In the Court of Appeal, State of California
SECOND APPELLATE DISTRICT, DIVISION TWO

In re. D.S.L.,	)
A Person Coming Under the Juvenile Court Law.	) 2d Juvenile No. **B335126**
David S.,	)
Petitioner	) LASC Case No.:
v.	) 22CCJP03402A
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,	)
Respondent;	)
LOS ANGELES DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)
Real Party in Interest.	)

APPLICATION OF DISABILITY RIGHTS EDUCATION & DEFENSE FUND, CRIPJUSTICE, DISABILITY RIGHTS CALIFORNIA, LEGAL AID ASSOCIATION OF CALIFORNIA, LEGAL AID AT WORK, AND PUBLIC COUNSEL FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, DAVID S.

Claudia Center, SBN 158255
Kavya Parthiban, SBN 346669
Disability Rights Education & Defense Fund
3075 Adeline Street, Suite 210
Berkeley, CA 94703
(510) 644-2555
kparthiban@dredf.org
Attorneys for Amici Curiae

Application for Leave to File Amici Curiae Brief

Under California Rules of Court, rule 8.200(c), Disability Rights Education and Defense Fund and additional *amici* parties respectfully request leave to file the attached amici curiae brief in support of Appellant David S's Petition for Extraordinary Writ. The *amici* parties share an interest in preventing and remedying disability discrimination against parents with disabilities who participate in dependency proceedings. The *amici* are committed to disability nondiscrimination and reasonable modifications in all aspects of dependency, including parenting evaluations and the provision of reasonable reunification services. The proposed brief reviews the application of dependency and disability nondiscrimination principles to the proceeding below and will assist the Court in deciding this matter. The *amici* include:

Amicus CripJustice is a national organization with a chapter in southern California led by people with disabilities to support people with disabilities who are system-impacted in medical institutions, jails or prisons, protective services, school systems, and living facilities. We organize and advocate to support the autonomy of people

with disabilities in these systems whose voices are often not heard.

Amicus Disability Rights Education and Defense Fund (DREDF) based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. DREDF pursues its mission through education, advocacy, and law reform efforts. For more than three decades, DREDF has received funding from the California Legal Services Trust Fund (IOLTA) Program as a Support Center providing consultation, information, training, and representation services to legal services offices throughout the state as to disability civil rights law issues. DREDF is nationally recognized for its expertise in the interpretation of federal and California disability civil rights laws. DREDF has participated as amicus and amici counsel in numerous cases addressing the scope and meaning of California civil rights mandates. DREDF remains dedicated to advancing the human and civil rights of people with disabilities, including disabled parents impacted by family and dependency court systems.

Amicus Legal Aid Association of California (LAAC) is the statewide membership association of over 100 public interest law

nonprofits that provide free civil legal services to low-income people and communities throughout California. LAAC member organizations provide legal assistance on a broad array of substantive issues, ranging from general poverty law to civil rights to immigration, and also serve a wide range of low-income and vulnerable populations. LAAC is California's unified voice for legal services and a zealous advocate advancing the needs of the clients of legal services on a statewide level regarding funding and access to justice. LAAC is interested in this matter due to the fact that it involves access to justice and our members.

Amicus Legal Aid at Work (formerly known as the Legal Aid Society – Employment Law Center) is a San Francisco-based, non-profit public interest law firm that has for decades advocated on behalf of the rights of members of historically underrepresented communities, including persons of color, women, immigrants, individuals with disabilities, and the working poor. Founded in 1916 as the first legal services organization west of the Mississippi, Legal Aid at Work frequently appears in state and federal courts to promote worker justice and the interests of people with disabilities. Legal Aid at Work is recognized for its expertise in the interpretation of state and federal antidiscrimination statutes.

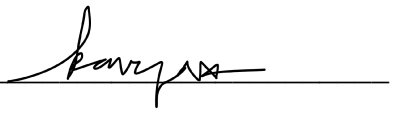
Amicus Public Counsel is a nonprofit public interest law firm dedicated to advancing civil rights and racial and economic justice, as well as amplifying the power of our clients through comprehensive legal advocacy. Founded on and strengthened by a pro bono legal service model, our staff and volunteers seek justice through direct legal services, promote healthy and resilient communities through education and outreach, and support community-led efforts to transform unjust systems through litigation and policy advocacy in and beyond Los Angeles. In our work with children and families, we see how the long reach of the child welfare system separates children, both formally and informally, from their families, communities, and culture– creating trauma that reverberates through generations. The Americans with Disabilities Act is critical to safeguard the rights and interests of parents with disabilities from unwarranted state intrusion into their families, a core constitutional value.

Amicus Disability Rights California (DRC) is the non-profit Protection and Advocacy agency mandated under state and federal law to advance the legal rights of Californians with disabilities. DRC was established in 1978 and is the largest disability rights legal advocacy organization in the nation. As part of its mission, DRC works to ensure that people with disabilities are not subject to disability-based discrimination.

On behalf of all *amici* parties, DREDF respectfully requests that the Court grant this application and permit the filing of the proposed amicus curiae brief for consideration in this matter.

Dated: April 30, 2024

Respectfully submitted,

By: 

Claudia Center, SBN 158255
Kavya Parthiban, SBN 346669
Disability Rights Education & Defense Fund
3075 Adeline Street, Suite 210
Berkeley, CA 94703
(510)-644-2555
Attorneys for Amici Curiae

In the Court of Appeal, State of California
SECOND APPELLATE DISTRICT, DIVISION TWO

In re. D.S.L.,	)	
A Person Coming Under the Juvenile Court Law.	)	2d Juvenile No **B335126**
David S.,	)	
Petitioner	)	LASC CaseNo.:
v.	)	22CCJP03402A
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,	)	
Respondent;	)	
LOS ANGELES DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)	
Real Party in Interest.	)	

AMICUS CURIAE BRIEF OF DISABILITY RIGHTS EDUCATION & DEFENSE FUND, CRIPJUSTICE, DISABILITY RIGHTS CALIFORNIA, LEGAL AID ASSOCIATION OF CALIFORNIA, LEGAL AID AT WORK, AND PUBLIC COUNSEL IN SUPPORT OF PETITIONER, DAVID S.

Claudia Center, SBN 158255
Kavya Parthiban, SBN 346669
Disability Rights Education & Defense Fund
3075 Adeline Street, Suite 210
Berkeley, CA 94703
(510) 644-2555
kparthiban@dredf.org
Attorneys for Amici Curiae

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Agency Materials

Legislative History

Other Authorities

Introduction

The father in this extraordinary writ, David S., moved from Michigan to California when he learned of the severe injury to his child living here with the child's mother, and the resulting dependency proceeding. David established a household in California with his mother so that he could provide a safe and loving home for David Jr. Throughout the process with the Los Angeles County Department of Children and Family Services (Department) and the court, David demonstrated commitment to his child, provided appropriate care for David Jr. during visitation sessions, and submitted to a neurological assessment showing "intact" results. He followed all the steps laid out for him by the Department and was successful at each step. Nevertheless, the dependency court terminated reunification services for him and scheduled a hearing to terminate parental rights based upon evidence rife with discriminatory assumptions about David's physical disability: David has a medical/genetic condition which makes him small (about 60 pounds) and causes an atypical body and physical appearance. Like many people with physical disabilities, David uses supports (including living with a family member, his mother) to live an integrated life in the community.

In 1979, the Supreme Court unanimously reversed a trial court's decision to transfer custody away from a disabled father based on its reasoning that the father's recently acquired spinal cord injury prevented him from having a "normal" relationship with his children. (*In re Marriage of Carney* (1979) 24 Cal.3d 725, 735-36 [598 P.2d 36].) The Court rejected the lower court's assessment as "affected by serious misconceptions as to the importance of the involvement of parents in the purely physical aspects of their children's lives" and described the court's preconception about the father's ability to parent as a "damaging," "false and demeaning" stereotype. (*Id*. at pp. 736-37.) The Court declared it "impermissible" for a court simply to rely on a physical disability "as prima facie evidence of the person's unfitness as a parent or of probable detriment to the child; rather, in all cases the court must view the handicapped person as an individual and the family as a whole." (*Id*. at p.736.) The Court explicitly weighed the father's supports – including other household members and accessible transportation – as positives that strengthened his ability to parent. (*Id*. at pp. 734, 738.)

