IN THE SUPREME COURT OF THE STATE OF ALASKA

Native Village of Kwinhagak Appellant, v. State of Alaska, Office of Children's Services, Appellees.	)))))))))	Supreme Court No. S-18481 Trial Court No. 4BE-19-00046 CN

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT BETHEL
THE HONORABLE TERRENCE HAAS, JUDGE

REPLY BRIEF OF THE APPELLANT NATIVE VILLAGE OF KWINHAGAK

ALASKA LEGAL SERVICES CORPORATION
Attorneys for Native Village of Kwinhagak

s/Pearl E. Pickett
Pearl E. Pickett, AK Bar No. 2003024
Alaska Legal Services Corporation
1016 W. 6th Ave., Suite 200
Anchorage, AK 99501
(907) 272-9431

Filed in the Supreme Court
Of the State of Alaska
on December 16, 2022

MEREDITH MONTGOMERY
Clerk of the Appellate Courts

By: Briar St. Clair
Deputy Clerk

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

PRINCIPAL AUTHORITIES

Alaska Constitution

Article 1

§ 1: This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

§ 7: No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

U.S. Code

25 U.S.C. § 1901, Congressional Findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes [Tribes]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1903(1)(i), Definitions

For the purposes of this Act, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include— (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or

conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated; . . .
(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;
***
(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;
(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts
***

25 U.S.C. § 1911, Indian tribe jurisdiction over Indian child custody proceedings
***
(b) Transfer of proceedings; declination by tribal court. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, that such transfer shall be subject to declination by the tribal court of such tribe.
(c) State court proceedings; intervention. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

25 U.S.C. § 1912, Pending court proceedings
(a) Notice; time for commencement of proceedings; additional time for preparation. In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That

the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.
***
(c) Examination of reports or other documents. Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.
***

Alaska Statutes

AS 47.10.084, Legal custody, guardianship, and residual parental rights and responsibilities

(a) When a child is committed under AS 47.10.080(c)(1) to the department, released under AS 47.10.080(c)(2) to the child's parents, guardian, or other suitable person, or committed to the department or to a legally appointed guardian of the person of the child under AS 47.10.080(c)(3), a relationship of legal custody exists. This relationship imposes on the department and its authorized agents or the parents, guardian, or other suitable person the responsibility of physical care and control of the child, the determination of where and with whom the child shall live, the right and duty to protect, nurture, train, and discipline the child, the duty of providing the child with food, shelter, education, and medical care, and the right and responsibility to make decisions of financial significance concerning the child. These obligations are subject to any residual parental rights and responsibilities and rights and responsibilities of a guardian if one has been appointed. When a child is committed to the department and the department places the child with the child's parent, the parent has the responsibility to provide and pay for food, shelter, education, and medical care for the child. When parental rights have been terminated, or there are no living parents and no guardian has been appointed, the responsibilities of legal custody include those in (b) and (c) of this section. The department or person having legal custody of the child may delegate any of the responsibilities under this section, except authority to consent to marriage, adoption, and military enlistment may not be delegated. For purposes of this chapter, a person in charge of a placement setting is an agent of the department.

(b) When a guardian is appointed for the child, the court shall specify in its order the rights and responsibilities of the guardian. The guardian may be removed only by court order. The rights and responsibilities may include, but are not limited to, having the right and responsibility of reasonable visitation, consenting to marriage, consenting to military enlistment, consenting to major medical treatment, obtaining representation for the child in legal actions, and making decisions of legal or financial significance concerning the child.

(c) When there has been transfer of legal custody or appointment of a guardian and parental rights have not been terminated by court decree, the parents shall have residual rights and responsibilities. These residual rights and responsibilities of the parent include, but are not limited to, the right and responsibility of reasonable visitation, consent to adoption, consent

to marriage, consent to military enlistment, consent to major medical treatment except in cases of emergency or cases falling under AS 25.20.025, and the responsibility for support, except if by court order any residual right and responsibility has been delegated to a guardian under (b) of this section. In this subsection, "major medical treatment" includes the administration of medication used to treat a mental health disorder.

(d) When the child is placed in foster care, the foster parent has the right and responsibility to use a reasonable and prudent parent standard to make decisions relating to the child. The foster parent may make decisions under (a) or (b) of this section that include decisions relating to the child's participation in age-appropriate or developmentally appropriate activities, including travel, sports, field trips, overnight activities, and extracurricular, enrichment, cultural, and social activities. The department shall provide foster parents with training regarding the reasonable and prudent parent standard. In this subsection, "reasonable and prudent parent standard" means a standard characterized by careful and sensible decisions to maintain the health, safety, and best interests of the child while encouraging the emotional and developmental growth of the child.

AS 47.10.087, Placement in secure residential psychiatric treatment centers

(a) The court may authorize the department to place a child who is in the custody of the department under AS 47.10.080(c)(1) or (3) or 47.10.142 in a secure residential psychiatric treatment center if the court finds, based on the testimony of a mental health professional, that

(1) the child is gravely disabled or is suffering from mental illness and, as a result, is likely to cause serious harm to the child or to another person;

(2) there is no reasonably available, appropriate, and less restrictive alternative for the child's treatment or that less restrictive alternatives have been tried and have failed; and

(3) there is reason to believe that the child's mental condition could be improved by the course of treatment or would deteriorate if untreated.

(b) A court shall review a placement made under this section at least once every 90 days. The court may authorize the department to continue the placement of the child in a secure residential psychiatric treatment center if the court finds, based on the testimony of a mental health professional, that the conditions or symptoms that resulted in the initial order have not ameliorated to such an extent that the child's needs can be met in a less restrictive setting and that the child's mental condition could be improved by the course of treatment or would deteriorate if untreated.

(c) The department shall transfer a child from a secure residential psychiatric treatment center to another appropriate placement if the mental health professional responsible for the child's treatment determines that the child would no longer benefit from the course of treatment or that the child's treatment needs could be met in a less restrictive setting. The department shall notify the child, the child's parents or guardian, and the child's *guardian ad litem* of a determination and transfer made under this subsection.

(d) In this section, "likely to cause serious harm" has the meaning given in AS 47.30.915.

AS 47.30.690, Admission of minors under 18 years of age

(a) A minor under the age of 18 may be admitted for 30 days of evaluation, diagnosis, and treatment at a designated treatment facility if the minor's parent or guardian signs the admission papers and if, in the opinion of the professional person in charge,

(1) the minor is gravely disabled or is suffering from mental illness and as a result is likely to cause serious harm to the minor or others;

(2) there is no less restrictive alternative available for the minor's treatment; and

(3) there is reason to believe that the minor's mental condition could be improved by the course of treatment or would deteriorate further if untreated.

(b) A *guardian ad litem* for a minor admitted under this section shall be appointed under AS 25.24.310 to monitor the best interests of the minor as soon as possible after the minor's admission. If the *guardian ad litem* finds that placement is not appropriate, the *guardian ad litem* may request that an attorney be appointed under AS 25.24.310 to represent the minor. The attorney may request a hearing on behalf of the minor during the 30-day admittance.

(c) The minor may be released by the treatment facility at any time if the professional person in charge or the minor's designated mental health professional determines the minor would no longer benefit from continued treatment and the minor is not dangerous. The minor's parents or guardian must be notified by the facility of the contemplated release.

AS 47.30.700 (2020) Initial involuntary commitment procedures (until Oct. 13, 2022)

(a) Upon petition of any adult, a judge shall immediately conduct a screening investigation or direct a local mental health professional employed by the department or by a local mental health program that receives money from the department under AS 47.30.520 — 47.30.620 or another mental health professional designated by the judge, to conduct a screening investigation of the person alleged to be mentally ill and, as a result of that condition, alleged to be gravely disabled or to present a likelihood of serious harm to self or others. Within 48 hours after the completion of the screening investigation, a judge may issue an *ex parte* order orally or in writing, stating that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others. The court shall provide findings on which the conclusion is based, appoint an attorney to represent the respondent, and may direct that a peace officer take the respondent into custody and deliver the respondent to the nearest appropriate facility for emergency examination or treatment. The *ex parte* order shall be provided to the respondent and made a part of the respondent's clinical record. The court shall confirm an oral order in writing within 24 hours after it is issued.

