IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

DISABILITY RIGHTS NEW JERSEY, INC.,
A New Jersey Non Profit Corporation,

Plaintiff-Appellant,

—v.—

COMMISSIONER, NEW JERSEY DEPARTMENT OF HUMAN SERVICES;
COMMISSIONER, NEW JERSEY DEPARTMENT OF HEALTH AND
SENIOR SERVICES; STATE OF NEW JERSEY,

Defendants-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR PLAINTIFF-APPELLANT AND JOINT APPENDIX VOLUME I OF XI (Pages JA-1 to JA-63)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit LAR 26.1, counsel for Disability Rights New Jersey, Inc. certifies the following:

I. For non-governmental corporate parties please list all parent corporations:

DRNJ is a non-profit corporation organized under the laws of New Jersey and does not have a corporate parent.

II. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

III. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

IV. In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

April 7, 2014 *<u>/s/ Nathan S. Mammen</u>*

Nathan S. Mammen

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PRELIMINARY STATEMENT

The State of New Jersey policy at issue in this case should frighten anyone. That policy—promulgated in the New Jersey Department of Human Services' Administrative Bulletin ("AB") 5:04B—allows state employees in state psychiatric hospitals to forcibly administer psychotropic medications to competent persons who have been involuntarily committed. This is not forcible medication for an emergency—the State has a separate policy for emergencies that is not challenged in this case. Rather, this policy specifically allows forcible medication in *non-emergency* situations. It permits the State to override the most fundamental right of a person to be free of unwanted medical treatment—here, to be free of drugs that by their nature are meant to be mind-altering—and to violate a person's body without any court authorization or supervision.

AB 5:04B singles out persons with mental illness for this draconian treatment. Notably, the State cannot forcibly treat persons with other illnesses without their consent, even if the State unequivocally believes those persons "need" the treatment to get better. Individuals with mental illness, however, are denied this most basic and fundamental right. New Jersey's antiquated discrimination against persons with mental illness is precisely what Congress outlawed in the Americans with Disabilities Act and the Rehabilitation Act, and this Court should so hold.

Although AB 5:04B's rank discrimination is reason enough to invalidate it, the policy is also patently unconstitutional. It fails to provide basic due process to protect the fundamental rights at stake. There is no judicial review before a *competent* individual's body is invaded with mind-altering substances. The State is not even required to prove the basis for its forcible medication, much less with clear and convincing evidence. The upshot is that individuals with mental illness who have committed no crimes do not even have the same rights provided to convicted prisoners. Whereas prisoners have law libraries or assistance of counsel to help them access the courts to vindicate rights, the State provides involuntarily committed persons neither.

Ultimately, the district court refused to enjoin AB 5:04B because it found the policy to be nearly identical to the policy the Supreme Court upheld in *Washington v. Harper*, 494 U.S. 210 (1990). But *Harper* addressed the due process rights of *prisoners*, and its holding was expressly premised on the unique nature of prisons. Treating civilly committed individuals with mental illness like prisoners is an outdated and outlawed form of discrimination.

To be sure, the State has an interest in caring for persons committed to its hospitals, and the majority of state employees making these decisions to forcibly medicate are likely doing so with honest intentions to help those they are forcibly medicating. But good intentions cannot justify running roughshod over the

fundamental right of persons in state hospitals to refuse unwanted medical treatment. AB 5:04B is a facially discriminatory and fundamentally unconstitutional policy and must be enjoined.

STATEMENT OF JURISDICTION

The United States District Court for the District of New Jersey (district court) had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) & (4). The parties filed cross-motions for summary judgment on all claims, and on September 27, 2013, the district court granted-in-part and denied-in-part each side's motion for summary judgment, and denied DRNJ's requested injunction of AB 5:04B. DRNJ filed a timely notice of appeal on October 25, 2013, JA1-3, and the State of New Jersey and Jennifer Velez filed a notice of cross appeal on November 8, 2013, JA4-6. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Administrative Bulletin ("AB") 5:04B violates Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

This issue was raised by DRNJ's and New Jersey's motions for summary judgment in *Disability Rights New Jersey v. Jennifer Velez et. al.*, No. 10-CV-03950-DRD, Docket No. 124-1, at 13 (D.N.J. Nov. 28, 2012) (DRNJ's Brief in Support of Motion for Summary Judgment) and Docket No. 122-4, at 31 (D.N.J.

Nov. 28, 2012) (State's Brief in Support of Motion for Summary Judgment), and was ruled on by the District Court at JA63.

2. Whether AB 5:04B violates the Due Process Clause of the Fourteenth Amendment.

This issue was raised by DRNJ's and New Jersey's motions for summary judgment in *Disability Rights New Jersey v. Jennifer Velez et. al.*, No. 10-CV-03950-DRD, Docket No. 124-1, at 30 (D.N.J. Nov. 28, 2012) (DRNJ's Brief in Support of Motion for Summary Judgment) and Docket No. 122-4, at 6 (D.N.J. Nov. 28, 2012) (State's Brief in Support of Motion for Summary Judgment), and was ruled on by the District Court at JA62.

3. Whether New Jersey denies persons subject to AB 5:04B access to courts.

This issue was raised by DRNJ's and New Jersey's motions for summary judgment in *Disability Rights New Jersey v. Jennifer Velez et. al.*, No. 10-CV-03950-DRD, Docket No. 124-1, at 25 (D.N.J. Nov. 28, 2012) (DRNJ's Brief in Support of Motion for Summary Judgment) and Docket No. 122-4, at 28 (D.N.J. Nov. 28, 2012) (State's Brief in Support of Motion for Summary Judgment), and was ruled on by the District Court at JA63.

STATEMENT OF RELATED CASES

Disability Rights New Jersey, Inc. is not aware of any related cases.

STATEMENT OF THE CASE

In June 2012, the New Jersey Department of Human Services ("DHS") adopted a policy—Administrative Bulletin ("AB") 5:04B—that permits it to forcibly medicate persons with mental illness who have been involuntarily committed to state psychiatric facilities. The legality of that policy is the subject of this appeal.

A. Involuntarily Committed Persons In New Jersey State Psychiatric Hospitals.

DHS operates four inpatient state psychiatric hospitals in New Jersey. JA1108-09. New Jersey receives federal funds to support DHS's operations. JA1110. These state psychiatric hospitals receive persons who have been involuntarily committed through civil commitment proceedings. JA1108-09.

Under New Jersey law, a court can order temporary commitment of a person upon finding probable cause to believe that the person is in need of involuntary commitment for treatment. N.J. Stat. Ann. 30:4-27.10.f. Within 20 days of the temporary commitment, a civil commitment hearing before a court must occur to determine whether there is a continuing need for involuntary commitment. N.J. Stat. Ann. 30:4-27.12.a; JA1142-43. The person being considered for involuntary commitment must have counsel present (counsel is appointed if the person is indigent), and the hearings are recorded by court reporters and result in a written court order. N.J. Stat. Ann. 30:4-27.12.d; 30:4-27.14.a; JA1142. A person cannot

be involuntarily committed unless the court determines by clear and convincing evidence that the person poses a danger to self, others, or property. N.J. Stat. Ann. 30:4-27-2; 30:4-27.15.a. Before involuntarily committing a person to state psychiatric hospitals, the court must also determine whether a less restrictive alternative, such as outpatient treatment, is appropriate. N.J. Stat. Ann. 30:4-27.15a.a. Civil commitment hearings take place on a weekly or biweekly basis in New Jersey's state psychiatric hospitals and include participation by a state attorney, the patient, an attorney appointed to represent the patient, and a psychiatrist. JA1143.

If a final order of commitment is entered, the person is entitled to periodic review of the commitment by the court. N.J. Stat. Ann. 30:4-27.16; N.J. Ct. R. 4:74-7(f). At these review hearings, the state bears the burden of proving by clear and convincing evidence that the person continues to require involuntary commitment. *In re J.R.*, 916 A.2d 463, 468 (N.J. Super. Ct. App. Div. 2007). If the evidence does not support continued involuntary commitment, the court orders that the person be discharged. N.J. Ct. R. 4:74-7(h)(1). If, however, a person is entitled to discharge from a state psychiatric facility but cannot be discharged because of unavailability of appropriate placement, the court may issue an "order of conditional extension pending placement" ("CEPP") until appropriate placement becomes available. *See In re S.L.*, 462 A.2d 1252, 1258-59 (N.J. 1983); N.J. Ct. R.

4:74-7(h)(2). Persons who are waiting to be released are known as CEPP patients. JA1123.

In 2011, a total of 8,636 civil commitment hearings took place, and over 50,000 took place between 2006 and 2012. JA57; JA1141-42. Notably, however, a civil commitment order does *not* equate to a finding of legal incompetence. N.J. Stat. Ann. 30:4-27.11c.c.; *see also* N.J. Stat. Ann. 30:4-24.2.c ("No patient may be presumed to be incapacitated because of an examination or treatment for mental illness, regardless of whether the evaluation or treatment was voluntarily or involuntarily received.").

Persons with mental illness, including those involuntarily committed in state psychiatric hospitals, are constituents of Disability Rights New Jersey, Inc. ("DRNJ"), a non-profit, federally-funded corporation that has been designated by the Governor of New Jersey to serve as New Jersey's protection and advocacy system for persons with disabilities. JA1108; N.J. Admin. Code 10:45-1.3. DRNJ implements, on behalf of New Jersey, the federal Protection and Advocacy for Mentally Ill Individuals Act. JA1108; 42 U.S.C. § 10801. In this role, DRNJ has the authority to "pursue legal, administrative, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State." 42 U.S.C. § 15043.

