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Attorneys for Plaintiffs

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

NATIVE VILLAGE OF HOOPER BAY on its own behalf and as *parens patriae* on behalf of its members, and NATIVE VILLAGE OF KONGIGANAK, on its own behalf and as *parens patriae* on behalf of its members, Plaintiffs, vs. CHRISTY LAWTON, in her Official Capacity as Director of the Office of Children's Services, Alaska Department of Health and Social Services, and FRONTLINE HOSPITAL, LLP d/b/a NORTH STAR BEHAVIORAL HEALTH SYSTEM, a Delaware limited liability corporation, Defendants.	Case No. 3AN-14-05238 CI

MEMORANDUM OF *AMICI CURIAE* THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AND THE CENTER FOR INDIAN LAW & POLICY ON THE TIMING OF A POST-ADMISSION JUDICIAL HEARING

This Court's Order dated February 12, 2015, granted a preliminary injunction in favor of the Plaintiffs and required that a foster child who is involuntarily admitted for emergency care to a private psychiatric hospital be given a post-admission judicial hearing in order to justify that child's continued confinement. *See* Order Regarding Defendant Christy Lawton's Motion to Dismiss and Motion to Dismiss for Sovereign Immunity and Plaintiffs' Motion for a Preliminary Injunction, *Native Village of Hooper v. Lawton*, 3AN-14-5238CI, Feb. 12, 2015, at 18 ("MPI Order"). This Court invited briefing by the parties and by *amici* with regard to the time frame within which such a hearing must be held in order to satisfy the applicable due process requirements. *Id.* at 16. In this memorandum, *amici* the Fred T. Korematsu Center for Law and Equality ("Korematsu Center") and the Center for Indian Law & Policy ("CILP"), respectfully assert that this question has already been answered by the Alaska Legislature, as applicable Alaska statutes and regulations require such a hearing within 72 hours after the child is involuntarily admitted. *Amici* further agree with Plaintiffs and *amici* ACLU and the Disability Law Center of Alaska that, in addition to the statutory requirement for a hearing within 72 hours, the United States and Alaska Constitutions also require a hearing within hours or days, but not weeks, after a child is involuntarily admitted. *Amici* respectfully submit that the statutory 72-hour period provides an appropriate guideline for this constitutional requirement, as it is in line with both the reasoned judgment of the Alaska Legislature and the practices of other states.

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The Korematsu Center and CILP urge this Court to craft a final remedial order that requires a post-admission judicial hearing within 72 hours and that requires North Star Behavioral Health System ("North Star") to follow the provisions of AS 47.30.705, *et seq*. when a minor is involuntarily admitted for treatment.

INTEREST OF *AMICI*

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center"), based at Seattle University School of Law, advances justice through research, advocacy and education. The Korematsu Center has helped research and filed several briefs in state and federal courts relating to the fair treatment of youths. The Korematsu Center does not, in this memorandum or otherwise, represent the official views of Seattle University.

The Center for Indian Law & Policy ("CILP"), based at Seattle University School of Law, serves Indian communities regionally and nationally, including providing legal services to Indian tribes and people. CILP does not, in this memorandum or otherwise, represent the official views of Seattle University.

ARGUMENT

AS 47.30.700 *et seq.* generally governs the involuntary admission of persons to designated treatment facilities. *Amici* respectfully submit that this Court must craft its remedial order according to the requirements of these statutes and the supporting regulations. Further, the Alaska Legislature, in enacting AS 47.30.700 *et seq*., intended to safeguard the liberty interests of persons subjected to involuntary psychiatric confinement, and so created a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *See Vitek v. Jones*, 445 U.S. 480, 488 (1980) (this Court has

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"repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"); *see also Carlo v. City of Chino*, 105 F.3d 493, 496-97 (9th Cir. 1997) (holding that California statute requiring notice of the right to telephone calls for prisoners created a liberty interest protected by the Due Process Clause of the Fourteenth Amendment). As such, *amici* submit that the due process issue identified by the Court can best be addressed by following the solution that the Legislature crafted to protect the same liberty interest.