(b) The petition required in (a) of this section must allege that the respondent is reasonably believed to present a likelihood of serious harm to self or others or is gravely disabled as a result of mental illness and must specify the factual information on which that belief is based including the names and addresses of all persons known to the petitioner who have knowledge of those facts through personal observation.

AS 47.30.705 (2020), Emergency detention for evaluation (until Oct. 13, 2022)

(a) A peace officer, a psychiatrist or physician who is licensed to practice in this state or employed by the federal government, or a clinical psychologist licensed by the state Board of Psychologist and Psychological Associate Examiners who has probable cause to believe that a person is gravely disabled or is suffering from mental illness and is likely to cause serious harm to self or others of such immediate nature that considerations of safety do not allow initiation of involuntary commitment procedures set out in AS 47.30.700, may cause the person to be taken into custody and delivered to the nearest crisis stabilization center as defined in AS 47.32.900 or the nearest evaluation facility. A person taken into custody for emergency evaluation may not be placed in a jail or other correctional facility except for protective custody purposes and only while awaiting transportation to a crisis stabilization center or treatment facility. However, emergency protective custody under this section may not include placement of a minor in a jail or secure facility. The peace officer or mental health professional shall complete an application for examination of the person in custody and be interviewed by a mental health professional at the crisis stabilization center, evaluation facility, or treatment facility.

(b) In this section, "minor" means an individual who is under 18 years of age.

AS 47.30.730, Petition for 30-day commitment

(a) In the course of the 72-hour evaluation period, a petition for commitment to a treatment facility may be filed in court. The petition must be signed by two mental health professionals who have examined the respondent, one of whom is a physician. The petition must

(1) allege that the respondent is mentally ill and as a result is likely to cause harm to self or others or is gravely disabled;

(2) allege that the evaluation staff has considered but has not found that there are any less restrictive alternatives available that would adequately protect the respondent or others; or, if a less restrictive involuntary form of treatment is sought, specify the treatment and the basis for supporting it;

(3) allege with respect to a gravely disabled respondent that there is reason to believe that the respondent's mental condition could be improved by the course of treatment sought;

(4) allege that a specified treatment facility or less restrictive alternative that is appropriate to the respondent's condition has agreed to accept the respondent;

(5) allege that the respondent has been advised of the need for, but has not accepted, voluntary treatment, and request that the court commit the respondent to the specified treatment facility or less restrictive alternative for a period not to exceed 30 days;

(6) list the prospective witnesses who will testify in support of commitment or involuntary treatment; and

(7) list the facts and specific behavior of the respondent supporting the allegation in (1) of this subsection.

(b) A copy of the petition shall be served on the respondent, the respondent's attorney, and the respondent's guardian, if any, before the 30-day commitment hearing.

AS 47.30.735, 30-day commitment, hearing

(a) Upon receipt of a proper petition for commitment, the court shall hold a hearing at the date and time previously specified according to procedures set out in AS 47.30.715.

(b) The hearing shall be conducted in a physical setting least likely to have a harmful effect on the mental or physical health of the respondent, within practical limits. At the hearing, in addition to other rights specified in AS 47.30.660 — 47.30.915, the respondent has the right

(1) to be present at the hearing; this right may be waived only with the respondent's informed consent; if the respondent is incapable of giving informed consent, the respondent may be excluded from the hearing only if the court, after hearing, finds that the incapacity exists and that there is a substantial likelihood that the respondent's presence at the hearing would be severely injurious to the respondent's mental or physical health;

(2) to view and copy all petitions and reports in the court file of the respondent's case;

(3) to have the hearing open or closed to the public as the respondent elects;

(4) to have the rules of evidence and civil procedure applied so as to provide for the informal but efficient presentation of evidence;

(5) to have an interpreter if the respondent does not understand English;

(6) to present evidence on the respondent's behalf;

(7) to cross-examine witnesses who testify against the respondent;

(8) to remain silent;

(9) to call experts and other witnesses to testify on the respondent's behalf.

(c) At the conclusion of the hearing the court may commit the respondent to a treatment facility for not more than 30 days if it finds, by clear and convincing evidence, that the respondent is mentally ill and as a result is likely to cause harm to the respondent or others or is gravely disabled.

(d) If the court finds that there is a viable less restrictive alternative available and that the respondent has been advised of and refused voluntary treatment through the alternative, the court may order the less restrictive alternative treatment for not more than 30 days if the program accepts the respondent.

(e) The court shall specifically state to the respondent, and give the respondent written notice, that if commitment or other involuntary treatment beyond the 30 days is to be sought, the respondent has the right to a full hearing or jury trial.

AS 47.30.740, Procedure for 90-day commitment following 30-day commitment

(a) At any time during the respondent's 30-day commitment, the professional person in charge, or that person's professional designee, may file with the court a petition for a 90-day commitment of that respondent. The petition must include all material required under AS 47.30.730(a) except that references to "30 days" shall be read as "90 days"; and

(1) allege that the respondent has attempted to inflict or has inflicted serious bodily harm upon the respondent or another since the respondent's acceptance for evaluation, or that the respondent was committed initially as a result of conduct in which the

respondent attempted or inflicted serious bodily harm upon the respondent or another, or that the respondent continues to be gravely disabled, or that the respondent demonstrates a current intent to carry out plans of serious harm to the respondent or another;

(2) allege that the respondent has received appropriate and adequate care and treatment during the respondent's 30-day commitment;

(3) be verified by the professional person in charge, or that person's professional designee, during the 30-day commitment.

(b) The court shall have copies of the petition for 90-day commitment served upon the respondent, the respondent's attorney, and the respondent's guardian, if any. The petition for 90-day commitment and proofs of service shall be filed with the clerk of the court, and a date for hearing shall be set, by the end of the next judicial day, for not later than five judicial days from the date of filing of the petition. The clerk shall notify the respondent, the respondent's attorney, and the petitioner of the hearing date at least three judicial days in advance of the hearing.

(c) Findings of fact relating to the respondent's behavior made at a 30-day commitment hearing under AS 47.30.735 shall be admitted as evidence and may not be rebutted except that newly discovered evidence may be used for the purpose of rebutting the findings.

AS 47.30.775, Commitment of minors

The provisions of AS 47.30.700 - 47.30.815 apply to minors. However, all notices required to be served on the respondent in AS 47.30.700 - 47.30.815 shall also be served on the parent or guardian of a respondent who is a minor, and parents or guardians of a minor respondent shall be notified that they may appear as parties in any commitment proceeding concerning the minor and that as parties they are entitled to retain their own attorney or have the office of public advocacy appointed for them by the court. A minor respondent has the same rights to waiver and informed consent as an adult respondent under AS 47.30.660 - 47.30.915; however, the minor shall be represented by counsel in waiver and consent proceedings.