B. New Jersey's Old Procedure For Involuntary Medicating Patients—The Three-Step "*Rennie*" Process.

For nearly thirty years, psychiatric hospitals in New Jersey employed a three-step procedure for involuntarily medicating persons with psychotropic drugs that was implemented pursuant to a consent order by the district court following this Court's decision in *Rennie v. Klein*, 720 F.2d 266 (3d Cir. 1983) (the "*Rennie* process").

Under the *Rennie* process, if an involuntarily committed patient withheld consent to the administration of psychotropic medication recommended by the treating physician, the medication plan would be reviewed by a treatment team, and the ultimate decision rested with the hospital's medical director, who would personally examine the patient and review the patient's chart. JA1108. If the medical director agreed that medication was a necessary element of the treatment plan, the patient could be forcibly medicated. The *Rennie* process allowed the State to forcibly medicate psychiatric patients, irrespective of their legal competence, without a judicial hearing, without access to legal resources, and without legal representation. JA1114. Two "*Rennie* Advocates," persons responsible for ensuring hospitals' compliance with the *Rennie* process, testified in depositions that the process provided little more than a rubber stamp on the prescribing physician's request. JA1119.

The administration of psychotropic drugs can have grave, lasting, and debilitating side effects. As the Supreme Court observed, these side effects can be "serious, even fatal." *Harper*, 494 U.S. at 229. Psychotropic medications are designed to change the way the user thinks; they directly affect the central nervous system and can modify emotion, cognition, and behavior. JA1110. Known side effects of psychotropic drugs include muscle cramps, uncontrollable tremors, shakiness, restlessness, disturbances in walking, constipation, dizziness, and dryness of mouth. JA1111. A survey in the State's psychopharmacology guidelines reports that patients in long-term treatment with various psychotropic drugs have "high prevalence rates for parkinsonism, akathisia, and tardive dyskinesia." JA1112. Tardive dyskinesia is a condition that results in "involuntary movement of the mouth, jaw, tongue, face or limbs" and may be irreversible in some cases. JA1111-12. In addition to these side effects, some patients may experience allergic reactions to psychotropic drugs.

On August 3, 2010, DRNJ filed a complaint on behalf of its constituents against Jennifer Velez, Commissioner of DHS, and Poonam Alaigh, Commissioner of DHSS, in the district court, challenging New Jersey's *Rennie* process for forcibly medicating involuntarily committed persons. DRNJ later filed an amended complaint adding the State of New Jersey as a defendant. The complaint alleged that the *Rennie* process violated the Due Process and Equal Protection

Clauses of the Fourteenth Amendment; the right of access to the courts; the right to counsel; the First Amendment; the Americans with Disabilities Act; and the Rehabilitation Act of 1973.[1]

On July 20, 2011, the district court granted in part the State's motion to dismiss, and dismissed the equal protection claim brought against DHS and all claims against DHSS, concluding that there was no cause of action against DHSS. JA201-38. But the district court refused to dismiss the remaining claims, concluding that the procedures authorized in *Washington v. Harper*, 494 U.S. 210 (1990), for involuntary medication of prisoners set the constitutional *floor* for due process protections. JA217.

After the district court refused to dismiss the claims, DHS moved to vacate the *Rennie* Consent Order, admitting that *Harper* and subsequent cases had undermined the involuntary medication procedures in place in New Jersey since the 1980s and that these procedures no longer passed constitutional muster. JA241. On March 19, 2012, the district court entered an order vacating the *Rennie* Consent Order. JA242-43.

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[1] The State of New Jersey was named as a defendant for the ADA claim only. Hereafter, this brief will use "the State" to refer collectively to the State of New Jersey and the Commissioner of New Jersey's Department of Human Services.

C. New Jersey's New Procedure For Involuntary Medicating Patients In Non-Emergency Situations—Administrative Bulletin (AB) 5:04B.

In June 2012, following the vacatur of the *Rennie* consent order, New Jersey replaced the *Rennie* process with two separate standalone policies governing Emergency (AB 5:04A) and Non-Emergency (AB 5:04B) Involuntary Medication. JA428-39; JA1421-27. AB 5:04A authorizes the State to involuntarily administer psychotropic medication in emergencies where patients "present[] a risk of imminent or reasonably impending harm or danger to self or others." JA1121; JA1423. This emergency medication policy requires an identifiable danger that is reasonably likely to happen in such a short time that "no other less restrictive alternative method available for either protecting the consumer or others or gaining the consumer's consent to the administration of medication or obtaining substituted consent is feasible." JA1423-24. AB 5:04A allows for a 72-hour period of forced medication, with reassessments every 24 hours of whether the emergency persists. JA1425. AB 5:04A is not being challenged in this litigation.

AB 5:04B, at issue here, creates the protocols for the non-emergency, long-term forcible administration of psychotropic medication. JA430. It only applies to the administration of psychotropic medication to involuntarily committed persons with mental illness. JA430; JA1124. It applies when "(1) an involuntarily committed [person] has been diagnosed with a mental illness, and, as a result of

mental illness, poses a likelihood of serious harm to self, others, or property if psychotropic medication is not administered; and (2) the [person] will not or cannot provide informed consent to the administration of psychotropic medication recommended by the prescriber." JA430; JA1124. AB 5:04B defines "likelihood" of serious harm as being within the "reasonably foreseeable future." JA433.

Under AB 5:04B, a three-person administrative panel conducts a Medical Review Hearing to determine whether medication will be forcibly administered. The patient is permitted to consult with a hospital employee, the Client Services Advocate ("CSA"), who is not an attorney, prior to the hearing. AB 5:04B does not specify a standard of proof or minimum amount of evidence necessary to authorize non-emergency forcible medication. JA1125. If the panel determines that the patient may be forcibly medicated, the patient may appeal to the hospital's medical director. If the medical director denies the patient's appeal, the patient may be forcibly medicated immediately; there is no stay pending the patient's petition to a court. JA1130. AB 5:04B does not require a judicial hearing or access to counsel before a person is forcibly medicated.

AB 5:04B applies to all persons who are involuntarily committed pursuant to N.J. Ct. R. 4:74-7, including those CEPP-status persons under N.J. Ct. R. 4:74-7(h)(2) who have been deemed to no longer constitute a danger to themselves or others, and are therefore entitled to discharge, but have not been discharged due to

the unavailability of an appropriate placement. It also applies where a person has an advance directive in place or where a designated mental health representative or guardian has been appointed by a court. JA1123.

D. AB 5:04B In Practice.

Approximately 255 Medical Review Hearings took place between June and December 2012 in which medical review panels considered whether to approve or reject involuntary medication. JA2658; JA21. In all but six of these hearings, the panel voted in favor of forcible medication. JA2658; JA21. Of the 56 cases in which patients opted to appeal the panel's decision, 55 were affirmed by the Medical Director. JA2658; JA21. The only time the Medical Director ruled in favor of an appellant's contest was where the patient was not given notice that the time of the hearing had changed. JA2658; JA21.

AB 5:04B requires completion of an Involuntary Medication Administration Report (IMAR) that records the medical review panel's decision, including a "narrative summary of the relevant oral and written evidence supporting medication of the patient without consent." JA447. In completing the IMARs, the medical review panels frequently simply repeat the language of AB 5:04B to justify forcible medication with no discussion of the actual evidence purportedly supporting its conclusion that a person meets the standard. JA1558 (patient WJ) ("Pt. has responded to medication by becoming calmer, therefore requires

medication in order to be less of a danger to others."); JA1575 (patient VC) ("Patient requires medication to be less of a danger to self, others, and property"); JA1621 (patient DR) ("After patient received medication involuntarily as a result of her first hearing she became notably less aggressive and intrusive with better organized behavior. … Patient requires medication to be less of a danger to herself and others."); JA1637 (patient JB) ("Patient requires medication to be less of a danger to self, others, property."); JA1651 (patient AL) ("Patient requires medication in order to be less of a danger to self and others."); JA1668 (patient SL) ("Patient requires medication in order to be less of a danger to self and others."); JA1684 (patient SA) ("Patient requires medication in order to be less of a danger to others."); JA1698 (patient MG) ("Pt requires medication in order to be less of a danger to self and others."); JA1712 (patient JR) ("Patient requires medication to be less dangerous to others and property."); JA1730 (patient LU) ("Pt requires medication in order to be less of a danger to himself and others").

E. District Court's Summary Judgment Decision And Denial Of An Injunction For Non-CEPP Status Individuals.

On November 28, 2012, the parties filed cross-motions for summary judgment on whether AB 5:04B violates the ADA and RA, involuntary committed persons' right of access to the courts and counsel, and the Due Process Clause.

On September 27, 2013, the district court granted in part and denied in part each party's cross-motion for summary judgment. JA61. With respect to non-

CEPP status patients, the court held that AB 5:04B did not violate their substantive or procedural due process rights. Regarding these persons' substantive due process rights, the court relied on the fact that these patients "have already been civilly committed based on a finding of dangerousness to self, others, or property, before a judge in a court of law in a process which includes assignment of counsel." JA35. The court concluded that the decision to involuntarily administer psychotropic drugs in the state hospitals "is a medical decision reached by independent medical professionals based on a finding of dangerousness. At its heart, this is a medical decision reached by competent medical professionals, and cannot be said to be arbitrary, conscience-shocking, or oppressive in a constitutional sense." JA35-36. Regarding these persons' procedural due process rights, the court applied the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), and concluded that AB 5:04B did not violate non-CEPP status persons' procedural due process rights because it was similar to the approach in *Harper*, 494 U.S. at 210, that the Supreme Court found sufficient to protect the rights of prisoners. JA36-43.