The State's failure to follow the applicable statutory requirements violates both the applicable statutes and, as the Court has already determined, due process. *Amici* respectfully submit that the appropriate remedy is to order Defendants to simply follow the statute and hold the necessary hearing within 72 hours of involuntary commitment.

I. A Post-Admission Hearing Must Take Place Within 72 Hours of the Involuntary Admission of a Minor Under The Relevant Statute and Regulation.

A. Private Psychiatric Hospitals Such as Defendant North Star Are Required by Statute to Adhere to AS 47.30.655 *et seq.*, which Governs Voluntary and Involuntary Admission for Psychiatric Care.

North Star is, by admission and judicial determination, a psychiatric hospital.[1] As such, requirements for its admissions procedures are governed by specific statutory and

[1] Defendant North Star admits that it is "licensed by the State of Alaska as an acute care specialty hospital," the services they provide are inpatient psychiatric treatment, and that "[i]f the attending physician determines that a child or adolescent brought to North Star Hospital does not require inpatient psychiatric treatment, the individual is not admitted." Defendant Frontline Hospital LLC d/b/a North Star Behavioral System's Motion for Summary Judgment and Memorandum in Support, 8/1/2014, at 4, 5. The state also characterizes North Star as an "acute psychiatric hospital." OCS Memorandum in Support of Motion to Dismiss and Opposition to Motion for Preliminary Injunction, 4/17/2014, at 1. This Court also determined in its MPI Order that North Star is a psychiatric hospital. MPI Order at 10.

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regulatory provisions, and the claim by Defendant Office for Children's Services ("OCS") that "[t]here are no regulations that address admission to psychiatric hospitals" is inaccurate.[2] OCS Motion to Dismiss and Opposition to Motion for Preliminary Injunction, 4/17/2014, at 5 ("OCS Opp. to MPI"). Psychiatric hospitals are governed by 7 AAC 12.215, which states that:

> (a) A hospital which is primarily engaged in providing to inpatients psychiatric services for the diagnosis and treatment of mental illness is a psychiatric hospital and must comply with the provisions of this section.
> . . .
> (d) A psychiatric hospital *must* have policies and procedures which require that it
> . . .
> (2) admit and discharge patients in accordance with AS 47.30
> ....

7 AAC 12.215 (emphasis added).

Because North Star is a psychiatric hospital, OCS and North Star are squarely subject to the requirements of AS 47.30.

B. AS 47.30.715 Requires that Involuntary Admission for Psychiatric Care Be Preceded by a Judicial Hearing, or, in the Case of an Emergency, Followed by a Judicial Hearing within 72 Hours after Admission.

Minors, including foster children, are protected by the admission standards and procedural safeguards provided under AS 47.30. *See* AS 47.30.775 (AS 47.30.700 – 47.30.815 applies to minors). A minor brought to North Star for admission must first be

[2] Further, OCS's claim that North Star is not subject to any regulations regarding admission is also inconsistent with its own assertions regarding North Star's legal status and its governing regulations. OCS acknowledges that "[t]he regulation that addresses psychiatric hospitals is 7 AAC 12.215, *Psychiatric hospitals,* specifically" *id.*, and they refer specifically to the language of 7 AAC 12.215(b). OCS Opp. to MPI at 3. Yet they fail to draw the court's attention to 7 AAC 12.215(d)(2).

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evaluated. *See* AS 47.30.710. If a judicial order has not been obtained under AS 4730.700, and if the minor is adjudged based on an emergency examination by a mental health professional to satisfy the criteria under AS 47.30.710(b), the mental health professional is required to apply for an *ex parte* order authorizing hospitalization for evaluation. Following this, a facility such as North Star "shall promptly notify the court of the date and time of the respondent's arrival," and the "court shall set a date, time, and place for a 30-day commitment hearing, to be held if needed ***within 72 hours*** after the respondent's arrival, and the court shall notify the facility, the respondent, the respondent's attorney, and the prosecuting attorney of the hearing arrangements. Evaluation personnel, when used, shall similarly notify the court of the date and time when they first met with the respondent." AS 47.30.715 (emphasis added).

