SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: December 2, 2021 9:51 AM FILING ID: [redacted] CASE NUMBER: [redacted]
Certiorari to the Colorado Court of Appeals Case Number [redacted] Adams County District Court Case Number [redacted]	
Petitioners: **[redacted], Respondent Mother** **[redacted], Respondent Father** **v.** **Respondent:** **People of the State of Colorado in the Interest of [redacted] Minor Children**	□ COURT USE ONLY □
Attorney for *Amici Curiae*: Jennifer Levin, #28065 Director of Public Policy The Arc of Colorado 1580 Logan Street, Suite 730 Denver, CO 80203 303.864.9334 x12 jlevin@thearcofco.org	Case Number: [redacted]

DISABILITY AND CIVIL RIGHTS ORGANIZATIONS' MOTION FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF MOTHER [redacted]'S PETITION FOR WRIT OF CERTIORARI

The Arc of Colorado, Civil Rights Education and Enforcement Center, Colorado Cross-Disability Coalition, and Disability Law Colorado (collectively, "*Amici*"), by and through their counsel, move pursuant to C.A.R. 29 and 53(g) for

leave to file an amicus brief in support of Mother [redacted]'s Petition for Writ of Certiorari. As grounds, *Amici* state:

1. Petitioner [redacted] timely filed her Petition for Writ of Certiorari as to her Minor Child [redacted] on November 26, 2021. *Amici*'s Motion is therefore timely. *See* C.A.R. 53(g).

2. *Amici* are disability and civil rights nonprofit organizations that share a commitment to the full, equal participation and independence of individuals with disabilities in society—including in exercising their fundamental right to parent their children. Many of the *Amici* were founded by, are staffed by, represent, and/or provide services to individuals with many types of disabilities, including mental and cognitive disabilities such as are at issue in this case. *Amici*'s collective experience spans decades working extensively to achieve the full promise of Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("504") in all facets of American life. This includes efforts both inside and outside the "child welfare" system. Specifically:

a. **The Arc of Colorado** promotes and protects the human rights of people with intellectual and developmental disabilities (IDD) and actively supports their full inclusion and participation in the community throughout their lifetimes. The Arc of Colorado was founded in 1954 and at the time, little was known about the condition of IDD or its causes; there were virtually no programs or activities in communities to assist in the development and care of children and adults with IDD and/or to help support families. In the early days, we worked to change the public's perception of children with IDD and to educate parents and others regarding the potential of people with IDD. The Arc of Colorado has worked for decades to obtain services for children and adults who were denied day care, preschool, education, and employment programs. Through a strong, statewide grassroots network of 15 chapters directed by 3,700 members, over 9,000 individuals and families are served annually. The Arc of Colorado is the state chapter and, across the state, has an additional 14 local chapters. Together, the Arc of Colorado works with the local communities to foster respect and access, giving people with IDD the power to achieve a full and satisfying life.

b. **The Civil Rights Education and Enforcement Center ("CREEC")** is a national nonprofit membership organization, founded in Denver, whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC's efforts to defend human and civil rights extend to ensuring that parents with disabilities have full and equal access to all programs, services, and benefits of public entities, including all modifications necessary to prevent removal of and achieve reunification with their children. CREEC lawyers have extensive experience in the enforcement of Title II of the Americans with Disabilities Act and Section 504 and believe the arguments in this brief are essential to realize the full promise of these statutes for parents with disabilities.

c. **The Colorado Cross-Disability Coalition ("CCDC")** is a Colorado non-profit organization dedicated to promoting social justice and combining individual and systemic advocacy as effective agents for change that can benefit people with all types of disabilities. CCDC – primarily led and staffed by people with disabilities – has developed a strong reputation for empowering people with the most significant disabilities to advocate for themselves and for others in difficult situations. CCDC promotes self-reliance and full participation by people with disabilities and their friends and family members through organizing, advocacy, education, legal initiatives, litigation training and consulting, policy development, and legislation. CCDC is viewed as a national model of how a disability rights organization – linking the talents and dedication of people with all types of disabilities and their non-disabled families, friends, and allies – can keep true to its grassroots mission while gaining expertise and increasing the power of people with disabilities to participate effectively in the larger community. In fact, CCDC was a fervent supporter of the "Carrie Ann Lucas Parental Rights for People with Disabilities Act," Colo. Rev. Stat. § 24-34-805, regarding family preservation safeguards for families that include a parent with a disability, among those being the right of parents with disabilities to utilize the reasonable accommodation/modification procedures of the ADA to determine whether such reasonable accommodations or modifications could have been provided to prevent terminations of parental rights in cases

