STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2018AP168

In the matter of the temporary guardianship and protective placement of J.J.H.:

WAUKESHA COUNTY,

Petitioner-Respondent,

v.

J.J.H.,

Respondent-Appellant-Petitioner.

BRIEF OF *AMICUS CURIAE* ASSOCIATION FOR THE RIGHTS OF CITIZENS WITH HANDICAPS, DISABILITY RIGHTS WISCONSIN, NATIONAL DISABILITY RIGHTS NETWORK, & NATIONAL ASSOCIATION OF THE DEAF

On Appeal from a §51.67 Order of Conversion to Temporary Guardianship and/or Temporary Protective Placement or Services Entered by the Waukesha County Circuit Court, the Honorable Lloyd V. Carter Presiding, Case No. 2017ME589

HABUSH, HABUSH & ROTTIER, S.C.
Counsel for *Amicus Curiae*
Susan R. Tyndall
State Bar No. 1012954
N14W23755 Stone Ridge Dr #100
Waukesha, WI 53188
Telephone: (262) 523-4700

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I. THIS COURT SHOULD EFFECTUATE THE PUBLIC POLICY ESTABLISHED BY THE LEGISLATURE

The legislature has expressly declared that the public policy of Wisconsin requires protection of the liberty interests of individuals threatened with involuntary commitment or protective placement. See Wis. Stat. §§51.001, and 51.20(2), (3) and (5)(a). It mandated that all hearings "conform to the essentials of due process and fair treatment including … the right to counsel, [and] the right to present and cross-examine witnesses," and mandated a right of appeal. §51.20(3), (5)(a), and (15). This court is duty-bound "to see that the public policy adopted by the legislature prevails." *Guertin v. Harbour Assurance Co. of Bermuda, Ltd*., 141 Wis.2d 622, 632, 415N.W.2d 831 (1987).

"[O]ne of the essential attributes of an adversarial trial is the mutuality of the parties' opportunity to present their cases." *In re S.M.H*., 2019 WI 14, ¶22, 385 Wis.2d 418, 922 N.W.2d 807.

> Part of the process due to every citizen is "the opportunity to be heard," which must occur "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 … (1965) (citation and internal marks omitted). This guarantee is foundational: "The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' " *Mathews v. Eldridge*, 424 U.S. 319, 333… (1976) (quoted source omitted).

Id., ¶17.

Individuals who have hearing disabilities must be able to communicate effectively in their court proceedings; it is the court's responsibility to provide the auxiliary aides and services necessary to establish effective communication. Such communication is fundamental to the concept of due process. Both the legislature and this court "have recognized that fair trials require comprehension of the spoken word—by parties, by witnesses, and by fact-finders." *State v Yang*, 2006 WI App 48, ¶13, 290 Wis.2d 235, 712 N.W.2d 400, *citing* Wis. Stat. §885.38 and *State v. Neave*, 117 Wis.2d 359, 363-366, 344 N.W.2d 181 (1984), *overruled on other grounds, State v. Koch*, 175 Wis.2d 684, 693-694, 499 N.W.2d 152 (1993). "A person who cannot communicate with the judge faces a barrier as significant as a lock on the courthouse door." Committee to Improve Interpreting & Translation in the Wisconsin Courts, *Improving Interpretation in Wisconsin's Courts*, p.5 (October 2000) (App.105).

Julie's[1] probable cause hearing did not comport with due process or the Americans With Disability Act (ADA) because, without any means of effective communication, Julie could not understand the proceedings or participate in her own defense. Julie was then deprived of her statutorily-mandated right of appeal when her appeal was declared moot.

Because conducting a ch. 51 hearing regarding a party who is Deaf or hard of hearing without the necessary auxiliary

[1] Pursuant to §809.19(1)(g), *amici* refer to J.J.H. by the pseudonym "Julie."

communication aids and services thwarts the public policy enunciated by the legislature, this court should declare such a deprivation a "structural defect" in this context, too. It should further declare that interpreters or other effective communications aids and services are required for judicial proceedings where a significant liberty interest is at stake, such as ch. 51 hearings. The statutory right to an interpreter should encompass the ADA requirement for other auxiliary aids and services that will enable effective communication between the court and the individual respondent.