C. AS 47.30 Sets Forth Specific Duties for Facilities Such as North Star; North Star Cannot Pick and Choose Which Sections of AS 47.30 It Will Follow, And The State Cannot Excuse North Star From These Requirements.

North Star's argument that its responsibilities for treating foster children brought to its facility is akin to the responsibilities of other medical facilities when a child is brought in with a broken arm ignores the fact that admission of children for psychiatric care is governed by AS 47.30. *See* 7 AAC 12.215(d)(2) (mandating that psychiatric hospitals have policies and procedures which require it to admit and discharge patients in accordance with AS 47.30). Further, North Star appears to be selective with regard to its adherence to specific sections of AS 47.30. North Star's Policy and Procedures refer to "Alaska State [sic] 47.30.838 [which] permits administration of psychotropic medication [to a minor] without the parent/guardian's informed consent if (1) there is a crisis

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situation; and (2) the medication is ordered by a licensed physician." "North Star Behavioral Health Systems Policy and Procedures," Ex. 4 at 3, Defendant Frontline Hospital LLC D/B/A North Star Behavioral System's Motion for Summary Judgment and Memorandum in Support, 8/1/2014 ("North Star MSJ"); *see also id.* at 20 (citing AS 47.30.838) ("North Star abides by AS 47.10.084 as a matter of policy and practice, subject to the limited exception in Alaska Statute 47.30.838.").

Yet North Star ignores other provisions of AS 47.30. North Star has not claimed ignorance, but ignorance of the statute is not a defense in any event, especially for a private psychiatric hospital which is quite sophisticated with regard to regulatory compliance. *See* North Star MSJ at 16-20 (discussing its policies and procedures, its billing practices, and its adherence to numerous federal and state regulations). North Star cannot disregard the statutory obligations set forth in AS 47.30.700 *et seq.*, discussed *supra*, Part I.B, nor can the State excuse North Star from such obligations.

D. OCS Cannot Admit Minors Voluntarily Under AS 47.30.690.

Under AS 47.30.690, only the "parent" or "guardian" can voluntarily admit minors who satisfy certain diagnostic criteria. If the Alaska legislature had intended this authority to extend beyond the "parent" or "guardian," it could have done so as other states have by expressly granting this power to a "person acting *in loco parentis*" or to a "custodian."[3] Under the principle of statutory construction *expressio unius est expressio alterius*, the authority to voluntarily admit a minor under AS 47.30.690 should not be

[3] *See, e.g.,* Ariz. Rev. Stat. § 36-518 (2005) (voluntary admission by "parent, guardian, or custodian"); 405 Ill. Comp. Stat. 5/4-302 (voluntary admission by "parent, guardian, or person in loco parentis"); Iowa Code § 229.13A (voluntary admission by "parent, guardian, or custodian").

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extended to any person or entity not designated. *See Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066 (Alaska 1991) (endorsing this longstanding principle of statutory construction, which "establishes the inference that, where certain things are designated in a statute, 'all omissions should be understood as exclusions.'"), *quoted in Ranney v. Whitewater Eng'g*, 122 P.3d 214, 218 (Alaska 2005). This inference is made even stronger by the fact that the Alaska legislature uses the term "*loco parentis*" and "custodian" in other statutes[4] but not in AS 47.30.690, which further indicates that the right to voluntarily admit a minor under 47.30.690 is granted only to a parent or guardian.

OCS is neither "parent" nor "guardian." While AS 47.30.915 does not define "parent" or "guardian," other Alaska statutes indicate that "parent" means "the biological or adoptive parent of the child" and that "guardian" means "a natural person who is legally appointed guardian of the child by the court." *See* AS 47.10.990(23) and (14); AS 13.26.030 ("person becomes a guardian of a minor by acceptance of a testamentary appointment or upon appointment by the court").[5] Because OCS is not a "parent" or

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[4] For *loco parentis*, *see* AS 14.34.010(a)(2) (*loco parentis* and Interstate Compact on Educational Opportunity for Military Children); AS 14.43.085(b)(2)(B) (*loco parentis* and Free Tuition and Fees for a Spouse or Dependent of a Peace Officer or Members of the Armed Services or a Fire Department); AS 23.30.395(7) (*loco parentis* and Alaska Workers Compensation Act); and AS 25.25.101 (*loco parentis* and Uniform Interstate Family Support Act). The term "custodian" is used in at least 272 Alaska statutes sections or court rules. In Westlaw in "Alaska Statutes and Court Rules," a search conducted on April 30, 2015, of the term "custodian" produced 272 "hits."