AS 47.30.915 (2020), Definitions (until Oct. 13, 2022)

In AS 47.30.660 — 47.30.915,

***

(5) "designated treatment facility" or "treatment facility" means a hospital, clinic, institution, center, or other health care facility that has been designated by the department for the treatment or rehabilitation of mentally ill persons under AS 47.30.670 — 47.30.915 but does not include correctional institutions;

***

(7) "evaluation facility" means a health care facility that has been designated or is operated by the department to perform the evaluations described in AS 47.30.660 — 47.30.915, or a medical facility licensed under AS 47.32 or operated by the federal government

AS 47.30.915 (2022), Definitions (After Oct. 13, 2022)
***
(5) "designated treatment facility" or "treatment facility" means a hospital, clinic, institution, center, or other health care facility that has been designated by the department for the treatment or rehabilitation of mentally ill persons under AS 47.30.670 — 47.30.915 but does not include correctional institutions;
***
(7) "evaluation facility" means a hospital or crisis residential center that has been designated or is operated by the department to perform the evaluations described in AS 47.30.660 — 47.30.915, or a medical facility operated under 25 U.S.C. § 5301 — 5423 (Indian Self-Determination and Education Assistance Act), as amended, that performs evaluations

Alaska Court Rules
Appellate Rule 204
***
(g) Parties to the Appeal. — All parties to the trial court proceeding when the final order or judgment was entered are parties to the appeal. A party who files a notice of appeal, whether separately or jointly, is an appellant under these rules. All other parties are deemed to be appellees, regardless of their status in the trial court, unless otherwise ordered by the court. An appellee may elect at any time not to participate in the appeal by filing and serving a notice of non-participation. The filing of a notice of non-participation shall not affect whether the party is bound by the decision on appeal.
***

CINA Rule 12.1
(a) Request for Appointment. — Any party, including a child, may request the appointment of an attorney for the child, either in writing or orally on the record. The court may also make the appointment on its own initiative.
(b) Appointment Types. —
(1) Mandatory Appointments. The court shall appoint an attorney for a child who is 10 years of age or older in any of the following circumstances:
(A) The child does not consent to placement in a psychiatric hospital or residential treatment center;
(B) The child does not consent to administration of psychotropic medication;
(C) The child objects to disclosure of psychotherapy information or records under CINA Rule 9(b);
(D) A request for a court order authorizing emergency protective custody has been made under AS 47.10.141(c); or
(E) The child is pregnant or has custody of a minor child.
(2) Discretionary Appointments. The court may appoint an attorney in other circumstances including, but not limited to:

(A) The child's and guardian ad litem's positions are not aligned on placement, family or sibling contact, permanency goal, case plan, or another important issue in the case;
(B) The child would benefit from a confidential relationship with an attorney; or
(C) The child is not residing in the designated placement.

(c) Scope of Appointment. — The court may limit the scope or duration of the attorney appointment to the issue that necessitated the appointment.

(d) Attorney's Role. — The attorney's role is to advocate for the child's expressed wishes. The attorney shall maintain a normal client-lawyer relationship as required by Rule 1.14 of the Alaska Rules of Professional Conduct.

Alaska Administrative Code

7 AAC 12.215, Psychiatric hospitals.

(a) A hospital which is primarily engaged in providing to inpatients psychiatric services for the diagnosis and treatment of mental illness is a psychiatric hospital and must comply with the provisions of this section.

***

(d) A psychiatric hospital must have policies and procedures which require that it

(1) have a transfer agreement with a general acute care hospital which includes provision for transfer of a patient's records upon transfer of the patient;

(2) admit and discharge patients in accordance with AS 47.30;

ARGUMENT

The Office of Children's Services (OCS) argues not only that the statutory protections of AS 47.30.670 *et seq.* are inapplicable to Mira's situation, but also suggests that Alaska's Constitution will tolerate a foster youth's 46-day involuntary hospitalization with no judicial review, when, on day one, an independent medical professional determined she did not need continued inpatient treatment. To accept OCS's position, this Court would need to ignore the facts of the case: that an independent medical professional recommended Mira's release on the first day of her hospitalization; that OCS never sought to provide a hearing; that no parent ever consented; and that Mira was not receiving high-quality care during her hospitalization.

This Court would have to accept that, for adults, the State's "designation" of a facility, alone, confers on that facility authority to keep a psychiatric patient against their will, but for children, "non-designated" facilities have unchecked authority to keep youth, indefinitely, without providing any due process. It would have to accept that although no statute has ever conferred on OCS the authority to consent to a foster youth's placement in a locked psychiatric facility, and though even parents' authority to consent to a child's hospitalization has bounds, that OCS has an unconditional right to consent to indefinite commitment – so long as it chooses the right facility. It would have to accept that the only psychiatric hospital in the state providing care to most children does not need to follow statutory procedures for inpatient hospitalization of minors. But OCS's reading of the law is wrong. The statutes do apply. And if the Court determines otherwise, then the Alaska

Constitution demands timely protection of youth's independent liberty interests to prevent the misuse of medical facilities as warehouses for difficult-to-place foster youth.

I. OCS's Interpretation of the Civil Commitment Statutes Is Contradictory and Absurd.

OCS engages in dizzying gymnastics of logic in its attempt to argue that the protections and procedures of AS 47.30.690 *et seq.* have no bearing on Mira, who was continuously, consecutively hospitalized at two facilities: Sitka Community Hospital, a non-designated facility which was an "evaluation facility" under the law at the time of her admission;[1] and North Star Hospital, a licensed psychiatric hospital required by regulation to admit and discharge patients pursuant to AS 47.30.[2] Though OCS does not dispute that OCS lacks authority to make a youth's hospitalization "voluntary" under AS 47.30.690, it argues that the entire statutory regime and its protections are inapplicable if facilities are not designated. [OCS Br. 18-20] OCS argues that adults may only be involuntarily hospitalized through the procedural processes and protections guaranteed by AS 47.30.700 *et seq.*, and then, *only* at designated facilities. [OCS Br. 15-16] But OCS argues, implausibly, a facility's lack of designation means *fewer* due process protections are applicable for children; undesignated facilities may confine a child, unchecked by any law. [OCS Br. 18-20] In an attempt to further limit the application of the important protections offered through AS 47.30.670 *et seq.* and expand its claimed authority to consent to

---

1 *See* AS 47.30.915 (2020); AS 47.32.900 (defining "evaluation facility" to include hospitals).

2 7 AAC 12.215(d).

hospitalization *without* any due process protections being afforded to foster youth, OCS also argues that the statutes do not apply to *most* facilities in Alaska. [OCS Br. 23] Including, critically, North Star Hospital, which is required by state regulation to admit and discharge its patients pursuant to AS 47.30.[3] [OCS Br. 22].

In *Premera Blue Cross v. State*, this Court reasoned "[w]e generally disfavor statutory constructions that reach absurd results. Therefore, we look for another construction that avoids the absurdity and is consistent with a reasonable interpretation of the terms of the statute."[4] Here, the legislature meant to craft a comprehensive statutory regime that would protect the rights of all those faced with involuntary commitment – where "any adult" can petition for the involuntary commitment of an individual they fear is gravely disabled or poses a risk of harm to self or others, triggering due process protections of AS 47.30.700-815 for minors and adults alike.[5] This Court must conclude that a facility licensed exclusively for acute hospitalization cannot *opt out* of a comprehensive statutory scheme meant to protect the rights of patients who are allegedly in need of acute hospitalization that it is required to follow by regulation.

A. OCS's Reading of AS 47.30.670-815 Would Render the Statutes Meaningless.

OCS's tortured interpretations of Alaska statute are directed at convincing this Court that there exists a void in the statutory scheme governing involuntary hospitalization of youth, wherein OCS can shed all limitations the legislature has placed on its authority to

---

3 *Id.*

4 *Premera Blue Cross v. State*, 171 P.3d 1110, 1120 (Alaska 2007).

5 *See* AS 47.30.700; AS 47.30.775.

confine youth in psychiatric facilities where the legislature *has* spoken. OCS's interpretations are not supported by law, and would yield a baffling result – that OCS may commit a child indefinitely at one psychiatric hospital, with no judicial review; while at the same type of facility that is "designated," it would have no authority to authorize admission at all.

