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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

1437 Bannock Street
Denver, CO 80202

Plaintiffs: Spencer Kontnik, and Colorado Cross-Disability Coalition, a Colorado Corporation,

v.

Defendant: Denver County Court

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Case Number: 22CV32599

Div: Ctrm: 466

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

Plaintiffs, Spencer Kontnik and Colorado Cross-Disability Coalition ("CCDC"), by and through undersigned counsel, hereby respond to Defendant Denver County Court's ("DCC") Motion to Dismiss ("MTD").[1]

INTRODUCTION

DDC explicitly discriminated against Mr. Kontnik, on the record, by reason of his disability by excluding him from continued participation in the jury selection process on the basis of uninformed, misguided and blatantly biased reasons. The DCC judge explicitly stated Mr. Kontnik is "a juror who is hearing impaired and under the ADA we have a[n] . . . Interpreter who's here and present and all set up to help him" and excluded him because proceeding through the jury selection process and serving as a juror "might be tough for him and also THE COURT would be required to have alternate just in the event there's -- there's issues with the interpretation or with the juror's ability to serve." Am. Compl. ¶ 65; Am. Compl. Ex. 1 at 24 (emphasis added).[2] The DCC judge did not seek evidence to support or refute these

[1] DCC does not move for dismissal of Plaintiff CCDC's claims; therefore, except as otherwise noted, Plaintiffs' Response addresses only Plaintiff Kontnik's claims.

[2] Plaintiffs will use Defendant's method of page reference. *See* Mot. to Dismiss 6 n.2.

discriminatory assumptions of Mr. Kontnik's actual abilities based on his disability. DCC repeatedly admits disability was the motivating factor in his exclusion.

DCC, represented by the Presiding Judge acting on behalf of the entire court,[3] admitted to the Colorado Civil Rights Division ("CCRD") that the DCC judge's approval of a stipulation to exclude a potential juror "by reason of a physical disability" was grounded solely in discriminatory and erroneous preconceptions. *See* Am. Compl. Ex. 1 at 21. DCC now provides a reason for excluding Mr. Kontnik that was not offered in response to Mr. Kontnik's charge of discrimination and not reflected in the judge's approval of the stipulation: the misguided belief that using a CART interpreter would somehow "slow down" the trial. *See* MTD 2, 11. That some undefined "things" might have been tough for Mr. Kontnik, that an alternate juror would be needed and that using a CART interpreter would slow down the proceedings are typical of disability-based myths, stereotypes, misconceptions, unfounded beliefs weaponized to make ill-informed and hasty judgments about the abilities of Mr. Kontnik to serve as a juror. DCC provides no basis in fact for these judgments, and its reliance on them demonstrates the need for the relief sought by Mr. Kontnik.

DCC's MTD arguments do nothing to immunize it from Mr. Kontnik's CADA[4] claim that is clearly and plausibly set forth in the Amended Complaint. The transcript excerpt from the

[3] Am. Compl. Ex. 1 at 2 ("Denver County Court (DCC) Response to Request for Information (RFI) from the Colorado Civil Rights Division[:] This Response was prepared by Theresa Spahn, Presiding Judge of DCC and other administrative staff of DCC."). It provided exhibits and argument on behalf of the DCC by Judge Spahn.

[4] All references to the CADA include and incorporate all of the standards available under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12213, its implementing regulations and interpretive guidance. Am. Compl. ¶¶ 153-156. *See Johnson v. Weld Cnty., Colo.*, 594 F.3d 1202, 1219 n.11 (10th Cir. 2010) ("Colorado and federal law apply the same standards to discrimination claims").

July 15, 2021, proceeding makes it clear that DCC does not provide adequate training and/or does not have enforceable policies and procedures in place to ensure that judges apply CADA and the rules governing the court's duties to potential jurors with disabilities like Mr. Kontnik. *See, e.g.,* Am. Compl. ¶¶ 65-94. The Amended Complaint and DCC make it clear the CADA was not considered and, by implication, that it never will be in similar decisions in the future. *Id.* ¶¶ 127-128; MTD 3, 10.

Plaintiffs alleged facts that constitute prohibited CADA discrimination. Defendant has not offered a non-discriminatory reason for denying meaningful access to the jury selection process. The reasons DCC has offered are red herrings, strawmen, premature or do not apply to the case at bar. First, DCC is a public entity and the proper defendant to this CADA claim. Second, DCC discriminated against Mr. Kontnik when it denied him meaningful access to the court's services and programs. Third, Plaintiffs offer evidence of the lack of a proper record underlying the exclusion of Mr. Kontnik as a juror, of the shifting rationales for his exclusion, and of the court's failure to follow its proper procedure in jury selection that is sufficient to infer discrimination and show that any reasons for exclusion are mere pretext.