[5] Perhaps the strongest argument for a broader notion of "parent" can be found in 7 AAC 41.990(a)(38), which defines "parent" as (A) parent by blood, marriage, or adoption; (B) legal guardian of a child; or (C) person standing in loco parentis. However, even this argument fails because (1) OCS is not a person; (2) this definition specifically limits its definitions to Chapter 41 of the Alaska Administrative Code which provides regulations for the "Child Care Assistance Program"; and (3) this definition, if applied to 47.30.690, would render "guardian" superfluous, which violates the principle of statutory construction under which the court "must also presume 'that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are

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"guardian," it must seek judicial authorization before seeking to involuntarily admit a minor under AS 47.30.700, or in the case of an emergency, seek judicial authorization within 72 hours of admittance. AS 47.30.705 *et seq.*[6]

II. The Due Process Clauses of the Alaska and Federal Constitutions Also Require a Hearing Within 72 Hours After Involuntary Commitment of a Minor.

As the Court determined in its MPI Order, due process independently requires post-commitment judicial review of OCS's and North Star's involuntary commitment of minors within a reasonable time. *Amici* respectfully submit that the most reasonable time frame for such a hearing is the 72-hour statutory requirement discussed above. The 72-hour hearing requirement was expressly designed to provide due process protections for the same liberty interests at issue here, and so reflects a reasoned legislative judgment that the Court should consider as at least persuasive, if not controlling, authority. This conclusion is further supported by the fact that the 72-hour period is consistent with the practices of other states regarding this issue.

A. The 72-Hour Hearing Requirement Reflects A Reasoned Legislative Judgment Regarding The Appropriate Due Process Protections For The Liberty Interests At Issue Herein.

The Alaska legislature, in enacting the provisions governing the admission of persons to psychiatric institutions, recognized the need to:

> more adequately protect the legal right of persons suffering from mental illness. The legislature has attempted to balance the

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superfluous.'" *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 761 (Alaska 1999) (quoting *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526, 530-31 (Alaska 1993)).

[6] If this Court were to find that OCS has authority under AS 47.30.690, OCS must follow the procedural safeguards in AS 47.30.690(b), which includes appointing a guardian ad litem who may request that an attorney be appointed who may request a hearing during the 30-day admittance.

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> individual's constitutional right to physical liberty and the state's interest in protecting society from persons who are dangerous to others and protecting persons who are dangerous to themselves by providing due process safeguards at all stages of commitment proceedings.

AS 47.30.655 (stating purpose of the 1981 major revision of Alaska civil commitment statutes (AS 47.30.660 and 47.30.670 – 47.30.915)). These revisions provide both standards for admission as well as procedural safeguards that include specific duties for facilities such as North Star and specific requirements with regard to the timing of post-admission judicial hearings. *See generally* AS 47.30 (regulating admission to designated treatment and evaluation facilities and providing procedural safeguards). The express statutory language also conclusively establishes that the statutory scheme was intended to account for and protect the constitutional liberty interests of individuals subject to the civil commitment process.

The 72-hour hearing requirement set forth in the statutory process discussed above was specifically intended to provide the necessary due process protections for the precise liberty interest at issue here. As such, even if the Court were to determine that this statutory process is not controlling, that process does provide persuasive authority regarding the Court's due process inquiry. After diligent inquiry (as shown by the extensive legislative history the Court has already reviewed), the Alaska Legislature determined that a post-commitment hearing within 72 hours after involuntary commitment provided the appropriate balance between the State's interests in public safety and the liberty interests of the individual.

