APL-2017-00247
Bronx County Clerk's Docket No. NN-14741/14

Court of Appeals
STATE OF NEW YORK

In the Matter of LACEE L.,
a child under the age of eighteen years,

STEPHANIE L.,

Respondent-Appellant,

—against—

ADMINISTRATION FOR CHILDREN'S SERVICES,

Petitioner-Respondent.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND NATIONAL DIABILITY RIGHTS NETWORK IN SUPPORT OF RESPONDENT-APPELLANT STEPHANIE L.

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DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

The American Civil Liberties Foundation (ACLU) is a non-profit, 50l(c)(3) organization. It has 53 affiliates throughout the 50 states and Puerto Rico, and a 501(c)(4) entity. *See* https://www.aclu.org/about/affiliates.

The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. It has 57 members: the P&A in the 50 states, D.C., P.R., Virgin Islands, Guam, American Samoa, Northern Marianas and the Native American P&A in Four Corners.

QUESTION PRESENTED

Given New York's policy in favor of parental reunification and the long history of governmental interference with the due process right to parent, a right which the Americans with Disabilities Act ("ADA") aims to protect, should this Court hold that failing to provide parents who are known to have disabilities with the reasonable modifications necessary to ensure meaningful access to reunification services, as mandated by Title II of the ADA, precludes a finding that reasonable efforts towards reunification have been made?

INTRODUCTION

This Court, the New York legislature, and the United States Supreme Court have all recognized the importance of the relationship between parents and their children. However, people with disabilities in this country have faced a long and shameful history of interference with their fundamental right to parent. Important progress has been made with respect to the rights of people with disabilities. Nevertheless, the combination of lingering stereotypes and failures to ensure that disabled parents can meaningfully access reunification services means that individuals with disabilities like Stephanie L. are too often denied fair opportunities to improve their parenting skills and demonstrate their fitness to parent. The result is obstruction of their right to parent and needless separation of children from loving parents.

The Americans with Disabilities Act (ADA) was enacted in order to remedy the precise type of problem at issue here, a child protection agency's failure to provide accessible reunification services to parents with disabilities. This appeal has resulted from the Administration for Children's Services' (ACS) refusal to comply with its ADA obligation to reasonably modify its services as necessary to accommodate Appellant Stephanie L.'s disability. The central question raised by this appeal is whether ACS, having knowingly failed to provide a disabled parent with reunification services that she can meaningfully access as required by the

ADA, has thereby failed to establish "reasonable efforts" to reunite this parent with her child. Finding "reasonable efforts" where ACS has violated the ADA in this manner would perpetuate a history of state-sanctioned interference with the fundamental rights of people with disabilities, and further would conflict with New York's policy in favor of reunification. *Amici* write to provide background on the history, purpose and scope of the ADA, and additional context on how the ruling in this case can help ensure liberty and equality for parents with disabilities.

STATEMENTS OF INTEREST

The American Civil Liberties Union Foundation is a nationwide, nonprofit nonpartisan 501(c)(3) organization of over two million members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. Since its founding, the ACLU has sought to ensure that the protections of the Constitution and the Bill of Rights apply equally to all persons. The ACLU's Disability Rights Program works toward a society in which discrimination against people with disabilities no longer exists, and in which people with disabilities are valued, integrated members of the community, with equal access to education, parenting, the community, and our justice system. Towards this end, the ACLU frequently litigates on behalf of individuals with disabilities, both as counsel and in amicus filings.

The National Disability Rights Network (NDRN) is the non-profit

membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Piute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

BRIEF FACTUAL BACKGROUND

Many people with disabilities, including intellectual disability,[1] are capable of successfully parenting their children, especially with appropriate support for

[1] Intellectual disability is a term of art that is used in the singular. Its three elements include: (1) significantly impaired intellectual functioning; (2) adaptive behavior deficits in conceptual, social, and practical adaptive skills; and (3) origination of the disability before age 18. *See* American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports (11th ed. 2010), p 1. The term "mental retardation" is outdated and no longer used. *See Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014) ("[p]revious opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon"); Rosa's Law, 124 Stat. 2643 (changing entries in the U.S. Code from "mental retardation" to "intellectual disability"); Developmentally Disabled Persons—Intellectual Disability—Terms, 2016 McKinney's Session Law News of NY, Ch. 37 (A. 9518) (May 2016) (amending various laws to substitute the term "intellectual disability" for the term "mental retardation" in family court proceedings).