The Department and the court below did the opposite of what *In re Marriage of Carney* directs. Instead, the assessments and opinions relied upon by the trial court, to the exclusion of other facts, narrowly focused on David S.'s physical appearance and disability-related limitations and presumed parental

unfitness on that basis alone. The Department and the court viewed David's natural supports – including the support of his mother and his use of ride-share apps instead of driving or using public transit to travel and attend appointments – as negative indicia of being overly "dependent" rather than natural and positive supports for an engaged disabled father. The Department relied on discriminatory stereotypes and failed to include or consider any accommodations in its service plans and assessments, evading its statutory duty to promote reunification. As amici detail herein, the court's decision below fails to meet the clear and convincing standard required to terminate reunification services and parental rights.

Parents with actual and perceived disabilities, like David S., live under the constant shadow of state intrusion and fear of permanently losing their children based on societal biases that assume unfitness based on ableism. The National Council on Disability has documented pervasive levels of discrimination against parents with physical and mental disabilities. (National Council on Disability, Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children (2012) at p.78 <https://heller.brandeis.edu/parents-with-disabilities/pdfs/rocking-the-cradle.pdf>[as of Apr. 29, 2024] (hereafter *Rocking the Cradle)*; see also Odegard, *The Americans with Disabilities Act: Creating "Family Values" For Physically*

Disabled Parents (1993) 11 Law & Ineq. 533.)The content and conclusion of the opinion below perpetuates the shameful exclusion and marginalization of parents with disabilities. It is manifestly unjust and must be reversed.

ARGUMENT

Amici have not been given access to court records, the following facts are taken from reviewing the filed writ petition and responses.

The Department's evidence, central to the trial court's decision, fixated on observations made by service providers and the court-appointed evaluator about David's atypical physical presentation—he weighs about 60 pounds due to a medical / genetic condition—and related physical characteristics and support needs. The trial court relied on the assessment of a court-appointed evaluator, who was retained to conduct a psychological and parenting assessment but instead improperly focused on David's body and physical strength, including grip strength. (PEW[1] 21, 38; Petitioner's Exhibit #1, pg. 8 of 10 ["I have grave concerns about this infant … being placed with … his father … [who] has his own physical challenges that must be diagnosed and assessed … If it is true that the child is 30 pounds and that

[1] "PEW" refers to "Petition for Extraordinary Writ" filed by the father on Apr. 2, 2024, 2d Juvenile No. B335126.

Mr. [redacted] is a father just 60 pounds himself with no promise of any change in becoming sturdier, then this child will very quickly outmatch his father physically and place the child at risk simply [because] Mr. [redacted] may not have the sheer physical strength to protect his son."]; *Id.* at p. 5 of 10 ["[W]hen asked why he does not drive, he reported that he is not built for it. This comment, too, serves as a cause for concern as his son grows and quickly outweighs and might be able to outmaneuver him."].) The court also reviewed evidence from David Jr.'s pediatrician, who similarly improperly focused on David's physical characteristics. (PEW 18 [child's pediatrician stating the father "appeared very weak and lacking an ability [to] both mentally and physically care" for David Jr.].) Further, the Department's evidence also repeatedly cited David's natural supports – including his relationship with his mother – as *negative* evidence of incapacity rather than as a positive natural support. (See, e.g., PEW 22 [The Department social worker wrote "DCFS has observed father to be heavily reliant on paternal grandmother for support. PGM appears to provide father with assistance with retaining/ understanding information relating to the child. Although father is consistently attending therapy services and visitation, it is unclear how dependent he will be on PGM if the child were to be in his care."].) This approach

discriminates on the basis of disability and the orders below must be reversed.

I. California Law Requires an Objective Assessment of Disabled Parents with Their Supports in Place and Prohibits Reliance on Disability Bias and Stereotypes.

California law requires that courts make an objective analysis of the ability of parents with disabilities to parent, with all existing supports—plus any additional feasible supports needed—in place. A disability in and of itself cannot determine parental fitness. Whenever concerns about a parent relate to their disability, courts must evaluate how formal and informal supports and services can mitigate the concern. This objective assessment is essential to avoiding unnecessary and discriminatory family separation.

In *In re Marriage of Carney*, the Supreme Court unanimously reversed a Los Angeles trial court's decision to transfer custody away from a disabled father based on its reasoning that the father's recently acquired spinal cord injury prevented him from having a "normal" relationship with his children including sports and other physical activities. (*In re Marriage of Carney*, *supra*, 24 Cal.3d at pp. 735-36). Rejecting the lower court's assessment as "affected by serious misconceptions

as to the importance of the involvement of parents in the purely physical aspects of their children's lives," the state high court declared:

> [I]f a person has a physical handicap it is *impermissible* for the court simply to rely on that condition as prima facie evidence of the person's unfitness as a parent or of probable detriment to the child; rather, in all cases the court must view the handicapped person as an individual and the family as a whole.

(*Id.* at p. 736 [emphasis added]; see also *id.* at p. 737 [describing lower court's preconception that the father is "deemed forever unable to be a good parent simply because he is physically handicapped" as a "damaging," "false and demeaning" stereotype].)

Instead, the Court in *In re Marriage of Carney* directed courts to conduct a holistic and assessment of the parent's disability, including their adaptations and supports:

> The court must view the handicapped person as an individual and the family as a whole. To achieve this, the court should inquire into the person's actual and potential physical capabilities, learn how he or she has adapted to the disability and manages its problems, consider how other members of the household have adjusted thereto, and take into account the special contributions the person may make to the family despite or even because of the handicap. Weighing these and other relevant factors together, the court should then carefully determine whether the parent's

> condition will in fact have a substantial and lasting adverse effect on the best interest of the child.

(*In re Marriage of Carney, supra,* 24 Cal.3d at p. 736.)

In 2010, the Legislature codified the Supreme Court's ruling in *In re Marriage of Carney*. (Fam. Code, § 3049 ["It is the intent of the Legislature in enacting this section to codify the decision of the California Supreme Court in In re Marriage of Carney (1979) 24 Cal.3d 725, with respect to custody and visitation determinations by the court involving a disabled parent."].) Decades earlier, the Legislature codified similar principles. (Welf. & Inst. Code, §§ 300, subd. (j), 2d par. ["The Legislature further declares that a physical disability, such as blindness or deafness, is no bar to the raising of happy and well-adjusted children and that a court's determination pursuant to this section shall center upon whether a parent's disability prevents the parent from exercising care and control."], 361.3, subd. (a)(8)(B) ["[T]he Legislature declares that a physical disability, such as blindness or deafness, is no bar to the raising of children, and a county social worker's determination as to the ability of a disabled relative to exercise care and control should center upon whether the relative's disability prevents him or her from exercising care and control."] [both provisions added in 1987].) More recently, in 2022, the Legislature enacted AB 1163, including statutory findings directing that assessments of

disabled people include their supports: "The Legislature finds and declares all of the following … Like adults without disabilities, adults with disabilities may use a wide range of voluntary supports … The capacity of an adult should be assessed with any supports … that the person is using or could use." (Welf. & Inst. Code, § 21000, subd. (c), (d), as amended by Stats. 2022, ch. 894, §16.) [2]

Courts of appeal have repeatedly implemented the principles of *In re Marriage of Carney* and the legislative

[2] The court and the agency did not recognize or refer to David as having a physical disability. However, its role in the determination below is apparent. He has a "physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss" (see Gov. Code, § 12926, subd. (m)(1)) – an acknowledged medical/genetic condition that causes him to have an atypical small body and very low weight. The condition obviously affects multiple body systems, including the musculoskeletal, and makes the achievement of several major life activities (e.g., performing manual tasks, lifting, and working particular jobs) more difficult. (Gov. Code, §§ 12926, subds. (1)(A), (B), 12926.5.) His medical/genetic condition substantially limits several major bodily functions, including normal cell growth and the musculoskeletal system. (Gov. Code, § 12926, subd. (n)) [incorporating any ADA disability into state law]; 42 U.S.C. § 12102(2) [listing major bodily functions as major life activities]; 28 C.F.R. § 35.108(c)(1)(ii) [same].) He is also perceived as having a disability. He is "regarded or treated" by an entity covered by California law "as having, or having had, any physical condition that makes the achievement of a major life activity difficult" (Gov. Code, § 12926, subd. (m)(4)) – the Department and court explicitly denigrated his fitness as a parent based on his physical disability. (See also 42 U.S.C. § 12102(3)(A) ["An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."].)

codifications. For example, in *Patricia W. v. Superior Court* (2016) 244 Cal.App.4th 397, 429 [198 Cal.Rptr.3d 1, 27], the court reversed the termination of reunification services where the criticisms of the father's "inactive" parenting style were "trivial to the point of being pretextual." The court added:

> It also appears that some of the Agency's criticisms of father's "inactive" parenting may have resulted from limitations arising from father's chronic back pain. Yet the state has no power to remove a child from the custody of a physically disabled parent unless the parent's abilities are compromised to such an extent that the child is at substantial risk of harm.