involving parents with disabilities. Ms. Lucas was an attorney with CCDC, who began working at that time with parents with disabilities in dependency and neglect cases, before creating the Center for the Rights of Parents with Disabilities in Colorado, where she became the full-time nonprofit director and attorney. Also, she was the parent of numerous adopted children with disabilities and she herself had several obvious disabilities.

d. **Disability Law Colorado ("DLC")** is an independent, public interest nonprofit organization, specializing in civil rights and discrimination issues. DLC is the Protection and Advocacy (P&A) System for the state of Colorado, mandated by the U.S. Congress to uphold the rights of individuals with disabilities. DLC is recognized as a leader in the National Disability Rights Network made up of Protection and Advocacy programs from all the states and territories. The agency works to promote systemic change to sustain or improve the quality of life for children and adults with disabilities and elders. DLC was created in 1976 by a group of parents of individuals with disabilities who came together to secure equal rights for their children with developmental disabilities who were living in state institutions. Important work DLC has done over the years includes requiring school districts to pay for children's education in public schools, working to prevent the sterilization of people with developmental disabilities, preventing discrimination against people with disabilities in the workplace, and litigation to support the rights of individuals with disabilities housed in the Colorado Department of Corrections to receive appropriate medical and behavioral health services.

3. *Amici* also share a concern that misunderstanding of, and systemic bias against, parents with mental health and intellectual disabilities throughout the "child welfare" system lead to the unnecessary termination of these parents' rights. Because of their decades of work enforcing the ADA and 504, *Amici* recognize the important role that these federal anti-discrimination mandates can play in ensuring equal opportunities for parents with disabilities to preserve and reunify their families.

4. *Amici* are also concerned that the Court of Appeals' decision in this case will lead to further, unnecessary destruction of families that include parents with disabilities. Specifically:

a. *Amici* join Mother [redacted] in asking this Court to review the Court of Appeals' decision not to exercise its authority to review the failure to accommodate Mother [redacted]'s obvious disabilities. This too-literal view of preservation contravenes the broad scope and purposes of the ADA and 504 and incentivizes further non-compliance with them.

b. *Amici* also join Mother [redacted] in asking this Court to review the Court of Appeals' rejection of Mother's claim that she was prejudiced by her counsel's deficient disability advocacy. Mother never received the full and equal opportunity to participate in her case as these laws required. Accommodating people with disabilities increases their participation in public life in general, and research bears this principle out with respect to dependency cases and parenting skills. Mother could have succeeded in her case, had she been given the opportunity the ADA, 504, and Colorado law require. Declining to hold Mother's counsel accountable here also incentivizes further inadequate disability advocacy in dependency cases.

c. *Amici* are most concerned with the implications of these two holdings together. The Court of Appeals refused to find the obvious disabilities issue preserved, but declined to find ineffective assistance of counsel in failing to raise it. Together, these holdings appear to put disability discrimination outside the reach of the law in dependency cases. This is not what Congress intended and guarantees further disability discrimination culminating in family separation.

d. *Amici* have worked for decades to enforce the ADA and 504 as Congress intended, including with respect to every type of state institution without exception. *See Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209, 211 (1998). *Amici* view as vitally important Mother [redacted]'s request that this Court clarify that the ADA and 504 apply to reunification services in dependency cases.

5. *Amici* fully support the arguments in Mother [redacted]'s Petition for Writ of Certiorari and do not repeat those arguments. Rather, *Amici* respectfully submit their brief will be helpful to the Court in augmenting the Court's knowledge concerning: (a) the history and broad scope of the ADA and 504, including Denver's important role in the disability rights movement that created these laws; (b) the past and current disparities and discrimination that parents with disabilities face when seeking to raise their children, in Colorado and across the nation; and (c) research demonstrating that accommodating parents with disabilities in dependency cases leads to better engagement, better parenting, and better outcomes for children and families.