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B. The Alaska Statutory Scheme for Involuntary Admission of Minors for Psychiatric Care Is Similar to Statutes in Other States, Further Supporting Its Application Under Due Process Principles.

In an emergency, when a person is brought in for psychiatric evaluation and/or treatment, most states set a short time frame during which confinement can occur without either a court order or a filing with the court. Fourteen states set the time limit at immediately to 30 hours;[7] seven states at 48 hours;[8] and nineteen states at 72 hours.[9] Expressed in a different way, the initial period of confinement is limited to periods ranging from 8 hours or less to 72 hours or less in forty states.[10] We note that many state statutes exclude weekend days and legal holidays from the time calculations, as does Alaska's. AS 47.30.805(a) (excluding "Saturdays, Sundays, legal holidays, or any period of time necessary to transport the respondent to the treatment facility").

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[7] Ariz. Rev. Stat. § 36-526 (2015); Idaho Code Ann. § 66-326(1) (2015); 405 Ill. Comp. Stat. 5/3-504 (2015); Iowa Code § 229.22 (2015); Me. Rev. Stat. tit. 34-B, § 3863(3) (2015); Md. Code Ann., Health-Gen. § 10-624 (2015); Mich. Comp. Laws § 330.1430 Sec. 430 (2015); Mont. Code Ann. § 53-21-129(2) (2015); N.M. Stat. Ann. § 32A-6A-19(B) (2015); N.C. Gen. Stat. § 122C-262 (2015); N.D. Cent. Code § 25-03.1-26(1) (2015); S.D. Codified Laws § 27A-10-5(3) (2015); Utah Code Ann. § 62A-15-629(3) (2015); Va. Code Ann. § 37.2-808(k) (2015).

[8] Conn. Gen. Stat. § 17a-502(b) (2015); Haw. Rev. Stat. § 334-59(e) (2015); Kan. Stat. Ann. § 59-2954 (2015); Neb. Rev. Stat. § 43-250(2) (2015); N.Y. Mental Hyg. Law § 9.39 (2015); Tex. Code Ann. Health & S. Code § 573.021(b) (2015); W. Va. Code § 27-5-3(b) (2015).

[9] AS 47.30.725(b); Ark. Code. Ann. § 20-47-210(a)(1) (2015); Cal. Welf. & Inst. Code § 5150(a) (2015); Colo. Rev. Stat. § 27-65-105(1)(a) (2015); Del. Code Ann. tit. 16, § 5001(8) (2015); Fla. Stat. § 394.463(2)(f) (2015); Ind. Code § 12-26-5-1 (2015); Ky. Rev. Stat. Ann. § 202A.031 (2015); Mass. Gen. Laws ch. 123, § 12(a) (2015); Minn. Stat. § 253B.05 (2015); Miss. Code Ann. § 41-21-67(5)(a) (2015); Nev. Rev. Stat. § 433A.150 (2015); N.H. Rev. Stat. Ann. § 135-C:31 (2015); N.J. Stat. Ann. § R 4:74-7(b)(1) (2015); Ohio Rev. Code Ann. § 5122.10 (2015); S.C. Code Ann. § 44-17-410(3) (2015); Wash. Rev. Code § 71.05.153(1) (2015); Wis. Stat. § 51.20(7) (2015); Wyo. Stat. Ann. § 25-10-109(c) (2015).

[10] The other ten states have longer periods and *amici* can provide this information if the Court requests it.

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Table 1: Emergency Confinement without Court Order

≤ 30 Hours	48 Hours	72 Hours
Arizona, Idaho, Illinois, Iowa, Maine, Maryland, Michigan, Montana, New Mexico, North Carolina, North Dakota, South Dakota, Utah, Virginia	Connecticut, Hawaii, Kansas, Nebraska, New York, Texas, West Virginia	Alaska, Arkansas, California, Colorado, Delaware, Florida, Indiana, Kentucky, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, Ohio, South Carolina, Washington, Wisconsin, Wyoming