In addition, the constitutional argument succeeds only with the assumption that plaintiffs seek to install Mr. Kontnik on the jury. This assumption fails in that Plaintiffs simply seek to have Defendant provide meaningful access to the courts. Following the statutory jury selection process and allowing Mr. Kontnik to proceed through this process would provide counsel and the judge the opportunity to properly assess his capacity to serve as a juror. Counsel is free to submit a challenge for cause during *voir dire* make a record of his abilities to serve. Lastly, a motion to dismiss is the wrong vehicle for raising Defendant's affirmative defense of judicial immunity.

For these reasons, explained in further detail below, this Court must dismiss the MTD.

ARGUMENT

This case is simple: DCC decided that a prospective juror was not able to serve as a juror by reason of his disability, and the CADA forbids any public entity, including a trial court, from summarily concluding that a disability disqualifies the individual with a disability from service. Am. Compl. ¶¶ 2, 57, 65, 80-88, 90-91, 160. DCC is a public entity. *Id.* ¶¶ 162-163. Even with a disability, Mr. Kontnik is amply qualified to participate in DCC's jury selection process and to serve as a juror: he is a valued asset to the Colorado legal community. *Id.* ¶¶ 15-17, 34-42. By filing this CADA claim, Plaintiffs simply ask DCC comply with the CADA to ensure such qualified jurors are not excluded for unlawful reasons. *Id.* ¶¶ 5-8, 151-177. Plaintiffs also ask DCC to follow applicable laws regarding determining jurors' abilities to serve before excluding them for unfounded reasons. *Id.* ¶¶ 65, 67-82, 88-94.

I. Standard of Review

Motions to dismiss for failure to state a claim under Colo. R. Civ. P. 12(b)(5) are viewed with disfavor. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). A court properly dismisses a claim only if the allegations in the complaint, taken as true and viewed in the light most favorable to the plaintiff, do not present plausible grounds for relief. *Id.*; *see also Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016).

II. Plaintiffs Have Sufficiently Pled Allegations of a CADA Claim

Plaintiffs alleged facts that constitute discrimination prohibited by CADA: Mr. Kontnik is an individual with a disability, who was excluded from or denied the benefits of the services, programs and activities of a public entity, by reason of his disability. *Compare* Colo. Rev. Stat. §

24-34-802(1)(b) (prima facie elements of CADA claim) *with* Am. Compl. ¶¶ 2, 4, 103-04, 142, 157-73 (alleging same).

A. Plaintiffs Properly Brought Their CADA Claim Against DCC, a Public Entity

Plaintiffs allege that DCC is a public entity against whom a CADA claim is properly brought. *See* Am. Compl. ¶¶ 146, 162, 171. A public entity is the proper defendant for a Section 802(1)(b) CADA claim such as this one. *Id.* ¶¶ 160 (citing Colo. Rev. Stat. § 24-34-802(1)(b)), 162 (defining public entity under CADA). *See also Trotman v. State*, 466 Md. 237, 262, 218 A.3d 265, 279 (2019) ("Jury service constitutes an activity of a public entity—namely, a trial court."); *Bacchus v. Denver Dist. Ct.*, No. 11-CV-03406-RBJ, 2012 WL 3403608 (D. Colo. Aug. 15, 2012) (ADA claim against state court).

DCC is required to ensure that individuals with disabilities have "an equal opportunity to participate in," 35 C.F.R. § 35.160(b)(1), its services and programs, including its court system and juror service. In fact, access to state and local courts and the ability of individuals with hearing disabilities to participate in such proceedings were a special concern that Congress considered when it enacted the ADA. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 527 (2004) (explaining that "Congress learned that many individuals . . . were being excluded from . . . court proceedings by reason of their disabilities," and citing legislative testimony concerning the "failure of state and local governments to provide interpretive services for the hearing impaired"). *See also* Title II Technical Assistance Manual § II-7.1000, https://www.ada.gov/taman2.html (recognizing "the importance of effective communication in . . . court proceedings" and requiring "effective communication with parties, jurors, and witnesses who have hearing impairments . . .").