For adults, OCS notes that "a narrow exception" exists wherein "in certain circumstances, specified facilities can involuntarily detain adults for mental health evaluation and treatment," noting that the "designation" of such facilities by the Department "essentially deputizes that facility with the State's police power and *parens patriae* authority to hold adults against their will." [OCS Br. 16-17] OCS states that "without a source of legal authority, confining an adult anywhere against their will – even out of well-founded concern for her health or best interests – could lead to civil or criminal liability." [OCS Br. 15-16] Essentially, OCS argues that when an adult is involuntarily committed, they may *only* lawfully be held or treated by a facility *designated* by the Department under AS 47.30. [OCS Br. 16-17] OCS explains that "whether a private facility has been 'designated' by the Department is significant because the designation is what empowers a private facility to hold patients under the authority of AS 47.30." [OCS Br. 22]

But whereas OCS had argued AS 47.30 was the *sole* source of authority to restrain an adult's liberty, OCS claims "designation" represents just one path by which to confine a child to a hospital for psychiatric treatment. It states parental consent, alone, is sufficient to confine a child at a non-designated facility for acute psychiatric care because the

"situation[] rel[ies] on the authority of the parents to hold the child, not the State's police or *parens patriae* power under AS 47.30." [OCS Br. 18] But the State's police power is still invoked to confine a child at statutorily-defined "treatment facility," with parental consent, because there are limits on the authority of a parent, as well. OCS does not dispute that even where a parent or guardian consents to a child's admission at a designated treatment facility, AS 47.30.690 limits the period of that "voluntary" admission to 30 days, after which the child is entitled to a hearing. [OCS Br. 34] Youth "voluntarily" committed also benefit from the appointment of a guardian ad litem.[6]

OCS is wrong to argue that parents have unlimited authority to admit their children for acute psychiatric hospitalization at facilities that are not "designated." But this erroneous conclusion of law is the bedrock on which it builds its next argument – that "[w]hen a child is in OCS custody, OCS can generally secure care in the same way a parent would," and therefore it *also* may commit a child to a *non-designated* facility for acute psychiatric hospitalization, without limitation. [OCS Br. 21] Not only is this conclusion incorrect, but it inconsistent with law that has made clear that OCS *does not* have the same authority as a parent to place a child in a psychiatric facility. As *In re Necessity for the Hospitalization of April S.* confirms, OCS does not have authority to consent to a child's admission to a treatment facility for acute psychiatric care.[7] Although the legislature has made changes to the civil commitment statutes since *April S.* was decided; the legislature

---

[6] AS 47.30.690.

[7] *Id.*; *In re Necessity for the Hospitalization of April S.*, 499 P.3d 1011, 1019 (Alaska 2021).

did not expand OCS's authority.[8] Similarly, OCS lacks authority to authorize a child's admission to a less-restrictive but longer-term secure residential psychiatric treatment center.[9] At no point has the legislature entrusted OCS with such authority; instead, it has reserved the right of parents the right to make major medical decisions on behalf of their children in foster care.[10]

In OCS's view, all one need do to side-step the procedural protections deemed important enough to the legislature to spell out for both voluntary and involuntary placements of minors, is place the child in a *non-designated* facility, which "would yield the absurd result of rendering [AS 47.30.690 and AS 47.30.775] a nullity."[11] [OCS Br. 18-20] Along the way, OCS ignores the fact that the legislature has placed limits on parents' authority to commit their children, and has *never* entrusted OCS with that authority. The legislature created a comprehensive statutory scheme to protect youth and adults alike[12] – to interpret that statutory scheme as OCS suggests would mean that the scheme can be

---

8 HB 127, CHAPTER 41 SLA 22 (enacted July 15, 2022).

9 *See* AS 47.10.087 (requiring pre-admission hearing to authorize placement of foster youth at such facilities).

10 AS 47.10.084(c).

11 *Premera Blue Cross*, 171 P.3d at 1120 (internal quotations omitted). *See also* AS 47.30.690 (providing limits on a parents' and guardians' authority to consent to the psychiatric hospitalization of a child); AS 47.30.775 (specifying that the protections of AS 47.30.700-815 also apply to minors).

12 AS 47.30.700 *et seq.* governs involuntary admission of adults and minors alike. For voluntary use of "treatment facilities," AS 47.30.670-685 governs voluntary admission and discharge of adults, and AS 47.30.690-695 governs admission and discharge minors through the consent of parents or guardians; both schemes spell out the procedures for a transition from *voluntary* to *involuntary* admission.

skirted entirely by seeking the involuntary detention of youth at *non-designated* facilities. This cannot be.

B. Licensed Psychiatric Hospitals Are Designated through Regulation Regarding Admission and Discharge.

OCS argues that North Star Hospital cannot be required to follow the admission and discharge procedures of AS 47.30.690-815 solely because it is not a "designated" treatment facility, as defined in AS 47.30.915. [OCS Br. 24] And, that allowing the Department's regulation requiring psychiatric hospitals to have procedures to admit and discharge patients in accord with AS 47.30 would render that definition section meaningless. [OCS Br. 24] OCS suggests a false equivalency could exist between a treatment facility being *required* to follow AS 47.30 by virtue of being "designated," and facilities *choosing* to abide by the procedures of AS 47.30.[13] [OCS Br. 24]

A closer examination of the facts shows a gaping hole in OCS's argument: this appeal does not concern North Star Hospital as a facility that has *opted* to have procedures for the admission and discharge of patients pursuant to AS 47.30; it is a facility that is *required by regulation* to admit and discharge patients pursuant to AS 47.30.[14] It is designated by virtue of its licensure. North Star Hospital is not alone in being governed by

---

[13] AS 47.30.915 (2022) also includes a non-designated "medical facility operated under the . . . Indian Self-Determination and Education Assistance Act . . . that performs evaluations" in its definition of evaluation facility. OCS does not account for how such a facility may be bound without being designated.

[14] 7 AAC 12.215(d) ("A psychiatric hospital must have policies and procedures which require that it . . . admit and discharge patients in accordance with AS 47.30").

this regulation, without being a designated treatment facility. Tellingly, OCS also sets the Alaska Psychiatric Institute ("API") apart as separate and distinct from "designated" facilities: The affidavit from the director of the Division of Behavioral Health firsts lists the "designated" facilities, then states, in a separate paragraph "[t]he state-owned [API] also provides treatment for these persons." [Exc. 36, OCS Br. 22, 24] Neither API nor North Star Hospital are "designated" treatment facilities. [Exc. 36] But both are required, by regulation, to admit and discharge patients pursuant to AS 47.30.[15] OCS's interpretation is implausible, and can be avoided if 7 AAC 12.215(d) is taken to mean what it says: that facilities such as API and North Star Hospital, licensed exclusively for the purpose of acute psychiatric care, must follow the procedures to admit and discharge patients pursuant to AS 47.30.

C. OCS's Arguments Regarding Evaluation Facilities Deepen the Absurdity of its Position.

OCS is correct that the legislature's amendments to the civil commitment statutes, altering the definition of "evaluation facility" to exclude "hospitals," may render moot the applicability of AS 47.30.700 *et seq*. to general hospitals that have not been "designated," in that the same circumstances will not arise as to Sitka Community Hospital.[16] [OCS Br. 25] However, the fact that the definition changed after Mira's admission does not change the fact that Mira was deprived of process to which she was entitled at the time of her hospitalization in December 2021. But more importantly, the fact that all "hospitals" are

---

15 7 AAC 12.215(d).

16 *Compare* AS 47.30.915 (2020) *with* AS 47.30.915 (2022).

no longer deemed "evaluation facilities" under the statute only makes the regulatory void OCS suggests exists even larger, and therefore less credible.