Because declaring appeals from such hearings "moot" similarly thwarts the public policy enunciated by the legislature, that too should be rejected by this court. While Waukesha argues that no stigma results from a Wis. Stat. §51.67 protective placement such as Julie's, *amici* disagree.

A statutory prerequisite to a §51.67 finding is a hearing under either Wis. Stat. §51.13(4) or §51.20; both involve the potential for a significant loss of liberty. The collateral consequences of such commitments extend to both, regardless of the specific disability underpinning the ruling. *Amici* contend that this court should therefore hold that appeals from an order under either §51.20 or 51.67 are generally excepted from the mootness doctrine because of such collateral consequences, because (as the legislature itself has declared) such consequences demand meaningful appellate review.

Alternatively—or additionally—this court should hold that the public interests inherent in this state's treatment of individuals alleged to meet commitment standards under ch. 51 require meaningful

review of such appeals. Effectuating the legislative prescription of a right to appeal would add Wisconsin to the majority of states, which hold such appeals not moot.

Adopting these rules will help level the playing field for people with disabilities, granting them better access to the courts and an ability to defend themselves, rights undeniably infringed upon here, and will fulfill the express public policy of this state. Justice requires no less.

II. THIS COURT SHOULD ESTABLISH AN EXCEPTION FROM THE MOOTNESS DOCTRINE FOR ALL CIVIL COMMITMENT APPEALS.

Appeals must not be meaningless rituals. *City of Middleton v. Hennen*, 206 Wis.2d 347, 354, 557 N.W.2d 818 (Ct.App.1996). The Fourteenth Amendment requires meaningful due process. *State v. Smythe*, 225 Wis.2d 456, 464, 592 N.W.2d 628 (1995) (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). Routinely declaring appeals from civil commitments moot renders them meaningless rituals.

This court recognizes several exceptions to mootness, *see Portage County v. J.W.K.*, 2019 WI 54, ¶12, 386 Wis.2d 672, 927 N.W.2d 509, but has not addressed the collateral consequences exception. Although only persuasive, the court of appeals has applied this exception, declaring a criminal appeal not moot though the sentence was completed. *State v. Genz*, No. 2016AP2475-CR, 2018 WL 625167, ¶¶10-13 (Wis. Ct.App.Jan. 30, 2018) (App.174-178), *citing Sibron v. New York*, 392 U.S. 40, 57 (1968) (applying mootness

"only if it is shown that there is no possibility that any collateral legal consequences will be imposed").

Given the legislatively-established public policy permitting appeals and the negative impact of social stigma and legal implications created by such cases, this court should adopt *Sibron's* collateral consequences exception for all appeals from civil commitment. Alternatively, this court should apply existing exceptions to all such appeals to ensure a meaningful right to appeal. Over thirty states and D.C. have adopted exceptions to mootness for all or most appeals from civil commitment; because Wisconsin's express public policy permits appeals, this court should, too.

A. This court should adopt the collateral consequences exception.

Sibron assumes collateral consequences flow even from short-sentence cases, raising constitutional issues that demand review despite being technically moot. *Sibron*, 392 U.S. at 52-53. For civil commitment, these collateral consequences are both legal and social, given the stigma attached to state-adjudged mental illness. *Addington v. Texas*, 441 U.S. 418, 425-26 (1979); *Vitek v. Jones*, 445 U.S. 480, 494 (1980) ("the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections;" thus, appeal not moot).

Because individuals with mental illness are often pushed to the precarious edges of society, the loss of liberty that can result from

civil commitment can be enough to set off a series of negative events such as loss of a job, an apartment or social connections. These consequences are compellingly detailed in 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 (2018).

