DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: October 18, 2022 1:32 PM FILING ID: E122527E3B254 CASE NUMBER: 2022CV32599
Plaintiffs: SPENCER KONTNIK, and COLORADO CROSS-DISABLITY COALITION, a Colorado Corporation, **v.** **Defendant:** DENVER COUNTY COURT.	▲ COURT USE ONLY ▲
Attorneys for the City and County of Denver: KRISTIN M. BRONSON, Denver City Attorney Michele A. Horn, Atty. No. 32599* Amanda K. MacDonald, Atty. No. 41094* Assistant City Attorneys Municipal Operations Section 201 W. Colfax Avenue, Dept. 1207 Denver, CO 80202-5332 Telephone: 720.913.3275 E-mail: michele.horn@denvergov.org; amanda.macdonald@denvergov.org *Counsel of record	Case Number: 2022CV32599 Courtroom: 466

MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5)

Defendant Denver County Court, through undersigned counsel, hereby moves for dismissal of Plaintiffs' Complaint pursuant to C.R.C.P. 12(b)(5) and, in support, states as follows:

CERTIFICATE OF CONFERRAL PURSUANT TO C.R.C.P. 121, § 1-15(8)

On October 5, 2022, defense counsel conferred with opposing counsel for over an hour regarding this motion and the reasons therefore. On October 13, 2022, Plaintiffs' counsel delivered a letter to undersigned counsel characterizing this motion as "substantially frivolous, substantially groundless and substantially vexatious." Undersigned counsel believes that any further conferral regarding this motion would not be productive or result in a resolution of the arguments presented below.

INTRODUCTION

In this lawsuit, Plaintiffs, Spencer Kontnik and the Colorado Cross-Disability Coalition (hereinafter jointly referred to as "Mr. Kontnik") seek to hold the Denver County Court ("DCC") civilly liable for a discretionary judicial ruling made by DCC Judge Judith A. Smith as she was selecting a jury for a criminal case.

Pursuant to the allegations in the Complaint, Plaintiff, Spencer Kontnik, was summoned for jury service by the DCC with a report date of July 15, 2021. [Amended Complaint, ¶ 45]. Mr. Kontnik, who suffers from a profound hearing loss, was provided with an interpreter which accommodated his hearing loss and allowed him to participate in the jury selection process; Mr. Kontnik was chosen as a potential juror for a criminal case to be tried before Judge Judith A. Smith. [*Id*., ¶¶ 47-49]. The case was *People v. Aadan*, 20M2897 [*Id*., ¶ 60]. Prior to Mr. Kontnik's entering the courtroom to begin the juror *voir dire* process, Judge Smith was presented with a stipulated motion by the parties requesting that Mr. Kontnik be excused from jury service on the grounds that interpretation services would slow down the one day trial, jury service would be "tough for him" and that Mr. Kontnik's service on the jury would require the Court to sit an alternate juror in the event that the interpretation service provided to accommodate Mr. Kontnik's hearing loss failed. [*Id*. ¶ 87, Ex.1, pp. 6, 24][1]. After leaving the bench for a period of time to research the issue, Judge Smith granted the stipulated motion and Mr. Kontnik was excused from jury service. [*Id*., pp. 6-7, 9].

Mr. Kontnik filed a discrimination complaint with the Colorado Civil Rights Division

[1] Plaintiffs chose not to number the individual pages of their Exhibit 1. The page numbers cited in this Motion consider the first page following the title page (bearing only the words "Plaintiffs Exhibit 1") to be page 1 of the Exhibit and the remaining pages are treated as if they were numbered sequentially thereafter.

("CCRD") against the Denver District Attorney's Office, the Office of the Colorado State Public Defender, and the DCC. [Amended Complaint, ¶ 119]. The CCRD issued a Request for Information to the DCC, the response to which was submitted by Judge Theresa Spahn, who was the chief judge for DCC at the time. [*Id*. ¶ 123, Ex. 1, pp. 2-3]. Mr. Kontnik later requested that CCRD issue a Notice of Right to Sue, which terminated the investigation and ceased the CCRD's administrative jurisdiction. [*Id*., ¶ 143]. Plaintiffs then filed the subject Complaint in Denver District Court.