(*Id.* at p. 429 & fn. 20 [citing *In re Tyler R.* (2015) 241 Cal.App.4th 1250, 1265 [194 Cal.Rptr.3d 543]; *In re Tyler R., supra,* 241 Cal.App.4th at p. 1265 [rejecting the suggestion that a severe disability alone "ipso facto make[s] a parent unfit"]; accord *In re Jamie M. (1982)* 134 Cal.App.3d 530, 541 [184 Cal.Rptr. 778] ["It cannot be presumed that a mother who is proven to be 'schizophrenic' will necessarily be detrimental to the mental or physical well-being of her offspring."].)

In *Tracy J. v. Superior Court (2012)* 202 Cal.App.4th 1415, 1427 [136 Cal.Rptr.3d 505, 514], the Court found that two disabled parents were entitled to continued reunification services where they "fully cooperated with the Agency, made substantial progress with their court-ordered case plans and demonstrated

their abilities to feed, soothe, protect and care for [their child]." The court specifically emphasized provider reports of "the parents' ability to work as a team and the complementary nature of their skills." (*Id.*; see also *id.* at p. 1420 [describing how one parent assisted the other parent with certain physical tasks].) Reversing the ruling below, the appellate court found that the termination of reunification services was "clearly unreasonable." (*Id.* at p. 1427) As in *In re Marriage of Carney*, the review in *Tracy J.* weighed favorably the role of supports, including partners and family members, in increasing parental capacity.

Similarly, in *In re Jamie M.*, the court reinstated reunification services where the lower court seemingly based termination on the parent's psychiatric diagnosis alone and did not assess the mitigating role of potential supports. "The court could have mandated the county department of public assistance to supervise appellant's home situation to oversee her continued medical treatment and proper financial management." (*In re Jamie M., supra,* 134 Cal.App.3d at pp. 543-544; see also *id.* at p. 540 ["[A] diagnosis of schizophrenia should be the court's starting point, not its conclusion."]; *id.* at p. 542 ["The trial court's duty in this situation is to examine the facts in detail. The social worker must demonstrate with specificity *how* the minor has been or will be harmed by the parents' mental illness."].)

Where a disabled parent needs services and supports to regain custody of their child, appellate courts have repeatedly ruled that these services be tailored and accommodated to the parent's disability-related needs. (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1790 [42 Cal.Rptr.2d 200], *as modified (July 18, 1995)* ["If mental illness is the starting point, then the reunification plan, including the social services to be provided, must accommodate the family's unique hardship.]; *id.* at p. 1792 ["[T]he juvenile dependency system is mandated by law to accommodate the special needs of disabled and incarcerated parents."]; *T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1244 [230 Cal.Rptr.3d 928, 942] ["The services provided must not only be appropriately tailored. They must also be accessible."]; *In re Victoria M.* (1989) 207 Cal.App.3d 1317, 1329, 1332-33 [255 Cal.Rptr. 498] ["Carmen obviously is developmentally disabled. . . . And yet Carmen's disabilities were not considered in determining what services would best suit her needs. . . . [If] generic reunification services are offered to a parent [with an intellectual disability], failure is inevitable, as is termination of parental rights."] [directing lower court to explore possible alternatives to termination]; *Tracy J., supra,* 202 Cal.App.4th at pp. 1427-28 ["Although services need not be perfect, they must be designed to remedy the family's problems and accommodate the special needs of disabled parents. . . . A developmentally or

physically disabled parent is entitled to services that are responsive to the family's special needs in view of the parent's particular disabilities."].)

The appellate court ruling in *In re Diamond H.* does not support the County's position here. There, the Court of Appeal for the Fourth District upheld the bypassing of reunification services for a parent with a developmental disability based on an extensive record of 17 referrals in 11 years, the failure to reunify with the older minors, and the provision of services including "a significant amount of services from the Regional Center." (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1134 [98 Cal.Rptr.2d 715].) The court rejected the parent's argument that the application of the bypass procedure violated the Americans with Disabilities Act ("ADA"). The court reasoned that the ADA does not provide a new defense in dependency proceedings, emphasizing that "California's juvenile dependency law [already] requires the courts and social services agencies to consider a parent's limitations and disabilities in providing reasonable services." (*Id.* at p. 1139;[3] see also *In re Anthony P.* (2000) 84

[3] See also *id.* ["[B]oth Agency and the court were aware of Helen's disability and her need for special services tailored to her limitations. Helen was offered and received a multitude of services that accommodated her developmental disability in the siblings' cases. In addition to parenting classes and individual and couples therapy, Helen received in-home services from the PRIDE program, the Regional Center and the ILC to assist her with daily tasks. In spite of the ample services she received for many years, Helen was presently unable to safely parent Diamond."].

Cal.App.4th 1112, 1115 [101 Cal.Rptr.2d 423] [upholding termination of parental rights of parent of nine-year-old who entered eight years earlier and remained hospitalized, and rejecting parent's argument that ADA necessarily preempted dependency proceedings].)

There is no such fact pattern here. Rather, in this case, the Department and trial court erred by improperly considering the father's physical appearance and manifestations of his unaccommodated physical limitations to speculate risk. The Department and trial court made generalizations about the father's parenting capacity on his unaccommodated disability, failed to evaluate him holistically based on objective evidence showing his commitment and capacity, and neglected to ensure his disability-related limitations were adequately accommodated and addressed to support reunification.

A. Decades-Old Dicta Should Be Revisited to Clarify that Dependency Proceedings Must Meet the Standards of the ADA

More than two decades ago, in two cases containing overwhelming evidence of the parent's inability to benefit from services or to regain custody, the Fourth District Court of Appeal issued opinions stating or suggesting that the requirements of the ADA do not apply at all to dependency proceedings. (See *In re*

Diamond H., supra, 82 Cal.App.4th at p. 1139 ["[T]he ADA does not directly apply to juvenile dependency proceedings . . . ."]; *In re Anthony P., supra,* 84 Cal.App.4th at p. 1116 ["[A] proceeding to terminate parental rights is not a government service, program, or activity."].) The statements from these two cases are inconsistent with the recognized scope of the ADA. They should be revisited to clarify that child welfare agencies and state dependency proceedings, like any other state or local government activity, must meet the nondiscrimination requirements of the ADA.

Congress enacted the ADA to provide "a clear comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and establish "clear, strong, consistent, enforceable standards" to combat disability discrimination backed by the "sweep of congressional authority." (42 U.S.C. § 12101(b)(1)-(4).) Title II of the ADA covers "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." (42 U.S.C. § 12131(1)(A)-(B).) "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." (*Tennessee v. Lane* (2004) 541 U.S. 509, 524 [124 S.Ct. 1978, 1989, 158 L.Ed.2d 820]; see also *id.* at p. 526

["Congress identified important shortcomings in existing laws that rendered them 'inadequate to address the pervasive problems of discrimination that people with disabilities are facing.'"] [quoting S. Rep. No. 101-116, p. 18 (1990)].) The legislative history of the Act highlights discriminatory practices affecting parents with disabilities. (See, for example, H.R. Rep. No. 101-485, p. 41, 1990 U.S.C.C.A.N. 303, 323 ["B]eing paralyzed has meant far more than being unable to walk—it has meant . . . being deemed an 'unfit parent.']).