> A study published in 2000 found that 54 percent of respondents believed an individual with any mental illness was a danger to others. That same study found that 58 percent of respondents would not want an individual with any mental illness as a coworker and that 68 percent would not want that same individual marrying into their family.[ ] Research suggests that the stigma associated with serious mental illness, mental illness that might require either voluntary or involuntary inpatient hospitalization, is even more profound. A 2008 survey on the public perception of one serious mental illness, schizophrenia, found that 77 percent of people would feel uncomfortable and 80 percent would fear for their safety around a person with untreated schizophrenia; 77 percent would feel uncomfortable working with that person; and 80 percent expressed discomfort related to dating that person.

Id., at 130 (App.113), *citing* Jack K. Martin et al., *Of Fear and Loathing: The Role of 'Disturbing Behavior,' Labels, and Causal Attributions in Shaping Public Attitudes toward People with Mental Illness*, 41 J. HEALTH & SOC. BEHAV. 208, 216 (2000). "[I]nvoluntary commitment and hospitalization generally have been found to have an even greater stigmatizing effect than being perceived

as mentally ill or receiving outpatient treatment." *Id.*, at 137 (App.120).

Other consequences of public stigma include underemployment, joblessness, the inability to live independently, social isolation, and a lower likelihood of seeking treatment. *Id.*, at 136, 137 (App.119-120). But stigma can also be internalized; negative consequences of that include lower self-esteem, lower quality of life, increased symptom severity, and poorer treatment adherence. *Id.*, at 137 (App.120).

Julie's brief explains legal collateral consequences such as gun possession restrictions, *J.W.K.*, 386 Wis.2d 672, ¶28 n.11, and liability for costs associated with involuntary hospitalization, §46.10(2); *Jankowski v. Milwaukee County*, 104 Wis.2d 431, 312 N.W.2d 45 (1981). (Pet. Brief at 15).

The court system must be able to correct serious flaws in the due process afforded these individuals to prevent future harm. Adopting the collateral consequences exception to mootness for all civil commitment appeals will help courts do so.

Seventeen states and D.C. have adopted this exception for civil commitment appeals, often citing social stigma in addition to legal impairments. (See Chart, App.101-102). For example, Alaska—before adopting an even more generous and categorical public interest exception—recognized collateral legal consequences and social stigma as grounds for exception, without requiring a particularized showing. *In re Joan K.*, 273 P.3d 594, 598 (Alaska 2012). Other courts also recognize social stigma in exempting mental health commitments

from mootness. *See, e.g., In the Matter of B.B.*, 826 N.W.2d 425 (Iowa 2013); *D.L. v. Sheppard Pratt Health System, Inc.*, 214 A.3d 521, 540 (Md.Ct.App. 2019); and *State ex rel. D.L.S.*, 446 S.W.3d 506 (Tex.Ct.App. 2014). Texas also incorporates the assumption of collateral consequences from *Sibron. State v. Lodge*, 608 S.W.2d 910 (Tex. 1980). Some states adopt multiple exceptions. *See, e.g.*, *In re Involuntary Treatment of L.T.S.*, 389 P.3d 660, 662 (Wash. 2016) (collateral consequences and public interest).

The legal and social consequences borne by people like Julie are too weighty to be summarily dismissed because of the brevity of civil commitment. This court should declare both the legal consequences and social stigma attached to state-adjudged mental illness—especially a finding of dangerousness—grounds for granting a meaningful appeal from all civil commitments and adopt the collateral consequences exception.

B. This court should apply the public interest exception for all such appeals.

Alaska recently held that appeals from involuntary commitment and medication orders *always* fall within the public interest exception. *Matter of Naomi B.*, 435 P.3d 918 (Alaska 2019). This court should reach the same conclusion for the same reasons.

Mootness drained judicial resources by requiring litigation of mootness in addition to the case's merits. *Naomi B.*, 435 P.3d at 927. Wisconsin courts are no different: §51.20(15) grants a right to appeal, but mootness doctrine requires extensive briefing before addressing an appeal's merits. *See, e.g.*, *Waukesha County v. S.L.L.*, 2019 WI 66,

¶¶14-16, 387 Wis.2d 333, 929 N.W.2d 140; *J.W.K.*, ¶¶11-15; *In re Mental Commitment of Christopher S.*, 2016 WI 1, ¶¶30-32, 366 Wis.2d 1, 878 N.W.2d 109; *Outagamie Cty. v. Melanie L.*, 2013 WI 67, ¶¶79-80, 349 Wis.2d 148, 833 N.W.2d 606.

