No. 02-1512

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CAROLINA CASUALTY INSURANCE COMPANY, and DENVER C. FOX,

Plaintiffs-Appellants,

v.

PINNACOL ASSURANCE,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Colorado
The Honorable Marcia Krieger, United States District Judge
District Court Docket Number: 00-MK-1164 (BNB)

Brief of Amici Curiae, American Association of People with Disabilities, The Arc in Jefferson County, The Arc of Adams County, Inc., The Arc of Arapahoe & Douglas, The Arc of Colorado-Advocating for People with Developmental Disabilities, Arc of Denver, Inc., The Arc of the United States, Association for Community Living in Boulder County, The Association for Persons in Supported Employment, Bazelon Center for Mental Health Law, Cerebral Palsy of Colorado, Colorado Cross-Disability Coalition, Disability Rights Education and Defense Fund, Inc., Disability Rights Action Committee, Employment Link, National Association of Protection and Advocacy Systems, and Self-Advocates Becoming Empowered, in Support of Appellants, Urging Reversal

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CORPORATE DISCLOSURE STATEMENT

Amici curiae are all non-profit corporations that have no parent corporation and do not issue stock; no publicly held company owns 10% or more of these organizations' stock.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are all non-profit corporations that are composed of and/or represent people with disabilities. Each works to ensure that people with disabilities enjoy the benefits of the services, programs, and activities of public entities, without discrimination.

It is critical to the daily lives of the people amici curiae represent that public entities provide services to them with an even hand. Amici curiae urge reversal of that part of the District Court's opinion in this case that granted summary judgment to Appellee Pinnacol Assurance ("Pinnacol") on Plaintiffs' Americans with Disabilities Act ("ADA") claim, because the Court failed to recognize that Pinnacol's refusal to cover work-related injuries based on "mental capacity" constituted facial discrimination in violation of Tile II of the ADA, 42 U.S.C. § 12132, et seq., and because the decision will lead to devastating consequences for individuals with mental disabilities in Colorado with respect to workers' compensation benefits and employment.

This case involves complex legal issues regarding discrimination against individuals with mental disabilities. Counsel for amici curiae have expertise concerning the rights of such persons and specifically concerning the discriminatory exclusion of people with disabilities by public entities.

The source of authority for filing this brief on behalf of amici curiae is that all parties have consented to its filing.

The American Association of People with Disabilities ("AAPD") is a national membership organization working to increase the political and economic power of children and adults with disabilities in the United States. Founded on the fifth anniversary of the ADA, AAPD has a strong interest in effective enforcement and implementation of the ADA and other disability rights laws.

The Arc in Jefferson County is a private, non-profit, § 501(c)(3), membership organization formed in 1961 that serves individuals with developmental disabilities and their families in Jefferson, Clear Creek, and Gilpin counties in Colorado. It is affiliated with The Arc of Colorado and The Arc of the United States and is governed by a 14-member Board of Directors. The mission of the organization includes supporting individuals in attaining and retaining employment, as well as exercising their rights as citizens and assisting them with problem solving.

The Arc of Adams County, Inc. is an advocacy organization supporting persons with developmental disabilities. The mission of the organization is to represent persons with developmental disabilities to assure they receive the appropriate and quality supports they need. Part of the mission of the organization is to advocate for adults to work in inclusive environments. The Arc of Adams

County routinely advocates for new employment opportunities and to maintain quality employment services for persons represented by the organization.

The Arc of Arapahoe & Douglas is a private, not-for-profit, § 501(c)(3) Colorado organization that works to include all children and adults with disabilities and their families in their communities. One of the ways the organization's advocates work to support this mission is by advocating for supported employment in the community for people with developmental disabilities. The Arc of Arapahoe & Douglas works with many different agencies to ensure community employment including Community Centered Boards, the Division for Vocational Rehabilitation, and local community providers who specialize in supported employment.

The Arc of Colorado-Advocating for People with Developmental Disabilities ("The Arc of Colorado") is a non-profit Colorado corporation that advocates for and supports people with developmental disabilities and their families, throughout the State of Colorado. The Arc of Colorado is affiliated with The Arc of the United States and has ten affiliated local chapters throughout Colorado. The Arc of Colorado provides individual, systemic, legislative, and judicial advocacy with respect to issues concerning people with developmental disabilities to promote their full participation in all community living.

The Arc of Denver, Inc., is a § 501(c)(3), private, not-for-profit membership organization dedicated to advocating for community inclusion for people with developmental disabilities. The focus of the organization's advocacy is on civil rights, education, supported employment, and home ownership.