Although the DCC has a policy to accommodate the individual disabilities of potential jurors [*Id*., Ex. 1, pp. 10-18] and although Mr. Kontnik's hearing loss was accommodated by the Court's provision of an interpreter for his use, he nonetheless asserts that he has been discriminated against by the DCC in violation of the Colorado Anti-Discrimination Act ("CADA"). Mr. Kontnik complains that Judge Smith improperly granted a stipulated motion of the parties excusing him from jury service and failed to strictly follow certain procedural rules which, he asserts, required Judge Smith to personally interview him before granting the motion. [*Id*., ¶ 81]. However, as more fully discussed below, the subject Complaint must be dismissed for failure to state a claim upon which relief can be given. First and foremost, DCC accommodated Mr. Kontnik's hearing loss by providing him with an interpreter which allowed him to take part in the jury selection process. The act which forms the basis of his complaint is a discretionary ruling by Judge Smith for which both she and DCC have immunity from suit. Furthermore, CADA does not require strict adherence to procedural rules related to jury selection and the subject rules do not provide for civil liability if they are not complied with. Finally, Mr. Kontnik cannot establish that Judge Smith should have prioritized his statutory rights under CADA over the criminal defendant's constitutional rights to a jury of his choice.

LEGAL STANDARD

Under C.R.C.P. 12(b)(5), a complaint may be dismissed if the substantive law does not support the claims asserted, or if the plaintiff's factual allegations do not, as a matter of law, support a claim for relief. *Warne v. Hall*, 373 P.3d 588, 589-90 (Colo. 2016). A reviewing court must accept all allegations of material fact as true and view the allegations in the light most favorable to the claimant. *Asphalt Specialties, Co. v. City of Commerce City*, 218 P.3d 741 (Colo. App. 2009). However, the claim for relief must satisfy the plausibility standards under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Warne*, 373 P.3d at 589-90. That is, a complaint must contain facts that, when assumed to be true, "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. A claim meets this threshold "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

ARGUMENT

A. Judicial Immunity is an Absolute Bar to Mr. Kontnik's Cause of Action

Judicial immunity is an absolute bar to Mr. Kontnik's cause of action, despite his attempts to circumvent immunity by couching the allegations of the Complaint against the DCC, not Judge Smith individually. The U.S. Supreme Court first recognized the concept of judicial immunity in *Bradley v. Fisher*, 80 U.S. 335, 347 (1872):

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.

The Colorado Supreme Court has also recognized absolute immunity for judicial actions. *See, e.g., State v. Mason*, 724 P.2d 1289, 1290-91 (1986) ("Judges traditionally have been immune from suit for their judicial acts because of the importance of an independent judiciary in which a judge may act without apprehension of the personal consequences"). As with other types of immunity, judicial immunity is an immunity from suit, not just immunity against damages. *Mireles v. Waco*, 502 U.S. 9, 11 (1991).

Judicial immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in their judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *Id*. at 11-12. Mr. Kontnik does not, and cannot, claim that Judge Smith's acceptance of the stipulated motion to excuse him from the jury was not an action in her judicial capacity or in the complete absence of all jurisdiction. Accordingly, Judge Smith is entitled to absolute immunity for exercise of her judicial discretion while presiding over a criminal jury trial. Knowing immunity clearly applies to Judge Smith and that it would be fatal to his cause of action, Mr. Kontnik tries to circumvent immunity by framing his claims against the DCC instead of Judge Smith. [*See, e.g.*, Amended Complaint, ¶ 171]. The strained attempts to avoid immunity fail as a matter of law based upon the Colorado Supreme Court's holding in *State v. Mason*, 724 P.2d 1289 (1986).

In *Mason*, a wife brought a wrongful death action against the individual members of the parole board, the parole board as an entity, and the State of Colorado after her husband was murdered by an inmate released by the parole board. The defendants moved to dismiss based on official immunity. *Mason*, 724 P.2d at 1290. The district court granted the motion to dismiss,

ruling that the individual members were immune for their discretionary acts, "and that the state and the parole board could not 'be made to answer for actions for which the individual employees were granted immunity.'" *Id*.