Under the prior definition of "evaluation facility," local hospitals could accommodate the emergency detention and evaluation processes contemplated in AS 47.30.700-715.[17] The status of the law now is murkier,[18] but within the "comprehensive" system that AS 47.30.660 requires the State to administer, the *only* known facility eligible to detain youth for evaluation would be API, which does not serve youth younger than age 13. And, would exclude North Star Hospital, which serves an outsized majority of Alaska's youth who receive acute psychiatric care.[19] [Exc. 40]

As described above, a far more reasonable interpretation of the law would require that the only psychiatric hospital in the state *other than* API, and the only facility in the state serving youth under 13, would be required to follow the regulation requiring it to

---

17 AS 47.30.915 (2020).

18 AS 47.30.700 allows a court to order transportation of an individual to the "nearest appropriate facility," without defining the term. Meanwhile, AS 47.30.705 allows qualified professionals and peace officers to cause a person, under emergent circumstances, to be "delivered to the nearest crisis stabilization center . . . or the nearest evaluation facility," making no mention of "treatment facilities," while also contemplating, in a prohibition on incarceration except under limited circumstances, that individuals awaiting transport would be transported to a "crisis stabilization center or treatment facility," making no mention of "evaluation facility." AS 47.32.900 does not define "crisis stabilization center" to include any hospital.

19 *See* Div. of Behavioral Health, Alaska Mental Health Trust Authority, Caring for Alaska's Children and Youth in Out-of-Home Behavioral Health (Mar. 19, 2029) 51-53 *available at https://health.alaska.gov/Commissioner/Documents/btkh/pdf/DBH-Conference-Presentation_FINAL_2019-03-19.pdf.* In 2018, through Medicaid, 546 youth were hospitalized at North Star Hospital, compared to 103 youth at Alaska Psychiatric Institute, and the 400 youth served at the *now narrowed* set of general hospitals which had authority to provide inpatient psychiatric care. *Id.*

admit and discharge its patients pursuant to AS 47.30. But if this is not the case, the lack of facilities to which AS 47.30 is applicable only makes the due process protections under Alaska's Constitution more important.

D. OCS Can Meet Its Obligations to Provide for Care of its Wards Without Setting Aside Youth's Rights to Due Process.

Ignoring constitutionally protected liberty interests articulated in established law, [Tribe's Br. 28-29] OCS relies upon "background principles" that children are not adults, and are routinely restrained from exercising absolute autonomy by teachers, doctors, babysitters and faceless bureaucracies, and cites its responsibility to provide for the care of its wards under AS 47.10.084 as authority to ignore and/or override AS 47.30's comprehensive scheme balancing individual rights against the State's interest in providing care to individuals suffering mental illness through civil commitment. [OCS Br. 19, 21, 29] This is a false dilemma, and a misreading of the law. Alaska's civil commitment statutes contemplate that individuals can receive an evaluation and emergency care while awaiting the provision of prompt due process if a qualified professional or peace officer "has probable cause to believe that a person is gravely disabled or is suffering from mental illness and is likely to cause serious harm to self or others of such immediate nature that considerations of safety do not allow initiation of involuntary commitment procedures,"[20] and OCS has authority to consent to "emergency" medical treatment, while parents retain authority to consent to major medical care.[21] OCS's authority ends with the emergency;

---

20 AS 47.30.705.

21 AS 47.10.084.

and Alaska's civil commitment statutes have set 72 hours as the timeline for when an "emergency" ends.[22] At that point, Mira's involuntary hospitalization could be sustained only through the provision of proper evidence or, for up to 30 days, parental consent.[23]

II. Hearings on the Hospitalization of Foster Youth Are Appropriately Heard in the CINA Case

In its arguments that AS 47.30 hearings should not be heard within the CINA case, OCS focuses primarily on existing logistical schemes that in no way contemplate the involuntary commitment of foster youth – even at API – not the law. [OCS Br. 46-49] These challenges can be overcome through appropriate administrative action and training within the Alaska Court System that would represent a minimal burden, as the Superior Court indicated.[24] [Exc. 102] OCS also argues that the issue of whether ICWA applies to civil commitments should not be reached in this case, because the issue is not before it. [OCS Br. 48-49] This is inaccurate; the review of Mira's hospitalization was initiated by the Tribe's request for a hearing under AS 47.30.700 *et seq.*, in a proceeding for which the Tribe had intervened under ICWA. [Exc. 22, R. 328] A system ensuring timely due process

---

22 *Id.* (reserving the right to make major medical decisions and consent to psychotropic medications to parents); AS 47.30.725-730 (allowing emergency detention for evaluation for up to 72 hours). *See also In re Necessity for the Hospitalization of Daniel G.*, 320 P.3d 262, 272-73 (Alaska 2014) (describing the low risk of erroneous deprivation of liberty, at least within the first 72 hours, when *ex parte* judicial procedures are followed).

23 *See* AS 47.30.690.

24 With the recent addition of CINA Rule 12.1, requiring appointment of counsel for youth aged 10 and older opposed to placement in a psychiatric hospital or residential treatment center, or the administration of psychotropic medication, some of the necessary changes to administrative practices are likely already under way.

in line with AS 47.30 *et seq*. must not, at the very least, ignore parallel proceedings concerned with the child's wellbeing and placement, or the parties to that case.

III. The Court May Properly Address the Violation of Mira's Constitutional Rights

OCS frames the constitutional violations at issue narrowly, limiting the inquiry to the order permitting placement at North Star Hospital, alone, while complaining of the lean factual record before the Court with which to analyze the facts. [OCS Br. 27-28, 33, 44-5] But this is factually inaccurate; the Tribe is appealing, as well, Mira's deprivation of the "procedural protections available to youth under AS 47.30.700 *et seq.*" – that means, as well, the failure to find that her entire hospitalization at Sitka Community Hospital was without any legal authority. [Statement of Points on Appeal]

The record regarding the circumstances of Mira's initial admission to Sitka Community Hospital is wanting because OCS initiated no review. OCS insists no sworn statement needs to be supplied to the Superior Court or any party regarding the factual circumstances leading to a foster youth's involuntary admission to a non-designated facility. [OCS Br. 18-21] None were. As described below, the paucity of information is an important factor, weighing in favor of more – not less – due process.[25]

In arguing that the Tribe has not properly raised the violations of Mira's constitutional rights, OCS ignores the facts in this case, as well as the Tribe's important interests at stake when the State infringes upon the rights of its citizens. Both Alaska law

[25] *Infra* § III.D.

and federal law recognize the critical role tribes play in protecting and advocating on behalf of their citizens. The leading role the Tribe has taken in protecting Mira's rights, and in pursuing an appeal in this case are demonstrative of the Tribe's essential role as a legal party in these proceedings, and the need to recognize the Tribe's standing.

A. The Tribe Has Standing to Challenge Violations of its Citizen's and Children's Rights under Alaska's Constitution within CINA Cases.

The congressional findings on the necessity of the Indian Child Welfare Act ("ICWA") acknowledge that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[26] ICWA allows federally recognized tribes to intervene as legal parties to child custody proceedings involving the removal minor citizens and biological children of tribal citizens who are eligible for membership in the tribe from their parents.[27] While the Indian child's tribe has some unique rights, few of those rights are limited to *intervening* tribes,[28] and nothing in ICWA suggests

---

[26] 25 U.S.C. § 1901(3). *See also Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36-37 (1989).

[27] 25 U.S.C. § 1903 (defining "Indian child" and "Indian child's tribe); 25 U.S.C. 1911(c) (allowing intervention of the Indian child's tribe in child custody proceedings).

[28] *Compare, e.g.* 25 U.S.C. § 1903 (allowing Tribe to define "extended family" and "Indian custodian" as matter of tribal law or custom, but not limiting this right to an intervening tribe); 25 U.S.C. § 1911(b) (allowing Indian child's tribe to seek transfer of jurisdiction of proceedings, regardless of whether it has intervened as a legal party) *with* 25 U.S.C. § 1912(c) (allowing Tribe to request continuance as a matter of right); 25 U.S.C. § 1912(c-d) (allowing *parties* to examine of all documents relied upon by the Court to make any decision; requiring any *party* seeking removal of a child from their parent to meet certain burdens).

that a tribe's rights, once intervened, are limited.[29] Instead, one of a tribe's roles as an intervening party is to advocate for the protection of its citizens.