The Arc of the United States ("The Arc"), through its approximately 900 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and related developmental disabilities and their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, that have authorized or encouraged segregation of people with mental retardation and related disabilities in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the ADA. The Arc is now actively involved in the law's implementation and enforcement.

The Association for Community Living in Boulder County ("ACL") is a § 501(c)(3) non-profit Colorado corporation governed by a volunteer Board of Trustees. ACL volunteers and staff provide advocacy services and assist individuals with developmental disabilities and their families by providing information and counsel on many aspects of daily life, including the importance of work at jobs in the community. ACL recognizes the opportunities provided in

work environments to make new friendships, experience success and accomplishment, and expand personal capacity to contribute to the workplace and the community.

The Association for Persons in Supported Employment ("APSE") is a national membership association that unites people with disabilities, support professionals, family members, employers, and other interested parties around a common mission of advancing integrated employment for people with disabilities. Implicit in this mission is elimination of any practices or policies that constitute discrimination against people with disabilities in the workplace. APSE is the only national organization with a sole focus on integrated employment of all people with disabilities, including those with significant cognitive disabilities with high support needs. APSE's interest in this case as amicus is assuring equal rights and opportunity in access to employment for people with disabilities. The lower court's decision in this case will have devastating consequences for people with disabilities in the workplace and a devastating impact on our nation's communities, as hundreds of thousands of people with disabilities will be permanently barred from the workplace through legally permitted discriminatory decisions under the cloak of "individualized assessment."

The Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental

disabilities. The Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities, including in the workplace. Much of the organization's work involves efforts to remedy disability-based discrimination through enforcement of the ADA.

Cerebral Palsy of Colorado ("CP of Colorado") is a Colorado non-profit corporation whose individuals served and their families have disabilities or other barriers. CP of Colorado's mission is to create, support and encourage inclusive opportunities for Coloradans of all abilities and their families, through early intervention, education, employment, state-wide training, information and referral, advocacy, public education services and collaborative strategies, with emphasis on diversity, dignity, quality of life and the advancement of human potential.

Colorado Cross-Disability Coalition ("CCDC") is a Colorado non-profit corporation whose members are persons with disabilities and their non-disabled allies. CCDC's mission is to work for systemic change that promotes independence, self-reliance, and full inclusion for people with disabilities in the entire community.

The Disability Rights Education and Defense Fund, Inc., ("DREDF"), based in Berkeley, California, is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in

1979, DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

The Disabled Rights Action Committee's ("DRAC") members include disabled persons whose rights are protected by the ADA. DRAC's purpose includes enforcing those rights. DRAC's interest as amicus concerns the District Court's aggregation of disabilities into an expansive group and then permitting discrimination under the guise of an "individualized assessment."

Employment Link is a private, non-profit corporation, incorporated in the State of Colorado. The primary mission of the organization is to locate employment for people with developmental disabilities and to assist with training and ongoing stabilization efforts related to those positions. Employment Link has a significant interest in the outcome of this case because of the direct, negative impact of the lower court's decision on the employment of people with disabilities in the Denver metropolitan area. Once employers gain information that there is some question relative to workers' compensation insurance coverage for qualified applicants with disabilities, they will, on that basis, make a decision not to hire them. This would have a disastrous effect on Employment Link's efforts to locate employment opportunities for the more than two hundred people presently served by the organization.

The National Association of Protection and Advocacy Systems ("NAPAS") is the membership organization for the nationwide system of protection and advocacy ("P&A") agencies. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. This case is of particular interest to NAPAS because P&As regularly represent individuals with disabilities with respect to work-related issues.

Self-Advocates Becoming Empowered ("SABE") -- a non-profit, national self-advocacy organization for persons with disabilities -- is governed by a board of directors representing nine geographic regions. SABE's mission is to ensure that people with disabilities are treated as equals and that they are given the same decisions, choices, rights, responsibilities, and chances to speak up to empower themselves.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Amici curiae support Rocky Mountain Job Opportunity Brigade's ("RMJOB")[1] position, urging reversal, as to the first issue: Did the position of Appellee Pinnacol Assurance that it would not cover, defend and/or indemnify[2]

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[1] Pursuant to Fed. R. App. P. 28(d), amici curiae will refer to both Appellants as RMJOB.

