# NO. 22-1776

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JONATHAN MERCEDES,

PLAINTIFF– APPELLANT,

V.

CITY OF NEW YORK, POLICE OFFICER RICHARD EVANS, SHIELD NO. 25177, JOHN DOES, RICHARD ROES, POLICE OFFICER ANTHONY AMIRALLY, POLICE OFFICER KEVIN TREACY, POLICE OFFICER CHRISTOPHER BOLAND, EMERGENCY MEDICAL TECHNICIAN JUAN C. SANTIAGO PAULINO, EMERGENCY MEDICAL TECHNICIAN TIMOTHY CARABALLOSO,

DEFENDANTS– APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (NEW YORK CITY)
The Hon. Alvin K. Hellerstein
District Court Case No. 1:17-cv-07368

## BRIEF OF *AMICI CURIAE* COMMUNITIES UNITED AGAINST POLICE BRUTALITY; NATIONAL ASSOCIATION FOR RIGHTS PROTECTION & ADVOCACY; NATIONAL POLICE ACCOUNTABILITY PROJECT OF THE NATIONAL LAWYERS GUILD

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## STATEMENT OF INTEREST[1]

**Communities United Against Police Brutality (CUAPB)** was founded in 2000 in the aftermath of an incident of police brutality in which an unarmed man was shot 35 times in the alleyway behind his home. Despite intense efforts by the community, there was no justice in that case. Historically and currently, the Minneapolis Police Department's Internal Affairs Unit and the Minneapolis Civilian Review Authority have provided little relief or accountability in incidents of police violence. CUAPB was formed in response to this lack of accountability, on the belief that addressing day-to-day abuse will reduce more egregious incidents. An all-volunteer organization, CUAPB provides a 24-hour hotline and other referral and advocacy services for people dealing with the effects of police brutality. CUAPB also operates copwatch and courtwatch programs, engages in litigation, works to change policies and practices that facilitate police brutality, and educates the community on their rights while dealing with police. CUAPB also authored and brought about the passage of Travis' Law (MN Stat. 403.03), which requires 911 dispatchers to send mental health crisis teams, rather than police officers, as the primary first responders to mental health crisis calls.

[1] Pursuant to Rules 29.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *amici curiae* state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

**The National Association for Rights Protection and Advocacy (NARPA)** was formed in 1981 to provide support and education for advocates working in the mental health arena. It monitors developing trends in mental health law and identifies systemic issues and alternative strategies in mental health service delivery on a national scale. Members are attorneys, people with psychiatric histories, mental health professionals and administrators, academics, and non-legal advocates -- with many people in roles that overlap. Central to NARPA's mission is the promotion of those policies and strategies that represent the preferred options of people who have been diagnosed with mental disabilities. Approximately 40% of NARPA's members are current or former patients of the mental health system. NARPA members were key advocates for the passage of federal legislation such as the Americans with Disabilities Act (ADA) (42 U.S.C. §§ 12101 et seq.), the ADA Amendments Act of 2008 (ADAAA) (Pub. L. 110-325), and the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act of 1986 (42 U.S.C. §§ 10801-51). NARPA has submitted amicus briefs in many cases in federal and state courts in cases affecting the lives of persons with psychiatric disabilities. A sample of these cases include: *Goodman v. Georgia*, 546 U.S. 151 (2006), *Tennessee v. Lane*, 541 U.S. 509 (2004), *University of Alabama v. Garrett*, 531 U.S. 356 (2001), *Olmstead v. L. C.*, 527 U.S. 581 (1999), *Godinez v. Moran*, 509 U.S. 389 (1993), *Washington v. Harper*, 494 U.S. 210 (1990), *Hargrave v.*

*Vermont*, 340 F.3d 27 (2d Cir. 2003), *In the Matter of M.C.*, 481 Mass. 336 (2019), *Gross v. Rell*, 304 Conn. 234 (2012), *In re Simone D.*, 9 N.Y.3d 828 (2007), *Phoebe G. v. Solnit*, 252 Conn. 68 (1999), *T.D. v. New York State Office of Mental Health*, 91 N.Y.2d 860 (1997), *Matter of McKnight*, 406 Mass. 787 (1990). NARPA's participation in amicus briefs, its work to pass civil rights legislation, and its role in advocating for public policy consistent with its core mission reflect NARPA's commitment to enforcing the civil and human rights of people who have been diagnosed with mental health disabilities. NARPA aims to ensure that courts treat people with mental health diagnoses fairly and equally under the law.