The Department of Justice has stated in its regulatory guidance that "Title II applies to anything a public entity does." (28 C.F.R. § Pt. 35, App. B.) Federal courts have followed this guidance. (*Yeskey v. Com. of Pa. Dept. of Corrections* (3d Cir. 1997) 118 F.3d 168, 171, *aff'd sub nom. Pennsylvania Dept. of Corrections v. Yeskey* (1998) 524 U.S. 206 [118 S.Ct. 1952, 141 L.Ed.2d 215] [quoting guidance and applying Title II of the ADA to prison programs]; see also *Lee v. City of Los Angeles* (9th Cir. 2001) 250 F.3d 668, 691 [the term "public entity" "include[s] every possible agency of state or local government" and the ADA applies to "anything a public entity does"] [quoting *Yeskey v. Com. Of Pa. Dept. of Corrections, supra,* 118 F.3d at p. 171 & fn. 5, 28 C.F.R. Pt. 35, App. A] [applying ADA to police and prison interactions].) The Ninth Circuit has applied Title II of the ADA to state family court proceedings. (See, e.g., *Duvall v. County of*

Kitsap (9th Cir. 2001) 260 F.3d 1124, 1136-40, *as amended on denial of reh'g (Oct. 11, 2001)* [finding that hard of hearing court user demonstrated triable issues of intentional disability discrimination].)

Further, it is plain that the nondiscrimination requirements of federal law govern over contrary state law. (*Crowder v. Kitagawa* (9th Cir. 1996) 81 F.3d 1480, 1483-86 ["When a state's policies, practices, or procedures" have the effect of "imposing unreasonable obstacles to the disabled" the state cannot evade the antidiscrimination mandate of the ADA simply by "explaining that the state authority considered possible modifications and rejected them."].) Instead, the state must engage in a "highly fact-specific" inquiry into what reasonable modifications are available to meet the requirements of the ADA when making decisions around public health and safety policies. (*Id.* at p. 1486; see also *Fry v. Saenz* (2002) 98 Cal.App.4th 256, 264-65 [120 Cal.Rptr.2d 30] [applying ADA and Section 504 of the Rehabilitation Act to CalWORKS program and finding that rule cutting off benefits when children reach age 18 discriminated against disabled children].)

Here, there is no unreconcilable conflict between the requirements of Title II of the ADA and California law on dependency. Given the above-described state law statutory and

caselaw authority, compliance with Title II of the ADA is straightforward. It simply means that in making "reasonable efforts" to support parents to reunify with their children, dependency courts and child welfare agencies may not discriminate against parents with disabilities and must provide accessible services and other reasonable accommodations to give them a fair to succeed.[4]

The principles of disability nondiscrimination in the context of dependency are detailed in necessary guidance issued jointly by the U.S. Department of Justice and the U.S. Department of Health and Human Services. (See, U.S. Dept of Health & Human Serv., *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts Under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act* (2015) <https://www.hhs.gov/sites/default/files/disability.pdf> [as of Apr. 27, 2024]. This guidance clarifies how to avoid disability-based discrimination involving parents with disabilities and supports child welfare agencies and dependency courts in understanding how to assess disabled parents and ensure services are

[4] A lack of definition of the phrase "reasonable efforts" can allow bias to seep into dependency proceedings and result in inconsistent and unfair outcomes. See Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law* (2002) 33 Stanford L. & Policy Rev. 217, 254-255.

accommodative and supportive of reunification. The dicta contained in *In re Diamond H.* and *In re Anthony P.* may discourage agencies and courts from implementing and relying on this important resource.

Courts nationwide have acknowledged the importance of implementing ADA principles and requirements in dependency court proceedings and related services. In 2017, in the home state of the father here, the Michigan Supreme Court in *In re Hicks/Brown* (2017) 500 Mich. 79 [893 N.W.2d 637] reversed the termination of parental rights of a mother with an intellectual disability finding that the state's child welfare agency violated the ADA. The Michigan Supreme Court found that "efforts at reunification cannot be reasonable . . . unless the [state child welfare agency] modifies its services as reasonably necessary to accommodate a parent's disability." (*Id*. at pp. 96, 90.) That same year, New York's highest court stated in *Lacee L. v. Stephanie L.* (2018) 32 N.Y.3d 219, 231 [114 N.E.3d 123] that "Family Court should not blind itself to the ADA's requirements placed on ACS and like agencies." "The courts may look at the accommodations that have been ordered in ADA cases to provide guidance as to what courts have determined in other contexts to be feasible or appropriate with respect to a given disability." (*Id.* at p. 231.) In 2019, the Colorado Court of Appeals ruled that a child welfare agency fails to comply with its duties under the ADA, as well as

its reasonable efforts mandates, if it does not make reasonable modifications to case plans and services offered to disabled parents. (*People In Interest of S.K.* (Colo. App. 2019) 440 P.3d 1240, 1249.) This Court should join these other state courts and acknowledge that the ADA requirements apply.

II. The Court Failed to Conduct an Objective Assessment of David's Ability to Parent and Instead Relied on Reports and Evaluations Tainted with Disability Bias, Violating State and Federal Law.

A. The Court Relied Upon Evaluations and Assessments That Improperly Focused on David's Atypical Size and Appearance, and Disregarded David's Objective Strengths.

The court below improperly relied on the service providers' opinions and bias-laced evaluation, and concluded that David would not be capable of taking care of David Jr. (See e.g. PEW 21,38; Petitioner's exhibit #1, p. 8 of 10 ["Mr. [redacted] is a father just 60 pounds himself with no promise of any change in becoming sturdier, then this child will very quickly outmatch his father physically and place the child at risk simply [because] Mr. [redacted] may not have the sheer physical strength to protect his son."]; *Id*. at p. 5 of 10 ["[W]hen asked why he does not drive, he reported that he is not built for it. This comment, too, serves

as a cause for concern as his son grows and quickly outweighs and might be able to outmaneuver him."]; PEW 18[father "appeared very weak and lacking an ability [to] both mentally and physically care" for David Jr.]; PEW 22 ["DCFS has observed father to be heavily reliant on paternal grandmother for support. … [I]t is unclear how dependent he will be on PGM if the child were to be in his care."].) Despite substantial evidence of David's commitment to his child, appropriate care for David Jr. during visitation sessions, ability to apply medical guidance, neurological assessment showing intact mental functioning, and that David did nothing wrong, the juvenile court terminated David's reunification services. This outcome reflects disability bias and must be reversed.

Experts and medical professionals often harbor their own biases and generalizations about parents with perceived or actual disabilities, leading to inaccurate assessments of their parenting abilities. (Kay, *The Americans with Disabilities Act: Legal and Practical Applications in Child Protection Proceedings* (2018) 46 Cap. U. L.Rev. 783, 797 (hereafter *Kay*); Dillon, *Child Custody and the Developmentally Disabled Parent* (2000) 2000 Wis. L.Rev. 127, 149.) Further, many reach opinions about parental capacity without sufficient observation of the parent-child interaction, relying instead on the parent's disability and its manifestations. (*Rocking the Cradle*, *supra*, at p. 130.) These opinions and the

resulting court rulings bypass the required "meaningful individualized inquiry" of the disabled parent's ability and instead improperly substantiate the pre-existing disability biases "that judges and case workers bring to the table." (*Kay*, *supra*, 46 Cap.U. L.Rev. at p.797; Powell et. al., *Terminating the Parental Rights of Mothers with Disabilities: An Empirical Legal Analysis* (2020) 85 Mo. L.Rev. 1069, 1096 [finding the influence of expert testimony and conclusions as significant—negative conclusions about capabilities increased termination odds for mentally disabled parents by 92%].) Given the importance of parenting evaluations, dependency courts must carefully scrutinize the appropriateness of each expert evaluation and opinion, ensuring they are based on appropriate measures of parental capacity and objective facts before adopting their conclusions. (Powell et al., *supra,* 85 Mo. L.Rev. at p. 1101.)

As evident in this matter, many court-appointed evaluators do not have the training or ability to properly assess parents with disabilities. For instance, one study of 206 family court evaluators found that though a large majority evaluated parents with physical disabilities, more than 85 percent reported having no training specifically about conducting parenting assessments of people with disabilities, and 63 percent had no training in testing accommodations for people with physical disabilities. (Breeden et al., *Child Custody Evaluations When One Divorcing*

Parent has a Physical Disability (2008) 53 Rehabilitation Psychology 445, 450.) Another study of child welfare evaluations found that evaluators were "largely unable to identify appropriate or adapted interventions for supporting or strengthening the parenting capacities of people with disabilities." (*Rocking the Cradle*, *supra,* at p. 141 [citing Fife, *A Study of the Quality of Psychological Assessments of Parents with Disabilities Involved in Termination of Parental Rights Cases* (2010)].) Lack of disability expertise can result in evaluators assuming no interventions could support a disabled parent in satisfactorily caring for their child.