[2] Amici curiae refer to the denial of coverage, defense and/or indemnification as the denial of the "benefits" of the workers' compensation program. The use of this term is intended to convey the meaning found in Title II,

(continued...)

the on-the-job injuries of an employee of RMJOB, Appellant Carolina Casualty Insurance Company's subrogor and the entity of which Appellant Denver C. Fox was President) based expressly on the fact that the employee "lack[ed] the mental capacity to look after his own affairs and ha[d] legal guardians" constitute discrimination on the basis of disability in violation of Title II of the ADA.? [3]

SUMMARY OF ARGUMENT

The District Court erred in granting summary judgment to Pinnacol on RMJOB's ADA claim and must be reversed. The Court erred in finding Pinnacol's July 23, 1999 denial of requests for benefits was not facially discriminatory and applied the wrong analytical framework for the ADA claim. Should the District Court's decision stand, the ability of people with mental disabilities to find, keep and maintain jobs will be severely impacted.

ARGUMENT

I. The Reasons in Pinnacol's July 23, 1999 Letter Exclude Individuals with Mental Disabilities From the Category "Employee" and Therefore From Benefits, Specifically Based on Their Disabilities.

A. Title II Mandates a Broad Prohibition On Discrimination Against Individuals with Disabilities.

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[2](...continued)
see 42 U.S.C. § 12132 ("no qualified individual with a disability shall . . . be denied the, benefits of the services, programs, or activities of a public entity") (emphasis added) and not the meaning of the word "benefits" in insurance law.

[3] Amici curiae take no position on the other issue presented for review.

Congress passed the ADA in 1990 based on findings that "individuals with disabilities continually encounter various forms of discrimination, including . . . exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities," that "[d]iscrimination against individuals with disabilities persists in such critical areas as employment . . . and access to public services," and that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(3), (5), & (8).

Congress concluded there was a "compelling need for 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) (internal citations and quotations omitted). In fact, one of the Act's "most impressive strengths" has been identified as its "comprehensive character," and accordingly, the Act has been described as "a milestone on the path to a more decent, tolerant, progressive society." Id. (internal citations omitted).

Against this backdrop of the nation's broad mandate to eradicate the vestiges of pandemic unequal treatment for people with disabilities in general and

people with mental disabilities[4] in particular, amici curiae seek reversal of the District Court's grant of summary judgment on the Title II claim.

B. The Denial of Benefits Was Facial Discrimination.

Pinnacol denied the request of its insured, RMJOB,[5] that it provide coverage for the work-related injuries of RMJOB employee Jeremy Dymowski.[6] (Aplt. App. at 236-38.) In a letter dated July 23, 1999 ("July 23 letter"), Pinnacol asserted that Mr. Dymowski was not an "employee" because

> Mr. Dymowski is not capable of forming his own contract. He lacks the mental capacity to look after his own affairs and has legal guardians. . . . [H]e is under a disability and incapable of forming a contract of hire. He is not working for RMJOB because of his own free will or his own choices; he was placed in that position by his parents and guardians.

(Id.) The District Court found this letter was not direct evidence of discrimination and purported to analyze RMJOB's claim under the burden-shifting test found in

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[4] The ADA defines disability as a "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." 42 U.S.C. § 12102(2)(a). Amici curiae use the term "mental disabilities" to cover the range of mental impairments that substantially limit major life activities. The term is intended to include other terms such as "developmental disabilities" and "mental illness."

[5] Appellant Carolina Casualty Insurance Co. is RMJOB'S casualty carrier and assumed defense of the underlying lawsuit. Both Appellants have been held to have standing under Title II. (Aplt. App. at 490.)

[6] Prior to the July 23, 1999 denial of indemnification, Pinnacol accepted premiums from RMJOB for Mr. Dymowski and many other people with mental disabilities. (Aplt. App. at 195-98, 200-03, 205-07.)

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). (Aplt. App. at 670, 674.) But see discussion infra at 16. In addition, the District Court found that Appellee had valid alternative grounds for its decision. (Aplt. App. at 675.) The District Court's findings and analysis were incorrect as a matter of law, and Appellants made their prima facie case of discrimination under Title II.[7]

Pinnacol's denial was based on its position that individuals with mental disabilities who have guardians are incapable of being employees entitled to benefits. Where the denial of a benefit is facially discriminatory, the motive behind the discrimination is irrelevant. International Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991); Bangerter v. Orem City Corp., 46 F.3d 1491, 1500-1501 (10th Cir. 1995). The McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002); Bangerter, 46 F.3d at 1501 n.16.