developing their parenting skills. Thanks to clinical and social advances that assist with strengthening adaptive functioning, people with intellectual disability can increase their capacity and develop effective decision-making and independent living skills.[2] The New York legislature has also observed that advances in care "have increased the capacity of persons with [intellectual] and developmental disabilities to function independently and make many of their own decisions" and that those "rights and activities […] should be exercised by such persons to the fullest extent possible."[3] The President's Committee for People with Intellectual Disabilities has found that "[p]eople with mild cognitive limitation can be caring, concerned and competent parents if the appropriate supports and services are in place."[4] With "appropriate adapted services" parents with intellectual disability can achieve "progress and positive outcomes" with respect to their parenting skills.[5]

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[2] Karen Andreasian et al., *Revisiting S.C.P.A. 17-A: Guardianship for People with Intellectual and Developmental Disabilities*, 18 CUNY L. Rev. 287, 294 (2015).

[3] *Matter of Michelle M.*, 52 Misc. 3d 1211(A), 2016 N.Y. Slip Op. 51114(U), *4 (Sur. Ct., Kings Cty. 2016) (quoting *Proceeding for Hytham M.G.*, NYLJ 1202756960466 (Sur. Ct., Kings Cty. 2016)); *see also In re Chaim A.K.*, 26 Misc. 3d 837, 847–48, 848 n.34 (Sur. Ct., New York Cty. 2009) (citing Susan Kabot, Wendy Massi, Marilyn Segal, *Advances in the Treatment and Diagnosis of Autism Spectrum Disorders*, Professional Psychology, Research and Practice, Vol. 34(1) (Feb. 2003)) (noting that "advances in medical knowledge," including with respect to developmental disabilities such as autism, have caused "[e]arly and simplistic assumptions about the permanency and unalterability of [intellectual disability] and developmental disability" to become "highly questionable").

[4] President's Comm. on Mental Retardation, U.S. Dep't of Health & Human Servs., *The Forgotten Generation: 1999 Report to the President* at 81 (1999).

[5] NATIONAL COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN, 142 (2012) available at https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf (hereinafter

Potential adaptations may include conveying important information through multiple modalities, such as talk, video, and charts, or practicing parent-child interaction in a variety of settings, such as at home and in the community.[6] Similarly, proper adaptations can assist parents with other types of disabilities in successfully caring for their children.[7] These include, but are not limited to, "adapted cribs, baby care trays on wheelchairs, walkers with baby seats, wheelchair accessible diapering tables and highchairs, lifting harnesses, and accessible childproofing."[8] For example, one parent with cerebral palsy, whose inability to establish mutual gaze with her child was attributed to "intrapsychic pathology" was able to establish mutual gaze with the help of a wheelchair tray.[9] A parent with a spinal injury who could not speak because he received oxygen through a tracheal tube learned to communicate with his son nonverbally through play.[10] Although parents with disabilities may approach parenting in different ways, available research supports the conclusion that many parents with disabilities

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ROCKING THE CRADLE). The National Council on Disability is an independent federal agency responsible for advising the President, Congress, and other federal agencies regarding policies, programs, practices, and procedures that affect people with disabilities. NATIONAL COUNCIL ON DISABILITY, ABOUT US, available at https://ncd.gov/about (last visited July 31, 2018).

[6] ROCKING THE CRADLE at 140.

[7] *Id*. at 141–142.

[8] *Id*. at 141.

[9] *Id*. at 143–144.

[10] *Id*. at 145.

can successfully raise their children with the help of appropriate support services.[11]

Here, as set out in Appellant's briefing, it is undisputed that Stephanie L. is an individual with a disability as that term is defined under the ADA, and that her cognitive limitations interfered with her ability to access ACS's parenting and reunification services. Stephanie repeatedly requested a number of basic accommodations for her disability, including: referring Stephanie to service providers with staff and programming appropriate for parents with intellectual disabilities; connecting Stephanie to services offered by the Office for People with Developmental Disabilities (OPWDD); keeping Stephanie's attorneys informed about out-of-court conferences, so that they could support her in preparation and attendance; participating in a support system that included Stephanie's mother-in-law as a liaison between ACS and Stephanie, as Stephanie saw her mother-in-law nearly every day and relied upon her for support; and connecting Stephanie with a Medicaid coordinator to assist her in enrolling in certain services. Essentially, Stephanie and her counsel sought the type of disability-competent case management that ACS is empowered to provide, and which was recognized as a reasonable accommodation under the ADA by the Second Circuit more than 15 years ago. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 282 (2d Cir. 2003).