6. *Amici* respectfully submit that their unique perspective will add helpful context to Mother [redacted]'s Petition and reinforce the special and important reasons for accepting it. *See* C.A.R. 49.

WHEREFORE, *Amici* respectfully request that this Court grant this motion and accept *Amici*'s attached brief in support of Mother [redacted]'s Petition for Writ of Certiorari.

Respectfully submitted December 2, 2021.

s/ Jennifer Levin
Jennifer Levin, #28065
Director of Public Policy
The Arc of Colorado
1580 Logan Street, Suite 730
Denver, CO 80203
303.864.9334 x12
jlevin@thearcofco.org

Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I certify that on December 2, 2021, a true and correct copy of the foregoing was served by the Colorado e-filing system to:

[redacted]

s/ Jennifer Levin

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: December 2, 2021 9:51 AM FILING ID: [redacted] CASE NUMBER: [redacted]
Certiorari to the Colorado Court of Appeals Case Number [redacted] Adams County District Court Case Number [redacted]	
Petitioners: **[redacted], Respondent Mother** **[redacted] Respondent Father** **v.** **Respondent:** **People of the State of Colorado in the Interest of [redacted] Minor Children**	□ COURT USE ONLY □
Attorney for *Amici Curiae*: Jennifer Levin, #28065 Director of Public Policy The Arc of Colorado 1580 Logan Street, Suite 730 Denver, CO 80203 303.864.9334 x12 jlevin@thearcofco.org	Case Number: [redacted]

BRIEF OF *AMICI CURIAE* DISABILITY AND CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF MOTHER [redacted]'s PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I certify that this petition complies with the requirements of C.A.R. 29, 32, and 53. This petition contains 3,132 words (3,150 allowed).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29, 32, and 53.

s/ Jennifer Levin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

AMICI CURIAE IDENTITY AND INTEREST IN THIS CASE

The Arc of Colorado, Civil Rights Education and Enforcement Center, Colorado Cross-Disability Coalition, and Disability Law Colorado (collectively, "*Amici*") are disability and civil rights nonprofit organizations that share a commitment to the full, equal participation and independence of individuals with disabilities in society—including in exercising their fundamental right to parent their children. *Amici*'s motion for leave to file this brief further details their identity and interest.

Amici submit this brief to support Mother's petition asking this Court to review the Court of Appeals' decision in this case. *Amici* are concerned that both lower courts contravened federal disability laws' broad scope by not reviewing the failure to accommodate Mother's obvious disabilities. *Amici* believe that finding no prejudice in Mother's counsel's deficient disability advocacy resulted from a misunderstanding of federal law and how parents with disabilities can succeed in dependency cases if accommodated as federal law requires. *Amici* fear that these holdings incentivize non-compliance with federal law by failing to impose consequences for it; contravene Congress' and Colorado's legislature's intent in passing sweeping anti-disability-discrimination mandates; and guarantee further disability discrimination culminating in unnecessary family separation.

ARGUMENT

> Including individuals with disabilities among people who count in composing "We the People," Congress understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation.

Tennessee v. Lane, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring). This case, and *Amici*, ask this Court to enforce Congress' understanding in dependency cases.

I. To achieve the remedial civil rights purposes behind both laws, Congress requires ADA/504 to be interpreted broadly.

A. Congress has repeatedly reiterated ADA/504's broad scope.

> Section 504 and Title II resulted from years of public protests, marches, acts of civil disobedience and court filings in the 1960s and 1970s–activities that were part of a movement aimed at securing for disabled people the same rights and privileges afforded to able-bodied people.

Pierce v. D.C., 128 F.Supp.3d 250, 265 (D.D.C. 2015). Some of those actions occurred across the street from this Court. *See* History Colorado, *Ride or Die*, https://www.historycolorado.org/sites/default/files/media/document/2020/Lost%20Highways%20Ride%20or%20Die%20Transcript.pdf[1] (detailing Denver's role as one hub of the disability rights movement, including how activists lay in the street blocking inaccessible buses at Broadway and Colfax for 24 hours in July 1978).

[1] Audio at https://www.historycolorado.org/lost-highways.