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[7] Under Title II, a plaintiff must prove (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability. Gohier v. Enright, 186 F.3d 1216, 1219 (10th Cir. 1999). The case at bar involves RMJOB's claim for discrimination against individuals or entities "because of the known disability of an individual with whom the . . . entity is known to have a relationship or association." 28 C.F.R. § 35.130(g).

Bangerter, not McDonnell Douglas, controls the burden of proof allocation in this case. In Bangerter, this Court examined whether a plaintiff must present evidence of discriminatory motive in a case in which members of a protected class were treated less favorably than others. Bangerter, 46 F.3d at 1500-1501. The issue was whether a city ordinance that required a conditional use permit for group homes for individuals with disabilities constituted unlawful discrimination.[8] Id. at 1495. The district court in Bangerter dismissed the action on the ground that the plaintiff had not alleged a discriminatory motive. Id. at 1499. This Court reversed, holding that a "plaintiff need not prove the malice or discriminatory animus of a defendant to make out a case of intentional discrimination where the defendant expressly treats someone protected by the FHAA in a different manner than others." Id. at 1501. Judge Ebel explained, "a plaintiff makes out a prima facie case of intentional discrimination . . . merely by showing that a protected group has been subjected to explicitly differential -- i.e. discriminatory -- treatment." Id. Pinnacol subjected an individual with a disability to explicitly differential and thus discriminatory treatment; this constitutes a prima facie case of intentional discrimination.

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[8] Bangerter was brought pursuant to the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. § 3604(f)(2).

Pinnacol's exclusion of Mr. Dymowski from the category "employee" has wide-ranging consequences discussed below, but, at a minimum, it demonstrates that Pinnacol believes it has the right not to provide benefits to any individual with a mental disability who has guardians.

The District Court cited to Tenth Circuit decisions for its conclusion that the July 23 letter is not direct evidence of discrimination. These cases are inapposite. In Ramsey v. City and County of Denver, 907 F.2d 1004 (10th Cir. 1990), this Court was careful to distinguish statements of opinion having no discriminatory effect from existing policies that constitute discrimination. Id. at 1008 (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)). In Thurston, there was "direct evidence that the method of transfer available to a disqualified flight captain depended on his age. The policy was thus discriminatory on its face." Id. Similarly, in denying benefits, Pinnacol relied explicitly on Mr. Dymowski's mental disability. See id. at 1008 ("[for the plaintiff's claim of discrimination] to be valid, the evidence would need to show that [the defendant] acted on his discriminatory beliefs.")

Likewise, in Stone v. Autoliv ASP, Inc., 210 F.3d 1132, 1137 (10th Cir. 2000), cert. denied, 531 U.S. 876 (2000), this Court held that comments reflecting personal opinions, not company policies, do not constitute direct evidence of discrimination. Pinnacol's denial of benefits because of "mental capacity" is not

comparable to the expression of personal opinion in Stone or to the myriad other examples from cases cited in Stone. Id. at 1136-37. These cases show that by combining a discriminatory statement with discriminatory action, a discriminatory policy is established.

Antithetical to the District Court's opinion, (Aplt. App. at 675 n.4), Pinnacol has a financial interest in applying this policy to all coverage for injured employees with mental disabilities. The statements constitute Pinnacol's asserted legal basis for denying all claims for benefits for workers with mental disabilities. They are statements of a discriminatory policy because they specifically require a particular level of ability for workers' compensation benefits. The District Court's approval of Pinnacol's requirement allows workers' compensation providers to apply it more broadly to other persons with mental disabilities by determining which persons, in their opinion, are capable of forming a contract and subsequently denying workers' compensation benefits to those failing this inquiry. In turn, employers previously willing to hire individuals with mental disabilities will not be willing to risk the liability that accompanies lack of workers' compensation coverage. When the ADA was passed, Congress knew that employers feared hiring people with disabilities precisely because of insurance and other costs.

> Researchers have shown that negative and discriminatory attitudes extend to the employment capabilities of disabled individuals. . . . The reluctance of employers to hire persons with disabilities is rooted in common myths and misunderstandings, including the notions that the employment of disabled workers will increase insurance and worker compensation costs . . . .

Americans with Disabilities Act: Joint Hearing on H.R. 2273 Before the Comm. on Educ. and Labor Subcomm. on Select Educ. Subcomm. on Employment Opportunities, 101st Cong. 82 (1989) (testimony of Arlene B. Mayerson, DREDF) (emphasis added).[9] To the extent that employers are exposed to potentially greater tort liability in the absence of workers' compensation coverage, they will be even less likely to hire people with disabilities. Validation of Pinnacol's policy will have a broad impact.

