiae Br. 3.) Even in the seemingly impossible event that the procedural circumstances of the Probable

Cause Hearing were to repeat themselves in the future, the relief J.J.H. seeks from this Court would not guarantee a different result, as there is nothing in the record that indicates the Waukesha County Circuit Court would not consider J.J.H.'s right to participate in and understand the proceedings, as Judge Carter did here. Accordingly, the Petition should be denied.

CONCLUSION

Based on the foregoing, Respondent Waukesha County respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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