To comply with the CADA, therefore, DCC is required to ensure jurors with hearing impairments, like Mr. Kontnik, have meaningful access to court proceedings, including the jury selection process.

B. Plaintiffs Pled that DCC Discriminated Against Spencer Kontnik

CADA forbids the exclusion from the services, benefits, programs, or activities of a public entity, Colo. Rev. Stat. § 24-34-802(1)(b), which can take the form of the denial of meaningful access to the services and programs of the entity. DCC claims "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." MTD 10.[5] On the contrary, DCC is obligated to provide "meaningful access" to its services, programs, or benefits, which in this case means the jury selection process. When it failed to so, Mr. Kontnik was the victim of discrimination. *See* Am. Compl. ¶¶ 2-4, 66, 80-91, 96, 101, 106, 116, 129-142 (alleging deprivation of meaningful access).

[5] DCC makes many similar assertions that reflect a fundamental lack of comprehension of the nature of Plaintiffs' claim. *See* MTD 2 ("Mr. Kontnik . . . was provided with an interpreter which accommodated his hearing loss and allowed him to participate in the jury selection process"); *id.* at 9 ("DCC . . . provided [Mr. Kontnik] with an interpreter which allowed him to participate in the jury selection process."); *id.* at 10 ("As demonstrated, DCC accommodated Mr. Kontnik's hearing loss. The accommodation allowed him to participate in jury service with all other prospective jurors."). The allegations actually assert Mr. Kontnik arranged for an interpreter who participated in introductory remarks and excused herself to enter the courtroom while he waited in the hallway with jurors to be called in for the rest of the jury selection process; the remainder of that process was abruptly ended when the interpreter came out into the hallway and informed Mr. Kontnik he had been excused and the reasons therefor, that the interpreter had been discharged for the day, causing Mr. Kontnik to have no other choice but to leave without continuing through the jury selection process. Am. Compl. ¶¶ 45-52, 57-58, 85-87, 96. DCC's formulations regarding what it means "to participate in the jury selection process" or "to participate in jury service with all other prospective jurors" is belied not only by the pled facts, but by the definition of "juror service" itself. "'Juror service' means the period of time during which a person is committed to serving upon a jury, from the time the person reports and checks in on his or her designated reporting date through and until he or she is released by the court or by the jury commissioner. 'Juror service' includes any time that a person spends in the jury selection process and any time that a person spends in a trial." Colo. Rev. Stat. § 13-71-102(2.5).

CADA requires public entities to provide "meaningful access" to their programs and services. *Alexander v. Choate*, 469 U.S. 287, 301 (1985). *See also Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1195 (10th Cir. 2007) ("The ADA requires more than physical access to public entities: it requires public entities to provide 'meaningful access' to their programs and services."); *JL v. New Mexico Dep't of Health*, 165 F. Supp. 3d 1048, 1073 (D.N.M. 2016) (a public entity excludes a disabled individual when it fails to provide meaningful access to its programs and services.); *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 857 (10th Cir. 2003) (the ADA requires public entities to provide disabled individuals "meaningful access" to their programs and opining that mere access—i.e., physical presence at a public fair—that is not meaningful constitutes a denial of benefits to the fair); *DeLong v. Brumbaugh*, 703 F. Supp. 399, 402-03 (W.D. Pa. 1989) (finding unlawful discrimination occurred when weight of the evidence showed deaf plaintiff who was excluded from the jury array who had significant communication skills and using interpreter that would neither disrupt nor delay the judicial process).

Public entities must provide a reasonable accommodation/modification if necessary to ensure meaningful access. *See* 28 C.F.R. § 35.130(b)(7) (requiring public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability"). What is particularly galling here is that DCC may not need to make a reasonable modification to its procedures, because existing procedures—embodied in the Colorado Uniform Jury Service and Selection Act ("UJSSA") and the court's applicable rules of procedure—may reach the desired result. Am. Compl. ¶¶ 68-82

(explaining existing procedures that must be followed regarding jurors with disabilities).[6] DCC must adhere to these requirements and ensure that they are strictly enforced. *Id*. ¶ 130.