The Tribe's interest in protecting the rights of its tribal citizens bound up in the child welfare system has long been recognized by Alaska courts. In *Department of Health and Social Services v. Curyung*, decided in 2006, the Alaska Supreme Court recognized the tribes' rights to bring *parens patriae* claims on behalf of their members, alleging violations of, *inter alia*, the federal and Alaska Constitutions, and ICWA.[30] The Court noted the "fact that individual parties could have brought suit to vindicate their rights does not deprive a state of *parens patriae* standing," and that an individual's "private right of action . . . does not preclude a sovereign's ability to bring a *parens patriae* claim."[31] It further observed that the *Curyung* plaintiff tribes had a unique interest in advocating for the rights of their members, noting "the well-being of individual families and children is inextricably bound up with the villages' ability to maintain their integrity, which is something that can only occur through the children of the Village."[32]

Up to the point the Tribe took action in December 2021, no party had taken action to protect Mira's independent liberty interests, though Mira disagreed with OCS's proposed course of action at earlier points in this case, voicing her opposition to residential

---

29 *See* 25 U.S.C. §§ 1901-22**;** *Baker v. John*, 982 P.2d 738, 752 (Alaska 1999) ("Courts must resolve ambiguities in statutes affecting the rights of Native Americans in favor of Native Americans.").

30 *Dep't of Health & Soc. Servs. v. Native Vill. of Curyung*, 151 P.3d 388, 402 (Alaska 2006).

31 *Id.* at 399-402.

32 *Id.* at 402 (internal citations omitted).

treatment. [Exc. 4-5; R. 265] For the first 39 days of Mira's hospitalization – the entirety of her hospitalization at Sitka Community hospital, and 22 days in to her hospitalization at North Star – no counsel had appeared on her behalf. [R. 415] Mira's attorney was only appointed to represent her in response to the Tribe's request that a hearing be held under "AS 47.30.700 *et seq*., to include appointment of counsel to represent the minor as required by AS 47.30.700(a)." [Exc. 22, 33] Other legal parties, such as the guardian ad litem, might have raised Mira's constitutional rights. But OCS's lack of communication to any other legal party regarding Mira's status may have contributed to parties' inaction in seeking review; after all, Mira was at North Star Hospital for over a week before OCS took steps to facilitate the GAL's contact with her. [Tr. 8, Dec. 30, 2021] It is impossible to raise a constitutional violation that OCS allows to occur in secret; it is near-impossible for a youth to raise a constitutional violation of her own rights without an attorney.

The Tribe took action to protect Mira's rights as soon as it was made aware: first, in the trial court, noting the important constitutional interests at play, then again by appealing the trial court decision that would continue to deprive her of timely and important due process protections. [Exc. 23] Kwinhagak is advancing the same interests in the protecting the rights of its citizens as the plaintiff tribes in *Curyung*. Kwinhagak is also filling a void: it was the first party to raise the issue of Mira's constitutional rights, where no other party took action.

This case can also be distinguished from *R.J.M. v. State*, cited by OCS, in which a father objected that his children's due process rights were violated because they were not allowed to testify in open court, although their testimony was taken in chambers, without

any party objecting, and although both participated in the appeal.[33] [OCS Br. 31] The *R.J.M.* court found that "in these circumstances," where the children were heard at every stage in the proceeding and the father showed no substantial prejudice to himself, the father lacked standing to assert the violation of his children's due process rights.[34] Here, there are different circumstances: Mira's position is clear; she was not given a meaningful opportunity to participate in the defense of her rights until after the Tribe insisted she be appointed counsel through its motion on day 19 of her continuous hospitalization; and the Tribe, as described above, has a unique interest in its children. Kwinhagak's claims on behalf of its citizen are properly raised, uncontroverted by Mira and her mother, and, thus, proper subjects for this Court's consideration.

While OCS argues that Mira and her mother should have filed their own appeals, rather than participating in Kwinhagak's, the law does not require this. Appellate Rule 204 provides that "other parties are deemed to be appellees, *regardless of their status in the trial court*," who may choose to participate in the appeal or not, but yet will be bound by the outcome of the appeal regardless.[35] Just because an appellee may be aligned, does not mean that they may not participate in the appeal, or that they must file their own. The numerous cases OCS cites for authority regarding an appellee's need to file a cross-appeal to address issues not raised in the original appeal do not involve multi-party litigation, where a single appellant may have adequate incentive to appeal, although other appellees

---

33 *R.J.M. v. State*, 946 P.2d 855, 871 (Alaska 1997).

34 *Id.* It is also worth noting that the opinion does not clearly state the children's positions in the appeal. *Id.*

35 Appellate Rule 204(g) (emphasis added).

may be aligned with that appellant without raising new claims.[36] [OCS Br. 31] Such is the case here, where the Tribe has sufficient incentive to file an appeal – to protect Mira's rights, and, through those rights, the future of its citizens; Mira and her mother have raised no new issues. [E.G. Br.] It is damaging enough to Kwinhagak that one child might be spirited away to an institution without due process, left alienated by a bureaucracy and judicial system, and possibly viewing the Tribe's inaction as tacit acceptance. But these harms are compounded when repeated.

B. This Court May Properly Consider the Violation of Mira's Constitutional Rights

The Tribe properly raised Mira's interests in liberty – and her attendant right to due process when the State infringes upon those rights – from the outset. In its request for a hearing pursuant to AS 47.30.700 *et seq.*, the Tribe invoked *Wetherhorn v. Alaska Psychiatric Institute* for the proposition that Alaska's constitution protects a liberty interest in not being involuntarily hospitalized;[37] *State v. Planned Parenthood*, for the proposition that minors, such as Mira, have protectable liberty interests;[38] and *Kiva O. v. State*, for the proposition that youth have an interest in not being medicated without appropriate consent,

---

[36] *See Peterson v. Ek*, 93 P.3d 458, 460 (Alaska 2004) (two litigants); *Nicolos v. N. Slope Borough*, 424 P.3d 318, 321 (Alaska 2018) (two litigants).

[37] *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 379 (Alaska 2007) ("Involuntary commitment implicates Alaska's constitutional guarantees of individual liberty and privacy and therefore entitles the respondent to due process protections.").

[38] *State v. Planned Parenthood*, 171 P.3d 577, 581 (Alaska 2007) ("[T]he primary purpose of [Alaska's Constitution's privacy clause] is to protect Alaskans' personal privacy and dignity against unwarranted intrusions by the State. Because this right to privacy is explicit, its protections are necessarily more robust and broader in scope than those of the implied federal right to privacy.") (internal citations omitted).

and requested the application of a generally-applicable law to evaluate Mira's involuntary hospitalization.[39] [Exc. 22-23] The Superior Court, "[h]aving reviewed the Tribe's Motion for Hearing Pursuant to AS 47.30.700 *et seq*.," granted the Tribe's request, and set a hearing to take place December 30, 2022. [Exc. 34] Although OCS has asserted that the appropriate framework was the ".087-like hearing" ordered within *Hooper Bay, et al. v. Lawton et al.*, 3AN-14-05238 CI, at numerous hearings [Exc. 36, 45; Tr. 4, Dec. 30, 20221; Tr. 12, Jan. 7 2022], the Tribe preserved its argument that AS 47.30.700 *et seq.* was the appropriate standard in each instance. [Exc. 18-31, 37-38; R. 39-41; Tr. 13-14, Jan. 7, 2022; Tr. 11, Jan. 14, 2022] It was only in issuing its ruling at the evidentiary hearing finally held January 18, 2022, that the Superior Court articulated its view that it could not apply AS 47.30 to Mira, because she was in foster care. [Exc. 102-103] The Tribe properly raised the possible violation of Mira's rights under Alaska's Constitution should she be deprived the process due under AS 47.30.700 *et seq.*, and did not waive the issue.