Nevertheless, ACS failed to provide these simple supports, and in so doing

[11] *Id.* at 186.

violated the ADA in a manner that plausibly made the difference in whether Stephanie successfully achieved reunification. The ADA unquestionably applies to ACS. This Court should find that "reasonable efforts" requires compliance with the ADA – and that whenever ACS does not comply with the ADA, "reasonable efforts" have not been made. Ruling otherwise denies Stephanie and other disabled parents the protections against discrimination that Congress expressly provided.

ARGUMENT

The right to parent is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. People with disabilities can successful parent their children, especially with access to supports. However, people with disabilities across the nation have long faced barriers to exercising their fundamental right to parent. The Americans with Disabilities Act (ADA) was passed to combat enduring interference with the fundamental rights of people with disabilities and to facilitate the integration of people with disabilities into the mainstream of American life. With respect to state and local government, the ADA is designed to ensure that people with disabilities have the same meaningful access to government services and programs that people without disabilities have long enjoyed and that, where feasible, determinations made about people with disabilities are based on an individualized assessment of their abilities rather than harmful and outdated stereotypes. Incorporating

compliance with the ADA into "reasonable efforts" standard protects the fundamental rights of parents with disabilities like Stephanie L., who need reasonable accommodations to succeed. Incorporation of the ADA standards further supports New York's policy in favor of reunification.

I. Parents with Disabilities Face Unconstitutional Discrimination in Parenting.

A. The Fourteenth Amendment Protects the Fundamental Right to Parent.

The right to parent one's children is a fundamental right protected by the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). The United States Supreme Court has long recognized that, "the right to […] bring up children is a central part of the liberty" protected by the Fourteenth Amendment. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)) (internal quotations omitted); *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (collecting cases) (noting that the "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"). The fundamental nature of the right to raise one's children has been upheld in a variety of contexts, including child-rearing, education, and religion. *See Stanley*, 405 U.S.

645 (presumption that unmarried fathers are unfit parents in Illinois custody proceedings violated due process and equal protection clauses of the Fourteenth Amendment); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (state law requiring students to attend public school "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of [their] children"); *Skinner*, 316 U.S. at 541 (the right to procreate is a parent's "basic civil right"); *see also May v. Anderson*, 345 U.S. 528, 533 (1953) (a parent's "right to the care, custody, management and companionship of her minor children" is "far more precious" than property rights).

A state's interest in protecting the welfare of children can justify restrictions on the right to parent. *See Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944). However, if a parent is fit, a state's interest in child protection is only "*de minimis*." *Stanley*, 405 U.S. at 657–58 (emphasis added); *see also In re Jamie J.*, 30 N.Y.3d 275, 286 (2017) (citing *Quilloin v. Walcott*, 434 US 246, 255 (1978)) (breaking up a natural family without a showing of unfitness "would infringe the constitutional rights of both parents and children"). Due process requires, moreover, that the state prove rather than presume that a parent is unfit to care for his or her children. *Stanley*, 405 U.S. at 657–58. When determining fitness in child protection proceedings, courts must take care to protect parents' "fundamental liberty interest [. . . .] in the care, custody, and management of their

child[ren]." *Santosky*, 455 U.S. at 753–54. Here, Stephanie L.'s liberty interest weighs in favor of incorporating the ADA standards, which mandate the reasonable accommodations Stephanie needed to succeed.

B. New York Policy Favors Reunification of Children with their Parents.

New York policy favors reunification of children with their parents, where feasible. The fundamental importance of parental rights is well-established in this court's precedents. *See Bennett v. Jeffreys*, 40 N.Y.2d 543, 552 (1976) (reiterating the "fundamental principle" that "[n]either law, nor policy, nor the tenets of our society would allow a child to be separated by officials of the State from its parent unless the circumstances are compelling"); *Ronald FF v. Cindy GG*, 70 N.Y.2d 141, 144 (1987) (citing *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465, 469 (1953)) ("It has long been recognized that, as between a parent and a third person, parental custody of a child may not be displaced absent grievous cause or necessity."). Moreover, the drafters of Article 10 of the Family Court Act were "deeply concerned" about preventing "unwarranted state intervention into private family life." *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 368 (2004) (quoting Besharov, *Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 29A, Family Ct. Act § 1012*, at 320 (1999 ed.)).

