



counterpart," citing *Myers v. Alaska Psychiatric Institute*,<sup>1</sup> and *Breese v. Smith*.<sup>2</sup> This Court then did not address substantive due process under the United States Constitution in holding the state could de-fund a less restrictive alternative and satisfy the United States Constitution's limitation on the state's right to confine someone for being mentally ill only if there is no less restrictive alternative. It is respectfully suggested that de-funding a less restrictive alternative does not comply with the United States Constitution's Due Process Clause.

As Linda stated in her opening brief, citing *San Antonio Independent Sch. Dist. v. Rodriguez*,<sup>3</sup> under the United States Constitution, when a fundamental constitutional right is infringed the least restrictive means of achieving the compelling governmental interest must be used. The U.S. Constitution does not allow a state to eliminate a less restrictive alternative through de-funding to satisfy the least restrictive means requirement.

There is no dispute that no compelling state interest justified deprivation of Linda's liberty (*e.g.*, Opinion at 6 ("Finally, a clinical psychiatrist testified that Linda could be discharged to an outpatient community support program if safe housing could also be arranged for her, such as an assisted living facility or other location with professional staff that could "retain her" if she became agitated. He also discussed a closed facility, Soteria-Alaska, as a less restrictive alternative to API.")).

At page 29 of the Opinion and accompanying note 77, this Court held the definition of "feasible" being "capable of being accomplished or brought about;

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<sup>1</sup> 138 P.3d 238, 245 (Alaska 2006).

<sup>2</sup> 501 P.2d 159, 170 (Alaska 1972).

<sup>3</sup> 411 U.S. 1, 51, 93 S.Ct. 1278, 1306 (1973).

possible," this Court had adopted in *State v. Alaska Laser Wash, Inc.*,<sup>4</sup> was only a dictionary definition and not relevant to the least restrictive means discussion. It is respectfully suggested, however, that it is only through such a definition, or something close, that allows this Court's limiting the least restrictive means analysis to an alternative that is feasible to be in compliance with Due Process under the U.S. Constitution.

This court misapplies the controlling least restrictive means requirement under the United States Constitution at page 30 of the Opinion, when this Court held:

[T]he court needed to answer [the] question [of least restrictive alternative] with one of the options actually available to it at the time of the hearing. Because Soteria-Alaska was closed, it was not "actually . . . available," and sending Linda there was not feasible. The State had no duty to re-open the private facility or to establish and operate a similar facility to meet its burden in this case.

(footnote omitted). The least restrictive means requirement of the United States Constitution is a limitation on state power. Thus, the question is not whether the State has the obligation to re-open or fund a less restrictive alternative, but that it may only constitutionally lock up someone for being mentally ill and a danger to self or others if there are no less restrictive means to achieve the compelling state goal of preventing harm. There are presumably limits to this. Requiring the least restrictive means to be feasible under the *Laser Wash* definition seems constitutionally sufficient. Allowing the State to de-fund a less restrictive alternative is not.

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<sup>4</sup> 382 P.3d 1143, 1152 (Alaska 2009).

Whether the State can confine someone in jail to await commitment proceedings is an analogous question. In *Lynch v. Baxley*<sup>5</sup>, the Eleventh Circuit first held:

While jail confinement necessarily keeps society safe from these individuals, such detention is not the least restrictive means for achieving that goal. Even if the purpose being pursued is legitimate, the government cannot attain it by means that "broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

The Eleventh Circuit, reciting various less restrictive means, then held:

We forbid the use of jails for the purpose of detaining persons awaiting involuntary civil commitment proceedings, finding that to do so violates those persons' substantive and procedural due process rights.<sup>6</sup>

Linda respectfully suggests this Court should similarly disallow the state to lock someone up for being mentally ill when a less restrictive alternative can feasibly be provided

What "available" means for least restrictive alternative analysis has been addressed by the US Supreme Court in the First Amendment context. In *U.S. v. Alvarez*<sup>7</sup> the Court first held, "when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives." The Court then invalidated the statute criminalizing false statements regarding military awards because the government could create an Internet accessible database of recipients. Similarly, in *Ashcroft v. American Civil Liberties Union*,<sup>8</sup> the United States Supreme Court held the Child Online Protection Act, 47 U.S.C. § 231 (COPA), unconstitutional because "there are a number of plausible, less restrictive alternatives."

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<sup>5</sup> 744 F.2d 1452, 1458-1459 (11th Cir. 1984).

<sup>6</sup> 744 F.2d at 1463.

<sup>7</sup> 567 U.S. 709, 729, 132 S.Ct. 2537, 2551 (2012).

<sup>8</sup> 542 US 656, 666, 124 S.Ct. 2783, 2792 (2004).

Linda acknowledges this Court's concern about someone found to present a danger being let go, but dangerous people are set free all the time. People convicted of crimes of violence are released after their sentence is up even if they are still dangerous. Gang members are not imprisoned for being members of a gang even though they are far more likely to be violent than mental patients found to be dangerous. Confining people because they have been found to be mentally ill and dangerous is an exception to the rule that people can only be confined for criminal behavior. It is respectfully suggested the State cannot avoid the United States constitutional least restrictive means limitation by de-funding a less restrictive alternative.

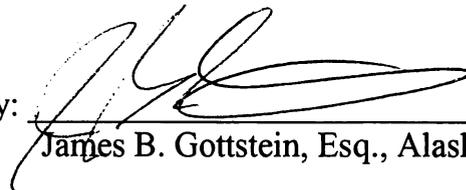
## II. Conclusion

For the foregoing reasons, Linda M., respectfully requests this Court (1) grant her Petition for Rehearing, (2) find the State may not de-fund a less restrictive alternative and satisfy the constitutionally required least restrictive means requirement,<sup>9</sup> and (3) reverse and vacate her 90 day commitment.

Dated this 14th day of January 2019.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

By:



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<sup>9</sup> While not raised previously, an alternative to reaching the constitutional issue raised by "de-funding" is the simple and unquestionable application of the United States Supreme Court's decision on the Americans with Disabilities Act in *Olmstead v. L.C.*, 527 U.S. 581, 592 (1999) (requiring treatment "in the most integrated setting appropriate to the needs of qualified individuals with disabilities"). Applicable here, *Olmstead* and its progeny require affirmative relief, such as funding or creation of community programs.

FILED

JAN 14 2019

APPELLATE COURTS  
OF THE  
STATE OF ALASKA

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IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Matter of the Necessity of the Hospitalization of	)	Supreme Court No. S-15859/16467 (Consolidated)
Naomi B.	)	
In the Matter of the Necessity of the Hospitalization of	)	Superior Court No. 3AN-15-00204PR
Linda M.	)	
	)	Superior Court No. 3AN-16-01656PR

**CERTIFICATE OF SERVICE and TYPEFACE**

The undersigned hereby certifies that:

- (a) on this date I mailed:
  1. Petition for Rehearing, and
  2. this Certificate of Service and Typeface,

to:

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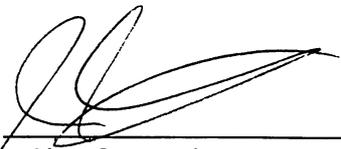
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and

- (b) Times New Roman 13 point font is used throughout.

DATED January 14, 2019.

By:



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Jim Gottstein