With regard to CEPP status persons, the court held that AB 5:04B violated the Fourteenth Amendment on both substantive and procedural due process grounds. The court noted that CEPP status patients have been determined "to no longer constitute a danger to themselves or others" and that "[t]he sole reason for

CEPP patients' continued commitment is temporary unavailability of an appropriate placement." JA36. Accordingly, the court found that "no legitimate government objective exists as to the forced medicating of CEPP status patients, and the continued medication of these individuals falls within the paradigm of state action which is arbitrary, conscience-shocking and oppressive in a constitutional sense." *Id.* The court further found that "[a]ny argument in favor of [CEPP patients'] continued medication can only be interpreted as a method of punishment for their involuntary commitment and/or a questionable action by the state to needlessly sedate its patients into complicity." JA43-44. The district court further held that the forcible medication of CEPP status patients constituted a violation of the ADA and RA, noting that the application of AB 5:04B to CEPP status patients "cannot be justified." JA57. The court enjoined the application of AB 5:04B only as to CEPP status individuals. JA63.

DRNJ filed a notice of appeal on October 25, 2013 to contest the district court's grant of summary judgment to the State with respect to non-CEPP status patients. JA1-3. And on November 8, 2013, the State filed a notice of cross appeal to contest the district court's ruling with respect to CEPP status patients. JA4-6.

SUMMARY OF THE ARGUMENT

AB 5:04B allows the State to deny competent involuntarily committed persons with mental illness the right to refuse forcible medication on a non-emergency basis, a right that is secured for all other competent patients in state facilities in New Jersey except when overridden by a court. In facially discriminating against involuntarily committed persons with mental illness based solely on their mental illness, it violates both the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act ("RA"), 29 U.S.C. § 794.

The State's discrimination under AB 5:04B is not justified by any exceptions to the protections of the ADA and RA. First, the policy is unnecessary to meet any "direct threat," because it applies solely for *non*-emergency forcible medication and the State has failed to show that every individual subject to AB 5:04B poses a direct threat of harm to *others* (as opposed to self or property), which is required to justify discriminatory treatment. Second, AB 5:04B cannot be defended on the basis that removing the policy would be a "fundamental alteration" to a state program. The fundamental alteration defense does not apply to facially discriminatory policies like AB 5:04B because the purpose of the ADA and RA is to eliminate such discrimination. The State has also failed to meet its burden of showing that the fundamental alteration defense applies here: The infrastructure is

already in place for judicial hearings prior to forcible medication, and the State's invocation of vague budgetary and fiscal constraints is insufficient to establish the defense. Third, denying the right to refuse mind-altering and potentially disabling psychotropic medication to involuntarily committed individuals is not a "legitimate safety requirement" exempt from the protections of the ADA and RA. Although ADA regulations allow a public entity to impose "legitimate safety requirements necessary for the safe operations of its services, programs, or activities," 28 C.F.R. § 35.130(h), the district court interpreted "safety requirements" so broadly that it swallows the carefully crafted "direct threat" exception and is contrary to the purpose of the regulation and ADA. The regulation protects *neutral* policies that are necessary for safety (e.g., knowing how to swim before taking a scuba class) but that may affect a person with disabilities, not facially discriminatory policies like AB 5:04B.

AB 5:04B also violates the United States Constitution by failing to provide basic and required due process before allowing the State to forcibly administer psychotropic medications to competent persons against their will. The liberty interest in avoiding unwanted, mind-altering medication is undoubtedly significant and constitutionally protected, and that right is no lesser for involuntarily committed persons in New Jersey. By not requiring a judicial hearing prior to forcible medication in *non-emergency* situations, and not requiring the State to

justify forcible medication by a clear and convincing standard, AB 5:04B fails to provide fundamental due process for these individuals.

Finally, the State fails to provide involuntarily committed persons subject to AB 5:04B with meaningful and constitutionally required access to the courts. The right of access to the courts requires persons detained by the State to have access to a law library or assistance of counsel; those persons subjected to AB 5:04B receive neither. Assistance of counsel is necessary here because the psychotropic drugs forcibly administered to involuntarily committed patients are, by design, mind-altering, and forcibly medicated individuals cannot effectively vindicate their rights in court absent assistance of counsel.

STANDARD OF REVIEW

This Court "review[s] the grant of summary judgment de novo." *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 300 (3d Cir. 2007).

ARGUMENT

I. AB 5:04B—NEW JERSEY'S POLICY FOR NON-EMERGENCY FORCIBLE MEDICATION OF INVOLUNTARILY COMMITTED PERSONS WITH MENTAL ILLNESS—VIOLATES THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT.

By discriminating against involuntarily committed persons in the care and custody of state psychiatric hospitals on the basis of nothing more than their mental illness, AB 5:04B violates Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act (RA), 29 U.S.C.

§ 794. These laws manifest Congress's intent to combat "discrimination against individuals with disabilities [that] persists in such critical areas as … institutionalization." 42 U.S.C. § 12101(a)(3); 29 U.S.C. § 701 (a)(5). Yet, the State uses AB 5:04B to withhold from competent involuntarily committed persons with mental illness the right to refuse mind-altering and potentially disabling psychotropic medication, even though all other competent patients in state facilities may refuse medical treatment except in rare instances of an overriding court order. Congress, through the ADA and RA, prohibited this type of "irrational disability discrimination." *Tennessee v. Lane*, 541 U.S. 509, 522 (2004).

A. By Denying Involuntarily Committed Persons In New Jersey Psychiatric Hospitals The Right To Refuse Non-Emergency Psychotropic Medication, AB 5:04B Excludes "Qualified Individuals" From A "Service, Program, Or Activity" Because Of Their Disability.

Title II of the ADA and Section 504 of the RA forbid a state such as New Jersey from discriminating on the basis of disability in the provision of its public services. Specifically, the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; *see also Frederick L. v. Dep't of Pub. Welfare of Com. of Pa.*, 364 F.3d 487, 491 (3d Cir. 2004); *Hargrave v. Vermont*, 340 F.3d 27, 34-35 (2d Cir. 2003). The RA imposes

a nearly identical prohibition against discrimination by a public entity that receives federal funds.[2] These antidiscrimination mandates apply to involuntarily committed persons in New Jersey psychiatric hospitals who are subject to AB 5:04B.

AB 5:04B violates the ADA. It denies (1) qualified individuals with a disability (i.e., involuntarily committed persons with mental illness) (2) the benefits of a service, program, or activity of the state (i.e., the right to refuse treatment) (3) on the basis of their disability (i.e., mental illness).

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[2] The ADA claim is brought against all defendants, but the RA claim is brought only against Jennifer Velez, in her official capacity as Commissioner of DHS. *See Disability Rights New Jersey, Inc. v. Velez*, 862 F. Supp. 2d 366, 374 (D.N.J. 2012) ("Under the statutory definition in Section 504 [of the RA], the state, as a whole, cannot be a 'program or activity.'"). It is undisputed that DHS receives federal funds. JA1113.

Because the relevant provisions of the ADA and RA have nearly identical operative language, this Court and others have held they impose functionally identical requirements. *See Pa. Prot. and Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 379 n.3 (3d Cir. 2005) ("In light of the similarities between the integration provisions of the ADA and RA and their implementing regulations, we construe and apply them in a consistent manner."); *Helen L. v. DiDario*, 46 F.3d 325, 330 (3d Cir. 1995) ("The law developed under section 504 of the Rehabilitation Act is applicable to Title II of the ADA."); *McDonald v. Com. of Pa., Dep't of Pub. Welfare, Polk Ctr.*, 62 F.3d 92, 95 (3d Cir. 1995) ("[T]he substantive standards for determining liability are the same" under the ADA and the RA); *see also Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999) ("Because Section 504 of the Rehabilitation Act and the ADA impose identical requirements, we consider these claims in tandem."). Accordingly, except as otherwise noted, this brief uses "ADA" to refer to both the ADA and RA claims.

1. Involuntarily Committed Persons In New Jersey Psychiatric Hospitals Are "Qualified Individuals With A Disability."

AB 5:04B applies to an "involuntarily committed" person who "has been diagnosed with a mental illness." JA430. Clearly, people with mental illness who are involuntarily committed in the State's psychiatric hospitals are qualified individuals with a disability. *See* 42 U.S.C. §§ 12102(1) & (2) (defining "disability" as a "mental impairment that substantially limits one or more major life activities," such as "caring for oneself … concentrating, thinking, communicating, and working"); *id.* § 12131(2) (defining "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, … meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity").

2. The Broad Right Under New Jersey Law To Refuse Medical Treatment Is A Service, Program, Or Activity Of The State.

AB 5:04B provides the State with the option of administering psychotropic medication against a person's will, denying that person his right to refuse medical treatment. The ADA's coverage extends to "*all services, programs, and activities* provided or made available by public entities." 28 C.F.R. § 35.102(a) (emphasis added). This Court has interpreted this broad language to mean that the ADA applies "to *anything* a public entity does." *Yeskey v. Pa. Dep't of Corr.*, 118 F.3d

168, 171 (3d Cir. 1997) (emphasis added); *see also Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997) ("[P]rograms, services, or activities" is a "catch-all phrase that prohibits all discrimination by a public entity, regardless of the context[.]").