Although parental rights must be balanced against the state's interest in protecting the well-being of children from unfit parents, *Wisconsin v. Yoder*, 406

U.S. 205, 233–34 (1971); *see also Matter of Marino S.*, 100 N.Y.2d 361, 372 (2003), New York's longstanding policy in favor of protecting parental relationships reflects the judgement that "parents are generally best qualified to care for their own children." *Bennett*, 40 N.Y.2d at 548; *see also Ronald FF*, 70 N.Y.2d at 144 ("[I]t is presumptively in a child's best interest to be raised by at least one parent unless the parents are determined to be unfit."); *see also Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y.2d 196, 203–04 (1971) (explaining that the "fundamental principle" that "the primacy of parental rights may not be ignored [. . .] rests on the generally accepted view that a child's best interest is that it be raised by its parent unless the parent is disqualified by gross misconduct"). The legislature and this Court have recognized that separation from their parents can itself be harmful to children. *See Nicholson*, 3 N.Y.3d at 378–79 (when determining whether to remove a child, courts "must balance [the risk of harm presented] against the harm removal might bring" and must "consider whether the risk to the child might be eliminated by other means" in order to "spare children the trauma of removal and placement in foster care"). Therefore, keeping biological families together and exercising diligent efforts to reunite children with rehabilitated birth parents "has long been the public policy of this state" and remains a "critical goal." *Marino S.*, 100 N.Y.2d at 372. Incorporating the ADA standards advance this public policy by supporting parents such as Stephanie L.,

who can succeed at parenting with reasonable accommodations.

C. People With Disabilities Have Historically Faced Barriers to Parenting.

Americans with disabilities have long faced barriers designed to prevent them from becoming parents or raising their children. Between the late nineteenth century and the early twentieth century, the influence of eugenic "science," extreme xenophobia, and Social Darwinism fueled negative societal perceptions of people with disabilities. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 461–62 (1985) (Marshall J., concurring in part and dissenting in part). In that time period, "leading medical authorities and others began to portray the 'feeble-minded' as a 'menace to society and civilization ... responsible in a large degree for many, if not all, of our social problems.'" *Id*. Proponents of the eugenics movement sought to eradicate people with disabilities by limiting their reproductive freedom, thereby preventing the spread of their "inferior" genes. *Id*. The category of people considered "socially unfit" and in need of elimination was quite broad, including people with physical, psychiatric, intellectual, and developmental disabilities.[12] Stephanie L., an individual with an intellectual

[12] One contemporary report advocated for a broad range of people, including the blind, the deaf, people with epilepsy, and people with intellectual disability, to be "eliminated from the human stock." *See* Bleeker Van Wagenen, *Preliminary Report of the Committee of the Eugenic Section of the American Breeders' Association to Study and to Report on the Best Practical Means for Cutting Off the Defective Germ-Plasm in the Human Population*, Buck v. Bell Documents, 74 at page 462 (2009), available at

disability, is within the category of individuals who historically experienced the devastating effects of eugenical thinking.

The goal of eradication was facilitated by state laws restricting the right to marry, segregating people with disabilities in custodial institutions, and mandating eugenic sterilization. *Cleburne*, 473 U.S. at 461–64. For people with disabilities, this constellation of laws "extinguished […] one of the 'basic civil rights of man'- the right to marry and procreate." *Id.* at 463 (citing *Skinner*, 316 U.S. at 541). The belief that people with disabilities were inferior and needed to be eradicated was so influential that it was embraced by the United States Supreme Court. In *Buck v. Bell*, 274 U.S. 200 (1927), the Court blessed the practice of eugenic sterilization, stating "[i]t 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." 274 U.S. at 207.

Interference with the ability of people with disabilities to parent continued well into the twentieth century. For example, sterilizations carried out by the North Carolina Eugenics Board peaked between 1946 and 1968.[13] In 1968, the Nebraska Supreme Court, citing *Buck v. Bell*, upheld a state law that allowed a

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https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1073&context=buckvbell.