If confinement is to occur past the initial period of confinement, states require either a filing with the court and/or a judicial response in the form of an authorization of the initial confinement, a probable cause hearing, or a more full hearing. Fifteen states require judicial authorization or a hearing within 72 hours or less;[11] twelve states set limits ranging from 80 hours to 5 days;[12] eleven states, within 5 to 7 days of confinement.[13] Expressed differently, judicial authorization or a hearing is required within 7 days or less in thirty-eight states.[14]

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[11] AS 47.30.725(b); Cal. Welf. & Inst. Code § 5150(h)(1) (2015); Conn. Gen. Stat. § 17a-502(d) (2015); Iowa Code § 229.22 (2015); Me. Rev. Stat. tit. 34-B, § 3863(3) (2015); Mass. Gen. Laws ch. 123, § 12(b) (2015); Minn. Stat. § 253B.07 § 7a (2015); Neb. Rev. Stat. § 43-254.01(1) (2015); N.H. Rev. Stat. Ann. § 135-C:31; N.J. Stat. Ann. § R 4:74-7(b)(1) (2015); Okla. Stat. 43A, § 5-413(A)(2) (2015); VA. Code Ann. § 37.2-814 (2015); Wash. Rev. Code § 71.05.170 (2015); Wis. Stat. § 51.20(7) (2015); Wyo. Stat. Ann. § 25-10-109(h) (2015).

[12] Ariz. Rev. Stat. Ann. § 36-531(D) (2015); Ind. Code §§ 12-26-5-5 & -8 (2015); Kan. Stat. Ann. § 59-2959 (2015); La. Rev. Stat. Ann. § 28:53(D) (2015); N.Y. Mental Hyg. Law § 9.39 (2015); N.D. Cent. Code § 25-03.1-26(2) (2015); Ohio Rev. Code Ann. § 5122.141(B) (2015); Or. Rev. Stat. § 426.095(2)(b) (2015); S.C. Code Ann. § 44-17-410(3) (2015); S.D. Codified Laws § 27A-10-5(4) (2015); Tenn. Code Ann. § 33-6-413(a) (2015); Tex. Code Ann. Health & Safety Code § 574.025(b) (2015).

[13] Ala. Code. § 22-52-8 (2015); Ark. Code Ann. § 20-47-205(b)(1) (2015); Idaho Code Ann. § 66-326(4) (2015); 405 Ill. Comp. Stat. 5/3-509 (2015); Mich. Comp. Laws § 330.1452 (2015); Mo. Rev. Stat. § 632.325(3) (2015); Mont. Code Ann. § 53-21-122 (2015); Nev. Rev. Stat. § 433A-220(1) (2015); 50 Pa. Cons. Stat. § 7303 (2015); Vt. Stat. Ann. tit. 18, §§ 7508, 7512 (2015); W. Va. Code § 27-5-3(b) (2015).

[14] The other twelve states set longer periods and *amici* can provide this information if the Court requests

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Table 2: Time Limits for Judicial Authorization or Hearing

≤ 72 Hours	80 Hours to 5 Days	5 to 7 Days
Alaska, California, Connecticut, Iowa, Maine, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, Oklahoma, Virginia, Washington, Wisconsin, Wyoming	Arizona, Indiana, Kansas, Louisiana, New York, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas	Alabama, Arkansas, Idaho, Illinois, Michigan, Missouri, Montana, Nevada, Pennsylvania, Vermont, West Virginia

Alaska's statutory scheme, requiring a hearing within 72 hours of admission or confinement, is consistent with the process followed by a broad range of states with similar statutory schemes. This again supports the determination that the proposed 72-hour framework represents a reasonable and appropriate balance between the interests of the State and the individual liberty interests the Court must protect pursuant to its due process inquiry.

CONCLUSION

For the reasons provided above, *amici* urge this Court to craft a remedial order that requires a judicial hearing within 72 hours of admission and to craft a remedial order that requires the OCS and North Star to adhere to the requirements of AS 47.30.

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it.

DATED this 30th day of April, 2015, at Anchorage, Alaska.

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By: _____ for

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I hereby certify that on the 30th day of April, 2015, a copy of the foregoing was mailed to:

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