Medical care is one of those things that "a public entity does" that is covered by the ADA. *See United States v. Georgia*, 546 U.S. 151, 157 (2006) ("[The] deliberate refusal of prison officials to accommodate [the plaintiff's] disability-related needs in such fundamentals as … medical care … constituted 'exclu[sion] from participation in or … den[ial of] the benefits of the prison's 'services, programs, or activities.'" (quoting 42 U.S.C. § 12132)); *Kiman v. N.H. Dep't of Corr.*, 451 F.3d 274, 284 (1st Cir. 2006); *Lee v. Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (concluding that "mental health services" provided by correctional facilities are "'services, programs, or activities of a public entity' within the meaning of the ADA"). As such, there is no question that the State's provision of a wide range of medical services for persons with and without disabilities, including the treatment of persons with mental illness, is properly considered a "service" under the ADA.

The right to refuse medical treatment is broadly protected under New Jersey law. New Jersey courts have held that "a competent adult person generally has the right to decline to have any medical treatment initiated or continued." *In re*

Conroy, 486 A.2d 1209, 1222 (N.J. 1985); *In re Farrell*, 529 A.2d 404, 410 (N.J. 1987) ("[W]e start by reaffirming the well-recognized common-law right of self-determination that [e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." (internal quotation marks omitted)). This right to refuse unwanted medication may be exercised by a legally competent patient "for any reason." *In re J.M.*, 3 A.3d 651, 657 (N.J. Super. Ct. Ch. Div. 2010). "[T]he right to self-determination ordinarily outweighs any countervailing state interests, and competent persons generally are permitted to refuse medical treatment, even at the risk of death." *Conroy*, 486 A.2d at 1225. Even incompetent persons have the right to refuse life-sustaining treatment through a surrogate decision maker. *Id.* at 1129-30.

The right to refuse medical treatment is also woven throughout New Jersey statutes and regulations. *See* N.Y. Admin. Code 8:43G-4.1(a)(8) ("Every New Jersey hospital patient shall have" the right "[t]o refuse medication and treatment to the extent permitted by law"); N.Y. Admin. Code 8:43-14.2(a)(3) (applying to patients in residential health care facilities); N.Y. Admin. Code 8:39-4.1(a)(4) (applying to patients in long-term care facilities); N.Y. Admin. Code 8:42C-5.1(b)(11) (applying to hospice patients); N.Y. Admin. Code 8:43F-4.2(a)(4) (applying to adult day health services facility patients); N.Y. Admin. Code 10:37-6.54(i) ("Clients [in state funded community mental health programs] shall have

the right to refuse medication."). AB 5:04B applies to involuntarily committed persons who "will not or cannot provide informed consent to the administration of psychotropic medication." JA430 (I.A(2)). Accordingly, it denies these persons a "service, program, or activity" of New Jersey.

3. Through AB 5:04B, The State Denies Persons With Mental Illness Their Right To Refuse Treatment Because Of Their Disability.

AB 5:04B is facially discriminatory.[3] It denies "an involuntarily committed" person in a State psychiatric hospital who "has been diagnosed with a mental illness" his right to refuse medication. JA430 (I.A). This discrimination is shown in at least two ways.

AB 5:04B discriminates between mental illness and other types of illnesses. AB 5:04B deprives persons with mental illness in state psychiatric hospitals of the right to refuse medical treatment even though persons without mental illness retain their right to refuse treatment and persons with mental illness can refuse treatment for other medical conditions. *See Hargrave*, 340 F.3d at 36-37 ("A program may discriminate on the basis of mental illness if it treats a mentally ill individual in a particular set of circumstances differently than it treats non-mentally ill individuals in the same circumstances.").

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[3] Section 504 of the RA prohibits discrimination "solely by reason of [a] disability." 29 U.S.C. § 794(a). Because AB 5:04B on its face applies only to persons with mental illness, it discriminates "solely" on the basis of disability.

AB 5:04B also discriminates between persons involuntarily committed for mental illness and persons involuntarily committed for other illnesses. New Jersey law provides that persons may be civilly committed for other reasons, such as "acute alcoholism," *see* N.J. Stat. Ann. 30:9-12.21, or tuberculosis, *see* N.J. Stat. Ann. 30:9-57. These persons retain their right to refuse medical treatment. *See City of Newark v. J.S.*, 652 A.2d 265, 279 (N.J. Super. Ct. Law Div. 1993) (holding that an individual involuntarily committed for tuberculosis "has the right to refuse treatment even if this is medically unwise"). But AB 5:04B deprives persons who have been committed for *mental* illness from exercising the same right. The ADA prohibits this discrimination. *See Hargrave v. Vermont*, 340 F.3d 27, 37 (2d Cir. 2003) (holding that Vermont's Act 114 "discriminates on the basis of mental illness" because "not all who are subject to civil commitment in Vermont are subject to Act 114—only those who are civilly committed as a result of mental illness").

"[AB 5:04B] facially single[s] out the handicapped and appl[ies] different rules to them. Thus, the discriminatory intent and purpose of [AB 5:04B] … [is] apparent on [its] face." *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 (10th Cir. 1995) (analyzing a claim of discrimination under the FHAA).

B. None Of The Defenses Asserted By The State Permit Its Discrimination Under AB 5:04B Against Involuntarily Committed Persons With Mental Illness.

AB 5:04B's blatant discrimination against persons with mental illness by excluding them from their right to refuse unwanted medication is exactly the type of discriminatory treatment prohibited by Title II of the ADA. *See Olmstead v. L.C.*, 527 U.S. 581, 603. n.14 (1999) ("States must adhere to the ADA's nondiscrimination requirement with regard to the [medical] services they in fact provide."); *see also id.* at 612 (Kennedy, J., concurring in part and concurring in the judgment) (concluding that failing to provide similar treatment to persons with mental disabilities as provided to persons with other medical problems, "without adequate justification, … demonstrate[s] discrimination on the basis of mental disability"). The State has offered three general justifications for why its discrimination under AB 5:04B is not barred by the ADA: First, the State has asserted that involuntarily committed persons in State psychiatric hospitals are not qualified individuals with disabilities, and can therefore be excluded from the right to decline treatment, under the ADA's "direct threat" exception. 28 C.F.R. § 35.139. Second, the State has argued that it is not required to modify its policies regarding non-emergency involuntary medication to provide such rights as a judicial hearing because doing so would "fundamentally alter" the nature of the treatment programs in the State's psychiatric hospitals. 28 C.F.R. § 35.130(b)(7).

Third, the State has argued that AB 5:04B is allowed as a "legitimate safety requirement" imposed pursuant to the State's general interest in maintaining a safe environment. 28 C.F.R. § 35.130(h). It is the State's burden to prove each of these defenses. *See Frederick L. v. Dep't of Pub. Welfare of Com. of Pa.*, 364 F.3d 487, 492 n.4 (3d Cir. 2004); *see also Hargrave*, 340 F.3d at 36; *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 841 (7th Cir. 2001) ("[A] public entity that asserts the reason it failed to accommodate a disabled individual was because she posed a direct threat to safety bears the burden of proof on that defense at trial."). The State's proffered justifications for its discrimination are wholly without merit.

1. The State Cannot Use The "Direct Threat To Others" Exception To Disqualify Persons With Mental Illness.

The State cannot meet the "direct threat" exception. The Attorney General's regulations implementing the ADA provide that the ADA "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others." 28 C.F.R. § 35.139. Critically, this exception is not applicable unless there is (1) a "*direct threat*" (2) to the health or safety *of others*." *Id.* (emphasis added). The "direct threat" defense "requires a rigorous objective inquiry," and "[t]he purported risk must be substantial, not speculative or remote." *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 305-06 (3d Cir. 2007). This exception does not apply.

First, AB 5:04B is entirely unnecessary to meet any "direct threat." As the title of AB 5:04B makes clear, this policy is for *non*-emergency involuntary medication. Any "imminent" or "reasonably impending" harm is adequately addressed by the State's broadly-drafted emergency medication policy, AB 5:04A, which has not been challenged in this litigation. Unlike AB 5:04B, AB 5:04A applies to all patients regardless of legal status and provides a procedure for involuntary medication where a person presents a "risk of imminent or reasonably impending harm or danger to self or others." JA1423. And the State has failed to show why AB 5:04A is insufficient to address potential imminent threats or danger. *See Hargrave*, 340 F.3d at 36; *cf. Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86 (2002) (noting the "imminence" requirement for a direct threat in the employment context). AB 5:04B is not a tool needed to address imminent threats, but instead provides a process for the State to regularly override a competent person's refusal of medication.

Second, the State has not shown the existence of any "direct threat." For a "direct threat" to exist, there must be a "*significant risk* to the health or safety of others that cannot be eliminated by a modification of polices, practices, or procedures or by the provision of auxiliary aids or services." *Doe v. Cnty. of Ctr., Pa.*, 242 F.3d 437, 447 (3d Cir. 2001). The public entity must make "an individualized assessment" of "the nature, duration, and severity of the risk; the

probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk." 28 C.F.R. § 35.139; *see also Sch. Bd. of Nassau Cnty. Fla. v. Arline*, 480 U.S. 273, 288 (1987). "[C]ourts and entities deciding whether to exclude the disabled" under the direct threat exception "must rely on evidence that 'assess[es] the level of risk' for the 'question under the statute is one of statistical likelihood.'" *Cnty. of Ctr.*, 242 F.3d at 447 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 652 (1998)).