[13] The Governor's Task Force to Determine the Method of Compensation for Victims of North Carolina's Eugenics Board, *Final Report to the Governor of the State of North Carolina* 6 (January 2012), available at http://digital.ncdcr.gov/cdm/ref/collection/p16062coll9/id/28026.

state mental institution to require that developmentally disabled inmates be sterilized prior to their release into the community. *In re Cavitt*, 183 Neb. 243, 159 N.W.2d 566 (Neb. 1968). People with disabilities continued to be confined within institutions under inhumane conditions. *See, e.g., New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 756 (E.D.N.Y. 1973) (finding conditions in the Willowbrook State School in Staten Island to be "hazardous to the health, safety, and sanity of the residents"). Courts treated people with disabilities as presumptively unfit parents solely by reason of their disability. *See, e.g., Adoption of Richardson*, 59 Cal. Rptr. 323, 327–29 (Cal. Ct. App. 1967) (reversing a trial court ruling which refused to permit a couple to adopt a child, solely because they were "deaf-mutes"); *In re Petition of Worcester Children's Friend Soc'y*, 402 N.E.2d 1116 (Mass. App. Ct. 1980) (vacating a lower court ruling that approved an adoption against the wishes of the child's mother, who had been hospitalized for depression after the deaths of her father and uncle, despite more recent evaluation showing no indications that she was unable to care for her child); *Bednarski v. Bednarski*, 366 N.W.2d 69, 73 (Mich. Ct. App. 1985) (reversing a trial court that terminated a deaf woman's custody of her "two normal children" because of her deafness); *Clark v. Clark*, 725 N.E.2d 100, 103 (Ind. Ct. App. 2000) (reversing trial court order requiring a blind father, who was a successful CEO of a computer company, to be accompanied at all times by a

"responsible adult" while caring for his daughter); *see also Matter of Trina Marie H.*, 48 N.Y.2d 742, 743 (1979) (noting that "[intellectual disability is] not a *per se* basis for a finding of neglect").

Today, parents with disabilities such as Stephanie L. face the contemporary effects of this legacy of discrimination. While certain forms of extreme intentional discrimination based on disability no longer occur with regularity, the state and local agencies which administer parenting and child protection requirements continue to engage in disability discrimination, not only through invidious animus, but through neglect, indifference, and a refusal to modify policies.[14] In enacting Section 504 of the Rehabilitation Act, and then the ADA, Congress intended to prohibit and eliminate all forms of disability discrimination against individuals like Stephanie L.

[14] *See, e.g.*, *Alexander v. Choate*, 469 U.S. 287, 295–96 (1985) ("Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect. Thus, Representative Vanik, introducing the predecessor to § 504 in the House, described the treatment of the handicapped as one of the country's 'shameful oversights,' which caused the handicapped to live among society 'shunted aside, hidden, and ignored.'"); *Helen L. v. DiDario*, 46 F.3d 325, 335 (3d Cir. 1995) ("Because the ADA evolved from an attempt to remedy the effects of "benign neglect" resulting from the "invisibility" of the disabled, Congress could not have intended to limit the Act's protections and prohibitions to circumstances involving deliberate discrimination. Such discrimination arises from 'affirmative animus' which was not the focus of the ADA or section 504. The Supreme Court elaborates upon this distinction noting that, although discrimination against the disabled normally results from 'thoughtlessness' and 'indifference,' not 'invidious animus', such 'animus" did exist.'") (quoting from and citing to *Alexander v. Choate*, 469 U.S. at 295 & n.12).

II. Reunification Services Provided by ACS Must Comply With the ADA.

A. The ADA Was Designed to Protect the Fundamental Right to Parent Provided by the Due Process Clause of the Fourteenth Amendment.

By 1990, Congress recognized that existing laws were "inadequate to address the pervasive problems of discrimination" faced by people with disabilities. *Tennessee v. Lane*, 541 U.S. 509, 526 (2004) (quoting S. Rep. No. 101–116, at 18). The ADA was enacted to provide "a clear and comprehensive national mandate to eliminate discrimination against disabled individuals, and to integrate them into the economic and social mainstream of American life." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (quoting S. Rep. No. 101–116, at 20 (1989); H.R. Rep. No. 101–485, pt. 2, at 50 (1990), reprinted in 1990 U.S.C.C.A.N. pt. 2, 303, 332 (internal quotations omitted)). The ADA has been described as "a milestone on the path to a more decent, tolerant, progressive society." *Id.* (quoting *Bd. of Trustees of Univ. of Alabama v. Garrett,* 531 U.S. 356, 375 (2001) (Kennedy, J., concurring)). To achieve its broad remedial purpose, the ADA prohibits discrimination against people with disabilities "in major areas of public life," including employment (Title I), public services (Title II), and public accommodations (Title III). *Id*.