Both laws resulted from extensive congressional fact-finding and history. *Lane*, 541 U.S. 509, 516 (2004); *Alexander v. Choate*, 469 U.S. 287, 295-97 (1985).

Section 504 of the Rehabilitation Act of 1973 ("504") prohibits disability discrimination by recipients of federal funding. 29 U.S.C. § 794(a); 45 C.F.R. part 84. 504 declared "[i]t…the policy of the United States that all programs" receiving federal funding must respect "equal access…inclusion, integration, and full participation" of individuals with disabilities. 29 U.S.C. § 701(c).

Twenty years later, in the Americans with Disabilities Act, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce," "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §§ 12101(b)(1), (4). ADA Title II ("ADA") prohibits disability discrimination by public entities. *Id.* §§ 12131-34; 28 C.F.R. part 35. This prohibition "also seeks to enforce a variety of other basic constitutional guarantees" for people with disabilities, including the due-process-based right to be meaningfully heard in civil proceedings. *Lane*, 541 U.S. at 522-23. No type of state institution is excepted. *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209, 211 (1998); DOJ & HHS, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local*

Child Welfare Agencies and Courts Under [ADA] and [504] (Aug. 2015), https://www.hhs.gov/sites/default/files/disability.pdf, pp. 3-4 (ADA, 504 apply to child welfare agencies and courts).

The ADA and 504 are construed similarly. *Havens v. Colo. Dep't of Corr.*, 897 F.3d 1250, 1263 (10th Cir. 2018).

Congress has amended each law to overrule narrow court interpretations and reiterate their broad scope. Congress' 1988 Civil Rights Restoration Act "restore[d] the broad scope of" 504 (and three other similar federal civil rights laws) by clarifying that non-discrimination obligations extend to "all of [a federal funding recipient's] operations," not simply any sub-programs receiving funding. Pub. L. 100-259, 102 Stat. 28 (1988) (overruling *Grove City College v. Bell*, 465 U.S. 555, 570-74 (1984)); 29 U.S.C. § 794(b).

Similarly, in 2008, Congress amended the ADA to "restore [its] intent and protections" after courts "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect." Pub. L. 110-325, 122 Stat. 3553 (2008) (citing *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999)). Congress overruled too-narrow interpretations of the definition of disability:

> to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.

Id.; *see also* 42 U.S.C. § 12102(4); 28 C.F.R. §§ 35.101(b), 35.108.

B. ADA/504's broad scope reaches failures to affirmatively accommodate.

The ADA and 504 recognize that disability discrimination often manifests in thoughtlessness, indifference, and "apathetic attitudes rather than affirmative animus." *Alexander*, 469 U.S. at 295-96; *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (ADA targets "the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life…"). These laws recognize that failing to accommodate "will often have the same practical effect as outright exclusion…" *Lane*, 541 U.S. at 511.

This is why the ADA imposes an "affirmative duty" to accommodate. *People in Interest of S.K.*, 2019COA36, ¶18; *People in Interest of C.Z.*, 2015COA87, ¶12; *accord Lane*, 541 U.S. at 533 ("affirmative obligation"). Specifically, the ADA requires

> 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

effect a fundamental alteration. 28 C.F.R. § 35.130(b)(7)(i).

> [F]ailure-to-accommodate claims concern an omission rather than an action; such claims allege [discrimination] by not satisfying an affirmative, ADA-created duty to provide reasonable accommodations.

Exby-Stolley v. Bd. of Cty. Comm'rs, 979 F.3d 784, 796 (10th Cir. 2020) (en banc).[2] The ADA thus requires covered entities to treat individuals with disabilities differently, or what some might call "preferentially." *Barnett*, 535 U.S. at 397. That this different treatment might violate

> disability-neutral rule[s] cannot by itself place the accommodation beyond the [ADA]'s potential reach. Were that not so, the "reasonable accommodation" provision could not accomplish its intended objective.

Id.