The State invoked the direct threat exception to disqualify all involuntarily committed persons with mental illness from the right to refuse treatment. But the State must prove that every person subject to AB 5:04B poses a direct threat of harm to others sufficient to exclude them from the ADA's protections against discrimination. *Hargrave*, 340 F.3d at 36 ("Defendants have therefore failed to demonstrate that every person subject to Act 114's DPOA-abrogation procedures poses a 'direct threat' of harm to others sufficient to exclude her from the protections of the ADA.").

Even in applying AB 5:04B, the State never makes the individualized assessment required for the "direct threat" exception. AB 5:04B allows involuntary medication based on a determination that the individual "poses a likelihood of serious harm," which is defined as meaning "that within the

reasonably foreseeable future" there is "a substantial risk that physical harm will be inflicted" to self, others, or property. JA433-34. AB 5:04B does not require an individualized assessment of the "nature, duration, and severity" of the risk or whether other alternatives would mitigate the risk before it chooses to involuntarily medicate a person.

Indeed, the failure of AB 5:04B to make any of the required individualized assessments required for the direct threat exception is revealed by the fact that AB 5:04B is so broad that it allowed the state to involuntarily medicate CEPP-status persons—those persons who have been *judicially* determined to no longer pose a danger. The district court quickly recognized the incompatibility of the State involuntarily medicating an individual for purported dangerousness *after* a court has determined the individual is eligible for release because they are no longer a danger. JA57-59.

Third, the "direct threat" exception applies only to threats to the health or safety of *others*. AB 5:04B, however, sweeps much broader than this exception because it allows the State to involuntarily medicate a person if it concludes that person "poses a likelihood of serious harm to *self*, others, *or property* without the medication." JA434 (IV) (emphasis added).

As the district court recognized, "an inherent difference exists when one poses a danger to self or others, for it is a general principle of self-determination

that one may pose a danger to self based on one's free will and volition." JA59; s*ee In re Farrell*, 529 A.2d 404, 410 (N.J. 1987) ("[W]e start by reaffirming the well-recognized common-law right of self-determination that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body … .'" (quoting *Schloendorff v. Soc'y of New York Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.))). This includes the right to refuse life-sustaining treatment. *Id.*; *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment." (citing *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990))).

The State's application of AB 5:04B bears proof that it fails to make individualized assessments that the person *being* medicated pursuant to AB 5:04B is imminently dangerous to others. Forcible medication has been justified by purported "intrusive behavior" that resulted in *others* assaulting the person that the State wants to medicate. JA1527 ("Patient … was assaulted as a result of his intrusive behavior."); JA1620 ("[Patient] was assaulted by other patients due to her intrusiveness."); JA1635 ("Her intrusiveness has resulted in [her] being assaulted by peers."). The State's doctors have referred to "banging on furniture," "throwing chair," "going into others rooms," "intrusive behavior," "screaming," and "yelling"

to support forcible medication. JA1132-34; JA1527. The State has forcibly medicated at least two people on the sole basis that each of them "requires medication in order to be less of a danger to himself." JA2669; JA2681; JA2759. And the State has relied on events occurring *before* a person was committed as justification for forcible medication. JA1483. Clearly, such behaviors do not "necessarily pose[] a direct threat" and fail to meet the high standard of imminence and severity required to sustain a "direct threat" defense. *Hargrave*, 340 F.3d at 35-36.

AB 5:04B suffers from the same defect as the Vermont law that the Second Circuit addressed in *Hargrave*. *See* 340 F.3d at 36. There, Vermont enacted Act 114, which allowed health care professionals to override the durable power of attorney of a civilly-committed individual by petitioning in family court for authority to involuntarily medicate the individual. *Id.* at 31. Because Vermont's civil commitment statutes required a judicial finding that an individual poses, or is substantially likely to pose, "a danger of harm to himself or others," Vermont argued that Act 114 fell within the ADA's "direct threat" exception. *Id.* at 35. The Second Circuit rejected this argument because "the State court's legal determination of dangerousness can be based on a finding that the individual merely poses a danger of harm to 'himself,' … whereas the 'direct threat' defense requires the person to pose a risk of harm to *others*." *Id.* (citation omitted).

The State cannot rely on the direct threat exception to deny involuntarily committed persons their right to refuse treatment.

2. The State's Discriminatory Policy Cannot Be Defended On The Basis That Removing The Discriminatory Policy Would Be A Fundamental Alteration To A State Program.

ADA regulations require "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would *fundamentally alter* the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (emphasis added); *see also* JA48 n.12. Before the district court, the State claimed that changing AB 5:04B would require a fundamental alteration.

But the fundamental alteration defense is simply not available to the State, because AB 5:04B is a facially discriminatory provision, targeting "an involuntarily committed" person who "has been diagnosed with a mental illness." JA430. This Court and others have agreed that "it is inappropriate to apply the 'reasonable modification' test to facially discriminatory laws. The only way to modify a facially discriminatory statute is to remove the discriminatory language." *See New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 305 (3d Cir. 2007); *see also MX Group v. City of Covington*, 293 F.3d 326, 344-45 (6th Cir. 2002); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*,

179 F.3d 725, 734-35 (9th Cir. 1999) (holding that the "reasonable modifications" test under 28 C.F.R. § 35.130(b)(7) does not apply to facially discriminatory laws).[4] The fundamental alteration defense applies only when considering whether reasonable modifications are required to alleviate discrimination from facially *neutral* laws or policies. *See Olmstead*, 527 U.S. at 603-04 (considering whether requiring placement of two individuals in community-based treatment programs would fundamentally alter the state's services to people with disabilities); *cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682-83 (2001) (considering whether allowing a golfer with a disability to use a golf cart would fundamentally alter PGA's golf tournament rules, which do not permit golf carts). AB 5:04B is not facially neutral.

The State's assertion of the fundamental alteration defense as a basis to preserve AB 5:04B makes no sense. The ADA exists to eliminate unlawful discrimination, and removing that unlawful discrimination will obviously alter the discriminatory state policy. The State cannot defend its discrimination under AB 5:04B on the basis that eliminating the discrimination would fundamentally alter the program. That is exactly the effect Congress intended for ADA to have. *See Townsend v. Quasim*, 328 F.3d 511, 518-19 (9th Cir. 2003) ("[P]olicy choices that

[4] Although these cases addressed zoning laws that prohibited methadone clinics within certain areas, the principle also applies to policies depriving persons with mental illness of their rights.

isolate the disabled cannot be upheld solely because offering integrated services would change the segregated way in which existing services are provided.").

Even if the State could invoke the fundamental alteration defense for its facially discriminatory policy, the State still has not met its burden to show that the defense applies here. The State argued to the district court that providing a judicial hearing before forcibly medicating a person with mental illness—as required before the State forcibly treats other illnesses, *see J.S.*, 652 A.2d at 278-79—would constitute a "fundamental alteration" to the State's administration of mental health treatment in DHS hospitals because these hearings "would impose undue financial and administrative burdens on the State and DHS," and would be "costly to patients, the mental health system, and the courts." *See* JA472.

But this Court has made clear that, "[t]hough clearly relevant, budgetary constraints alone are insufficient to establish a fundamental alteration defense." *Pa. Prot. and Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 380 (3d Cir. 2005); *see also Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1183 (10th Cir. 2003) ("If every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed."); *M.R. v. Dreyfus*, 663 F.3d 1100, 1118 (9th Cir. 2011) ("[B]udgetary concerns do not alone sustain a fundamental alteration defense."), *amended by* 697 F.3d 706 (9th Cir. 2012); *Pashby v. Delia*, 709 F.3d 307, 323-24

(4th Cir. 2013) ("We join the Third, Ninth, and Tenth Circuits in holding that, although budgetary concerns are relevant to the fundamental alteration calculus, financial constraints alone cannot sustain a fundamental alteration defense.").

Likewise, "states cannot sustain a fundamental alteration defense based solely upon the conclusory invocation of vaguely-defined fiscal constraints." *Frederick L. v. Dep't of Pub. Welfare of Com. of Pa.*, 364 F.3d 487, 496 (3d Cir. 2004). And, in fact, here the undisputed evidence established that implementing hearings and providing counsel to involuntarily committed patients refusing medication would not be costly at all. The infrastructure and resources required for judicial hearings and provision of counsel already exist and are being used at least once per week within State psychiatric hospitals to make determinations regarding civil commitment. JA360; JA1141-44; JA57. For instance, in September 2012, only 34 AB 5:04B hearings took place across all psychiatric hospitals. JA57. Annualized, this would total 408 hearings, only a 5% increase in total hearings. JA57; JA360; *see also* JA1141, JA1144 (describing number of hearings and number of patients on refusing status). Such a minor change in total resource allocation is hardly an undue burden on the State.

Courts have routinely rejected fundamental alteration defenses based on far stronger showings of administrative burden. *See, e.g.*, *Kinney v. Yerusalim*, 9 F.3d 1067, 1074-75 (3d Cir. 1993) (requiring city to install new curb cuts on its streets

was not a fundamental alteration); *Kathleen S. v. Dep't of Pub. Welfare of Com. of Pa.*, 10 F. Supp. 2d 460, 470-71 (E.D. Pa. 1998) (requiring the state to provide community-based treatment services for patients in a psychiatric hospital was not a "fundamental alteration"); *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 188 (E.D.N.Y. 2009) (requiring the state to provide community-based housing to over 4,000 individuals previously residing in state-run Adult Homes was not a "fundamental alteration."). The State cannot rely on the fundamental alteration defense to preserve the facially discriminatory AB 5:04B.