Title II of the ADA was enacted by Congress "against a backdrop of pervasive unequal treatment in the administration of state services and programs,

including systematic deprivations of fundamental rights." *Lane*, 541 U.S. at 524. The "historical experience" of discrimination reflected in Title II of the ADA includes restrictions on the right to marry, unjustified institutionalization, and "the abuse and neglect of persons committed to state mental health hospitals." *Id.* at 524–25. As reviewed in *Cleburne*, such restrictions interfered with the ability of people with disabilities to become parents or to parent their children and were often based on the harmful stereotype that people with disabilities were uniformly "unfit" and posed a danger to society. 473 U.S. at 461–64; *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600–01 (1999) ("recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects [the judgment that . . .] confinement in an institution severely diminishes the everyday life activities of individuals, including *family relations*") (emphasis added). Accordingly, Title II of the ADA "seeks to enforce [the] basic constitutional guarantee" of the rights "protected by the Due Process Clause of the Fourteenth Amendment," *Lane*, 541 U.S. at 522–23, 524, including the right to parent, *id.* (citing *Skinner*, 316 U.S. at 541). The application of the ADA to this matter and context was intended by Congress, and is plainly encompassed by the Act's terms.

B. Reunification Services Provided By ACS Are Covered By the ADA and Must Ensure Nondiscrimination and Provide Reasonable Accommodations.

Title II prohibits discrimination in the "services, programs, or activities of a public entity," which is defined as including "any State or local government." 42 U.S.C. §§ 12131(1), 12132. Title II is recognized for its extraordinary breadth, *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211–12 (1998) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)) (the fact that the ADA "can be applied in situations not expressly anticipated by Congress […] demonstrates [its] breadth." (internal quotations omitted)), and has been described in several circuits as covering "anything a public entity does." *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir.2002) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001)); *Yeskey v. Comm. of Pa. Dep't of Corr.*, 118 F.3d 168, 171 (3d Cir.1997), *aff'd sub nom Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998); *see also Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir.1998) (finding that "the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does"); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44–45 (2d Cir. 1997), *recognized as superseded on other grounds by Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001) ("services, programs, or activities" includes the normal functions of government entities).

Under these standards, state and local reunification services such as those provided by ACS are obviously "services, programs, or activities" covered by Title II. *See In re Terry*, 610 N.W.2d 563, 570 (Mich. Ct. App. 2000) (parental reunification services and programs are "services, programs, or activities" which "must comply with [Title II of] the ADA"); *Saunders v. Horn*, 960 F. Supp. 893, 899 (E.D. Pa. 1997) ("the management of child protection services [. . . is] routinely understood to be covered by the [. . .] ADA") (citing *Eric L. v. Bird*, 848 F.Supp. 303 (D.N.H.1994)); *People In Interest of C.Z.*, 360 P.3d 228, 234 (Colo. App. 2015) (Title II of the ADA applies to reunification services); *Lucy J. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 244 P.3d 1099, 1116 (Alaska 2010) ("reunification services provided by the state are services within the contemplation of Title II") (quoting *C.W. v. State*, 23 P.3d 52, 55 (Alaska 2001)) (internal quotations and alteration omitted).

As covered "programs, services, or activities," reunification services must comply with the substantive standards of Title II. Under Title II, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A "qualified individual with a disability" is a person with a disability who "meets the essential eligibility requirements for the receipt of services or the

participation in programs or activities provided by a public entity," with or without reasonable accommodations. 42 U.S.C. § 12131(2). Accordingly, public entities must "make reasonable modifications in policies, practices, or procedures" that are "necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7)(i). Such reasonable modifications must provide "meaningful access" to the public entity's program or services, *McElwee v. Cty. of Orange*, 700 F.3d 635, 641 (2d Cir. 2012) (quoting *Henrietta D. v. Bloomberg*, 331 F.3d 261, 282 (2d Cir. 2003)), provided that they neither "impose an undue hardship on a program's operation" nor "fundamentally alter the nature of the service, program, or activity." *Id*. (citing *Powell v. Nat'l Bd. of Med. Examiners*, 364 F.3d 79, 88 (2d Cir. 2004), *opinion corrected*, 511 F.3d 238 (2d Cir. 2004)). Public entities are also prohibited from "utiliz[ing] criteria or methods of administration" which "have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability" or "have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities." 28 C.F.R. § 35.130(b)(3)(i)-(ii). As a result, ACS has an affirmative duty to provide reasonable modifications necessary to avoid administering its reunification programs in ways that discriminate against people

with disabilities or would defeat or impair the accomplishment of its objective: facilitating parental reunification.