The court of appeals agreed that the individual board members were entitled to immunity; however, the court ruled that the individuals' immunity did not extend to the parole board as an entity or to the State, finding that official immunity was only applicable to individuals. *Id*. The Colorado Supreme Court reversed, finding that the "policies that entitle the individual members of the parole board to quasi-judicial immunity also entitle the parole board as an entity and the state of Colorado to quasi-judicial immunity." *Id*. at 1293. As part of its rationale, the Court stated:

> If the parole board and the state of Colorado are subject to suit when the individual members of the parole board are immune, the parole board's adjudicatory process will be hampered. Whether the State of Colorado, the parole board as an entity, or the individual members of the parole board are sued, the members face the prospect of devoting time to being deposed and testifying in court for each grant, refusal, or revocation of parole, leaving parole board members less time to perform the difficult task of determining when a person is ready for release from institutional custody and whether release is compatible with the welfare of society.

Id. at 1292.

The same rationale applies equally in this case. If plaintiffs could sidestep a judicial immunity defense simply by naming a court or governmental entity as defendant, as opposed to the individual judge, the entire purpose of judicial immunity would be destroyed. Judges would be forced to answer discovery, be deposed, and testify as witnesses in every case wherein a participant felt wronged by a judge's decision in a case – simply because the litigant sues the overarching court or governmental entity, not the individual judge. If immunity could so easily be avoided, Judge Smith and every other judicial officer could be required to devote a substantial

portion of their time to defending civil litigation filed against the courts for which they work, instead of focusing on the adjudication of the cases in their courtrooms. Such a result would crumble our judicial system and "the protection essential to judicial independence would be entirely swept away." *Bradley*, 80 U.S. at 348.

Judge Smith's acceptance of the stipulated motion to excuse Mr. Kontnik from the jury was a judicial action within her jurisdiction, thus entitling Judge Smith to immunity from suit. The DCC, as the governmental entity employing Judge Smith, cannot be made to answer for the discretionary judicial ruling of Judge Smith, which is subject to immunity. *See Mason*, 724 P.2d at 1290. Mr. Kontnik has not pled facts sufficient to overcome this immunity

B. Mr. Kontnik has not Alleged that DCC is Legally Responsible for Judge Smith's Discretionary Judicial Ruling

Aside from judicial immunity, Mr. Kontnik has not pled, nor can he establish, that the DCC has any control over or responsibility for a discretionary ruling of a sitting judge. As pled, DCC did everything required to accommodate Mr. Kontnik's participation in the jury selection process, i.e., it provided an interpreter who was available to Mr. Kontnik and whom he utilized to take part in the process. The act of which Mr. Kontnik complains, and which serves as the basis for his allegation of discrimination, is that Judge Smith granted a stipulated motion which excused him from jury service. There are no allegations in the Complaint that the DCC could possibly be in control of, or responsible for, this discretionary judicial ruling. Judges are, by design and purpose, independent to make their own decisions as to how a trial proceeds and this includes decisions regarding who will serve on the jury. Mr. Kontnik has not pled, and cannot plausibly plead, that DCC bears any legal responsibility for, or controls in any way, a decision made by a sitting judge as to whether a particular motion regarding jury service should be

granted.

Courts who have considered discrimination allegations related to jury service under the ADA and associated state statutes consistently have found that a court system violates the law only when it has a policy or structural design prohibition which would categorically exclude individuals with a disability from jury service. *See, e.g., Galloway v. Superior Court of District of Columbia*, 816 F. Supp. 12 (D.D.C. 1993) (court-wide policy of excluding blind individuals from jury service); *Trotman v. State*, 466 Md. 237, 264-65 (Md. App. 2019) (criminal case holding that while the ADA may prohibit a blanket determination that all individuals with a disability are incapable of serving on a jury, it does not prohibit a judge from dismissing a disabled juror on a case by case basis); *Crawford v. Hinds County Board of Supervisors*, 1 F.4th 371 (5th Cir. 2021) (finding that wheelchair bound individual may have standing to sue under ADA when architecture of courthouse twice physically prohibited his ability to serve on a jury).

The case propounded by Mr. Kontnik in his Complaint, *Cerrone v. People*, 900 P.2d 45 (1995), is of the same ilk. It concerned the categorical exclusion of hourly wage workers from a grand jury in violation of C.R.S. § 13-71-103. It did not find that, in a particular case, an hourly wage worker could not be excluded from the jury after there has been a joint stipulation dismissing him or her from the jury nor did it hold that the court system could have been found civilly liable for the presiding judge's granting of such a stipulation.