3. Denying Persons With Mental Illness Their Right To Refuse Treatment Is Not A "Legitimate Safety Requirement."

The State also cited to the district court an ADA regulation that "[a] public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities." 28 C.F.R. § 35.130(h). Based on this regulation, the district court ultimately held that AB 5:04B did not violate the ADA for non-CEPP status patients, concluding that "'adequate justification' exists for differential treatment of the relevant class because the treatment is not based on disability, but based on a finding of dangerousness." JA59-60. This ground was the sole basis for the district court's conclusion that AB 5:04B did not violate the ADA.

Neither the State nor the district court provided any analysis of the history or context of § 35.130(h), and as a result both took this regulation entirely out of

context, and their interpretation of "safety requirements" is so broad that it swallows the carefully crafted "direct threat" exception. The district court's opinion contains no analysis of § 35.130(h) and how it fits within the overall requirements of the ADA. *See* 42 U.S.C. § 12134(b) (requiring that regulations "be consistent with" the ADA); *United States v. Boynton*, 63 F.3d 337, 344 (4th Cir. 1995) (instructing that a regulation should be interpreted consistent with its purpose and not to produce absurd results). It would gut the public services provisions of the ADA to allow a public entity to use § 35.130(h) to define "legitimate safety requirements" as a way of allowing the very discrimination that Congress intended to outlaw. The history and purpose for § 35.130(h) does not support such a conclusion.

Section 35.130(h) was added in 2010 as one of several amendments to the Department of Justice's regulations governing Part II of the ADA. 75 Fed. Reg. 56164, 56178. Even before this regulation was added to the ADA regulations, the Department's ADA Title II Technical Assistance Manual instructed that a public entity could impose "legitimate safety requirements necessary for the safe operation of its services, programs, or activities." *See ADA Title II Technical Assistance Manual* (1993) at II-3.5200; 75 Fed. Reg. 56196. As an illustration of a legitimate safety requirement, the Technical Assistance Manual explained that "[a] county recreation program may require that all participants in its scuba program

pass a swimming test, if it can demonstrate that being able to swim is necessary for safe participation in the class. This is permissible even if requiring such a test would tend to screen out people with certain kinds of disabilities." *ADA Title II Technical Assistance Manual* at II-3.5200.

The 2010 amendments to the ADA regulations also addressed requirements for public entities to accommodate use by an individual with a disability of "other powered-mobility devices" such as golf carts or Segways—i.e., powered devices other than wheelchairs. 75 Fed. Reg. 56177, 56178; 28 C.F.R. §§ 35.104, 35.137(b)(1). Section 35.130(h) was specifically intended to "provide[] public entities the appropriate framework with which to assess whether legitimate safety requirements that may preclude the use of certain other power-driven mobility devices are necessary for the safe operation of the public entities." 75 Fed. Reg. 56200; *cf. Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1136-37 (9th Cir. 2012) (observing that a parallel regulation under Title III of the ADA allowed Walk Disney World to establish legitimate safety requirements in its accommodation of a patron's use of a Segway). The Department of Justice has published examples of legitimate safety regulations governing use of powered-mobility devices, such as "requiring the user to operate the device at the speed of traffic" or "identifying specific locations … where the devices cannot be accommodated." *See* U.S. Dep't of Justice, Civil Rights Division, *Wheelchairs,*

Mobility Aids, and Other Power-Driven Mobility Devices, available at www.ada.gov/opdmd.htm (last visited April 6, 2014).

AB 5:04B is not a legitimate safety requirement allowed by § 35.130(h). *Legitimate* safety requirements are neutral policies that are necessary for safety but may have an effect on a person with disabilities, such as requiring that a person participating in a scuba class know how to swim or setting a speed limit for Segway use. AB 5:04B, however, is explicitly discriminatory—it targets only an involuntarily committed person who "has been diagnosed with a mental illness" and takes away only that person's right to refuse treatment.

Congress intended for the ADA to stop "discrimination against individuals with disabilities" in areas such as "institutionalization" and "health services" and to eliminate "overprotective rules and policies," "exclusionary qualification standards and criteria," and the relegation of persons with disabilities "to lesser services, programs, activities, [and] benefits." 42 U.S.C. § 12101(a). The district court's opinion upholding AB 5:04B turns "legitimate safety requirement" on its head and allows the very type of discrimination Congress sought to eliminate through the ADA.

II. AB 5:04B IS UNCONSTITUTIONAL FOR FAILING TO PROVIDE BASIC DUE PROCESS.

AB 5:04B not only violates the ADA by discriminating against persons with mental illness, it violates the United States Constitution by failing to provide

fundamental due process required before the State can forcibly medicate a person. AB 5:04B allows the State to forcibly medicate non-consenting *competent* persons with mind-altering drugs without the most basic protection of a judicial hearing or a clear and convincing standard of proof. And it allows the State to override these persons' right to refuse treatment based on procedures that are wholly inadequate to protect the rights of civilly committed persons. The State's lax and malleable procedures are constitutionally inadequate to protect the liberty interest of persons with mental illness to be free from forcible medication. *See Mathews*, 424 U.S. at 335.

A. AB 5:04B Fails To Provide Basic Due Process Before Allowing The State To Override The Fundamental Right Of A Competent Person With Mental Illness To Refuse Unwanted Medical Treatment.

It is beyond dispute that forcible medication of a person represents a significant intrusion into that person's liberty. "The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Harper*, 494 U.S. at 229. Forcible medication with antipsychotic medications is a "particularly severe" interference. *Riggins v. Nevada*, 504 U.S. 127, 134 (1992). The purpose of these drugs is to alter the way a person thinks. *Id*.

Indeed, New Jersey has long recognized that competent adults have a broad right to refuse unwanted medical treatment. *See Conroy*, 486 A.2d at 1222; *see*

also State v. Pelham, 824 A.2d 1082, 1087 (N.J. 2003) ("New Jersey has been in the forefront of recognizing an individual's right to refuse medical treatment."). A person in New Jersey does not lose this right simply by being involuntarily committed. N.J. Stat. Ann. 30:4-27.11c (providing that involuntary commitment of a patient in state psychiatric facilities does not "modify or vary a legal or civil right of that patient"); *see also* N.J. Stat. Ann. 30:4-24.2.c ("No patient may be presumed to be incapacitated because of an examination or treatment for mental illness, regardless of whether the evaluation or treatment was voluntarily or involuntarily received."). This state-created right is entitled to protection by the federal Due Process Clause. *Mills v. Rogers*, 457 U.S. 291, 300 (1982); *see also Sandin v. Conner*, 515 U.S. 472, 484 (1995) (recognizing states can create liberty interests protected by the Due Process Clause).

The right to refuse treatment is also undoubtedly protected by the Due Process Clause of the United States Constitution. *See Glucksberg*, 521 U.S. at 719 ("We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.") (citing *Cruzan*, 497 U.S. at 278-79). In fact, years before *Harper*, *Cruzan*, or *Glucksberg*, this Court concluded that the right of an involuntarily committed person to refuse unwanted antipsychotic drugs was protected by the Due Process Clause. *See Rennie v. Klein*, 653 F.2d 836, 843-44 (3d Cir. 1981) (*Rennie* I),

remanded 458 U.S. 1119 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983) (*Rennie* II).[5]

Yet, AB 5:04B takes away the right to refuse unwanted drugs and allows the State to forcibly medicate without the most basic process of a judicial hearing or a clear and convincing standard of proof.

1. AB 5:04B Fails To Require A Judicial Hearing.

Forcible medication of a person with mind-altering drugs is an incredible intrusion on a person's liberty. Forcible medication goes well beyond mere civil commitment, which the Supreme Court has repeatedly recognized constitutes "a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (citing cases). Civil commitment restrains a person and takes away a person's freedom of movement; forcible medication with psychotropic medications affects how a person *thinks*. *See Mills*, 457 U.S. at 293 n.1. Through AB 5:04B, the State assumes this frightening power to invade a person's body and *mind* without as much as a judicial hearing.

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[5] Although in *Rennie* this Court concluded that New Jersey's predecessor policy to AB 5:04B satisfied due process, *see Rennie* II, 720 F.2d at 270, the Court also specifically held that involuntarily committed persons were to be accorded no fewer constitutional protections than prisoners, *see Rennie* I, 653 F.2d at 846. The district court recognized that, "[s]ince *Rennie*, the law concerning prisoner refusal of psychoactive medication has evolved to mandate additional due process protection." JA217 (citing *Harper*, 494 U.S. at 233). Recognizing this fact, the State moved to vacate the consent order entered following *Rennie* and substituted its predecessor policy with AB 5:04B.