The **National Police Accountability Project (NPAP)** was founded in 1999 by members of the National Lawyers Guild to address misconduct by law enforcement officers through coordinating and assisting civil rights lawyers. NPAP has approximately 550 attorney members practicing in every region of the United States, including dozens of members who represent clients that have been grievously harmed by police during a mental health crisis.

Every year, NPAP members litigate the thousands of egregious cases of law enforcement abuse that do not make news headlines as well as the high-profile cases that capture national attention. NPAP provides training and support for these attorneys and resources for non-profit organizations and community groups working on police and correctional officer accountability issues. NPAP also

advocates for legislation to increase police accountability and appears regularly as *amicus curiae* in cases, such as this one, presenting issues of particular importance for its members and their clients.

## ARGUMENT

The New York Mental Hygiene Law includes an integral protection against arbitrary seizure of people with mental illness in the form of the overt act requirement. Despite the plain language of the law and the Second Circuit's recognition that § 9.41 governs seizures by police officers, the district court dispensed of the limitation in granting summary judgment on Jonathan Mercedes's false arrest claim. The district court's decision is a continuation of a problematic trend failing to provide people with mental illness the full protection of governing legal principles.

Further, the district court's decision granting summary judgment even though the arresting officers failed to articulate probable cause for the seizure sets a concerning precedent that will expand police contact with people in mental health crisis. This expansion is alarming given the prevalence of police brutality against people experiencing mental health crises—a group that is often on the receiving end of unjustifiable police violence. *Amici* respectfully request that the Court reverse the district court's decision.

## I. The District Court Erred By Ignoring The Plainly Stated Requirements For The Seizure Of A Person With Mental Illness By A Police Officer Imposed By The New York Legislature.

Although the district court correctly found New York Mental Hygiene Law § 9.41 serves as the authority for a police officer to seize a person with mental illness, it overlooked § 9.01's critical limitation on an officer's authority to do so. Section 9.01 clearly states that for the officer's seizure to be justified, the person with mental illness must have first engaged in some overt act demonstrating that the person is a potential danger to himself or to others. N.Y. Mental Hyg. Law § 9.01. The district court's disregard of this limitation is irreconcilable with the plain language of the statute, but it is not surprising given the failure of courts in this circuit to consistently apply the overt act requirement.

### A. As This Court Has Recognized, The Plain Language Interpretation of New York's Mental Hygiene Law Requires Overt Harmful Conduct to Seize an Individual Under the Statute.

As the district court noted, Section 9.41 provides that a peace officer may "take into custody any person who appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others." JA-794 (quoting N.Y. Mental Hyg. Law § 9.41). The district court further correctly recognized that the New York Legislature defined "likely to result in serious harm" as follows:

> (a) a substantial risk of physical harm to the person as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to himself or herself, or (b) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.

*Id.* (quoting N.Y. Mental Hyg. Law § 9.01). However, the district court, like other courts detailed *infra*, ignored the plain language of § 9.01 requiring an overt act and concluded that "[f]or a mental health seizure, a showing of probable cause requires 'a probability or substantial chance of dangerous behavior, not an actual showing of such behavior.'" *Id.* (quoting *Mizrahi v. City of New York*, 15 Civ. 6084 (ARR), 2018 WL 3848917, at *20 (E.D.N.Y. Aug. 13, 2018) (quoting *Heller v. Bedford Cent. Sch. Dist.*, 144 F. Supp. 3d 596, 622 (S.D.N.Y. 2015)).

Although the Due Process Clause of the United States Constitution does not require a determination of overt conduct to invoke the State's civil commitment authority, *see Project Release v. Prevost*, 722 F.2d 960, 972-74 (2d Cir. 1983), a reading of § 9.01 establishes beyond any question that the Legislature clearly imposed an overt act requirement when it set forth the limits on the authority of police officers pursuant to Mental Hygiene Law §§ 9.41 and 9.01. The district court's decision flouts the plain language of this statute.