In none of these cases was a discretionary decision of a trial judge during jury selection found to be the basis of an ADA-type claim against the court system. Rather, liability was based on factors under the control of the court system, i.e., generalized policies or the physical structure of the courthouse in question. Furthermore, in none of these cases was a prospective juror who was provided an accommodation but thereafter excused from jury service found to be

entitled to relief under the ADA or comparable state statutes. In the instant case, Mr. Kontnik admits that his hearing loss was accommodated. DCC has a policy to accommodate disabled individuals and, pursuant to that policy, provided him with an interpreter which allowed him to participate in the jury selection process. [Amended Complaint, ¶ 47, Ex. 1, pp. 11-19].

Mr. Kontnik attempts to circumvent this obvious problem with his complaint by characterizing DCC's response to the CCRD investigation as a "ratification" of Judge Smith's actions. [*Id*, ¶¶ 123, 170]. Inherent in Mr. Kontnik's assertions regarding ratification is the admission that, without ratification, DCC would not be liable for the conduct; if the DCC were already liable there would be no need to proceed under a ratification theory of liability. In agent/principal terms, which is the relationship to which the ratification doctrine generally applies, ratification is defined as "the adoption and affirmance, either expressly or by implication, by one person of the prior act of another which did not bind him but which was done or professed to be done on his account, whereby the act is given effect as though originally authorized." *Hayutin v. Gibbons*, 338 P.2d 1032, 1036 (Colo. 1959). While Chief Judge Spahn, on behalf of DCC, did respond to the administrative inquiry and explained the circumstances of the underlying incident, there is no indication that, in doing so, Judge Spahn was adopting or affirming Judge Smith's actions on behalf of DCC, or accepting civil liability for such actions, as would be necessary for ratification.

Further, there is no case law supporting Mr. Kontnik's assertion that an entity's response to an administrative inquiry amounts to a ratification of the underlying behavior being investigated. Importantly, the negative implications of finding Judge Spahn's response to the CCRD to be ratification would be profound. If an entity could be found liable under a ratification theory merely by responding to an administrative inquiry related to an incident which may, or

may not, have been contrary to law, no entity would ever respond to such an inquiry. Applying a legal ratification theory to a response to an administrative inquiry would give every entity justification to avoid cooperating with an administrative investigation and hamstring the administrative investigation process as a result. Furthermore, if responding to an administrative inquiry divested a party of the defense of official immunity in a civil action, as Mr. Kontnik attempts, the result would be a complete abrogation of the doctrine of immunity that has been in place for 150 years and would leave parties with an impossible decision: (1) respond to an administrative inquiry, but lose immunity to civil suit; or (2) ignore the administrative inquiry.

As demonstrated, DCC accommodated Mr. Kontnik's hearing loss. The accommodation allowed him to participate in jury service with all other prospective jurors. The action of which Mr. Kontnik complains is not subject to the control of the DCC so as to make it liable for a violation of the CADA. Nor did DCC ratify Judge Smith's decision by responding to the CCRD administrative inquiry. Mr. Kontnik has not plausibly pled, nor can he establish, that the DCC has any control or authority over the individual, discretionary actions of a particular judge engaging in the jury selection process and, accordingly, cannot establish liability under CADA.

C. Mr. Kontnik's Reading of CADA is Overbroad

CADA aims to protect the rights of a disabled individual to participate in programs provided by a public entity. C.R.S. § 24-34-802(1)(b). As applied to jury service, CADA would guarantee a disabled individual the right to participate in the jury process. As admitted, by providing Mr. Kontnik with an interpreter, DCC accommodated Mr. Kontnik's hearing loss and allowed him to participate in the jury selection process. [Amended Complaint, ¶ 3]. Accordingly, the provisions of CADA have been met as access was clearly provided.

Mr. Kontnik's assertions of discrimination hinge on the improper insertion of certain jury

selection procedures into the requirements of CADA. Namely, Mr. Kontnik would have this Court read C.R.S. §§ 13-71-104 and 13-71-105 as mandatory definitions of what it means to provide access under CADA. There is no legal basis for this reading.