Because the July 23 letter constitutes facial discrimination, the burden must shift to Pinnacol to provide a justification for its discrimination. Johnson Controls, at 199-200. The District Court's alternate basis for holding in favor of Pinnacol is without support. Although the District Court purported to analyze the Title II claim under the McDonnell Douglas test, it, in fact, proceeded to apply the "mixed-motive" causation test first found in Price Waterhouse v. Hopkins, 490

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[9] In stark contrast, however, studies have concluded that the employment of workers with disabilities does not raise the premium rates of workers' compensation for employers and that safety records of such workers are the same or better than those of non-disabled workers. Id. at 92.

U.S. 228, 258 (1989). Even under this analysis, the fact question -- whether mental disability was a cause -- should be decided by a jury. Cf. Davey v. Lockheed Martin Corp., 301 F.3d 1204, 1213-14 (10th Cir. 2002) (in mixed-motive cases under Title VII of the Civil Rights of 1964, the burden shifts to the defendant to prove it would have taken the same action even in the absence of the unlawful motive); Baird v. Rose, 192 F.3d 462, 470 (4th Cir. 1999) (Title VII mixed motive standards are applicable to ADA Title II actions). The District Court held that Pinnacol had an alternative motive without requiring Pinnacol to prove that it would have taken the same action for a non-discriminatory reason. Indeed, it is hard to conceive of a justification for excluding people with mental disabilities from workers' compensation.

A decision that disqualifies from the workers' compensation program individuals who lack the "mental capacity" to contract constitutes intentional disability discrimination. Under existing precedent, RMJOB made out a prima facie case of discrimination. The record is devoid of evidence that Pinnacol has a justification for its discrimination. The District Court erred in ruling otherwise.

C. Whether Pinnacol Made an Individualized Inquiry Is Irrelevant in Light of Its Discriminatory Policy

The District Court characterizes Pinnacol's decision as a determination based on an "individualized, case-by-case assessment of persons with disabilities."

(Aplt. App. at 675) (citing Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999)). First, the case-by-case determination in Albertson's involved the question of whether the plaintiff had a disability, a question that was not at issue in this case. Second, Pinnacol's individualized assessment involved the application of a discriminatory policy -- people who "lack[] the mental capacity to look after [their] own affairs" are not employees -- to an individual. The fact that the assessment was individualized does not legitimize the discriminatory criteria. The District Court's reliance on Albertson's is misplaced. The District Court's belief that "many 'developmentally disabled' individuals are nevertheless capable of making reasoned, voluntary decisions" like entering an employment contract and that "[s]uch individuals, despite their disabilities, could be considered 'employees' for workers' compensation purposes," (Aplt. App. at 675), ignores the fact that Pinnacol never engaged in such a determination. Pinnacol simply equated mental disability with an inability to be an employee. This is precisely the kind of discrimination the ADA was designed to prevent.

Many individuals with mental disabilities who have guardians are well-equipped to work and be productive employees. See Section II infra. The July 23 letter shows that Pinnacol did and will select out people with disabilities and deny them benefits based on a belief that such individuals are incapable of being employees. No individual with a mental disability is safe from this discrimination.

Logic compels the conclusion that Pinnacol will repeat this policy every time the mental disability of a worker is at issue. The same generalization made about Mr. Dymowski's disability will be used again and again to deny benefits to others with mental disabilities.

D. The Fact That Some People with Disabilities Might Still Be Covered by Workers' Compensation Does Not Diminish the Impact of the Discriminatory Policy

Public entities are prohibited from

> applying eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

28 C.F.R. § 35.130(b)(8). Pinnacol's policy uses mental disability and the inability to contract as criteria for excluding individuals from benefits. This policy "screen[s] out or tend[s] to screen out" individuals with mental disabilities from workers' compensation benefits.

> Paragraph (b)(8) . . . prohibits overt denials of equal treatment of individuals with disabilities, or establishment of exclusive or segregative criteria that would bar individuals with disabilities from participation in services, benefits, or activities.