This Court has made clear that "'[i]n determining the proper interpretation of a statute, this court will look first to the plain language of a statute and interpret it by its ordinary meaning. If the statutory terms are unambiguous, our review generally ends and the statute is construed according to the plain meaning of the words.'" *Bonime v. Avaya*, 547 F.3d 497, 502 (2d Cir. 2008) (quoting *Tyler v. Douglas*, 280 F.3d 116, 122 (2d Cir. 2001)). This is because the Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

When applying or interpreting a statute, it is well-settled that a court may not substitute its judgment or "personal notions of good public policy for those of the legislature." *Schwieker v. Wilson*, 450 U.S. 227, 234 (1981); *see also In re Gault*, 387 U.S. 1, 71 (1967) (Harlan, J. concurring) (same); *S. Power Co. v. Cleveland Cty.*, 24 F.4th 258, 267 (4th Cir. 2022) (same). This is because any substituting by a court of its own judgment for that of the legislature amounts to the usurping of "the legislative body's policy-making function." *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1167 (10th Cir. 2006).

Here, the law is clear. The New York Legislature imposed a requirement of (1) "threats or attempts at suicide"; (2) "other conduct" demonstrating that an individual with mental illness poses a danger to himself; or (3) "homicidal or other violent behavior" before a police officer may seize an individual with mental illness. N.Y. Mental Hyg. Law § 9.01. The New York Legislature struck what it determined to be the proper balance between individual liberty and public safety when it set forth the circumstances under which police officers may seize a person with mental illness. It is not for any court to substitute its notions of good public policy by writing out of Mental Hygiene Law § 9.41 limitations placed on police officers' authority.

This Court has recognized any seizure of a person with mental illness must comport with the Fourth Amendment and "[t]he Fourth Amendment requires that an involuntary hospitalization 'may be made only upon probable cause, that is, only if there are reasonable grounds for believing that the person seized is subject to seizure *under the governing legal standard*.'" *Glass v. Mayas*, 984 F.2d 55, 58 (2d Cir. 1993) (quoting *Villanova v. Abrams*, 972 F.2d 792, 795 (7th Cir. 1992)) (emphasis added). It has also recognized that the overt act requirements of § 9.01 governs a determination of whether a person satisfied the seizure requirements of

§ 9.41. *Myers v. Patterson*, 819 F.3d 625, 631 (2d Cir. 2016). Accordingly, there is no question that the statute requires an overt act to conduct a seizure.

### B. This Court's Inconsistent Application of the Overt Act Requirement Has Led Lower Courts to Write it Out Completely, Including the District Court in This Case.

Even though this Court has correctly recognized the statute to require an overt act to conduct a seizure, courts within this circuit have not consistently applied the requirement. The disregard of the requirements of § 9.41 as defined by § 9.01 began with *Thomas v. Culberg*, 741 F. Supp. 77 (S.D.N.Y. 1990), a *pro se* case. There, the court held that the "likely to result in serious harm" requirement of § 9.41 governed the transfer of a criminal defendant to Bellevue Hospital. *Id.* at 81 n.1. In so holding, the court, citing *Matter of Carl C.*, 126 A.D.2d 640 (2d Dep't 1987), concluded that New York law does not require a showing of an overt act before transport to a psychiatric hospital. *Id.* However, *Matter of Carl C* involved neither an application of the "likely to result in serious harm" requirement nor its meaning. 126 A.D.2d at 640-41. Rather, *Matter of Carl C* stood for the well-settled proposition that from a *constitutional* perspective, as opposed to a statutorily-imposed requirement, one way a person could pose a threat of serious harm to himself was through an inability to meet his basic needs. *See id.* (citing *Matter of Harry M.*, 96 A.D.2d 201, 207-08 (2d Dep't 1983)). At no time did the court in *Thomas* make any attempt to examine how the definition of "likely to

result in serious harm" under New York Hygiene Law might impose additional requirements on the police officer who seized the plaintiff. *See* 741 F. Supp. at 81 n.1.