Although it is true that the Tribe did not explicitly raise Mira's right to equal protection under Alaska's Constitution,[40] [OCS Br. 32] this case is demonstrative of why *plain error* analysis is available to ensure the protection of seemingly self-evident rights. When important constitutional rights are at stake, where an individual would be substantially prejudiced, the Alaska Supreme Court allows more liberal review for plain

---

[39] *Kiva O. v. Dep't of Health & Soc. Servs., Office of Children's Servs.*, 408 P.3d 1181, 1188 (Alaska 2018) (recognizing a fundamental right to consent to psychotropic medication for ones child in OCS custody).

[40] Alaska Const. Art. I § 1.

error of issues not explicitly raised at the trial court.[41] In *Adams v. State*, the Alaska Supreme Court reviewed prior jurisprudence concerning plain error, and articulated "[a] constitutional violation will always affect substantial rights and will be prejudicial unless the State proves that it was harmless beyond a reasonable doubt," while emphasizing the importance that the violation be obviously prejudicial.[42]

In this case, there was plain error. The Tribe had no opportunity to raise the equal protection issue before the Superior Court. Instead, Judge Montgomery first noted the troubling double-standard applied to foster youth, observing "if [a hearing is] under AS 47.30, much more rights are entitled to the minor," and questioning, "I don't know why somebody in OCS custody would be entitled to less rights, but that's clearly what AS 47.10.087 does." [Exc. 97, 102] In so doing, the Superior Court raised the issue of equal protection *sua sponte*, noting the Tribe could appeal that finding. [Exc. 103] The error was clear, and prejudicial, affecting not just Mira's rights in her continued, involuntary hospitalization,[43] but her rights in future involuntary hospitalizations at North Star Hospital, which were already under way at the time of this appeal. [R. 8-10] This Court may properly review the violations of Mira's rights to equal protection under the Alaska Constitution.

---

41 *Adams v. State*, 261 P.3d 758, 771-773 (Alaska 2011) In contrast, the case cited by OCS, *Donahue v. Ledgends, Inc.*, 331 P.3d 342, 356 n.75 (Alaska 2014), involved a request for attorney's fees by a prevailing party, made for the first time in a Rule 68 motion.

42 *Adams*, 261 P.3d at 772-73.

43 *See* AS 47.30.730-740 (specifying procedures and rights in 30-day, and 90-day commitment proceedings).

C. Mira's Right to Equal Protection Was Violated

As described above, and in the Tribe's opening brief, the civil commitment statutes *do* apply to admissions to North Star Hospital, and *did,* at the time of her admission, apply to Sitka Community Hospital. [Tribe's Br. 15-17] Positive law affirmed that the civil commitment statutes were applicable to Mira's hospitalization, for which neither the youth nor her parent had given consent,[44] OCS cites no authority for the proposition that AS 47.30.700 *et seq. did not* apply – only the tortured interpretation of statute addressed above.

But OCS misleadingly argues that Mira received *more* due process than youth *not* in foster care, because if a parent had consented to her admission, she still would not have received judicial review until near day 30 of her hospitalization. [OCS Br. 33-34] In fact, no parent or guardian consented to Mira's admission; this was not a voluntary admission.[45] And, OCS persists in counting only the 28 days following Mira's admission to North Star Hospital as a measure of whether timely review was provided, ignoring the full 18 days she was confined to Sitka Community Hospital without authorization, review, or effort to initiate such review. The judicial review of Mira's continuous involuntary hospitalization, in fact, came 16 days after judicial review would have occurred had a parent or guardian consented to Mira's 30-day "voluntary" hospitalization, and 43 days after an initial hearing was required for Mira's involuntary hospitalization.

---

44 AS 47.30.775; *April S.*, 499 P.3d at 1019 (Alaska 2021).

45 *April S.*, 499 P.3d at 1019 (Alaska 2021).

Assuming the civil commitment statutes would offer protection to youth *not* in foster care under these circumstances – and they would – Mira's rights to equal protection were clearly violated.

D. Mira's Rights to Substantive and Procedural Due Process Were Violated.

OCS suggests the *Hooper Bay* injunction properly balances the competing interests at stake. [OCS Br. 35] But OCS, in its reliance upon *Parham v. J.R.*, gives short shrift to Alaska's more protective Constitution,[46] and ignores significant risks of erroneous deprivation of liberty unique to foster youth within the mental health system in Alaska.

OCS asserts that *In re the Necessity of Hospitalization of Daniel G*, 320 P.3d 262 (Alaska 2014), did not concern a minor, based on counsel's personal knowledge of the matter, though the Alaska Supreme Court had referred to Daniel as a minor at length while discussing the case in *In re the Necessity of Hospitalization of April S.*[47] [OCS Br. 36] Although *Daniel G.* does not state Daniel's age, OCS is wrong to conclude that Daniel *must be* a minor based on the father "initiat[ing] involuntary commitment procedures." [OCS Br. 36] The opinion outlines facts that could apply equally to a minor or an adult child: it states Daniel was delivered to Providence by a peace officer; that Providence made the petition; and makes no mention of whether the father might have preferred that the peace officer deal with Daniel without setting Daniel's involuntary commitment to API in

---

[46] Alaska Const. Art. I §§ 1, 7; *Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 245 (Alaska 2006) (Alaska's Constitution is more protective of liberty and privacy than the federal Constitution).

[47] *April S.*, 499 P.3d at 1017-18 (Alaska 2021).

motion.[48] For Daniel, like Mira, it may very well be the subsequent, lengthy detention for psychiatric treatment was unwanted by his parent. *April S. may* have mis-articulated the status of precedent, but this case presents an opportunity to articulate the rights of minors clearly, with the same result.

As OCS applies the *Matthews v. Eldridge* test, it relies heavily upon the constitutional analysis of less-protective *federal* constitutional rights of *Parham v. J.R.*, 442 U.S. 582 (1979), suggesting that this Court should reach the same result applying Alaska's Constitution's more expansive concepts of liberty. [OCS 36-43] But the facts – and the pre-commitment hearing – at issue before the *Parham* court can be distinguished from this case involving post-admission review. Even the U.S. Supreme Court might take issue with the "balance" struck by OCS's inaction in this case.

In *Parham*, the Supreme Court found that no judicial review was necessary for foster children prior to their involuntary hospitalization.[49] Finding that Georgia's system of relying on a neutral medical decisionmaker provided adequate process, the Court emphasized "it is necessary that the decisionmaker have the authority to refuse to admit any child who does not satisfy the medical standards for admission" and that the "child's continuing need for commitment be reviewed periodically by a similarly independent procedure."[50] It also urged caution regarding the *continued* hospitalization of youth in

---

48 *Daniel G.*, 320 P.3d at 264-65.

49 *Parham v. J.R.*, 442 U.S. 584, 607 (1979). The Supreme Court also pre-supposed a competent child welfare system that had supplied comprehensive history to physicians. *Id.* at 618-19.

50 *Id.* at 607 (also emphasizing the importance of comprehensive review of collateral information by the professional).

foster care, noting additional procedural protections may be required, without deciding the issue.[51]

Here, OCS required Mira to remain at Sitka Community Hospital not based on a medical professional's independent judgment, but because OCS lacked an immediate placement option *other* than Sitka Community Hospital. [Exc. 30] Mira's condition deteriorated during her unwarranted hospitalization in a perverse feedback loop noted in research – involuntary hospitalization can result in both immediate and lasting harm.[52] But OCS, arguing no review is necessary, bemoans its responsibility to identify an appropriate placement for its ward when medical professionals exercise their independent judgement that youth no longer require hospitalization "—go where?" [OCS Br. 29]. Had OCS taken

---

[51] *Id.* at 619-620. ("The absence of an adult who cares deeply for a child has little effect on the reliability of the initial admission decision, but it may have some effect on how long a child will remain in the hospital. We noted in *Addington* v. *Texas*, 441 U.S. 418, 428-429 (1979), that 'the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected.' For a child without natural parents, we must acknowledge the risk of being 'lost in the shuffle.' . . . Whether wards of the State generally have received less protection than children with natural parents, and, if so, what should be done about it, however, are matters that must be decided in the first instance by the District Court on remand") (internal citation altered from short form).