Despite adjudicating thousands of involuntary commitment cases each year, lower courts have minimal guidance for addressing due process concerns and other meritorious issues. *See* Pet. Brief, p. 19. These issues unequivocally recur yet evade review; the public has a vital interest in appellate review of cases that involve such a "massive curtailment of liberty." *Naomi B.*, 435 P.3d at 928. This court should follow Alaska in categorically excepting appeals from civil commitments, "whether the appeal is premised on a question of statutory or constitutional interpretation or on an evidence-based challenge." *Id.* at 929.

This court has acknowledged the public interest and repetition-evading-review exceptions regarding involuntary medication of prisoners because these issues "affect a large number of persons." *Christopher S.*, ¶32. This court has also found short-term commitments raise issues of great public importance that recur regularly but evade review. *State ex rel. Watts v. Combined Community Services Bd. Of Milwaukee Cty.*, 122 Wis.2d 65, 71, 362 N.W.2d 104 (1985); *Melanie L.*, ¶80. The same principles apply to all appeals from civil commitment. Therefore, this court should apply the same exceptions in these cases. At least fifteen states have done so. (See Chart, App.102-103).

Absent adoption of such an exception, lower courts may continue depriving litigants of their statutory right to a meaningful appeal. The appellate court incorrectly declared these facts too unique to recur but this general situation—the lack of any interpreter for a party who requires one—is prone to recurrence. Indeed, it happened twice in three days to Julie herself. Recent changes to Wisconsin's interpreter qualification/certification make it even more likely to recur. *See* 2019 WI Act 17 and App.149-153 (discussing shortage of interpreters).

The majority of jurisdictions has adopted an exception to mootness for all appeals from involuntary commitment/protective placement. (App.101-103). Recognizing the public interest inherent in such circumstances will protect the due process rights of vulnerable people facing deprivation of liberty, lasting stigma, and other consequences stemming from involuntary commitment.

III. PEOPLE WHO REQUIRE INTERPRETATION SERVICES HAVE A DUE PROCESS RIGHT TO THEM FOR ALL LEGAL PROCEEDINGS.

Julie was twice—in three days—denied the ability to understand court proceedings involving her personal liberty. (Pet. Brief, p.5-6, n.2). The due process implications of denial of such services is so well-recognized that this court's handouts explain the Fifth, Sixth, and Fourteenth Amendment ramifications of such denials. *See A summary of the ADA, state statutes, and case law on the right to an interpreter*, p. 2-3. (App.155-156).

All of the issues discussed there were implicated here. Thus, this court should declare that the circuit court infringed Julie's due process rights by proceeding *twice* without interpretation services to enable her to understand and meaningfully participate in her hearings. Moreover, the court should ensure that all Wisconsin citizens are protected from such deprivations by declaring that all people who are Deaf or hard of hearing have an absolute right to effective interpretation services for all court proceedings in Wisconsin.

While there are challenges to making interpreter services available in a timely way, video remote interpretation is generally a workable solution with far greater availability for short notice hearings. Including such services on this court's roster and/or recommending its use should increase access to interpreters for persons who are Deaf or hard of hearing. And this court should declare that hearings must not occur when the accused cannot "hear" or be heard.