28 C.F.R. pt. 35, app. A (analysis of § 35.130(b)(8)). The District Court opined that "many 'developmentally disabled' individuals . . . could be considered 'employees' for Worker's Compensation purposes." (Aplt. App. at 675 n.4). In

other words, because "developmentally disabled" persons include persons with Mr. Dymowski's level of mental impairment and other persons who do not suffer from such an impairment, the discrimination against those with mental impairments is permissible. Here, the District Court erred. "[A]ppropriate treatment of some disabled persons does not permit [an entity] to discriminate against other disabled people." Lovell v. Chandler, 303 F.3d 1039, 1054 (9th Cir. 2002), cert. denied, 537 U.S. 1105 (2003); Hargrave v. Vermont, 340 F.3d 27, 37 (2d Cir. 2003) ("A program . . . discriminate[s] on the basis of mental illness if it treats a mentally ill individual in a particular set of circumstances differently than it treats non-mentally ill individuals in the same circumstances").

Finally, the District Court's aggregation of "developmental disabilities" is contrary to the prohibition against "eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities." 28 C.F.R. § 35.130(b)(8) (emphasis added). The class subjected to facial discrimination in this case is persons with mental disabilities that affect their forming contracts. With regard to persons having that type of disability, facial discrimination is abundantly clear.

II. The District Court's Decision Has Significant Consequences for People with Mental Disabilities and the Nation's Economy.

Although it is impossible to gauge the precise impact of the lower court's decision, if workers' compensation insurers are able to deny coverage for on-the-job injuries of people with mental disabilities, it is hard to imagine an employer that will decide to hire any of them. This will have an impact upon people with disabilities who seek to work, as employers may become wary of hiring anyone whose status as an "employee" can later be questioned by a workers' compensation carrier.

The decision below, if affirmed, will do more than deprive individuals with mental disabilities the wages, respect, and dignity they so rightfully deserve; it will negate their economic impact at a time when this country can least afford it. The scope of the problem is enormous: "Public spending for disability-related programs in the United States totaled $293.9 billion in FY 1997." David Braddock, Disability at the Dawn of the 21st Century and the State of the States, pt. I, at 66 (David Braddock ed., Am Ass'n Mental Retardation 2002). One-third of that amount was for "income maintenance." Id. at 67. It has been estimated that there were 4.32 million persons with developmental disabilities[10] in the

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[10] The term "developmental disability" is defined as a severe, chronic disability that is likely to continue indefinitely, attributable to mental and/or physical impairment manifested before the individual attains the age of 22,

(continued...)

United States population in 2000. David Braddock et al., Disability at the Dawn of the 21st Century and the State of the States, supra, pt. II, at 125. The estimate of the number of people with mental illness is even higher: "In the United States between 2.1% and 2.6% of the population -- more than 5.25 million people -- experience a mental illness that affects the individual's ability to effectively perform living and working tasks . . . ." Laurie Ford, Supported Employment in Business: Expanding the Capacity of Workers with Disabilities 133 (Paul Wehman ed., Training Resource Network, Inc. 2001) (citing Carlos W. Pratt et al., Psychiatric Rehabilitation, at 9 (Academic Press 1999)).

Thirty years ago, the contribution of people with mental disabilities to the nation's economy was more limited than today. The lack of emphasis upon or denial of vocational opportunities for those with more severe mental disabilities has been described as follows:

> The significance of the problem was clearly set forth in one of the period's [1960-1984] most remarkable books, The Economics of Mental Retardation, published in 1973. According to its author, Ronald W. Conley, an economist and director of the Division of Monitoring and Program Analysis of the Rehabilitation Services

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[10](...continued)
resulting in substantial functional limitations in three or more areas of major life activity, including self-care, receptive and expressive language, capacity for independent living, and economic self-sufficiency, and reflecting the individual's need for a combination and sequence of forms of assistance that are of lifelong or extended duration. 42 U.S.C. § 15002(8)(A) (2000). The term refers to, among others, people labeled "mentally retarded."

> Administration of the U.S. Department of Health, Education, and Welfare, the earning losses to the country due to either below or nonexistent production among mentally retarded persons was a staggering $3.4 billion for 1970. He based his financial report on the estimate that there were over 690,000 "economically idle" mentally retarded adults of whom he contended 400,000 could be gainfully employed.

R.C. Scheerenberger, A History of Mental Retardation: A Quarter Century of Promise 197 (Paul H. Brookes Publishing Co. 1987) (footnote omitted) (quoting Ronald W. Conley, The Economics of Mental Retardation, at 371 (The Johns Hopkins University Press 1973)).