C.R.S. § 13-71-104(c) provides that, before a potential juror with a disability is dismissed, the responsible judge should "interview the person to determine the reasonable accommodations, if any . . . the court may make available to permit the person to perform the duties of juror." Judge Smith did not interview Mr. Kontnik prior to granting the joint motion excusing him from jury service. However, per the clear wording of the statute, the reason for the interview would have been to determine whether reasonable accommodations were available. Here, it was readily apparent that Mr. Kontnik's hearing loss had already been accommodated because it was the interpreter setting up her interpreting equipment in the courtroom that triggered the parties' concern and caused them to bring their joint stipulation to the judge. [Amended Complaint, Ex. 1, pp. 5-6]. The concern was not whether accommodation was available, but whether the provided accommodation would slow down the one-day jury trial. [*Id*.]. As Mr. Kontnik's hearing loss had already been accommodated, there was no need to interview him to determine if an accommodation was available. Furthermore, although the statute states that the judge "shall" interview the juror, interpreting case law has read the interview process to be optimal, but not mandatory. *People v. Pineda*, 40 P.3d 60, 63 (Colo. App. 2001) (finding "better practice" is to interview pursuant to statute but finding no error in court's failure to interview). Furthermore, when a juror with a disability has been dismissed from a jury because of the collateral effects of an accommodation on trial proceedings, courts have found no error related to the dismissal under C.R.S. § 13-71-104. *See People v. Pineda*, 40 P.3d 60 (Colo. App. 2001) (while specifically not addressing CADA, finding no error when, on motion from the

prosecutor, judge dismissed juror with attention deficit disorder from jury service even though disability could have been accommodated by allowing juror to take notes; presiding judge had already issued order prohibiting all jurors from taking notes).

As to C.R.S. § 13-71-105, it provides standards by which courts should evaluate an individual juror's request to be excused from jury service and makes no affirmative conditions under which a court must accept any particular juror for service.

As a general rule, procedural rules do not create substantive rights. *See, e.g., In re People ex rel. B.C.*, 981 P.2d 145, n. 4 (Colo. 1999) (rules of procedure do not "abridge, enlarge, nor modify the substantive rights of any litigants") (citation omitted). Neither C.R.S. § 13-71-104 nor § 13-71-105 have ever been found to provide any enforceable rights to a juror who has been excused from jury service. Indeed, neither statute has ever formed the basis of a civil case related to jury service and there is no indication that the Legislature intended such a use. Furthermore, there is no legal or statutory support for the proposition that either statute is to be made a part of or to be read in conjunction with CADA. Mr. Kontnik's attempts to frame Judge Smith's failure to interview him pursuant to C.R.S. § 13-71-104 as *de facto* indication of discrimination is, accordingly, completely without legal foundation. CADA requires accommodation in jury service and Mr. Kontnik was provided with accommodation. CADA does not mandate that all procedural rules surrounding the selection of a jury be strictly adhered to nor does it provide a civil remedy in instances where procedural rules may not have been strictly adhered to.

D. The Constitutional Rights of a Criminal Defendant Necessarily Outweigh the Statutory Rights of a Potential Juror

The joint motion of the parties that led to Mr. Kontnik's excusal is not characterized in the record as either a joint challenge for cause or a joint peremptory challenge. *See* C.R.Cr.P. 24

(recognizing only two types of jury challenges). If the stipulation is viewed as a joint peremptory challenge, neither party was required to give a reason for the motion and the presiding judge had no obligation to investigate the reasons behind the request absent a challenge or an indication that the motion was unconstitutional. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (party "ordinarily is entitled to exercise permitted peremptory challenges for any reason at all . . .") Notably, a peremptory challenge due to a juror's disability does not implicate the Constitution. *Donelson v. Fritz*, 70 P.3d 539, 544 (Colo. App. 2002) (constitutional prohibition against discrimination "does not apply to peremptory challenges to persons with disabilities") (collecting cases); *see also Board of Trustees v. University of Alabama v. Garrett*, 531 U.S. 356, 368 (2001) ("States are not required by the Fourteenth Amendment to make special accommodations for the disabled . . .").