The New Jersey civil commitment hearings that occur before a judge prior to any person's involuntary commitment do not allow such a State intrusion. Those hearings only determine whether there is clear and convincing evidence that the person is in need of treatment in a psychiatric hospital because she is dangerous to self, others, or property. N.J. Stat. Ann. 30:4-27.2, 30:4-27.12. As New Jersey courts have recognized in other circumstances, civil commitment does not empower the State to forcibly medicate. *See J.S.*, 652 A.2d at 278-79. And as a matter of federal due process, civil commitment of a person does not empower the State to forcibly medicate because the forcible medication goes much farther than the intrusion authorized by the involuntary commitment order. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that a person committed solely to determine incapacity for trial cannot be held indefinitely without a commitment hearing); *Specht v. Patterson*, 386 U.S. 605, 609 (1967) (holding that due process requires a full judicial hearing before a person convicted of one crime that carries a maximum sentence can be sentenced under a sex offender act to an indefinite term). Here, the civil commitment hearings do not decide issues critical to the determination of whether a person with mental illness can be forcibly medicated, such as whether the medication is necessary or the least restrictive means to addressing any State interest.

Due process "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Although a judicial hearing is not required before involuntarily medicating a prisoner for dangerousness, *see Harper*, 494 U.S. at 231, in contexts outside of medicating *prisoners* for dangerousness, courts have concluded a judicial hearing is required. *See United States v. Sell*, 539 U.S. 166, 180-81 (2003) (specifying the standard "a *court*" must apply before forcibly medicating for competency to stand trial); *United States v. Brandon*, 158 F.3d 947, 955 (6th Cir. 1998) (holding a judicial hearing is required before forcibly medicating a non-dangerous pre-trial detainee to restore competency to stand trial); *United States v. Weston*, 206 F.3d 9, 14 (D.C. Cir. 2000) (same). In *Mills*, the Supreme Court reserved deciding whether the federal Due Process Clause required a judicial hearing before forcibly medicating an involuntarily committed person. 457 U.S. at 303-04. But in the more than 30 years since *Mills*, numerous states have concluded a judicial hearing is required before the government can forcibly medicate an involuntarily committed person. *See Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 242-43 (Alaska 2006); *In re L.A.*, 912 A.2d 977, 978 (Vt. 2006); *Doe v. Hunter*, 667 A.2d 90, 93 (Conn. Super. 1995); *Steele v. Hamilton Cnty. Cmty. Mental Health Bd.*, 736 N.E.2d 10, 20 (Ohio 2000); *Messer v. Roney*, 772 S.W.2d 648, 649 (Ky. App. 1989); *Jarvis v. Levine*, 418 N.W.2d 139, 149 (Minn. 1988); *In re Mental Commitment of M.P.*, 510

N.E.2d 645, 647 (Ind. 1987); *Riese v. St. Mary's Hosp. & Med. Ctr.*, 271 Cal. Rptr. 199, 210-11 (Cal. App. 1987); *Rivers v. Katz*, 67 N.Y.2d 485, 497 (N.Y. 1986); *People v. Medina*, 705 P.2d 961, 971-72 (Colo. 1985); *Rogers v. Comm'r of Dep't of Mental Health*, 458 N.E.2d 308, 311 (1983). Although these decisions turned on state law, the overwhelming consensus of these states that due process requires a judicial hearing before forcible medication is a powerful indication of the process required by the federal Due Process Clause. *See, e.g., W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (upholding a minimum wage law against a due process challenge because "[t]he adoption of similar requirements by many states evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it."); *cf. Schad v. Arizona*, 501 U.S. 624, 642 (1991) (plurality) (recognizing "the high probability that legal definitions, and the practices comporting with them, are unlikely to endure for long, or to retain wide acceptance, if they are at odds with notions of fairness and rationality sufficiently fundamental to be comprehended in due process"). As these states have recognized, the fundamental nature of an involuntarily committed person's right to be free from intrusions into their body requires a judicial hearing before the State violates that right.

2. AB 5:04B Fails To Require The State To Justify Forcible Medication With Clear And Convincing Evidence.

AB 5:04B also allows the State to forcibly medicate a person without being required to prove by clear and convincing evidence that the person poses a "likelihood of harm"—the State's purported basis for the forcible medication. Under AB 5:04B, "likelihood of harm" is defined only as "a substantial risk" of harm "within the reasonably foreseeable future." JA433. This vague definition does not specify any degree of proof necessary before the State overrides a person's fundamental right to be free from unwanted medical treatment. This fails basic due process.

A standard of proof "instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington*, 441 U.S. at 423. And it "allocate[s] the risk of error between the litigants and … indicate[s] the relative importance attached to the ultimate decision." *Id.* In the context of the *Mathews* balancing test, the Court "must consider both the risk of erroneous deprivation of private interests resulting from the use of a ['likelihood'] standard and the likelihood that a higher evidentiary standard would reduce that risk." *Santosky v. Kramer* 455 U.S. 745, 761 (1982).

A clear and convincing evidence standard is required when fundamental rights are at stake. For instance, recognizing the "significant deprivation of

liberty" that results from "civil commitment for any purpose," the Supreme Court had held "that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process *requires* the state to justify confinement" by clear and convincing evidence. *Addington*, 441 U.S. at 425, 427 (emphasis added); *see also J.R.*, 916 A.2d at 469 (recognizing that the "serious deprivation of liberty" by involuntary commitment requires the state to prove facts necessary for commitment by clear and convincing evidence). Likewise, a state cannot terminate parental rights without proving neglect by clear and convincing evidence. *Santosky,* 455 U.S. at 747-48. And in addressing New Jersey's "Megan's Law," which provides for community notification of the presence of certain sex offender registrants based on a determination of the registrant's future dangerousness, this Court concluded that the Due Process Clause required the state to prove its case regarding future dangerousness by clear and convincing evidence. *E.B. v. Verniero*, 119 F.3d 1077, 1111 (3d Cir. 1997). A person's interest in being free from unwanted psychotropic medication is at the very least of the same weight and gravity as involuntary commitment, termination of parental rights, or sex offender registry requirements such that due process requires the State to justify its forcible medication by clear and convincing evidence. Numerous other states agree. *See Myers*, 138 P.3d at 253; *Steele*, 736 N.E.2d at 20; *Bradshaw v. State*, 816 P.2d 986, 990 (Idaho 1991); *In re Mental*

Commitment of M.P., 510 N.E.2d at 657; *Medina*, 705 P.2d at 972; *Rivers*, 67 N.Y.2d at 497.

The State's vague and open-ended "likelihood" standard creates a significant prospect that persons are being erroneously deprived of their right to refuse unwanted treatment. An involuntarily committed person "should not be asked to share equally with society the risk of error" of an erroneous decision by the State to forcibly medicate with psychotropic drugs "when the possible injury to the individual is significantly greater than any possible harm to the state." *Addington*, 441 U.S. at 427. And the State's application of AB 5:04B shows that this prospect is reality. Psychiatrists have offered conclusory assertions—describing patients as "assaultive" or "intrusive," JA1133-34—and medical review panels authorize involuntary medication based on these vague statements. JA1132-33; JA1739-1904. Medical Review Panels have also authorized involuntary medication with boilerplate justifications that simply repeat the "likelihood" standard. *See, e.g.*, JA 1558; JA1575; JA1621; JA1637; JA1651; JA1658; JA1684; JA1698; JA1712; JA1730. Finally, psychiatrists have justified involuntary medication on the basis of violent behavior that occurred several months or years prior to a hearing, in some cases even prior to the patient's initial commitment, when recommending involuntary medication. JA1125-26; JA2659, JA2661. Reliance on this stale evidence increases the risk of erroneous deprivation, as it permits forcible

medication without any evidence that a patient *currently* presents a likelihood of potential harm.

B. Any State Interest In *Non*-Emergency Involuntary Medication Does Not Outweigh Providing These Basic Procedural Safeguards To Protect The Right To Refuse Unwanted Treatment.

The need for basic constitutional safeguards of a judicial hearing and a clear and convincing standard of proof is not overcome by any State interest or burden. *See Mathews*, 424 U.S. at 335.

First, the State cannot justify depriving involuntarily committed persons of basic process on the basis of dangerousness. Although the district court recognized the State's interest "in preventing the individual from harming himself or others residing or working in the institution," JA35, that interest is already protected by the State's policy for *emergency* involuntary medication. That policy, AB 5:04A, allows for the involuntary medication of patients upon a finding that a patient "presents a risk of imminent or reasonably impending harm or danger to self or others." JA1121; JA1423. The impending harm need not be "certain or immediate," but there must be an identifiable danger that is reasonably likely to happen in such a short time that "no other less restrictive alternative method available for either protecting the consumer or others or gaining the consumer's consent to the administration of medication or obtaining substituted consent is feasible." JA1423-24. This policy for emergency medication, which is not being

challenged, protects the State's interest in preventing harm within their facilities. Given that the State already has a procedure in place by which it can involuntarily medicate patients to ensure the safety of its hospitals, the State has not shown any need for the additional procedures in AB 5:04B that allow for long-term forcible medication.

Second, there would be minimal incremental burden to the State burden of providing patients a judicial hearing prior to non-emergency involuntary medication. The framework is already in place: Each year, New Jersey state judges hold thousands of civil commitment hearings at the very hospitals where the patients at issue reside. JA1141-42. These hearings—held on a weekly basis—are transcribed and result in a written order. *Id.* Importantly, in contrast to the significant number of annual civil commitment hearings, the number of involuntary medication hearings is minimal and would result in minimal additional increase. For example, in September 2012 only 34 AB 5:04B hearings took place across all psychiatric hospitals in New Jersey, which (if annualized) totals 408 hearings per year. JA57; JA360. By contrast, 8,636 civil commitment hearings were held in 2011, the last full year in the record below. JA13. Adding the approximate 408 judicial hearings before forcibly medicating would constitute less than a 5% increase in the judicial hearings already taking place in the State's mental health facilities.