During the same period, however, corporations were beginning to understand the importance of hiring people with mental disabilities:

> The W.T. Grant Co., as early as the sixties, encouraged their stores to seek out mentally retarded employees and reported that 77% of those hired were rated good to excellent in their job performance by their supervisors. Similarly, McDonald's undertook a pilot project with the Columbus, Ohio, Program for the Mentally Retarded to determine if mentally retarded adults could be trained to fill fast-food positions and have a better longevity record than other employees. A follow-up study in 1979 revealed that the turnover rate was 41% at the end of the first year, compared to 175% among all employees. All managers who lost a mentally retarded employee requested a similar replacement. A subsequent follow-up study at 24 months showed that the net turnover among mentally retarded employees during the second year was zero.

Scheerenberger, supra, at 201 (footnotes omitted). Thus, corporations began hiring people with mental disabilities, not out of charity, but, instead, because it

was profitable. When it is no longer economically feasible for them to continue this practice, benevolent considerations, if any, will fall by the wayside.

To discuss the economic magnitude of the impact of the lower court's opinion upon all people with mental disabilities is beyond the scope of the argument here. Instead, the problem will be addressed from the perspective of those who make a contribution to this nation's economy through supported employment. Fundamentally, Pinnacol's policy will impact individuals with mental disabilities seeking employment of any type in any field.

The concept of supported employment emerged, in part, from the notion that the issue was not "whether people with severe disabilities [could] perform real work, but what support systems were needed to achieve that goal . . . ." Frank R. Rusch & Carolyn Hughes, Supported Employment: Models, Methods, and Issues 6 (Frank R. Rusch ed., Sycamore Publishing Co. 1990) (citation omitted). Supported employment is an option that provides people with disabilities with individualized supports to assist them in achieving their employment goals. Wendy S. Parent et al., More Than a Job: Securing Satisfying Careers for People with Disabilities 153 (Paul Wehman & John Kregel eds., Paul H. Brookes Publishing Co. 1998). It allows them to obtain competitive work in typical businesses in the community where they can perform the same kinds of jobs as people who do not have disabilities, earning comparable wages in the process,

working with non-disabled co-workers. Id. The supports that are provided to a person in supported employment are to bridge the gap between the individual's current skills and the requirements of the job. Id. at 154.

In the mid-1970s, supported employment programs began to appear across the country. Rusch & Hughes, supra, at 7. Supported employment was officially sanctioned in 1984 and was intended primarily for people with more severe disabilities or multiple disabilities. Scheerenberger, supra, at 201-02. See also Pub. L. No. 98-527, 98 Stat. 2662 (codified as amended at 42 U.S.C. 15002(30) (2000)); S. Rep. No. 98-493, at 3 (1984), reprinted in 1984 U.S.C.C.A.N. 4334, 4336. "Participation in supported employment has risen from approximately 10,000 persons in FY 1986 to over 139,000 in FY 1995." Paul Wehman et al., Supported Employment: A Decade of Rapid Growth and Impact, 24 Am. Rehab. 31, 34 (1998). In fiscal year 1995, more than 61% of the participants in supported employment had "mental retardation"[11] and more than one-quarter of the participants had "mental illness." Id. at 35, Table 1. Of those classified with

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[11] Many abhor the term "mental retardation," if for no other reason than the cruel use of the term "retard" as a noun. Nevertheless, the term "mental retardation" is used in literature in the field by many compassionate, dedicated professionals. As recently noted: "Currently people with mental retardation and others in the field are struggling to identify a new name for this disability. So far, no new consensus term has emerged." Mental Retardation: Definition, Classification, and Systems of Supports 5 (AAMR Ad Hoc Comm. on Terminology and Classification, 10th ed. Am. Ass'n on Mental Retardation 2002).

"mental retardation," nearly 38% were at the "moderate" level, and more than 10% were at the "severe/profound" level. Id. at 36, Table 2.[12]

In a national survey conducted at Virginia Commonwealth University for fiscal year 1993, it was estimated that supported employment participants earned nearly $600 million annually and paid more than $100 million each year in federal, state, and local taxes. John Kregel & Paul Wehman, Integrated Employment: Current Status and Future Directions 43 (William E. Kiernan et al., eds., Am, Ass'n Mental Retardation 1997) (Conclusion). Two years later, the estimate of annual wages earned by people in supported employment increased to $768 million. Wehman et al., supra, at 37. One commentator, after reviewing 16 studies in which the benefits and costs of supported employment were analyzed, noted the many conflicting findings documented in these studies. Even accounting for considerations of differences in methodologies and populations examined, he concluded that most experts agreed that, "after about four years of operation, supported employment programs generate greater monetary benefits for taxpayers than monetary costs . . . ." Robert Cimera, Supported Employment in

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[12] Under the International Classification of Diseases (9th rev.) Clinical Modification (6th ed.) (Medicode, 1998), the term "moderate mental retardation" applies to a person who has an IQ of between 35 and 49, the term "severe mental retardation" applies to a person who has an IQ of between 20 and 34, and the term "profound mental retardation" applies to a person who has an IQ of under 20. Mental Retardation: Definition, Classification, and Systems of Supports, supra, at note 11, at 102, Table 7.1.