Relevant here, ACS cannot be heard to complain that compliance is too unwieldy or difficult. Rather, there is a body of regulatory authority and guidance documents that can guide and assist child protection service agencies in implementing the nondiscrimination and reasonable modification requirements of Title II of the ADA (and family courts in assessing compliance). *See* 28 C.F.R. §§ 35.101-190; U.S. Dep't of Health and Human Services and U.S. Department of Justice, *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* (August 2015); National Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and their Children* (2012).

Using these resources and the standards of Title II, child protection services agencies such as ACS can ensure that a parenting class offered to a parent with a disability is "as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others," 28 C.F.R. § 35.130(b)(1)(iii), and can assess whether reasonable modifications are "necessary to provide . . . aids, benefits, or services that are as effective as those provided to others," 28 C.F.R. § 35.130(b)(1)(iv). Such agencies

can consider whether any proposed modifications might impose an undue hardship on ACS or fundamentally alter the nature of ACS's reunification services. 28 C.F.R. § 35.130(b)(7)(i); *McElwee*, 700 F.3d at 641. Similarly, consistent with these standards, New York state courts can assess whether agencies have complied with federal laws and, if they have not, can deem them not to have made "reasonable efforts." Here, compliance with the ADA would have assisted Stephanie L. in her reunification efforts, plausibly making the difference,[15] and the lower courts erred in finding "reasonable efforts."

C. Fully Incorporating the ADA into the "Reasonable Efforts" Standard Protects the Due Process Rights of Parents with Disabilities and Furthers New York's Policy in Favor of Reunification.

By requiring ACS to comply with its obligations under the ADA in order to demonstrate reasonable efforts at reunification for purposes of Article 10, New York courts can safeguard the important due process right to parent that the ADA was designed to protect. As one family court observed, the question of whether or not a child protection agency provides parents with meaningful assistance "'may have a profound and practical effect on'" perceived parental fitness "thereby setting the stage for future termination of parental rights." *In re Jaime S.*, 9 Misc. 3d 460, 463–64 (Monroe Cty. Fam. Ct. 2005) (quoting *Matter of Sheila G.*, 61

[15] *See Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995) ("It is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits.").

N.Y.2d 368, 382 (1984) and citing N.Y. Social Services Law § 384–b(7)). Holding that reasonable efforts have not been made where a child protection agency has failed to comply with its ADA obligations incentivizes compliance. Ensuring that parents with disabilities who *can* successfully parent with the help of appropriate reunification services have meaningful access to such services also furthers New York's policy in favor of reuniting children with their parents when feasible. *See Matter of Marino S.*, 100 N.Y.2d 361, 372 (2003).

Other states have determined that providing parents known to have disabilities with reunification services compliant with Title II of the ADA is a prerequisite for a finding that child protection agencies have made reasonable efforts at reunification. *In re Terry*, 610 N.W.2d 563, 570 (Mich. Ct. App. 2000) ("if [a child protection agency] fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family"); *In re Hicks/Brown*, 500 893 N.W.2d 637, 639–40 (Mich. 2017) (same); *Lucy J. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 244 P.3d 1099, 1116 (Alaska 2010) (same); *see also In re Adoption/Guardianship Nos. J9610436 & J9711031*, 796 A.2d 778, 797–98 (Md. 2002) (while not explicitly relying upon the ADA, holding that reasonable efforts were not made, because the state agency had failed to "offer more fully tailored services to a parent it deemed mentally disabled"). This Court

should adopt the approach of those jurisdictions.