The National Council of Disability has highlighted the pervasive issue of parenting assessments based on "questionable evaluation methods" that yield "invalid and biased recommendations" for parents with disabilities. (*Rocking the Cradle*, *supra,* at p. 129.) Experts often rely on limited interviews and pseudoscientific measures, such as standardized tests,[5] that

[5] Standardized psychological measures often do not include disabled people as part of the norm base line, detrimentally affecting disabled people's results when compared to nondisabled parents. While APA guidelines thus recommend psychologists to use tests where the tests and norms are based on populations similar to the population of the person being evaluated, assessments of parents with disabilities rarely use tests where disabled people are included in the normative baseline. (*Rocking the Cradle, supra*, at p. 133; APA Task Force on Psychological Assessment and Evaluation Guidelines, *APA Guidelines for Psychological Assessment and Evaluation* (2020) < https://www.apa.org/about/policy/guidelines-psychological-assessment-evaluation.pdf>[as of Apr. 27, 2024] (hereafter *APA Guidelines*).)

fail to gauge parenting capacity. (McConnell & Llewellyn, *Stereotypes, Parents with Intellectual Disability, and Child Protection* (2002) 24 J. Soc. Welf. & Fam. L. 308; see also Lawless, *When Love is Not Enough: Termination of Parental Rights When the Parents Have a Mental Disability* (2008) 37 Cap. U. L.Rev. 491, 514.) These evaluations frequently neglect more important indicators of parental fitness, such as the quality of the parent-child relationship and parental commitment.[6] Many expert evaluations and opinions lack sufficient observation of parent-child interactions to make conclusions on these indicators. (*Rocking the Cradle, supra*, at pp. 135-136.)

In this matter, while the trial court referenced the opinions of David Jr.'s medical professionals and David's therapist in its decision, none of these providers witnessed David caring for David Jr. during visitation. Dr. Miora, the 730-examiner, witnessed one two-hour visitation between the father and his son. This length of time was inadequate. (See *Rocking the Cradle, supra*, at p.129 [therapists observing disabled parents interacting with their children use too-short time periods such as only two

---

Further, standardized tests like IQ tests "continue to be administered despite the research evidence demonstrating that parental IQ is a poor predictor of parenting competence. When norm-referenced assessments are used, (sub)normal may be equated with (in)adequate so that parenting practices and behaviors of [disabled parents] are judged subnormal and inadequate rather than simply different." (McConnel & Llewellyn, *supra*, 24 J. Soc. Welf. & Fam. L. at p. 309.)

[6] Lawless, *supra,* 37 Cap. U. L.Rev.at pp. 229,514.

hours] [citing McWey et al., *Mental Health Issues and the Foster Care System: An Examination of the Impact of the Adoption and Safe Families Act* (2006) 32 J. of Marital and Family Therapy 195, 202.) Worse, the examiner fixated on David's physical condition. The court's order below to terminate David's reunification services and schedule a hearing to terminate his parental rights constitutes a manifest injustice. The Court must reverse.

1. Disability Bias Includes Responses of Disgust, Discomfort, and Aversion to Atypical Bodies.

Deeply ingrained biases, stemming from centuries of structural subordination, categorize people with disabilities as "deviant, incompetent, and unequal" and thus unquestionably separate from the "norm." (Harris, *Reckoning with Race and Disability* (2021) 130 Yale L. J. F. 916, 919.) These structural biases and beliefs shape people's understanding of their external world and can trigger affective visceral responses—such as disgust, revulsion, and fear—when presented with individuals with different types of bodies. (*Id.* at p. 946; Davis, *Introduction: Normality, Power, and Culture*, *in* DISABILITY STUDIES READER (4th ed. 2013) p. 1; Hanoch Livneh, *On the Origins of Negative Attitudes Towards People with Disabilities* (1982) 43

Rehabilitation Literature 338, 341.) Disgust can cause an observer to see potential threat and danger to the exclusion of other facts. (see Kahneman, *Thinking Fast and Slow* (2011) pp. 52-57[discussing the cognitive phenomenon of "what you see is all there is," whereby the brain forms a coherent picture of a target using only perceived information without considering other facts.])

Feelings of disgust towards disabled people historically justified government-led exclusionary practices. Early "ugly laws," for example, regulated the visibility and movement of disfavored groups, such as those with physical or mental disabilities, prohibiting them from appearing in public spaces. (See generally, Schweik, *The Ugly Laws Disability in Public* (2009) p. 67.) Rhetoric justifying ugly laws eventually gave grounds to segregate and institutionalize individuals with certain disabilities as an attempt to protect mainstream society from them. (*Id*.). Such societal attitudes and reactions linking disability with deficiency, dependency, and criminality supported policies like forced sterilization of those deemed to be intellectually disabled, as upheld by the United States Supreme Court in *Buck v. Bell*. (*Buck v. Bell* (1927) 274 U.S. 200, 207 [47 S.Ct. 584, 585, 71 L.Ed. 1000] ["It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who

are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough."].)

Today, visceral reactions and ill-informed beliefs about disabled people continue to place barriers on disabled people's ability to create and maintain their families. Parents with actual and perceived disabilities report persistent negative misconceptions that they cannot direct and provide proper care to their children and that their children will be maladjusted. (*Rocking the Cradle*, *supra,* at pp. 42-42, 188-189.) Such aversion based on disability is apparent here, where the Department's evidence emphasized David's atypical physical presentation and related characteristics, and disregarded his objective strengths and supports. By terminating David's reunification services based on this evidence, the Court enacted and enforced this unlawful disability discrimination.

2. Observers of a Person with Visible Physical Disabilities, Like The Father, Frequently Presume Cognitive Limitations and Impairments Because of "Spread."

Observers frequently make unfounded assumptions about the capabilities of individuals with visible physical disabilities due to "spread." (Dunn, *The Social Psychology of Disability* (2015)

p. 51.) This "relatively automatic" and "unconscious" empirically demonstrated process "taints observer's general judgments in a negative direction, leading them to infer the presence of other complications or liabilities from the outset" through "some recognized cue to a person's disability status." (*Id*. at p. 40; Marini, *Societal Attitudes and Myths About Disability: Improving the Social Consciousness, in Psychosocial Aspects of Disability* (2012) p. 40.)

Spread often results in attributing intellectual disability to people who, like David, are or are perceived to be physically disabled. (Marini, *supra,* p. 40 [often "[s]omeone with a physical disability is believed to be mentally impaired as well"]; Dunn, *supra,* p. 61 ["[S]ome recognized cue to a person's disability status—a wheelchair, a cane, a missing limb or limbs, slow slurred or stuttering speech—is sufficient for leading observers to assume the presence of other qualities that are considered to be negative or off-putting."].) This inference comes from the fact that individuals with physical conditions, like David, may not show verbal or nonverbal behaviors commonly associated with intelligence because of their physical limitations. (*Id*.; see Murphy et al*., Accurate Intelligence Assessments in Social Interactions: Mediators and Gender Effects* (2003) 71 J. Personality 465, 469, 485 [perceived intelligence associated with "more pleasant, self-assured, and less indifferent facial

expression," and "a less awkward, stiff [posture]," while negatively associated with "fidgeting"]; Shellenbarger, *How To Look Smarter* (Jan 13, 2015) WALL ST. J. https://www.wsj.com/articles/how-to-look-smarter-1421189631 [as of Apr. 27, 2024]; accord Murphy, *supra,* p. 485 ["[H]igher perceived intelligence was associated with clear communication[.]"].)