To be sure, a number of decisions by this Court in which police officers seized individuals pursuant to § 9.41 no doubt contributed to district courts ignoring the governing legal criteria imposed by the New York Legislature. In *Kerman v. City of New York*, 261 F.3d 229 (2d Cir. 2001), this Court considered whether a decision by police officers to hospitalize an individual under § 9.41 was justified. This Court examined this issue in the context of whether the decision by the defendants was reasonable under the Fourth Amendment for qualified immunity purposes. *Id. at* 240. It recognized that § 9.41 authorizes hospitalization when an individual appears mentally ill and conducts himself in a manner that is likely to result in serious harm. *Id.* at 240 n.8. However, this Court failed to cite or otherwise acknowledge that § 9.01 set forth criteria as to what constitutes "likely to result in serious harm." *Id.* This Court then explained that "[w]e interpret this provision consistently with the requirements of the Fourth Amendment and therefore assume that the same objective reasonableness standard is applied to police discretion under [§ 9.41]." *Id.* Ultimately, this Court reversed judgment that the district court granted to the one defendant whom the Court determined was responsible for the decision to seize and transport the plaintiff to the psychiatric

hospital. *Id.* at 241. Nevertheless, the Court's conflation of the Fourth Amendment's objective reasonableness standard with § 9.01's more exacting standard was improper.

In *Anthony v. City of New York*, 339 F.3d 129 (2d Cir. 2003), this Court addressed the legality of a police seizure of a person who was diagnosed with a number of mental disabilities. Examining the constitutional standards regarding a seizure by the police without reference to state law, which was not at issue in this case, this Court concluded that "[a] warrantless seizure for the purpose of involuntary hospitalization 'may be made only if there are reasonable grounds for believing that the person seized' is dangerous to herself or to others." *Id.* at 237 (internal cites omitted) (internal quotes omitted in original). This Court then held that while questions of fact existed as to whether it was reasonable to believe that the plaintiff posed a danger to herself, the officers were entitled to qualified immunity because it was objectively reasonable for them to believe that a reasonable basis existed to seize the plaintiff, even absent an overt act. *Id.* at 138.

More recently in *Myers v. Patterson*, 819 F.3d 625 (2d Cir. 2016), this Court applied a standard Fourth Amendment objective reasonableness analysis to determine whether an involuntary detention satisfied the requirements of § 9.41 despite recognizing that the overt act requirement of § 9.01 governed. *Id.* at 631. In particular, this Court stated that "[t]o handcuff and detain, even briefly, a person

for mental health reasons, an officer must have 'probable cause to believe that the person presented a risk of harm to [her]self or others'" although it did not further require a similar finding of the requisite overt conduct. *Id.* at 632 (quoting *Kerman*, 261 F.3d at 237). This Court ultimately reversed the granting of summary judgment on the ground that questions of fact existed as to whether the plaintiff presented such a risk of harm. *Id.* at 633-36. But, as in *Kerman*, the Court's elision of the Fourth Amendment's standard with the standard laid out in the New York Hygiene Law set a muddled precedent for district courts interpreting the legality of involuntary detentions.[2]

Since this Court's decisions in *Kerman* and *Anthony*, the district courts have inconsistently analyzed § 1983 claims of allegedly mentally ill individuals seized pursuant to Mental Hygiene Law § 9.41. Like the district court in this case, many courts when deciding whether police officers lawfully seized a person with mental illness under § 9.41 have noted the existence of the overt act requirement of § 9.01

[2] To be sure, the district court cited § 9.01 when it concluded that the Appellant presented a substantial risk of physical harm to others. However, in the portion of the opinion that addressed the wrongful seizure, the court did not cite to any violent behavior of the Appellant. JA-793 – JA-796. Hence, it cannot be determined that district court applied the overt act requirement of §§ 9.41 and 9.01. Admittedly, the district court in its recitation of the facts noted that an Intergraph Computer Aided Dispatch Report noted that the appellant presented as "VIOLENT" and "PICKING UP WEAPONS." JA-790. However, a second report noted that the appellant was "NON-VIOLENT." *Id.* The failure of the police officers in this case to attempt to reconcile the conflicting information rendered their assessment of danger not a reasonable one. *See Kerman*, 261 F.3d at 240 (police assessment of danger when officer fails to corroborate information that would have established plaintiff was not dangerous when it would have been easy to do so rendered assessment unreasonable).

and then simply ignored it by concluding that the Fourth Amendment probable cause requirement requires a risk of dangerous behavior, not the actual overt conduct required by § 9.01.[3] *See*, *e.g.*, *Mizrahi*, 2018 WL 3848917, at *20; *Heller*, 146 F. Supp. at 622; *Dunkelberger v. Dunkelberger*, 14-CV-3877, 2015 WL 5730605, at * 11-12 (S.D.N.Y. Sep. 30, 2015); *Tsesarskaya v. City of New York*, 843 F. Supp. 2d 446, 455-56 (S.D.N.Y. 2012); *Glowczenski v. Taser Int'l. Inc.*, No CV-04-4052, 2010 WL 1936200, at *6 (E.D.N.Y. May 13, 2010).

