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Supreme Court No. 97374-1  
(COA No. 50032-9-II)

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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State of Washington,

Respondent,

v.

Karen Conway,

Appellant.

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**AMICUS CURIAE BRIEF OF DISABILITY RIGHTS  
WASHINGTON IN SUPPORT OF APPELLANT'S  
PETITION FOR REVIEW**

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## **I. INTERESTS AND IDENTITY OF AMICUS CURIAE**

Amicus Disability Rights Washington is the organization designated by federal law and the Governor of Washington to provide protection and advocacy services to people in Washington with mental, developmental, physical, and sensory disabilities. Disability Rights Washington has a Congressional mandate to advocate on behalf of people with disabilities through the provision of a full range of legal assistance including legal representation, regulatory and legislative advocacy, and education and training.

Because of the high percentage of people with disabilities involved in the criminal justice system, Disability Rights Washington created a program dedicated to protecting the rights of people with disabilities experiencing incarceration and reentering society. This program is called AVID, which stands for Amplifying Voices of Inmates with Disabilities. AVID has extensive experience representing the interests of people with a variety of disabilities and fields hundreds of calls and letters annually from individuals with legal problems related to their disabilities, such as the Americans with Disabilities Act's application to court processes and barriers to receiving Social Security benefits upon release from prison.

## **II. STATEMENT OF THE CASE**

Amicus Disability Rights Washington joins generally in Appellant's Statement of the Case.

## **III. ARGUMENT**

Disability Rights Washington agrees that this Court should accept review for the reasons stated by Appellant, but writes to specifically support review under RAP 13.4(b)(4) because this case involves an issue of substantial public interest concerning individuals with disabilities. First, Disability Rights Washington explains that the Americans with Disabilities Act (ADA) was passed to combat discrimination against people with disabilities, including discrimination in state court programs and processes like those at issue here. Second, Disability Rights Washington points out that people with disabilities already face more barriers than their non-disabled peers in prison and upon release and reentry into society. Third, Disability Rights Washington argues that Washington's Legal Financial Obligation (LFO) statutory scheme preventing individuals whose only income is Social Security benefits from vacating their criminal records due to inability to pay court-imposed mandatory LFOs disparately impacts people with disabilities in violation of the ADA.

**A. THE ADA WAS PASSED TO COMBAT RAMPANT DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES, INCLUDING DISCRIMINATION IN STATE COURT PROCESSES AND PROGRAMS**

In passing the ADA, Congress found that “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society....” Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 329 (1990). President George H.W. Bush proclaimed that the passage of the ADA was another showing that Americans will not tolerate discrimination, and that the “shameful wall of exclusion” of people with disabilities would “finally come tumbling down.” “Remarks of President George Bush at the Signing of the Americans with Disabilities Act,” [http://www.eeoc.gov/eeoc/history/35th/videos/ada\\_signing\\_text.html](http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html) (last visited August 28, 2019).

Title II of the ADA prohibits a public entity from discriminating against a qualified individual with a disability, or excluding such an individual from participation in, or denying the individual the benefits of, any of the entity’s services, programs, or activities. 42 U.S.C. § 12132. State court processes and programs are covered by Title II. *See, e.g.,*

*Tennessee v. Lane*, 541 U.S. 509, 533, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004) (stating Title II creates an “affirmative obligation to accommodate persons with disabilities in the administration of justice”); *Duvall v. Kitsap*, 260 F.3d 1124, 1136 (9th Cir. 2001) (applying Title II to state court proceeding). This Court acknowledged that people with disabilities are entitled to equal access to courts under the ADA when it adopted General Rule 33, the court rule that outlines a process for accommodating people with disabilities in court proceedings. *See* GR 33.

Throughout American history, people with disabilities have been the subjects of “pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.” *Lane*, 541 U.S. at 524. State entities have had a long history of depriving people with disabilities basic liberties like the ability to vote, marry, or serve as jurors. *See id.* States have also treated individuals with disabilities unconstitutionally through unjustified commitment, abuse and neglect in state mental health hospitals, and irrational discrimination in zoning decisions. *See id.* at 524-25 (citing *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972); *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)). It is in this context of historical discrimination against people



with disabilities that Ms. Conway's case and Washington's LFO scheme must be examined.

**B. WASHINGTON'S CRIMINAL JUSTICE SYSTEM  
DISPROPORTIONATELY IMPACTS PEOPLE WITH  
DISABILITIES**

People with disabilities are overrepresented in our country's criminal justice system. *See* Jennifer Bronson et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Special Report: Disabilities Among Prison and Jail Inmates, 2011-12* 1 (2015), <http://www.bjs.gov/content/pub/pdf/dpji1112.pdf>. National surveys show that approximately 32 percent of inmates in state prisons report having at least one disability. *Id.* Jail inmates are more than four times more likely than the general population to report having at least one disability. *Id.*

While incarceration is hard for everyone, it is more challenging for inmates with disabilities. *See* Rachael SeEVERS, Disability Rights Washington, *Making Hard Time Harder: Programmatic Accommodations for Inmates with Disabilities Under the Americans with Disabilities Act 4* (2016), <http://avidprisonproject.org/Making-Hard-Time-Harder/>. Research shows that inmates with disabilities are sentenced to an average of fifteen more months in prison as compared to other inmates with similar criminal convictions. Paula M. Ditton, Bureau of Justice Statistics, U.S. Dep't of Justice, *Special Report: Mental Health and Treatment of Inmates and*

*Probationers* 8 (1999), <http://www.bjs.gov/content/pub/pdf/mhtip.pdf>.