Here, the psychological evaluator and service providers repeatedly reported David to be cognitively limited despite objective evidence to the contrary. Although David's neurological assessment showed "intact" results with no diagnosable cognitive or learning disorder in his evaluation, the 730 psychologist nevertheless labeled David as "neurodevelopmentally challenged" and presumed that "the evidence suggests future could render [father] compromised in a way that could affect baby David's safety and development." (Petitioner's Exhibit #1, p. 8.) This conclusion is strong evidence of spread—despite objective tests showing no cognitive disorder, the psychologist cited to indicia of disability and concluded the opposite. (See, e.g., Petitioner's Exhibit #1, p. 4 [describing David as "a man noticeably slight of figure and weight, sporting a sallow complexion and several tattoos…he spoke in a highly nasal and dysarthic manner, making it difficult to understand his speech"]; *Id.* at p. 9 [describing David as having "nascent" emotional capacity based

on description of how he felt seeing his son hospitalized, quoting him as saying, "it crushes you . . . ICU . . . he was blown up like a balloon, praying—one week in ICU. Dead not breathing upon arrival."]; *Id*. [Miora "question[s] to what extent he would naturally and in an evolving way recognize his son's desires, such as to read a book, do a puzzle" based on David "follow[ing] his son in some basic ways but more aptly phrased appeared to motorically attempt to engage him"]; see *Rocking the Cradle*, *supra,* at p.136 [without adequate disability sensitivity and expertise, these evaluations may mistakenly attribute poor bonding or emotional attachment because a parent with a physical disability has "rigid posture, awkward physical touch, stiffness, blank expression, failure to maintain eye contact with the child" that could be explained by various physical disabilities rather than a lack of ability or desire to bond].)

David's therapist similarly assumed David had a "limited level of understanding" based on seeming guarded during sessions and "appearing" not to be "actively participating" and getting anything out of therapy despite David consistently attending therapy and "show[ing] as compliant with receiving the service." (OPO[7] 35-36; e.g., *Rocking the Cradle*, *supra,* at p.143 [describing how a psychologist in a similar case improperly

[7] "OPO" refers to "Answer to Petition for Extraordinary Writ" served on Apr. 15, 2024, Juvenile No. B335126.

concluded a lack of mutual gaze between a severely physically disabled mother and child indicated psychological issues of the mother rather than being a result of physical inaccessibility].) Again, this therapist's assumption that David was not comprehending or "actively participating" is likely more based on normative expectations of how intelligence and participation physically manifest without consideration of how David's unique physical limitations may alter such manifestation. (See *Patricia W., supra*, 244 Cal.App.4th at p. 429 fn. 4 [father's "'inactive' parenting" may have been a result of "limitations arising from father's chronic back pain" not lack of commitment or potential parenting capacity.].)

Similarly, other professionals, who were relied on by the Department and the Court, suggested that David was cognitively limited after brief interactions. For example, the pediatrician to David Jr. noted that David "appeared out of it," was "very weak and lacking in ability both mentally and physically," and had limited verbal response to seeing the physical damage to his son's brain by repeating that David Jr. would be fine and "asking when he would be fine." (PEW 18.) Instead of seeing David as a typical parent who would be shocked at information of harm to their child and coping with such information by fixating on the hope of recovery, this provider instead inferred cognitive delay and inability to apply medical guidance when caring for his son. The

neurologist for David Jr. also inferred cognitive limitations based on David's physical presentation, noting his "dysmorphic and cachexic features," "failure to thrive and short stature," failure to complete high school, and that he seemed not to be absorbing information they were providing. (PEW 19.) Neither of these providers—assigned to assess David Jr.—witnessed David caring for his son or implementing provider recommendations during visitation.

These inferences that David's comprehension is too low to provide for a child with a brain injury adequately is based on "more advocacy than fact." (*Tracy J.*, *supra*, 202 Cal.App.4th at p.1425.) David's neurological assessment and visitation notes depict an attentive and dedicated father who could put recommendations and guidance into practice. Instead, the Court improperly relied on the opinions of professionals who spewed safety concerns rooted in ableist generalizations and disability bias.

B. <u>The Department's Providers Evaluated David Without Adaptations or Supports in Place.</u>

To the extent David's "grip strength" truly interfered with his ability to parent, the Department's providers failed to consider the use of or implement adaptations. Accessible parenting evaluations for parents with disabilities are critical

given their substantial impact at the termination stage. (Powell et al., *supra,* 85 Mo. L.Rev. at p. 1100-01; *Rocking the Cradle*, *supra,* at ch. 9.) Adapting evaluations by providing baby care adaptations and assistive technology to accommodate a parent's disability-related limitations is crucial. Megan Kirshbaum from Through the Looking Glass (hereafter "TLG"), a national expert on parents with disabilities, asserts:

> [O]ne cannot evaluate the capability of a parent with a significant physical disability or the relationship between an infant and such a parent without first providing adaptive babycare equipment and techniques that can make interaction physically possible or less stressful. To do so is only to evaluate the mismatch of the environment with the disability, not the parenting.

(Kirshbaum & Olkin, *Parents with Physical, Systemic, or Visual Disabilities* (2002) 20 Sexuality and Disabilities 65, 65-68; see generally Kirshbaum, *A Disability Culture Perspective on Early Intervention with Parents with Physical or Cognitive Disabilities and Their Infants* (2000) 13 Infants and Young Children 9).]

State and federal disability nondiscrimination laws require evaluators to modify examinations as a reasonable accommodation. (*Rocking the Cradle*, *supra*, at p.115 ["Title III of the ADA governs private attorneys and most court evaluators]; *ibid*. at p.131; 28 C.F.R. § 36.302(a).) Nevertheless, parents with disabilities are frequently subjected to inappropriate and

unmodified assessments that skew their case outcomes. (*Rocking the Cradle, supra,* at pp.131-132.) Often, parenting evaluations are conducted in psychological offices without adaptations or accommodations, creating a distorted picture of one's parenting. (*Id*. at p. 143.) This goes against APA guidelines, emphasizing the importance of ensuring evaluators complete assessments in appropriate and accessible environments with adaptations and supports. (*Id*. at pp.141-142 ["When the client uses assistive technology and accommodations, it is advisable to incorporate them into behavioral observation to avoid capturing unaccommodated disability"]; *APA Guidelines*, *supra*, at p.X) Despite APA guidelines urging psychological evaluations to communicate limitations when assessments are not made accessible, parenting evaluations rarely communicate these barriers to dependency courts. (*Rocking the Cradle, supra,* at p.134.)

While many evaluators may not know how to identify appropriate adaptive interventions for disabled parents in their evaluations, numerous resources can provide evaluators, courts, and child welfare agencies with such guidance. (E.g., *Rocking the Cradle, supra,* ch. 9; Idaho Assistive Technology Project, *Assistive Technology for Parents with Disabilities, A Handbook for Parents, Families and Caregivers* (April 2003).) These resources underscore the importance of considering baby care adaptations –

such as adapted cribs, walkers with baby seats, adapted diapering tables, and lifting harnesses – when concerns are related to a parent's physical limitations, like here. (*Rocking the Cradle*, *supra*, at pp.140-141.) Additionally, studies show how providing such adaptations during assessments demonstrated increased parental capacity, which was not otherwise identifiable without adaptations. (*Id*. at pp. 143-46; Kirshbaum & Olkin, *Parents with Physical, Systemic, or Visual Disabilities* (2002) 20 Sexuality and Disability 65, 70-72; Callow et al., *Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community: Jacobus Tenbroek Disability Law Symposium* (2011) 17 Tex. J. C.L. & C.R. 9, 19-20.) Given the severity of the fundamental right at risk in dependency proceedings, assessments that fail to implement basic adaptations that could have shown and strengthened parental capacity should not support terminations.

State case law and federal guidance do not permit such un-adapted evaluations or opinions to be dispositive of a disabled parent's capacity to parent and require courts to see the parent with a disability as a whole. (*Rocking the Cradle*, *supra*, at p. 131["Title III of the ADA governs psychological practice and requires reasonable accommodation and the inclusion of modified examinations as a form of accommodation"]; *In re Marriage of*

Carney, supra, 24 Cal.3d at p. 736; *Tracy J.*, *supra*, 202 Cal.App.4th at pp.1424-1425). While courts may rely on observations and opinions of providers and evaluators, they must examine whether such opinions and evaluations considered using adaptive parenting equipment or services and whether such evaluations and opinions stem from assessments or observations that espouse generalizations that parents with a diverse range of disabilities are categorically unfit to parent.

In David's case, the Department and Court solicited and relied upon opinions from the court-appointed evaluator, Dr. Miora. Her evaluation included an observation of the parent-child interaction for only two hours. She did not offer any adaptations to accommodate David's physical limitations nor did she acknowledge the assessment's limitations as an un-adapted evaluation. To supplement her negative conclusion about David's capacity, Dr. Miora cited as well to service providers who also made speculative assumptions about David's physical capabilities. The biased assessment is not persuasive and does not support the ruling below.