Other courts have noted when defendants seize plaintiffs pursuant to § 9.41 but failed to cite § 9.01 as containing additional governing criteria. These courts simply asked whether a reasonable basis existed to believe that the plaintiff presented as dangerous. *See*, *e.g.*, *Frederick v. New York*, 449 F. Supp. 3d 115, 134 (W.D.N.Y. 2020); *Garcia v. Dutchess Cnty*., 43 F. Supp. 3d 281, 291 (S.D.N.Y. 2014); *Burdick v. Johnson*, No. 1:06-CV-1465 (LEK-RFT), 2009 WL 1707475, at * 5 (N.D.N.Y. June 17, 2009).

[3] *Amici* respectfully suggest that, beyond ignoring the overt act requirements of § 9.01, the district court and other courts have created confusion as to what an assessment of danger entails when they reason probable cause requires "a probability or substantial chance of dangerous behavior." JA-794 (internal quotes omitted). The concept of danger *itself* connotes a risk of harm. *See* Webster's Ninth New Collegiate Dictionary 324 (1984) (dangerous means "able or likely to inflict injury"); *In re Commitment of Kientz*, 597 N.W. 712, 718 (Wis. 1999) (finding state met its burden of proving Kientz was likely to engage in future acts of violence, not that he engaged in such acts). Hence, in the absence of any overt act requirement, the proper analysis is to ask whether the allegedly mentally ill person presents a *risk of harm* to oneself or others, as this Court did in *Kerman*. 261 F.3d at 237. A risk of dangerousness amounts to a risk of a risk of harm; a risk of dangerous behavior is a bit of a non-sequitur.

A few courts have faithfully applied the statute and recognized that the overt act requirements imposed by the Legislature govern § 1983 claims that challenge seizures pursuant to § 9.41. These courts assessed whether a reasonable basis existed to conclude that plaintiffs met the requirements for seizure because their presentation as "dangerous" included the overt behavior required by §§ 9.41 and 9.01. *See Greenaway v. Cnty. Of Nassau*, 97 F. Supp. 3d 225, 234 (E.D.N.Y. 2015); *Thorton v. City of Albany*, 831 F. Supp. 970 (N.D.N.Y. 1993).[4]

Finally, it cannot be argued that *Kerman*, *Anthony*, and *Myers* constitute binding authority that require an *en banc* panel to reverse. In both *Kerman* and *Myers*, this Court ruled in favor of the plaintiffs-appellants finding that questions of fact existed as to whether reasonable cause existed for police officers to conclude the plaintiff posed a danger to himself for both Fourth Amendment and qualified immunity purposes. *See Kerman*, 261 F.3d at 240; *Myers*, 819 F.3d at 633-36. Hence, any determination of the applicability of the overt act requirement of § 9.01 was not necessary for this Court's decisions. This means that the applicability of the § 9.01 requirement was not part of this Court's holdings in any way and these decisions are not binding on this panel. *See Jimenez v. Walker*, 458 F.3d 130, 142 (2d Cir. 2006).

[4] When the district court decided *Thorton* in 1993, § 9.41 contained the overt act requirements. Since then, the Legislature moved the overt act requirements to the definitions section of the Mental Hygiene Law: § 9.01.

In *Anthony*, the plaintiff, who suffered from Down Syndrome and not mental illness, s*ee* 339 F.3d at 132, apparently never challenged the applicability of § 9.41 to her seizure as this Court never cited the statute in its decision, *see id.* at 132-38. As the applicability of the overt act requirement of §§ 9.41 and § 9.01 was never part of the case, it clearly was not necessary to resolve the claims. Accordingly, the question of whether probable cause to believe a person with mental illness is dangerous was not necessary for the resolution of the case and the language of this Court in *Anthony* is not binding. *See Barakat v. Holder*, 632 F.3d 56, 59 (2d Cir. 2011).[5]

### C. Writing Out the Statutory Requirements in § 9.01 Will Further A Troubling Trend of Diminishing the Rights of People with Mental Illness.