C. DCC's Grounds for Exclusion Are a Pretext for Discrimination

In CADA cases, pretext has been defined by Colorado courts as "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the [defendant's] explanation" of the reasons for its action. *Williams v. Dep't of Pub. Safety*, 369 P.3d 760, 772 (Colo. App. 2015). As set forth above, Mr. Kontnik has met his burden for making out a prima facie case of discrimination. DCC has provided no reasons beyond pure speculation about Mr. Kontnik's abilities to cause this Court to dismiss his Amended Complaint. *See, e.g., United States v. Dempsey*, 830 F.2d 1084, 1091 (10th Cir. 1987) (speculation regarding abilities of deaf juror and interpreter with respect to court proceedings insufficient to prevent the juror from serving); *DeLong*, 703 F. Supp. 399 at 405 (ruling that court's exclusion of juror with hearing impairment from the array was unreasonable, discriminatory and constitutes unlawful discrimination because based on unfounded determinations about juror's abilities to serve and that interpreter would disrupt court proceedings and done without permitting juror, as required by state law, to explain her ability to serve).

What undefined "things" "might be tough" for Mr. Kontnik, and why an alternate might be needed "just in the event there's . . . [unidentified and speculative] issues with the interpretation or the juror's ability to serve[,]" remains unexplained. Am. Compl. ¶ 65; Am. Compl. Ex. 1 at 24. Perhaps because these reasons have no basis in fact, providing DCC no

[6] DCC misrepresents *People v. Pineda*, 40 P.3d 60, 63 (Colo. App. 2001) for the proposition that strictly enforcing the UJSSA is optimal but not required. MTD at 11. For multiple reasons set forth in that case, the case at bar is completely distinguishable.

meaningful way to explain them to this Court, DCC appears to settle on a reason not on the record that the use of a CART interpreter, "would slow down the one-day jury trial." MTD 2, 11 (DCC provides a passing reference to another unexplained reasons for its dismissal of a hearing impaired juror. *See* MTD at 2.). According to the same rationale, any juror with a disability who uses an interpreter or who needs an accommodation might slow down a trial:

> 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*.]

MTD 11.[7] In short, from the moment DCC excluded Mr. Kontnik without discerning his ability to serve as a juror—and in fact used his need for an accommodation against him—DCC failed to provide Mr. Kontnik with meaningful access to the jury selection process. Am. Compl. ¶¶ 65, 84-96. DCC argues this is appropriate: an "accommodation was available."

DCC provides no evidence that this "reason" has any factual basis whatsoever. In fact, this reason is refuted by materials provided by DCC in its CCRD Response. "CART" is an acronym for communication access real-time translation. Am. Compl. ¶ 140; Am. Compl. Ex. 1 at 13-14 (explaining the meaning of CART). Furthermore, the specific obligations under state law as well as by the DOSLS regarding the requirements for CART interpreters explain what CART is, why it is required and how it is to be provided. *Id*.; *see also* Colo. Rev. Stat. § 13-90-

[7] For example, DCC could exclude a juror who uses a wheelchair from participating under the assumption it might take longer for that individual to get in and out of the jury box, thereby causing trial delays, even though the ramp to the jury box was provided.

202(5) ("'Communication access realtime translation (CART) reporter' means a word-for-word speech-to-text translation service for the deaf, hard of hearing, or deafblind.").

Plaintiffs also have made specific allegations regarding the particular CART interpreter, Patricia Messinger, who was assigned to the underlying case. *See* Am. Compl. ¶¶ 53-56 (alleging "Ms. Messinger . . . is an employee of Visible Voices . . . an agency exclusively engaged in the business of providing CART services."). If DCC and its judges were familiar with how CART interpreting that provides word-for-word speech-to-text translation works, they would know that "CART requires the skill of a trained stenographer with the ability to write at speeds of up to 225 words per minute with 98% accuracy." Visible Voices, http://www.visiblevoices.com. DCC has provided nothing but speculation to rebut Plaintiffs' allegations regarding Mr. Kontnik's abilities to engage in all aspects of the jury selection process and participate as a juror. Am. Compl. ¶¶ 15-16, 34-42, 46. DCC cannot demonstrate that its asserted reason made off the record for shutting the door to Mr. Kontnik's further participation in the jury selection process with a CART interpreter "who's here and present and all set up to help him" would slow down the proceedings in any way. *Cf. DeLong*, 703 F. Supp. at 404 ("The clear weight of the credible evidence compels the conclusion that the presence of a deaf person, with the skills of [the deaf plaintiff], and an interpreter, would neither disrupt nor delay the judicial process in any respect.").