Similarly, the Surrogate's Court in New York considered the state's responsibilities under the ADA, including the ADA's community integration mandate as interpreted by *Olmstead*, in setting forth the standard for "best interest" in guardianship proceedings under Article 17–A. *Matter of Michelle M.*, 52 Misc. 3d 1211(A), 2016 N.Y. Slip. Op. 51114(U), *5 (Sur. Ct. Kings Cty. 2016) ("understanding [. . .] what an individual can or cannot do in managing her daily affairs, and assessing what is the least restrictive tool available to address that individual's specific area of need, is a necessary inquiry in determining what is in her 'best interest'" for purposes of guardianship proceedings). Incorporating the state's ADA responsibilities into the standards for guardianship proceedings furthered the state's policy in favor of ensuring that persons with intellectual and developmental disabilities can "function independently and make […] their own decisions […] to the fullest extent possible." *Id.* This Court should likewise consider the state's obligations under the ADA in interpreting the requirements of state law in family court proceedings.

In this matter, had the standards of the ADA been applied by ACS and enforced by the lower courts, Stephanie L. would have had a fair chance at succeeding in reunification, and the policies of the state of New York would have been advanced. This Court should take the opportunity presented here to confirm

that the ADA standards are fully incorporated into the "reasonable efforts" analysis.

D. Stephanie L. Was Denied Reasonable Accommodations that Would Have Plausibly Enabler Her to Succeed with Reunification Services; the Lower Courts Should Not Have Found that ACS Made "Reasonable Efforts."

As set out in Appellant's briefs, Stephanie L. was denied basic reasonable accommodations that would have plausibly enabled her to succeed with reunification services. The requested accommodations which were not provided included: referring Stephanie to service providers with staff and programming appropriate for parents with intellectual disabilities; connecting Stephanie to services offered by the Office for People with Developmental Disabilities (OPWDD); keeping Stephanie's attorneys informed about out-of-court conferences, so that they could support her in preparation and attendance; participating in a support system that included Stephanie's mother-in-law as a liaison between ACS and Stephanie, as Stephanie saw her mother-in-law nearly every day and relied upon her for support; and connecting Stephanie with a Medicaid coordinator to assist her in enrolling in certain services.

These basic modifications, essentially a form of modified case management, are both reasonable and feasible for ACS to implement. And such accommodations have long been recognized by the federal courts as required under the ADA. For example, in 2003, the Second Circuit affirmed a lower court injunction requiring a

New York City agency to ensure access to certain public benefits and services for eligible persons with HIV illness or AIDS through "intensive case management," among other accommodations, reasoning as follows:

> We have specifically embraced the view that the Rehabilitation Act requires affirmative accommodations to ensure that facially neutral rules do not in practice discriminate against individuals with disabilities. … [T]he District Court found, and the defendants do not dispute, that the plaintiffs are sharply limited in their ability to "travel[ ], stand[ ] in line, attend[ ] scheduled appointments, complet[e] paper work, and otherwise negotiat[e] medical and social service bureaucracies." … Title II [of the ADA] seeks principally to ensure that disabilities do not prevent access to public services where the disabilities can reasonably be accommodated. … The defendants in this case have not … alleged that the proposed accommodation would cause them or their programs undue hardship. … Accordingly, we affirm the injunction as a reasonable accommodative measure.

Henrietta D. v. Bloomberg, 331 F.3d 261, 274–75, 278, 279, 281, 282 (2d Cir. 2003) (rejecting defendants' argument that their own bureaucracy is so defective that even healthy applicants cannot "negotiate" it, such that there is no prohibited discrimination).

Here, the Court should incorporate the standards of the ADA into "reasonable efforts" for individuals with disabilities such as Stephanie L. Such incorporation will help bring justice and equality to New York's disabled parents – and will avoid the need for ancillary, multi-year federal court litigation.

CONCLUSION

For the forgoing reasons, the amici urge this Court to reverse the judgment of the Appellate Division and remand the case for further proceedings consistent

with the holding that "reasonable efforts" incorporates the nondiscrimination and reasonable accommodations requirements of the ADA, and that non-compliance with the ADA forecloses a finding of reasonable efforts at reunification for purposes of Article 10.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH 22 NYCRR § 500.1 and 500.13 (c)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of 500.13 (c)(1) (no more than 7,000 words for an amicus brief) because the total word count for all printed text in the body of the brief, exclusive of the corporate disclosure statement; the table of contents, the table of cases and authorities required by subsection (a) of this section is 6603.

2. This brief complies with the typeface requirements of and the type style requirements of 500.1(j)(1) because the body of this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in l4-point Times New Roman and the footnotes are printed in 12-point Times New Roman.

Dated: July 31, 2018

_____
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