*Amici* respectfully suggest that the writing out of the stringent requirements of § 9.01 imposed by the Legislature amounts to treating people with mental illness as second-class citizens. Courts have simply stripped people with mental illness of the substantive protections provided by the Legislature by interpreting governing statutory law in a manner completely inconsistent with rules of statutory construction. This pattern is evidence of a more general trend of courts failing to

[5] *Arroyo v. City of New York*, 683 F.App'x 73 (2d Cir. 2017) (summary order), another case in which this Court determined the claims of someone seized pursuant to § 9.41, cannot serve as binding precedent because of its summary nature.

neutrally apply principles of precedent in cases brought by people with mental illness. Three examples will suffice to demonstrate this troubling trend.

In *Bryant v. Steele*, 462 F. Supp. 3d 249 (E.D.N.Y. 2020), a person diagnosed with mental illness challenged his confinement in a psychiatric hospital pursuant to § 1983. Summary judgment turned on whether the hospital physicians conducted psychiatric evaluations of him and the plaintiff asserted they did not. *Id.* at 268. The district court ruled against the plaintiff, concluding that the only evidence supporting the plaintiff's position was a "self-serving" affidavit and that the affidavit alone was insufficient to create an issue of fact. *Id.*

This holding was clearly inconsistent with binding precedent from this Court, which makes clear that a party's affidavit alone, so long as it is sufficiently factually detailed, creates issues of fact. *See Danzer v. Norden Systems, Inc.*, 151 F.3d 50, 57 and n. 8 (2d Cir. 1998). In *Danzer*, this Court held that "[t]here is nothing in …[R]ule [56(c)] to suggest that nonmovants' affidavit alone cannot - as a matter of law - suffice to defend against a motion for summary judgment." *Id.* at 57. To hold otherwise would amount to a "radical change in the courts' role [that] would be inappropriate" in all litigation. *Id.*

When the plaintiff in *Bryant* appealed to this Court, this Court turned what the only reasonable reading of *Danzer* amounted to—a hard and fast rule—into a discretionary one. This Court stated:

> While in certain circumstances an uncorroborated affidavit can be sufficient to defeat summary judgment, *see Danzer v. Norden Systems, Inc.*, 151 F.3d 50 (2d Cir. 1998) (holding that uncorroborated affidavit created issue of fact precluding summary judgment), those circumstances do not exist here. *Bryant v. Iheanacho*, 859 F.App'x 604, 605 (2d Cir. 2021).

This Court did not cite any authority, and *amici* is unaware of any authority, that supported turning the *Danzer* rule into a discretionary principle. *See id*. Significantly, this Court did not give any reason for doing so. It simply mischaracterized the decision in *Danzer* to uphold the dismissal of claims brought by a person diagnosed with mental illness.

Next, it is well-settled that "[a]s a substantive matter, due process does not permit the involuntary hospitalization of a person who is not a danger to either himself or others." *Rodriguez v. City of New York*, 72 F.3d 1051, 1061 (2d Cir. 1995); *Project Release*, 722 F.2d at 971 (same). Because "the Due Process Clause contains a substantive component that bars certain arbitrary wrongful conduct 'regardless of the procedures used to implement them,'" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)), once a government official confines a non-dangerous mentally ill person, the official violates their substantive due process rights.

Nevertheless, this Court concluded that "due process does not require a guarantee that a physician's assessment of the likelihood of serious harm be correct." *Rodriguez*, 72 F.3d at 1062. Of course, the Due Process Clause cannot

guarantee that any assessment of danger be correct any more than the Fourth Amendment can guarantee that every search and seizure be based on probable cause. Yet, it cannot be seriously argued that a person with mental illness has not suffered a violation of his due process rights if a doctor confined him when he was not dangerous. Nevertheless, because the Due Process Clause cannot guarantee correct assessments of danger, this Court concluded that "an involuntary commitment violates substantive due process if the decision is made 'on the basis of substantive and procedural criteria that are . . . substantially below the standards generally accepted in the medical community." *Bolmer v. Oliveira*, 594 F.3d 134, 142 (2d Cir. 2010) (quoting *Rodriguez*, 72 F.3d at 1063). This is simply an unwarranted stripping of constitutional protections.