III. The Court Improperly Failed to Consider David's Natural Supports, Violating State and Federal Law

The evidence presented below repeatedly cited David's natural supports – including his relationship with his mother and

his use of ride-share apps to travel – as *negative* evidence of incapacity rather than as positive natural supports. But the capacity and abilities of people with disabilities must be assessed with their supports in place.

Disabled people and their families adeptly navigate a still largely inaccessible world by leveraging social relationships and informal networks alongside other institutional supports to strengthen capacity.[8] These non-institutional supports used by people with disabilities, often referred to as "natural supports," include a broad range of unpaid or informal supports. (Michelle C. Reynolds et al., *Reconceptualizing Natural Supports for People with Disabilities* (2018) 54 Internat. Rev. of Research in Developmental Disabilities 177, 180-186; accord Welf. & Inst. Code, §§ 4512, subds. (e), (f) [defining and describing "natural supports" and "circle of support"]), 21000(c) ["Like adults without disabilities, adults with disabilities may use a wide range of voluntary supports to help them understand, make, and

---

[8] Cf. Piepzna-Samarasinha, *Tiny Disabled Moment #3, The Free Library of Beautiful Adaptive Things* in The Future is Disabled: Prophecies, Love Notes and Mourning Song (2022)(describing how other disabled people rather than medical providers offered effective suggestions – "adaptive tools, access hacks, or crip tricks" – that allowed her knees to heal); Morris, *Broken Promises* (2019) <https://tonybaldwinson.files.wordpress.com/2019/03/broken-promises-jenny-morris-lorraine-gradwell-memorial-lecture-final.pdf> [as of Apr.28, 2024] (independence is not "doing things yourself, or living on your own," but is "having [the] assistance and support how and when we [disabled people] choose.")

communicate their own decisions. These voluntary arrangements should be encouraged and recognized[.]"], (d) ["The capacity of an adult should be assessed with any supports[.]".) Research shows that natural supports can allow disabled parents to parent effectively and manage challenges associated with their disabilities. (Kroese et al., *Social Support Networks and Psychological Well-being of Mothers with Intellectual Disabilities* (2002) 15 J. of Applied Research in Intellectual Disabilities 324, 326.)

The Supreme Court of California's unanimous decision in *In re Marriage of Carney* emphasized the critical role of natural supports in assessing the ability of the disabled plaintiff to parent. (*In re Marriage of Carney*, *supra*, 24 Cal.3d at p. 725). Our high Court unequivocally held that a parent's "physical handicap" cannot serve as "prima facie evidence of the person's unfitness as a parent or of probable detriment to the child[.]" (*Id.* at 736.) Needing physical assistance does not mean that a disabled parent is not capable of controlling and directing the care of their child.[9] Instead, courts must "learn how [the parent]

[9] See *Rocking the Cradle*, *supra*, at p.142 [explaining that providers should assess how the parent maintains a connection to the child and authority in the eyes of the child during assisted physical care rather than rather than penalize the parents for using support]; see also Kirshbaum, *Babycare Assistive Technology for Parents with Physical Disabilities: Relational, Systems, & Cultural Perspectives* (1997) 67 Am. Family Therapy Academy Newsletter 20, at pp. 20-23.

adapted to the disability and manages its problems, consider how the other members of the household have adjusted thereto, and take into account the special contributions the person may make to the family despite or even because of the handicap." (*Ibid.*)

In *In re Marriage of Carney*, the Court weighed as a positive the role of other persons in the household who helped with certain manual tasks. (*Id.* at p.734 ["even if [Carney's girlfriend] were to leave, William could still fulfill his functions as father with appropriate domestic help."].) The Court also highlighted the role of accessible transit – specifically the recent purchase of an accessible van with hand controls – that allowed Carney to be mobile and participate in his sons' activities. (*Id.* at 738; see also *id.* at 734 [quoting testifying psychologist who said that father's access to transit "opens up more vistas, greater alternatives when he's more mobile such as having his own van to take them places"].)

Similarly, in *Tracy J. v. Superior Court*, the Court of Appeals underscored the importance of considering natural supports in dependency determinations of parental fitness. (*Tracy J.*, *supra*, 202 Cal. App. 4th 1415.) There, the Court found "significant merit" in the parents' argument that Tracy, a parent with developmental disabilities, and Michelle, a parent with cognitive limitations and "physical limitations [that] made it

difficult for her to respond to [the minor]," had demonstrated capacity to parent effectively due to their "ability to work as a team and the complementary nature of their skills," alongside formal supports such as independent living service providers and services from regional center. (*Id*. at pp. 1425, 1427.) Service providers noted the parents' protective and alert nature, ability to respond to the minor's needs, and collaborative parenting approach. (*Id*. at pp.1421, 1427.) The court concluded that the evidence – including observations of the parents' collaborative approach and ability to utilize supports – supported custody. The court rejected a social worker's reservations about leaving the minor alone with the parents, finding that this concern was based on an improperly narrow focus on the parent's disability-related limitations. (*Id*. at pp. 1419, 1424-25). Here, the lower court erred by narrowly focusing on physical limitations and failing to conduct a holistic evaluation of parenting capacity with the parent's natural supports in place.

In the investigation of the Massachusetts Department of Children and Families involving a disabled mother, Sara Gordon, the United States found that the child welfare agency violated the ADA by insisting that Gordon show "independent proficiency." Instead, the agency should have considered Ms. Gordon's readily available family support and resources together with the progress she demonstrated. (U.S. Dep't of Justice, Civil

Rights Division & U.S. Dep't of Health & Human Serv., Office for Civil Rights, *Findings Letter to Interim Comm'r Erin Deveney, Mass. Dep't of Children & Families*, DJ No. 204-36-216 and HHS No.14-182176 (Jan. 29 2015), <https://www.hhs.gov/sites/default/files/mass_lof.pdf> at pp.2,7,15.) It is unlawful for any court to require that a disabled parent demonstrate that they can parent by themselves with no supports. (*Rocking the Cradle*, *supra*, at p.193 ["Supporting parents with disabilities and their families in the community is not only the right thing to do, it is legally mandated."].)[10] No parent, with or without a disability, parents in a vacuum. (*See id.* [African proverb: "it takes a village to raise a child."]; Rivera Drew, *Disability and the Self-Reliant Family: Revisiting the Literature on Parents with Disabilities*, 45 Marriage Fam Rev. 431, at p. 9.)

Here, David relocated with his mother to California upon news of dependency involvement to ensure that he could parent his child with the support of his mother. But as in the overturned lower court opinion in *Carney*, the Department's evidence criticized this problem-solving approach contrary to governing law and policy. (PEW 17-18 [describing David as "heavily reliant

[10] Nevertheless, many service providers and court systems unjustly penalize parents with disabilities for depending on others in child rearing and expect them to carry out parenting in isolation to prove fitness. Kroese et al., *supra*, at p. 325

on paternal grandmother for support" and that is was "unclear how dependent he will be on [paternal grandmother] if the child were to be in his care"].)

And, as in *Carney*, David problem-solved his transit barriers. He arranged for a designated rideshare driver to facilitate his mobility and ability to make necessary appointments for his child. David uses a rideshare driver for safety – he is small due to his medical condition and well-known due to his social media presence. Rather than recognizing this as a testament to David's resourcefulness to meet his child's needs, the Department erroneously criticized him for not being able to use public transportation. (OPO 21; see also Petitioner's Exhibit#1, at p.5 of 10.)[11]

[11] Regardless of how odd David's line of work may appear, David ingeniously turned his physical challenges to secure consistent economic stability by leveraging his nonconforming physical appearance as a TikTok personality. Given the overwhelming rates of unemployment for people with physical disabilities that present as nonconforming bodies, many have leveraged analogous economic opportunities as performers. (See e.g. Adelson, *Dwarfs: The Changing Lives of Archetypal 'Curiosities'—and Echoes of the Past*, 25 Disability Studies Quarterly (Summer 2005) <https://dsq-sds.org/index.php/dsq/article/view/576/753 >["freak shows" in the late twentieth century as a means of securing income to survive]; Fordham, *Dangerous Bodies: Freak Shows, Expression, and* Exploitation (2007) 14 UCLA Ent. L. Rev. 207, 208, 219-21["After being treated as strange and grotesque by the majority" some people with physical abnormalities and disabilities turned to freak shows to find a community in which their differences were accepted and appreciated as well as financial reward, a practice still adapted to the modern internet world today.]