Many state and federal courts recognize Sixth and Fourteenth Amendment rights to interpretation at trial. *See Neave*, 117 Wis.2d at 364 (collecting cases). Wisconsin has recognized a statutory right to a qualified interpreter for civil litigants who are Deaf or hard of hearing under §885.38 and the ADA. *Strook v. Kedinger*, 2009 WI App 31, ¶¶15-16, 316 Wis. 548, 766 N.W.2d 219 (affirming ADA command that state courts establish effective communication for people with disabilities, giving "'primary consideration' to the disabled person's choice of auxiliary aids"). *Strook* concluded: "If a person is unable to hear and understand, that person is unable to

participate, and if unable to participate, it is a denial of due process under the Fifth and Fourteenth Amendments." *Id.* ¶17. The lower courts denied Julie such due process; by so declaring, this court can prevent such harm to Wisconsin citizens in future cases.

Strook echoes *United States v. Johnson*, 248 F.3d 655, 663 (7th Cir. 2001), holding that a defendant is denied due process when unable to understand the proceedings because of language difficulties. District Courts have extended this right to civil proceedings, citing authority recognizing due process violations when people who are Deaf navigate legal proceedings without interpreters. *See, e.g., Sandoval v. Holinka*, 2009 WL 499110 (W.D.Wis. 2009); *Bonner v. Arizona Dept. of Corrections*, 714 F.Supp. 420, 425 (D.Ariz. 1989).

Bonner is particularly instructive. Bonner, who is "deaf, mute, and vision impaired," was provided interpreters; however, he alleged they were "unskilled" and that he could "understand them 50% of the time." *Id.* at 421. The court held this was insufficient and violated Bonner's constitutionally-protected due process liberty interest. *Id*. at 425-26. Here, Julie represents a class of individuals with multiple disabilities that require specialized interpretive aids to understand, be understood, and meaningfully participate in legal proceedings. That accommodating people like Julie can be difficult—though not impossible—on short notice does not diminish their due process rights. Only by addressing the merits of this case and definitively declaring this right to exist in Wisconsin will this court require lower courts to take the due process rights of people with disabilities

seriously in all cases, especially when liberty interests and collateral consequences are threatened.

This court should hold that Julie's due process rights were violated when with her involuntary commitment hearing proceeded without accommodating her need for effective communication aids and services. The court should make clear that such violations will not be tolerated in this state.

CONCLUSION

For the foregoing reasons, *amici* urge this court to establish a collateral consequences and/or public interest exception from the mootness doctrine for all involuntary commitment cases and hold that Julie and all people who are Deaf or hard of hearing have a due process right to court-appointed interpretation services that can establish effective communication and meaningful participation.

Respectfully submitted this 22nd day of January, 2020

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Susan R. Tyndall
State Bar No. 1012954
styndall@habush.com

HABUSH, HABUSH & ROTTIER, S.C.
N14W23755 Stone Ridge Dr #100
Waukesha, WI 53188
Telephone: (262) 523-4700

Attorneys for Association for the Rights of Citizens with Handicaps, Disability Rights Wisconsin, National Disability Rights Network, & National Association of the Deaf

CERTIFICATE OF FORM, LENGTH, AND ELECTRONIC FILING

I hereby certify that:

This brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional font. The length of this brief is 2970 words.

I have submitted an electronic copy of this brief and appendix, which complies with the requirements of Wis. Stat. § 809.19(12) and (13). The text of the electronic brief is identical to the printed form of the brief filed as of this date. The content of the electronic appendix is identical to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this brief and appendix filed with the court and served on all parties.

I hereby certify that filed with this brief an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court entries (supplied by petitioner);

(3) the findings or opinion of the circuit court (supplied by petitioner); and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues (supplied by petitioner).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using the first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references in the record.

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Dated this 22nd day of January, 2020.

By:_____

Susan R. Tyndall
State Bar No. 1012954
Email: styndall@habush.com

CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on January 22, 2020, this brief and appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Supreme Court within 3 calendar days. I further certify that the brief and appendix was correctly addressed.

Date: _____

By: _____
Susan R. Tyndall
State Bar No. 1012954

Habush, Habush & Rottier S.C.®
N14 W23755 Stone Ridge Dr.
Suite #100
Waukesha, WI 53188
(262) 523-4700
styndall@habush.com
Counsel for Amicus Curiae Disability Rights Wisconsin, the National Disability Rights Network, and the National Association of the Deaf