Most importantly, Plaintiffs have direct evidence that Mr. Kontnik's was excluded "by reason of disability." Am. Compl. ¶ 134. All of the asserted reasons are nothing but false and based on unfounded stereotypical assumptions not truly indicative of the abilities of Mr. Kontnik to proceed through the jury selection process. *See, e.g.,* Am. Compl. ¶ 156 (setting forth the

purposes for which the ADA was enacted as well as cases construing the effects of such biases and discrimination against people with disabilities). Also, "post-hoc justifications . . . can be evidence of pretext." *Williams*, 369 P.3d at 772. In the employment discrimination context, the Colorado Supreme Court has determined: "Where a prima facie case of discrimination is proven and the reasons given for discharge are found to be a pretext for discrimination, no additional evidence is required to infer . . . discrimination." *Colorado Civil Rights Comm'n v. Big O Tires, Inc*., 940 P.2d 397, 402 (Colo. 1997), *as modified on denial of reh'g* (July 28, 1997). In the absence of any evidence or argument refuting Plaintiffs' allegations that DCC's proffered reasons are a pretext, the same analysis should be applied to public entities as well. What is to stop DCC from engaging from excluding jurors with disabilities for discriminatory reasons unless it is required to receive the training and enforce policies, practices and procedures as requested in this case?

III. DCC's Constitutional Concerns Are Incorrect and Unfounded

DCC attempts to create a conflict between the criminal defendant's rights and Mr. Kontnik's rights: no such conflict exists. The right to a fair trial and satisfactory jury service are part and parcel of the constitutional right to due process. *See Dempsey*, 830 F.2d at 1087 (10th Cir. 1987) ("'Satisfactory jury service' must at least meet the constitutional requirements of a fair trial."). An Ohio case demonstrates that there is no tension between an accused's right to a fair trial and the government's interest in equal access to the courts. A criminal defendant's conviction was overturned when the trial court denied a challenge to a hearing impaired juror because even with an accommodation she could not competently serve. *State v. Speer*, 2010-Ohio-649, 124 Ohio St. 3d 564, 925 N.E.2d 584, 589. The court cautioned that in the interest of

access to the courts, "[a] hearing impairment by itself does not render a prospective juror incompetent to serve on a jury." 925 N.E.2d at 589. To ensure the right to a fair trial, the trial court must then determine whether an accommodation "will enable an impaired juror to perceive and evaluate all relevant and material evidence . . . ." *Id*. This is precisely why Mr. Kontnik seeks to be a full participant in the jury selection process: it is imperative that the trial court conduct an individualized inquiry to determine whether the juror is competent to perform satisfactory jury service, to understand and evaluate the evidence, participate in the trial process, communicate with judge and jurors, and comprehend legal principles.[8] The thrust of both the criminal defendant's constitutional right and Mr. Kontnik's statutory right is not whether an accommodation was merely available but whether the accommodation "enable[s] the juror to serve." *Id*. at 590. DCC deprived Mr. Kontnik of this right.

Furthermore, Defendant's claim rests on the assumption that Plaintiffs would have the judge and counsel place Mr. Kontnik on the jury no matter what. *See, e.g*., MTD 14. The argument jumps right over the very *voir dire* process that Plaintiffs allege Mr. Kontnik was unlawfully excluded from and of and proceeds to the need for counsel to use a peremptory challenge. Nothing in Plaintiffs' Amended Complaint seeks to install him on the jury or prohibit

[8] *Cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001) (explaining that an individualized inquiry is among the ADA's most "basic requirement[s]"). Even in the absence of statutory requirements and court rules of procedures that govern court conduct with respect to jurors with disabilities, public entities are required to engage in the interactive process with people with disabilities in order to determine the most effective means at providing the appropriate accommodations, which includes determining how the accommodation will enable the individual with a disability to perform the function at issue. *See, e.g., Enriching, Inc. v. City of Fountain* Valley, 151 Fed. Appx. 523, 524 (9th Cir. 2005) (noting the public entity's obligation to engage in an interactive process to determine the appropriate accommodation); *Aragona v. Berry*, 3:10-CV-1610-G, 2012 WL 467069, at *10 (N.D. Tex. Feb. 14, 2012) ("public entity has an obligation to engage in an 'interactive process' to determine the best means of accommodating a disability . . . [h]owever, 'the responsibility of making the determination of the appropriate reasonable accommodation is shared between'" the individual with the disability and the public entity); *Windham v. Harris Cnty., Texas*, 875 F.3d 229, 237 n.11 (5th Cir. 2017) (accommodation "is best determined through a flexible, interactive process" between the individual with a disability and the public entity).

a challenge for cause during or after *voir dire* should it raise doubt about his fitness to serve. Plaintiffs allege DCC unlawfully excluded Mr. Kontnik from the jury selection process for discriminatory reasons. If he were afforded meaningful access to the jury selection process, a challenge for cause would still be available, and any constitutional considerations the criminal defendant may have had were not yet before the judge because *voir dire* had not even been attempted when she excluded Mr. Kontnik.