To illustrate, because expungement of records is a remedy for a wrongful involuntary hospitalization, *see Rodriguez*, 72 F.3d at 1065-66; *Demarco v. Sadiker*, 952 F. Supp. 134, 142-43 (E.D.N.Y. 1996), one would think that if a person with mental illness proved a doctor confined him when he was not dangerous, he would be entitled to expungement of his record, regardless of the objective reasonableness of the defendant's conduct, which could preclude damages as a remedy. However, because the Due Process Clause cannot guarantee a correct assessment—just as any constitutional provision cannot guarantee that

officials will adhere to governing standards—a person with mental illness must now prove far more than he was not dangerous.

Finally, in *Mental Disability Law Clinic v. Hogan*, 519 Fed. App'x 714 (2d Cir. 2013), an organizational plaintiff challenged the New York State Office of Mental Health's policy of immediately assessing full care and treatment charges when a patient sued the Office of Mental Health. Previously, a court found that such assessment of charges constituted impermissible retaliation for patients exercising their First Amendment rights. *Acevedo v. Surles*, 778 F. Supp. 179, 183-85 (S.D.N.Y. 1991). Because of a change in Second Circuit retaliation jurisprudence set forth in *Greenwich Citizens Comm., Inc. v. Ctys. of Warren & Washington Indus. Dev. Agency*, 77 F.3d 26, 30 (2d Cir. 1996), which made retaliation claims more difficult to prove, the plaintiff in *Mental Disability Law Clinic* asserted a different theory of First Amendment liability when challenging what amounted to virtually the identical state practice: the actions of the State unduly burdened, *i.e.*, objectively chilled, the First Amendment right of access to the court.[6] This Court rejected the plaintiff's contention by holding that the plaintiff could raise only a First Amendment retaliation claim. But why was this

[6] The plaintiff had established that almost half the patients against whom charges were assessed faced charges of over one-half million dollars and two thirds faced charges of over $200,000. *See* Brief for Plaintiff-Appellant, *Mental Disability Law Clinic v. Hogan,* 12-1581-cv, Doc. # 42 at 12.

the case? If a plaintiff has a colorable, but ultimately unsuccessful First Amendment retaliation claim, why does such colorable claim bar recovery under a different First Amendment theory of liability? If a plaintiff has a colorable contract claim that ultimately lacks merit, this colorable claim does not bar recovery under tort.[7]

The decisions by this Court in *Bryant*, *Bolmer*, and *Mental Disability Law Clinic* and all the cases that have failed to analyze wrongful seizure claims under the overt act requirement set forth in § 9.01 have a common element: the failure to permit litigants with mental illness to benefit from the neutral application of governing legal principles. The upshot of this is that the litigants will generally go from likely winners, at least at the intermediate stage of the litigation process, to losers in the entirety. *Amici* respectfully ask this Court to put a stop to this discriminatory treatment by recognizing that the New York Legislature intended to make it more difficult for police officers to exercise their power to seize people with mental illness than most courts have been willing to recognize.

[7] The Court in *Mental Disability Law Clinic* asserted that "[t]he Clinic points to no case law in which this Court or any other has declined to apply retaliation doctrine to a plaintiff's claim that a government entity responded or will respond in an unconstitutional manner to the exercise of First Amendment rights." 519 Fed. App'x. at 717. There was good reason for this; to the best of appellant's knowledge, this was the first time a party made this argument.

## II. The District Court's Order Permitting Police Officers to Seize Individuals under New York Mental Hygiene Law § 9.41 Absent Probable Cause is Alarming Given the Frequency of Police Killings of People in Mental Health Crisis.

Permitting police officers to make an arrest absent evidence that an individual meets the governing legal criteria will expand police officer involvement in mental health crisis management, a task for which law enforcement is extraordinarily ill suited. Similarly, presuming a person in crisis is a danger to themselves or others despite an absence of record evidence, as the lower court did here, establishes a troubling precedent that could erode the constitutional protections of people living with a mental illness.