C. The duty to accommodate arises upon notice of a disability; holding otherwise incentivizes disability discrimination.

This is also why the duty to accommodate arises upon notice of a disability. *E.g.*, *S.K.*, ¶22. Notice occurs when an entity is told about a disability. *Id.* But

[2] *Exby-Stolley* was an ADA Title I/employment case. Reasonable modifications under Title II are "essentially equivalent" to reasonable accommodations under Title I. *Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1195 n.8 (10th Cir. 2007).

notice also occurs when a disability is obvious. *Id.* (*citing In re Hicks/Brown*, 893 N.W.2d 637, 640 (Mich. 2017); *Robertson*, 500 F.3d at 1196). The latter principle ensures a department cannot escape its obligation to individualize services by failing to investigate the likelihood a parent has a disability. *In re M.A.S.C.*, 486 P.3d 886, ¶24 (Wash. 2021).

Pierce v. D.C. is instructive here. Pierce was Deaf and imprisoned, but no prison official assessed his need for accommodations or other assistance. 128 F.Supp.3d at 250. Given ADA/504's purposes, the court rejected the prison's insistence it had no legal obligation to accommodate unless and until specifically requested:

> [N]othing in the disability discrimination statutes even remotely suggests that covered entities have the option of being passive in their approach to disabled individuals as far as the provision of accommodations is concerned.

Id. at 269. The affirmative duty to accommodate is at its "apex" in prison, given the uneven power dynamic that vests prisons with complete control over whether incarcerated people (disabled or not) receive any services at all. *Id.* The court refused to endorse the prison's reasoning, by which prison officials observing obvious disabilities "could sit idly by, taking no affirmative steps to accommodate…and expecting to be able to wield the inmate's failure to request

accommodation like some sort of talisman that wards off" any future ADA/504 liability. *Id.* at 270. Thus, the court found:

> no matter how fervently [the prison] holds the belief that a public entity's duty to provide accommodations arises only by request, there is neither legal nor logical support for that proposition.

Id. Requesting accommodations performs a "signaling function," but no such signal is required where a disability is obvious. *Id.*

The Seventh Circuit has also succeeded in applying the reasonable-accommodations standard with "an understanding of mental illness." *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1284 (7th Cir. 1996). There, despite knowing of an employee's mental disabilities, his employer fired him rather than granting a request for a "less stressful" position. *Id.* at 1282. The court rejected the employer's attempt to "blame" the plaintiff for not specifically requesting an accommodation:

> The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help.

Id. at 1285.

There is no unfairness in applying this affirmative duty to accommodate obvious disabilities to departments and courts in dependency cases. A similarly uneven power dynamic exists between parents and these entities, because the latter

have complete control over parents receiving any services at all. To hold otherwise, as the lower courts effectively have here, allows–and incentivizes–departments to "figuratively shrug[] and effectively s[i]t on their hands" when a parent has an obvious disability. *Pierce*, 128 F.Supp.3d at 254; *accord M.A.S.C.*, ¶24. Holding otherwise also undercuts ADA/504's broad, remedial purposes and encourages continued disability discrimination.

After notice, the duty is simply to *reasonably* accommodate. *Lane*, 541 U.S. at 531-32. But the "primary object of attention" must be at that later stage—not the first stage of whether someone has a disability, if the department and court are on notice of it. 28 C.F.R. § 35.101(b).

This Court should review this case to, as the Tenth Circuit en banc recently did, construe the duty accommodate in a manner that effectively ensures *all* people with disabilities actually receive accommodations. *Exby-Stolley*, 979 F.3d at 802. As [redacted]'s Petition explains, the record shows there was an obvious disability-related need for accommodations in this case.

II. Disregarding ADA/504 in dependency cases reinforces biases, misconceptions, and disparities about parents with disabilities.

Choices about how to raise one's children are said to be among the rights our Constitution most shelters from unwarranted state intervention. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-17 (1996). But this professed sanctity of parental rights

has never fully and equally extended to parents with disabilities. It remains good law in this country that "[t]hree generations of imbeciles are enough" and the Constitution permits involuntary sterilizing Americans with mental disabilities. *Lane*, 541 U.S. at 534 (Souter, J., concurring) (quoting *Buck v. Bell*, 274 U.S. 200, 207 (1927)). Recently, Colorado's legislature recognized:

- parents with disabilities have long "face[d] unfair, preconceived, and unnecessary societal biases, as well as antiquated attitudes, regarding their ability to successfully parent their children," including in dependency cases; and
- these attitudes have historically resulted in unnecessarily separating children from their parents with disabilities. C.R.S. § 24-34-805(1)(a).