If the stipulated motion is viewed as a request for excusal for cause, the motion implicated Mr. Aadan's constitutional rights, as he was the criminal defendant in the trial for which a jury was being chosen. A trial judge in a criminal case has the responsibility to protect the defendant's constitutional right to a fair trial. "The right to challenge jurors for cause stems from the defendant's right to due process and to a trial before a fair and impartial jury." *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000); *see also Carillo v. People*, 974 P.2d 478, 486 (Colo. 1999) (quoting *People v. Macrander,* 828 P.2d 234, 238 (Colo. 1992) ("[T]he right to challenge a juror for cause [is] an integral part of a fair trial").[2] Although there is an individual right not to

[2] On direct review by a court of appeal, Judge Smith's ruling granting a dismissal for cause would be reviewed only for abuse of discretion. *See People v. Jones*, 942 P.2d 1331, 1333 (Colo. App. 2014) ("Absent an abuse of discretion, a reviewing court will not disturb a trial court's decision concerning a prospective juror's ability to render satisfactory jury service when questions of the juror's ability to serve are raised because of a physical disability").

be the subject of a peremptory challenge for certain reasons, most notably race or sex, not only is this right limited to peremptory challenges, it has furthermore never been extended to peremptory challenges based on disability. *See Donelson v. Fritz, supra.* Accordingly, if Mr. Kontnik had any rights not to be excused from the subject jury for cause, those rights derive from statutory law and not constitutional law. Mr. Kontnik admits in his Complaint that he does not assert a constitutional violation, although he states that "there is no reason to do so." [Amended Complaint, ¶ 149]. In actuality, he has no legal basis to assert a constitutional claim. Instead, he asserts his rights derive from CADA.

When a trial judge is faced with a situation that implicates the conflicting constitutional rights of a criminal defendant and the statutory rights of a potential juror, the judge must necessarily prioritize the defendant's constitutional rights over the potential juror's statutory rights. *See People ex rel. Gallagher v. District Court*, 933 P.2d 583, 588 (Colo. 1997) (recognizing, in speedy trial context, that statutory right to speedy trial "must yield to protection of a defendant's constitutional rights"); *Delacruz v. People*, 393 P.3d 480, 486 (Colo. 2017) (same).

If Judge Smith were to have denied the stipulated motion, that ruling could have forced Mr. Aadan to utilize one of his peremptory challenges to remove Mr. Kontnik from the jury, which he was clearly entitled to do. In turn, forcing Mr. Aadan to utilize one of a limited number of peremptory challenges to excuse a juror when there was a stipulation to excuse the same juror for cause, which was denied by the court, could possibly have constitutionally tainted the jury selection process if it was later determined that it impacted the outcome of the trial. *Dunlap v. People*, 173 P.3d 1054, 1081-82 (Colo. 2007) ("[D]efendant is denied the substantial right to the full use of his peremptory challenges where the trial court erroneously denies a challenge for

cause, the defendant uses a peremptory strike to remove the objectionable juror, and the defendant exhausts his peremptory challenges") (citation omitted). Indeed, at one time, such a ruling would have resulted in an automatic reversal of the trial. *People v. Novotny*, 320 P.3d 1194, 1203 (2014) (overruling prior precedent requiring automatic reversal when criminal defendant required to utilize peremptory challenges after challenge for cause was improperly denied but allowing for reversal when ruling structurally impacts trial).

Accordingly, Judge Smith's decision had constitutional implications to the criminal defendant. Even if Mr. Kontnik had the rights he asserts in his Complaint, he cannot establish that Judge Smith should have prioritized his statutory rights under CADA over Mr. Aadan's constitutional right to exercise his jury challenges as he saw fit. Similarly, Mr. Kontnik cannot establish that DCC should bear civil liability for Judge Smith's prioritization of a criminal defendant's constitutional rights over a potential juror's statutory rights.

CONCLUSION

For all the foregoing reasons, DCC requests that Mr. Kontnik's complaint be dismissed for failure to state a claim pursuant to C.R.C.P. 12(b)(5).

Dated this 18th day of October 2022.

KRISTIN M. BRONSON
Denver City Attorney

By: */s/ Michele A. Horn*
Michele A. Horn
Amanda K. MacDonald
Attorneys for Denver County Court

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October 2022 a true and correct copy of the foregoing **MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5)**was filed and served via the Colorado Court electronic filing system to the following:

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