A wealth of reporting and data show that police responses to mental health situations create real dangers for civilians. People living with serious mental illness are 16 times more likely to be killed during interactions with law enforcement than civilians with no mental health conditions. Nicquel Terry Ellis, *After the Death of Another Mentally Ill Person in Police Custody, Experts Call for Widespread Training and Health Resources*, CNN (Aug. 11, 2022).[8] More than one in four of the people shot and killed by police officers between 2015 and 2020 had a known mental illness. National Alliance on Mental Illness, *988: Reimagining Crisis*

[8] Available at: https://www.cnn.com/2022/08/11/us/brianna-grier-mental-illness-police-response-reaj/index.html#:~:text=A%20study%20conducted%20by%20the,in%204%20fatal%20police%20shootings.

*Response*.[9] Police officers also tend to use greater amounts of non-lethal force on people with mental illness—and with greater frequency—than they do on people not displaying signs of mental illness. Michael T. Ross and William Terrill, *Mental Illness, Police Use of Force, and Citizen Injury*, Police Quarterly 11 (June 2017); Ayobami Laniyonu and Phillip Atiba Goff, *Measuring disparities in police use of force and injury among persons with serious mental illness*, 21 BMC Psychiatry 500 (Oct. 2021).

People with mental illness are not disproportionately subject to police brutality because they are more violent or present unique public safety risks. Instead, the disproportionate outcomes are due to the fact that police are "trained to presume danger" and consistently erroneously interpret symptoms of mental illness as threatening conduct. David Kirkpatrick, Steve Eder, Kim Barker, and Julie Tate, *Why Many Police Traffic Stops Turn Deadly*, The N.Y. Times (Oct. 31, 2021)[10]; Glenn Lipson, *et al.*, *A Strategic Approach to Police Interactions Involving Persons with Mental Illness*, 10 J. Police Crisis Negot. 30, 32 (2010). Courts have acknowledged this phenomenon and treat mental illness as a mitigating factor for officers to consider in their use of force evaluation. *See*, *e.g.*, *Palma v. Johns*, 27 F.4th 419, 437 (6th Cir. 2022) ("behavior that ordinarily seems threatening may

[9] Available at: https://tinyurl.com/3v7j24jd.
[10] Available at: https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html.

present a lower risk of harm if the officer has reason to believe that the behavior is a symptom of a mental condition"); *Crawford v. City of Bakersfield*, 944 F.3d 1070, 1075 (9th Cir. 2019); *Gibson v. County of Washoe*, 290 F.3d 1175, 1190 (9th Cir. 2002).

Crisis intervention training for police officers has done little to reduce police harm. *See* Amy Kerr, *et al.*, *Police Encounters, Mental Illness and Injury: An Exploratory Investigation*, 10 J Police Crisis Negot. 116, 129 (2010) (noting that "CIT training appears to have no effect on injuries in police encounters with people with mental illness"). The fact that the City of New York and other jurisdictions have instituted training programs to educate police officers on how to identify symptoms of mental illness and respond accordingly will not improve outcomes. Conversely, jurisdictions that have wholly removed police contact with individuals who are experiencing mental illness have seen significant reductions in related deaths and injuries. Jackson Beck, *et al.*, *Behavorial Health Crisis Alternatives*, VERA Institute (Nov. 2020)[11] (detailing the reductions in police brutality after implementing police alternative crisis response teams in Phoenix, Arizona, Eugene, Oregon, and Olympia, Washington).

Because police are predisposed to see those with mental health conditions as dangerous, expanding officers' ability to detain people in mental health crises

[11] Available at: https://www.vera.org/behavioral-health-crisis-alternatives.

absent probable cause will increase the number of police-civilian interactions that can escalate into police brutality. The lower court's opinion unjustifiably expands opportunities for law enforcement to use unnecessary force against people with mental illness.

## CONCLUSION

For these reasons, *amici* respectfully urge this Court to reverse the district court's partial denial of Plaintiff-Appellant's motion for summary judgment and permit Mr. Mercedes to proceed with his remaining claims.

Dated: Port Washington, New York
January 27, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(b)(4), I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 5,766 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman typeface.

Dated: Port Washington, New York
January 27, 2023

*William Brooks*