IV. The Issue of Judicial Immunity Cannot Be Resolved by Way of Motion to Dismiss

Judicial immunity is a defense that DCC must plead. This court should not entertain this argument because a motion to dismiss is not the proper way to seek dismissal based on an affirmative defense. If the Court wishes to address this issue, Plaintiffs request that the Court convert DCC's motion into a motion for summary judgment, direct DCC to file their answer and any affirmative defenses and submit further briefing on the issues of judicial immunity, and provide Plaintiffs twenty-one days to respond.

DCC asserts both Judge Smith and the DCC are entitled to judicial immunity. MTD 4-7. Immunity is an affirmative defense, *Dillard v. Gregory*, No. 11-CV-01928-RBJ-BNB, 2012 WL 5056932, at *5 (D. Colo. Oct. 18, 2012), and affirmative defenses generally are not raised by motion. *Bristol Bay Prods., LLC v. Lampack*, 312 P.3d 1155, 1163-64 (Colo. 2013) (citing Colo. R. Civ. P. 8(c)); *see also Prospect Dev. Co., Inc. v. Holland & Knight, LLP*, 433 P.3d 146, 149 (Colo. App. 2018) ("affirmative defenses must be raised in an answer to a complaint"). DCC, however, moves for dismissal based on this affirmative defense, stating that "Mr. Kontnik has not pled facts sufficient to overcome this immunity." MTD 7. Plaintiffs do not have the burden of pleading facts that show why immunity is not applicable. "This is so because a plaintiff has no

obligation to anticipate an affirmative defense in the complaint and include allegations intended to negate it." *Bristol Bay Prods.*, 312 P.3d at 1163. DCC's MTD is the wrong vehicle for an affirmative defense.

Nor is it obvious from the face of the amended complaint that Plaintiffs have pled themselves out of the courtroom. *See, e.g.*, *Prospect Dev. Co., Inc.*, 433 P.3d at 149-50 (noting exception to general rule allowing affirmative defense in motion to dismiss if "bare allegations of the complaint" show the defense applies); *Bristol Bay Prods.*, 312 P.3d at 1164 (discussing federal cases where "allegations indicate the existence of an affirmative defense that will bar the award of any remedy"). Assuming judicial immunity applies, DCC is not entitled to immunity to suit for injunctive or equitable relief.[9] *See Pulliam v. Allen*, 466 U.S. 522, 542–43 (holding that judicial officers are not immune from suits seeking equitable or injunctive relief). Because DCC asks this Court to accept its pretextual reasons as sufficient for excluding Mr. Kontnik from the jury selection process by reason of his disability and has failed to train its personnel, including judges, regarding the requirements for jurors with disabilities, Plaintiffs seek equitable relief.

CONCLUSION

For the foregoing reasons, the MTD should be denied in all respects.

Respectfully submitted this 8th day of November, 2022,

[9] In asserting that "judicial immunity is immunity from suit, not just immunity from damages," DCC mischaracterizes the holding of *Mireles v. Waco*. MTD 5. *Mireles* concerned a claim under a different statute; there is no statutory, common law or other immunity against equitable relief pursuant to a CADA claim. *See Churchill v. Univ. of Colorado at Boulder*, 285 P.3d 986, 1007 (Colo. 2012) (discussing the Supreme Court's holding that judicial immunity is not a bar to equitable relief and the "absence of common law immunity for judges of equitable relief").

/s/ Kevin W. Williams
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Pursuant to C.R.C.P. 121, § 1-26(7), the original of this document with the original signature is maintained in the offices of the Colorado Cross-Disability Coalition, Empire Park, 1385 S. Colorado Blvd., Suite 610-A, Denver, CO 80222, and available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2022, a copy of the foregoing **Plaintiffs' Opposition to the Motion to Dismiss Pursuant to Colo. R. Civ. P. 12(b)(5)** was filed with the Court via the Colorado Court's E-Filing System and served upon the following counsel for the Defendant electronically through the same:

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