These declarations came as our legislature implemented the ADA into dependency (and other family) law via H.B. 18-1104/the Carrie Ann Lucas Parental Rights for People with Disabilities Act ("Lucas Act"). *See* 2018 Colo. Legis. Serv. Ch. 164 (H.B. 18-1104) (West). The Lucas Act requires reasonable efforts and treatment planning to comply with the ADA. C.R.S. §§ 19-3-100.5(5), 19-3-208(2)(g), 19-3-507(1)(c). Courts must now make specific findings that accommodations could not prevent termination if the parent has a disability. *Id.* § 24-34-805(2)(f).

A. Disparities regarding parents with disabilities that Colorado's legislature aimed to reduce.

Approximately 7% of Coloradans under age 65 identify as having a disability. U.S. Census Bureau, https://www.census.gov/quickfacts/CO (estimates as of 2019). Yet approximately half of parents served by ORPC (which is 91% of respondent parents) are identified as having one or more disabilities. Office of Respondent Parents' Counsel, Fiscal Year 2022-23 Budget Request, https://coloradoorpc.org/wp-content/uploads/2021/11/Final-ORPC-FY-2022-23-Budget-Request.pdf, pp. 15, 21. Nearly 75% of all terminations in Colorado involve parents with disabilities, and:

> [w]hile 9.7% of parents without disabilities will have their parental rights terminated, that percentage jumps to 23.9% for parents with disabilities. Similarly, while parents without disabilities enjoy a 73.2% reunification rate, for parents with disabilities, that rate decreases to 51.3%.

Id.

Colorado is not alone. Nationwide, child welfare systems are ill-equipped to support parents with disabilities, which results in disproportionately high rates of involvement and "devastatingly high rates" of termination of parent-child relationships. Nat'l Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* (2012), https://ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf ("NCD"),

p. 18.[3] Among parents with disabilities, those with intellectual or psychiatric disabilities face the most discrimination based on unfounded stereotypes, lack of individualized assessment, and failure to provide necessary services. *Id*. at 118-28.

Removal rates where parents have psychiatric disabilities are as high as 70-80%. *Id.* at 16, 78. A recent study of mothers' termination appeals nationwide (including Colorado) found that the mothers with psychiatric disabilities were the demographic for whom the ADA was least likely to be raised or applied. Robyn Powell et al., *The [ADA] and Termination of Parental Rights Cases: An Examination of Appellate Decisions Involving Disabled Mothers*, 39 Yale L. & Pol'y Rev. 157 (2020).

B. Biases and misconceptions about people with mental disabilities at play in dependency cases.

As Colorado's legislature recognized in the Lucas Act, these disparities do not materialize out of nowhere: they result from biases and misconceptions about parents with disabilities. C.R.S. § 24-34-805(1)(a)(I)-(II).

Unfortunately, "[t]he law and society have always approached a person's claimed mental illness with a degree of skepticism and disbelief." *State Farm Fire & Cas. Co. v. Wicka*, 474 N.W.2d 324, 327 (Minn. 1991). This may stem from

[3] NCD is an independent federal agency. *Id.* at Letter of Transmittal.

misplaced "fear that mental illness is feigned with ease and frequency," especially the "[s]tronger skepticism [that] arises when a putatively mentally ill person has a 'normal appearance' or 'doesn't look sick.'" *Id.*

Another common myth is that individuals with mental disabilities simply aren't trying hard enough—which results in misplaced impatience with such individuals. Michael Perlin, *"Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did*, 10 J. Contemp. Legal Issues 3, 15 (1999). We also often incorrectly stereotype (1) people with psychiatric disabilities as dangerous, and (2) the manifestations of psychiatric disabilities as unchanging. NCD at 79, 97-98. "[S]ymptoms of mental illness such as apathy, disorganization, and lethargy may be misconstrued as parental noncompliance…" Sandra Azar et al., *Practices Changes in the Child Protection System to Address the Needs of Parents With Cognitive Disabilities* (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5012538/pdf/nihms-545125.pdf, at 11.