Here, as in *Tracy J.*, the visitation monitors repeatedly attested to David's "attentive" and "engaged" parenting, noting his sufficient energy and consistency in child interaction. (PEW 22.) David Jr.'s occupational and physical therapist stated that she saw David as "very consistent." (*Ibid.*; See *Rocking the Cradle*, *supra*, at p.146[in cases involving parents with physical capacity barriers, opinions by occupational therapists may be more appropriate than a neuropsychological assessment].) David Jr.'s current foster parent, who specialized in occupational therapy and viewed sessions, also noted the father and son's strong bond and expressed that with the paternal grandmother in the home for support, "she [felt] even more confident that [the child] would flourish in the home." (PEW 22.) Further, David's mother's presence in California bolstered his parenting capacity by allowing him to have more assistance with medical appointments and support in understanding information as needed. (PEW 17.) However, rather than acknowledging David's progress in visitation and the value of these natural supports, the Department penalized David's utilization of his mother's help as a point of concern.

The Court's failure to consider David's natural supports and adaptations to his physical limitations as strengths and instead requiring David to show parenting capacity independently violates governing law.

IV. Even if the Court Found David's Ability to Parent Insufficient, With His Formal and Informal Supports in Place, It Erred By Failing to Consider Reasonable Modifications, Including Other Potential Adaptive Supports and Services.

Dependency jurisprudence mandates child welfare agencies to provide parents with disabilities services that "accommodate" their specific needs to advance reunification. (See, e.g., *Elizabeth R.*, *supra*, 35 Cal.App.4th at p. 1792; *T.J.*, *supra*, 21 Cal.App.5th at p.1244[reunification services "must not only be appropriately tailored… [t]hey must be accessible."]; *Victoria M.*, *supra*, 207 Cal.App.3d at p.1332["failure is inevitable" with "generic services" for a developmentally disabled parent and negates a "reasonable efforts" finding].) Here, the Court deprived David of a meaningful opportunity to demonstrate his parental capacity and reunify with David Jr. through the procurement of additional services and supports to address any disability-related limitations.

Any array of resources exists to assist people with disabilities to thrive, many of which could have been leveraged by the Department to successfully support David and his son in reunification. For instance, adaptive baby care equipment and home modifications, as mentioned previously, could have been

explored to address concerns related to David's physical limitations. (See *Rocking the Cradle*, *supra*, at p.144.) Notably, in 2000, California enacted Assembly Bill 2152, mandating our state Medicaid program to cover adaptive parenting equipment for parents with physical disabilities like David. (Welf. & Inst. Code, §14132, subd. (m).) The Department could have explored such an avenue.

Furthermore, referrals for personal assistance services ("PAS"), known as vital support for individuals with a diverse range of disabilities, could have been made to aid David with tasks related to parenting. A national survey revealed that nearly 80% of disabled parents require such assistance with physical aspects of parenting tasks, which PAS could potentially address. (*Rocking the Cradle*, *supra*, at pp.194-196.) Although certain government-funded PAS may not allow personal assistants to directly care for children, these assistants can still assist David with other essential tasks related to successful parenting, including support in medication preparation and administration, meal preparation, and ensuring a safe and clean home environment for the child. (*Id.* at p.195.)

Additionally, a referral to a Center for Independent Living program ("CIL") could have empowered David to access peer support and other services to aide in independent living. (*Id.* at

pp.195, 212.) The department could have also explored giving David access to paratransit services if they found his use of rideshare services inadequate. (*Id.* at p.200.)

Considering David Jr.'s age and disabilities, the Department also could secure additional support for David and his son through programs like Early Intervention, Head Start, and Early Start through the Regional Center. (*Rocking the Cradle, supra,* at p.213); see generally Bhagwanji et al., *Relationships with Parents with Disabilities: Perceptions and Training Needs of Head Start Staff* (1997) <https://files.eric.ed.gov/fulltext/ED433152.pdf> [as of Apr. 28, 2024].)

The record reveals that David responded to and resolved all concerns articulated by the child welfare agency.[12] David complied with all mandates set before him – he participated in a specialized parenting course, individual counseling, and a psychiatric evaluation. He demonstrated significant improvement in his parenting skills, as evidenced by visitation notes. Still, the Department denied expanded visitation and recommended termination of his parental rights based on unfounded speculations that he would not be able to care for his medically

[12] Namely, that David did not protect his son from his mother's substance use and that he kept unsecured guns in his home

fragile child. Imposing an "independent" parenting standard without considering how existing and potential future supports could increase David's parenting capacity unlawfully denied him an equal opportunity to reunify with his son. The ruling below must be reversed.

CONCLUSION

This case exemplifies the problem of disability bias in the dependency court system. Despite an unwavering commitment to his child, demonstrated through his relocation, caregiving, and adherence to all requirements set forth by the Department, the Department and the court unfairly assessed David based on his physical appearance and disability and denied him the opportunity to reunify with his son.

California law is clear that individuals with disabilities must be assessed as individuals, with their strengths and support systems taken into account. But in David's case, these principles were disregarded. The Department and the court made discriminatory assumptions about David's abilities and penalized him for his reliance on supports to live an integrated life in the community.

Left unchecked, systemic ableism improperly reinforces the idea that parents who fall outside the norm cannot add value and

contribute to their children's lives, perpetuating the marginalization of people with disabilities. Disabled parents are entitled to an effective opportunity in dependency proceedings to maintain meaningful relationships with their children. By overturning the decision below, this Court can reaffirm the principles of equality and fairness for disabled parents.

Dated: April 30, 2024

Respectfully submitted,

By: 

Claudia Center, SBN 158255
Kavya Parthiban, SBN 346669
Disability Rights Education & Defense Fund
3075 Adeline Street, Suite 210
Berkeley, CA 94703
(510)-644-2555
Attorneys for Amici Curiae

CERTIFICATION OF WORD COUNT

The text of this brief consists of 11,239 words as counted by this Microsoft Word for Microsoft 365 version word-processing program used to generate this brief.

Dated: April 30, 2024

Respectfully submitted,

By: _____

Claudia Center, SBN 158255
Kavya Parthiban, SBN 346669
Disability Rights Education & Defense Fund
3075 Adeline Street, Suite 210
Berkeley, CA 94703
(510)-644-2555
Attorneys for Amici Curiae

Certification Pursuant to California Rule of Court 8.200 subd. (c)(3)

Amici affirm that no counsel for any party authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no other person or entity contributed money to fund preparing or submitting this brief.

Dated: April 30, 2024

Respectfully submitted,

By: 

Claudia Center, SBN 158255
Kavya Parthiban, SBN 346669
Disability Rights Education & Defense Fund
3075 Adeline Street, Suite 210
Berkeley, CA 94703
(510)-644-2555
Attorneys for Amici Curiae

DECLARATION OF SERVICE

I, Kavya Parthiban, declare I am a citizen of the United States, over 18 years of age, and not a party to within action; my business address is 3075 Adeline Street, Suite 210, Berkeley, CA 94703. On April 30, 2024, I caused to be served the following documents: APPLICATION OF DISABILITY RIGHTS EDUCATION & DEFENSE FUND AND OTHER ORGANIZATIONS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, DAVID S. and AMICUS CURIAE BRIEF by electronic service through TrueFiling to the addresses designated below:

Hon. Cathy Ostiller, D. 425
Los Angeles County Superior Court
JuvJOAppeals@lacourt.org
CourtCounselWrits@lacourt.org

Dan Szrom, Esq.
Children's Law Center – 1
Appeals1@clcla.org
Szromd@clccal.org
(Attorneys for Child)

Stephen Watson, Senior DCC
Dawyn R. Harrison, County Counsel
Los Angeles County Counsel-
Appellate Section
(Attorneys for DCFS)
Appellate@counsel.lacounty.gov
SWatson@counsel.lacounty.gov

David Paul, Esq.
Law Office of Martin Lee
DCA5@ladlinc.org
(Attorneys for Mother)

Dominka Campbell, Esq.
Law Office of Amy Einstein
DCA1@ladlinc.org
Campbelld@ladlinc.org
(Attorneys for Father)

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of April 2024, at Berkeley, CA.

By: _____

Claudia Center, SBN 158255
Kavya Parthiban, SBN 346669
Disability Rights Education & Defense Fund
3075 Adeline Street, Suite 210
Berkeley, CA 94703
(510)-644-2555
Attorneys for Amici Curiae