This minimal burden to the State starkly contrasts with the risk of severe prejudice to involuntarily committed persons from being subjected to unwarranted forcible medication.

In granting summary judgment to the State for the non-CEPP status patients, the district court did not address any burden—or lack thereof—to the State by requiring a judicial hearing and a clear and convincing standard of proof. Rather, the district court merely relied on *Harper*, concluding that there was no due process violation because "A.B. 5:04B provides similar safeguards" as the prison policy in *Harper* and "the definition [of likelihood of serious harm] set forth in A.B. 5:04B is strikingly similar to that considered in *Harper*." JA39-41.

But *Harper* was a case about the rights of *prisoners*; it did not address the procedure required to satisfy due process for civilly committed patients. It is axiomatic that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals," *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982), and the district court erred in holding that the minimal due process protections provided to prisoners are also sufficient for these persons. *See White v. Napoleon*, 897 F.2d 103, 112 (3d Cir. 1990) ("Prisoners may well suffer a greater loss of liberty than persons involuntarily committed to mental institutions.").

In fact, it is clear from *Harper* that the *prison* environment was central to the Court's conclusion that a judicial hearing and clear and convincing evidence standard were not required. The Court explained that "[t]he extent of a prisoner's right under the [Due Process] Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement." *Harper*, 494 U.S. at 222. Indeed, the Court framed its ultimate holding in terms of the prison environment: "[G]iven the requirements of the *prison environment*, the Due Process Clause permits the State to treat a *prison inmate* who has a serious mental illness, … if the inmate is dangerous to himself or others and the treatment is in the inmate's best interest." *Harper*, 494 U.S. at 227 (emphasis added); *see Riggins*, 504 U.S. at 134 (describing *Harper* as "[t]aking account of the unique circumstances of *penal confinement*" (emphasis added)). And given that prison context, the Court concluded that a judicial hearing and clear and convincing evidence standard were not "a prerequisite for the involuntary treatment of prison inmates." *Harper*, 494 U.S. at 228.

Other cases relied on by the district court to support its holding that the *Harper* procedures satisfied due process for civilly committed persons involved pre-trial detainees. JA31-32 (citing *United States v. Hardy*, 724 F.3d 280 (2d Cir. 2013); *United States v. Loughner*, 672 F.3d 731 (9th Cir. 2012)). Pretrial detainees are, like convicted prisoners, subject to legitimate prison regulations. *See Bell v.*

Wolfish, 441 U.S. 520 (1979); *see also Bistrian v. Levi*, 696 F.3d 352 (3d Cir. 2012) ("[C]onditions that are reasonably related to a penal institution's interest in maintaining jail security typically pass constitutional muster.").

Nor is the district court's decision justified by its assertion that "involuntary medication is not a form of punishment, but rather [is] a form of treatment." JA34 (citing *Jurasek v. Utah State Hosp.*, 158 F.3d 506 (10th Cir. 1998)). In *Harper*, it was not a punitive desire to punish prisoners that weighed in favor of allowing involuntary medication. Rather, it was the State's functional need to curtail potentially violent behavior in prison environments and "ensur[e] the safety of prison staffs and administrative personnel" that weighed heavily in favor of restricting prisoners' rights. *Harper*, 494 U.S. at 225 ("There are few cases in which the State's interest in combating the danger posed by a person to both himself and others is greater than in a prison environment, which, 'by definition,' is made up of persons with 'a demonstrated proclivity for antisocial criminal, and often violent, conduct.'" (*citing Hudson v. Palmer*, 468 U.S. 517, 526 (1984)). That functional need for ensuring prison safety does not apply here, as there is no evidence here that involuntarily committed patients as a class have the same "proclivity for antisocial criminal, and often violent, conduct." *Id.* And there is certainly no punitive need to punish involuntarily committed patients that weighs against their constitutional interests. Persons subject to AB 5:04B are not

convicted prisoners or pretrial detainees; they are involuntarily committed persons with mental illness who have not been accused or convicted of a crime, and they retain liberty interests that prisoners do not. Accordingly, given the greater rights of civilly committed persons, and the minimal burden to the State of providing a judicial hearing, the *Mathews* balance strikes in favor of requiring that involuntarily committed persons be provided with the critical safeguard of an impartial, judicial decisionmaker and a clear and convincing evidence standard of proof.

III. THE STATE'S FAILURE TO PROVIDE COUNSEL TO PERSONS SUBJECT TO FORCIBLE MEDICATION UNDER AB 5:04B DENIES THEM ACCESS TO COURTS.

Finally, the State's process under AB 5:04B allows the State to involuntarily medicate persons without providing them meaningful access to the courts to challenge the decision to medicate them. It is a bedrock principle that "no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). But that principle becomes hollow if a person's confinement by the state impedes access. Thus, in the context of prisoners, the Supreme Court has held that the fundamental constitutional right of access to courts requires prisons to provide either "adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *see Peterkin v. Jeffes*, 855

F.2d 1021, 1041 (3d Cir. 1988) ("Legal assistance …—whether in the form of an accessible and adequate law library, court-appointed or other attorneys or para-professionals, or some combination of legal resources—is central, not peripheral, to the right of access to the courts that *Bounds* protects."). There is "no diminution of this fundamental right" when a prisoner is held in a segregated unit. *Peterkin*, 855 F.2d at 1038. And even detainees in Guantanamo Bay, Cuba have a right of access to counsel. *See Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 22 (D.D.C. 2005); *Al Odah v. United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004). A person subject to involuntary commitment is entitled to no less protection of his right of access to courts. *See Ward v. Kort*, 762 F.2d 856, 858, 860 (10th Cir. 1985) (holding that "a person under a mental commitment[] is entitled to protection of his right of access to the courts" by assistance of counsel).

Without question, persons subject to involuntarily commitment by the State retain greater constitutional rights than prisoners, yet the State provides them less access to courts to protect those rights. *Harper*'s conclusion that a prison inmate could be involuntarily medicated without a judicial hearing was made "in the context of the inmate's confinement," 494 U.S. at 222, in which an inmate has a constitutionally-protected right to legal resources, *see Bounds*, 430 U.S. at 428, to challenge the forcible medication. But involuntarily committed persons subject to AB 5:04B, most of whom are indigent, are provided neither a law library nor

assistance of counsel to ensure their access to courts to challenge being forcibly medicated. JA1140-41. "Certainly no access to any library or any legal assistance violates the *Bounds* standard." *Pembroke v. Wood Cnty., Tex.*, 981 F.2d 225, 229 (5th Cir. 1993).

In fact, the need for counsel of persons subjected to forcible medication under AB 5:04B is greater than that of prisoners seeking to enforce their constitutional right of access to courts. Although assistance of counsel may not be required in all civil cases that may result in a person losing physical liberty, *see Turner v. Rogers*, 131 S. Ct. 2507, 2517 (2011), it is required in cases in which that person's "version of a disputed issue can fairly be represented only by a trained advocate." *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973). The State's use of AB 5:04B to authorize forcible administration of drugs is exactly the case in which "fundamental fairness" requires counsel. *Gagnon*, 411 U.S. at 790. For one thing, the law governing the right to refuse treatment is complex, even for lawyers. *Cf. Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (noting that the right to counsel under the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty"). But more importantly, antipsychotic drugs are, by their very design, intended to be mind-altering. *See Harper*, 494 U.S. at 229 ("The purpose of the drugs is to alter

the chemical balance in a patient's brain, leading to changes, *intended* to be beneficial, in his or her cognitive processes.") (emphasis added). If "the side effects of antipsychotic drugs can hamper the attorney-client relation" and "prevent[] effective communication" in cases in which a criminal defendant is represented by counsel, *see Riggins*, 504 U.S. at 144 (Kennedy, J. concurring), then those same side effects assuredly can prevent an involuntarily committed person who has been forcibly medicated from vindicating in court on his own his right to refuse treatment. "In these circumstances, in particular, access to the Court means nothing without access to counsel." *Al-Joudi*, 406 F. Supp. 2d at 22; *cf. id.* (concluding that Guantanamo detainees are entitled to counsel because they have "'no alternative form of legal assistance available to them'" (quoting *Bounds*, 430 U.S. at 823)).

Perhaps nothing better illustrates the need for counsel for all persons subject to AB 5:04B as the CEPP-status patients. These are persons who have been determined in a *state court* hearing with *counsel* to no longer be dangerous and eligible for release. And yet, until the district court ruled that subjecting them to AB 5:04B violated due process and the ADA, they were also subject to involuntary medication under the State's policy—despite the state court's ruling. The State's process under AB 5:04B is woefully inadequate to protect the fundamental rights at stake. The Constitution demands more protection of the right of access to courts

of those who are most vulnerable to being denied that right by their involuntary commitment and forcible medication with mind-altering drugs.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment to the State with respect to the patients in New Jersey psychiatric hospitals who are not CEPP status, should grant judgment to DRNJ that AB 5:04B violates the ADA, RA, Due Process Clause, and right of access to courts for all persons in the State's psychiatric hospitals, and should enjoin AB 5:04B.

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Respectfully submitted,

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April 7, 2014

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Pursuant to Local Appellate Rule 46.1(e), the undersigned certifies that at least one of the attorneys whose name appears on the brief is a member of the bar of the United States Court of Appeals for the Third Circuit.

April 7, 2014 */s/ Nathan S. Mammen*

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