Yet another common, but incorrect, assumption is that parents with intellectual disabilities cannot learn. U.S. Dep'ts of Justice (DOJ) & Health & Human Servs. (HHS), *Investigation of Mass. Dep't of Children and Families by [DOJ] and [HHS] Pursuant to [ADA] and [504]* (Jan. 2015),

https://www.hhs.gov/sites/default/files/mass_lof.pdf, at 14. Moreover, individuals with intellectual disability may exhibit mental health symptoms differently than typically-developed individuals—and thus differently than some expect. Univ. of Minn. School of Social Work Ctr. for Advanced Studies in Child Welfare, *The Intersection of Child Welfare and Disability: Focus on Parents*, CW360° (2013), https://cascw.umn.edu/wp-content/uploads/2013/12/Fall2013_CW360_WEB.pdf ("CW360°"), at 18-19. For example, individuals with intellectual disability may exhibit anxiety by asking repetitive questions, whereas typically-developed individuals might exhibit anxiety only internally, such as negative self-talk. *Id.*

C. Colorado has the legal framework to address discrimination against parents with disabilities—if we enforce it.

Federal anti-disability-discrimination laws have always applied to dependency cases, because departments and courts are public entities and receive federal funding. But the Lucas Act removed any doubt that, in Colorado dependency cases, those laws must have teeth. This is the legal framework our legislature has mandated to begin to reduce disability discrimination and disparities in dependency cases.

The opinion here does the opposite. It incentivizes non-compliance with the ADA, 504, and Lucas Act and will exacerbate disability discrimination and

disparities. Accepting certiorari will effect our federal and state legislatures' intent and remedy discrimination against [redacted] and other parents with disabilities.

III. Accommodating parents with disabilities improves engagement, parenting, and outcomes for children and families.

Congress knew that anti-discrimination law was one step to increase people with disabilities' inclusion and participation in public life. Research bears Congress out in dependency cases.

Accommodating parents with disabilities makes it more likely they will engage, improve parenting skills, and become fit. *See, e.g.*, *In re Xavier*, 62 Misc. 3d 1212(A) (N.Y. Fam. Ct. 2019) (unpublished), at *11, *aff'd*, 187 A.D.3d 659 (N.Y. App. Div. 2020) (parent defensive in court, but "in a less threatening and charged environment when she felt supported," open to constructive criticism, motivated to improve parenting skills); Azar, *supra*, at 9; CW360° at 17, 20; Joshua Kay, *The [ADA]: Legal and Practical Applications in Child Protection Proceedings*, 46 Cap. U. L. Rev. 783, 803-05 (2018); Susan Kerr, *The Application of [ADA] to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. Contemp. Health L. & Pol'y 387, 404–05 (2000); Robyn Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. Rev. 127, 142-44 (2016).

Just as Congress knew decades ago, the opposite is also true: not accommodating parents with disabilities increases the likelihood they cannot engage. *See, e.g.*, Pub. L. 108-446, 118 Stat. 2647 (2004), *codified at* 20 U.S.C. § 1400(c)(4) (amending Individuals with Disabilities Education Act in part to address "low expectations" and "insufficient focus" on research-proven methods for teaching people with disabilities); Jude Pannell, *Unaccommodated: Parents with Mental Disabilities in Iowa's Child Welfare System and the [ADA]*, 59 Drake L. Rev. 1165, 1172-75 (2011); Kerr, *supra*, at 415.

Thus, accommodating parents with disabilities is not only what civil rights laws require: It can also create better outcomes for Colorado children and families. *See, e.g.*, CW360° at 17.

CONCLUSION

For the reasons above and in [redacted]'s Petition, *Amici* respectfully ask this Court to accept certiorari to resolve the important issues of anti-disability-discrimination law presented.

Respectfully submitted December 2, 2021.

s/ Jennifer Levin

Jennifer Levin, #28065
Director of Public Policy
The Arc of Colorado
1580 Logan Street, Suite 730
Denver, CO 80203
303.864.9334 x12
jlevin@thearcofco.org

Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I certify that on December 2, 2021, a true and correct copy of the foregoing was served by the Colorado e-filing system to:

[redacted]

s/ Jennifer Levin