[52] *See generally* Nev Jones et al, *Investigating the Impact of Involuntary Psychiatric Hospitalization on Youth and Youth adult Trust and Help-Seeking in Pathways to Care*, 56 Soc. Psychiatry & Psychiatric Epidemiology 2017 (2020) (orienting on past research showing negative impact of involuntary hospitalization on minors, including increased risk of suicide following involuntary hospitalizations deemed coercive; describing study surveying 40 individuals on their experiences in care, identifying themes of "analogies to prison or jail, dehumanization, moral judgment, learning to lie," and a common occurrence of individuals being unwilling to engage in care subsequent care based on prior experience with involuntary hospitalization). *See also* Morgan C. Shields et al, *Patient Safety in Inpatient Psychiatry: A Remaining Frontier for Health Policy*, 11 Health Affairs 1853, 1853 (2018) (describing safety risks and adverse experiences while in inpatient settings).

any action pursuant to AS 47.30.700 *et seq.*, the factual record would be more detailed, rather than riddled with contradictory versions of fact where Mira may have "defecated on the bed and carpet" – a fact that, if true, is sensational enough it would normally bear repeating in evidence – or "drinking alcohol." [Exc. 25, 30] The process received by Mira stands in contrast to the hopeful view in *Parham* that children in foster care would benefit from a more detailed factual history than their peers.[53]

OCS misconstrues the risks posed by failure to provide prompt judicial review in other ways – by discounting concerns regarding quality of "proper care" received by Mira. [OCS Br. 42] As a general matter, maintaining accountability for quality of care and safety for psychiatric inpatients is a challenge.[54] But here, while it is unknown whether contact was facilitated between Mira and her GAL while she was at Sitka Community Hospital, there was an eight-day lag where OCS had not facilitated that contact after Mira's transfer North Star Hospital. [Tr. 8, Dec. 30, 2021] Such isolation of minors is not an anomaly.[55]

---

53 *Parham*, at 618-19.

54 *See generally* Shields, *supra* n.52. Shields and her co-authors highlight the risks posed by the growth in for-profit care, specifically noting investigations of fraud at United Health Services, and existing oversight regimes of accreditation, state licensing, and the federal government. *Id.*

55 *See Martha S. v. State*, 268 P.3d 1066, 1083 n.38 (Alaska 2012) ("[The parents] make some valid complaints about restrictions imposed by OCS on their ability to contact their children and participate in their treatment. . . . OCS took Andy . . . into custody on October 23, 2009. Andy was immediately transported to an emergency room in Fairbanks and then to North Star psychiatric facility in Anchorage without being able to talk to his parents. At the probable cause hearing in mid-November, Andy's therapist testified that OCS would not allow Andy to have any contact with his parents").

There is ample reason for concern that care received by Mira and others has fallen short of any ideal.[56] The State is well-aware of past dysfunction as a general matter, and cannot claim ignorance of the current condition at the facility to which it entrusted Mira, with no judicial review.[57] And if it was North Star's mental health professional's first time learning of a youth's dangerous consumption of hand sanitizer while under North Star's closest supervision, this will be at least the second event *this Court* has learned of in the space of less than six months.[58] [OCS Br. 10-11] What is more, Mira was not actually

---

[56] *See* Michelle Theriault Brooks, *Embattled North Star CEO Stepping Down, 'Effective Immediately,'* Anchorage Daily News (Nov. 29, 2022) *available at* https://www.adn.com/alaska-news/anchorage/2022/11/29/embattled-north-star-hospital-ceo-stepping-down-effective-immediately/ (summarizing recent dysfunctions and regulatory actions); Michelle Theriault Brooks, *'I watched it rapidly turn into absolute chaos': Inside the deepening dysfunction at North Star psychiatric hospital'*, Anchorage Daily News (Nov. 20, 2022; updated Nov. 29, 2022) *available at* https://www.adn.com/alaska-news/anchorage/2022/11/20/i-watched-it-rapidly-turn-into-absolute-chaos-inside-the-deepening-dysfunction-at-north-star-psychiatric-hospital/.

[57] The State of Alaska, together with the U.S. Department of Justice, entered a settlement with North Star's parent company for Medicaid fraud at various facilities, including North Star Hospital – keeping youth longer than medically necessary, inadequate staffing, and billing for services not actually provided, among other allegations. *See* State of Alaska, Dep't of Law, *Alaska Attorney General Announces $608,489.78 Settlement from Fraud Case Against United Health Services, Inc, and UHS Services of Delaware, Inc.*, https://law.alaska.gov/press/releases/2020/081420-MFCU.html (last visited Nov. 30, 2022); Exs. 10.1, 10.2 to United Health Services, Form 8-K, Report to U.S. Securities & Exchange Commission (Jul. 10, 2020) *available at* https://ir.uhs.com/static-files/7cc17c12-ca5e-4fc4-b3ed-9e7f4dbe94eb (providing 10.1, settlement between United Health Services and U.S., and 10.2, template settlement between U.S. States and United Health Services listing "North Star Hospital" in appendix B, as one of the entities alleged to have, "during the period from January 1, 2010, through December 31, 2018, . . . submitted or caused to be submitted false claims for services provided to Medicare, Medicaid, Tricare, FEHB, and VA beneficiaries . . .").

[58] *Tuluksak Native Community v. State*, S-18377, Oral Arguments at 51:30 (referring to foster youth Hanson abusing hand sanitizer while at North Star Hospital during his hospitalization).

getting her once-per-week individual counseling. [Exc. 58] Judge Montgomery even concluded that while Mira "need[ed] treatment[,] North Star is not the place for that treatment, as she's not getting treatment and treatment is not being provided." [Exc. 98]

The risk to Mira of erroneous deprivation of liberty is obvious: she experienced it. The benefit of additional protections are similarly obvious: she would have left Sitka Community Hospital after one day. This brings us to substantive due process – OCS insists this appeal is about Mira's admission to North Star Hospital, without timely review, for necessary treatment. [OCS Br. 44-45] It is not; it is about the fact that no party will ever know what other course Mira might have charted if she had been allowed to discharge from Sitka Community Hospital on day one, based on the medical professional's assessment, rather remaining hospitalized for days on end not based on medical necessity for treatment, but because OCS failed to provide a foster child with a home. OCS cites Judge Brennan's instructive dissent in Parham, asserting "Mira received a hearing long before she was 'condemned to suffer the rigors of long-term institutional confinement."[59] Plainly, this is not the case – Mira was approved to discharge on day one, but deteriorated in the confines of Sitka Community Hospital. [Exc. 26, 30] OCS may not warehouse its wards in hospitals, as it did Mira. By doing so, OCS exceeded its powers – regardless of what process might be provided. This is the substantive due process violation that has tainted Mira's entire hospitalization.

---

[59] *Parham*, 442 U.S. at 638 (Brennan, J., dissenting in part).

CONCLUSION

Mira deserves better. OCS's interpretation of the applicability of AS 47.30.670 *et seq.*, if accurate, would mean that the protections for children spelled out by the statute for both voluntary and involuntary hospitalizations at "treatment facilities" are meaningless, because OCS could choose some other facility to warehouse foster children. OCS's balancing of youths' interest in liberty, and the State's interest in providing care and treatment for its wards leaves out an important detail: for youth like Mira, treatment is not the aim. And OCS leaves unspoken the reality: additional review would threaten an important, unchecked resource for placement of difficult children whose needs could be met with "ongoing counseling and support" outside of a hospital, if only OCS would provide it. [Exc. 30]

DATED: 12/5/22

ALASKA LEGAL SERVICES CORPORATION
Attorneys for Native Village of Kwinhagak

s/Pearl E. Pickett
Pearl E. Pickett, AK Bar No. 2003024