The time that inmates with disabilities serve is also harder, with more sanctions imposed and less access to positive programming than other inmates. Sasha Abramsky & Jamie Fellner, Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* 59-60 (2003), <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf> (noting that in some states, inmates with mental illness account for 41 percent of institutional infractions, while constituting only 19 percent of the prison population).

Upon reentry to society, a criminal record exacerbates the barriers people with disabilities already have to accessing employment, housing, and healthcare. *See* Rebecca Vallas, Center for American Progress, *Disabled Behind Bars: The Mass Incarceration of People With Disabilities in America's Jails and Prisons* 14-15 (2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/07/18000151/2CriminalJusticeDisability-report.pdf>. Most, if not all, jails and prisons in Washington State do not have a pre-release agreement with the Social Security Administration, so people who have received Social Security benefits in the past may face lengthy delays in benefit reinstatement once they are released. *See id.* at 15. This delay in getting financial assistance leaves people with disabilities in a very

precarious situation that may lead to an increased rate of recidivism. *See id.* The criminal justice system's disparate impact on Washingtonians with disabilities continues long after a criminal sentence is served, as is explained below.

**C. THE ADA PROHIBITS DISCRIMINATORY STATE PROCESSES THAT SUBJECT PEOPLE TO HARSHER CRIMINAL PENALTIES JUST BECAUSE THEY HAVE DISABILITIES**

A state's facially neutral law that disparately affects people with disabilities who are trying to access state programs and services violates Title II of the ADA. *See, e.g., Crowder v. Kitagawa*, 81 F.3d 1480, 1483-84 (9th Cir. 1996) (holding Hawaii's administrative rule that required dogs coming from any state or country that was not considered rabies-free to be quarantined for 120 days was discriminatory under Title II of the ADA because it denied visitors to the state who use guide dogs meaningful access to state programs and services). Washington's LFO scheme discriminates against people with disabilities whose sole income consists of Social Security benefits. Because a court cannot attach Social Security benefits to pay for LFOs, those LFOs will not be paid, which means the court cannot issue a certificate of discharge. *See* 42 U.S.C. § 407(a); RCW 9.94A.640(1); *City of Richland v. Wakefield*, 186 Wn.2d 596, 609 (2016). Without a certificate of discharge, an individual will not be eligible to

vacate a conviction. *See* RCW 9.94A.637(5). Therefore, Washington's LFO scheme deprives individuals with disabilities whose sole income is from Social Security benefits of a benefit that nondisabled people may enjoy, vacation of a conviction, and is in violation of Title II of the ADA. To be further punished and marked for life with a criminal conviction because you have a disability that is so severe as to qualify for Social Security benefits is discriminatory.

In this case, Ms. Conway is facing criminal justice system barriers solely because she has a disability and receives benefits from the Social Security Administration, benefits she has received for nearly 30 years. *See State v. Conway*, 8 Wn. App. 538, 542 (2019). She receives these benefits because she has a disability that results in her inability to engage in substantial gainful activity and that disability is expected to last for a continuous period of not less than 12 months. *See* 42 U.S.C. § 423(d)(1)(A); 42 U.S.C. § 1382c(a)(3)(A). While a non-disabled person in Ms. Conway's position could eventually be eligible to vacate her conviction after payment of LFOs and receiving a certificate of discharge, the same remedy is not available to Ms. Conway. This is discriminatory under the ADA.


The State's support of indefinite periodic hearings about Ms. Conway's ability to pay her LFOs is also discriminatory under the ADA.

Disability Rights Washington agrees with the dissent in *State v. Catling*: “Individuals with lifelong disabilities that prevent them from working may never be able to pay off their LFOs, resulting in a lifetime of hearings about ability to pay LFOs and the negative consequences of having a criminal record.” *State v. Catling*, 193 Wn.2d 252, 269 (2019) (González, J., dissenting); *see also State v. Catling*, 2 Wn. App. 2d 819, 845 (Fearing, J., dissenting) (stating that the defendant in that case “abides trapped in an enduring legal process and he suffers other coercive consequences”). In effect, the State will continuously hold a lien on Conway’s civil rights and encumber her Social Security disability benefits until she pays all of her legal financial obligations. *See Catling*, 2 Wn. App. 2d at 845 (Fearing J., dissenting). This disparate impact of being subject to indefinite hearings is based on disability and is in violation of Title II of the ADA. For these reasons, this Court should accept review of Ms. Conway’s case.

#### IV. CONCLUSION

Amicus Disability Rights Washington respectfully asks this Court to accept review of this case.

Respectfully submitted this 28<sup>th</sup> day of August, 2019.

  
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Heather McKimmie, WSBA #36730  
Director of AVID Program  
Disability Rights Washington

# DISABILITY RIGHTS WASHINGTON

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## Transmittal Information

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