Business: Expanding the Capacity of Workers with Disabilities 291 (Paul Wehman ed., Training Resource Network, Inc. 2001). In addition, he stated: "Overall, the literature on supported employment seems to support the notion that all supported employees, regardless of severity or number of disabilities, are cost-efficient from the taxpayers' perspective." Id. at 292 (emphasis in original). See also Kregel & Wehman, supra, at 43 ("Virtually every benefit-cost analysis completed in the last 10 years indicates that supported employment dramatically improves individuals' earnings and economic self-sufficiency . . . . Supported employment costs less than . . . activity centers[] or other day support options for individuals with disabilities") (citations omitted).

Although supported employment takes time to become cost-efficient, one thing is clear: If people with disabilities are not working and, instead, remain at home with their aging parents or are placed in day activity programs or institutions in which they are not generating any income, those alternatives will never be cost-efficient. Supported employment is an important and proven approach for many people with disabilities to make an economic contribution to this country.

It is not only the amounts earned by people in supported employment that illustrate its economic impact, but other factors as well. For example, in analyzing the cumulative benefit and cost data from 1978 to 1986 for 214 individuals in supported employment, more than $450,000.00 had been saved in Supplemental

Security Income payments, with more than two-thirds of that amount attributed to savings in such payments to participants "labeled moderately and severely mentally retarded." Paul Wehman & Mark L. Hill, Economics, Industry, and Disability: A Look Ahead 294 (William E. Kiernan & Robert L. Schalock, eds., Paul H. Brookes Publishing Co. 1989). See also Kregel & Wehman, supra, at 39 ("Based on FY 1991 [Rehabilitation Services Administration] data, over half (53%) of all supported employment participants were dependent on SSI and/or SSDI as their primary source of financial support when they entered the program. At the point of closure, the number . . . dependent on these federal income maintenance programs fell to 30% . . . ."). But see Cimera, supra, at 289-90. In addition, the cost of estimated alternative service programs for these workers, such as day activity centers, had they not been working, would have been approximately $1.8 million, with approximately $1.1 million of that amount "for those with moderate and severe retardation." Wehman & Hill, supra, at 294. More than half of the 214 program participants "were described as moderately mentally retarded" and 6% were at the "severe" level. Id. at 288 & Table 24.1.

In addition to the net economic loss to the nation's economy that will result if employers become reluctant to hire people with developmental disabilities, there also will be a negative, cascading impact upon the lives of these people and their families. The current problems posed for them may become considerably

worse. In 2000, there was an estimated nationwide total of nearly 72,000 persons with developmental disabilities who were on formal state waiting lists for residential services. See David Braddock et al., pt. II, at 126 (citing Robert W. Prouty et al., Residential Services for Persons with Developmental Disabilities: Status and Trends Through 2000, at 69 (Univ. of Minn., Institute on Cmty. Integration, Research & Training Ctr. on Cmty. Living 2001)). Further, it has been estimated from U.S. Census Bureau data collected in 1990 and 1991 that more than one-quarter of individuals with developmental disabilities in this country living in family settings (excluding those living with a spouse and in one's own residence) were in households headed by a family member 60 years or older. Glenn T. Fujiura, Demography of Family Households, 103 Am. J. Mental Retardation 225, 232 (1998). See also Braddock et al., supra, pt. II, at 124 ("[T]he majority of people with developmental disabilities in the United States currently reside with family caregivers. As these caregivers age beyond their caregiving capacities, formal living arrangements must be established to support their relatives with disabilities . . . .") (citation omitted).

Although the court below extolled the virtues of its individualized approach under the ADA, public policy considerations sometimes require a broader vision. As one commentator concluded:

> We need to look at the situations of people with disabilities not totally as individual problems but as problems stemming from the interface of individual situations and the economic conditions in which they live. As the U.S. economy moves into one based on high-tech and information -- in spite of the current economic sluggishness -- it is incumbent on policymakers to prevent people on the economic fringes from being left behind. Moreover, when economic policymakers face a difficult trade-off between high inflation and high unemployment, they need to recognize the impact of their decision on low-wage, low-skilled workers with disabilities. When they choose to deal with high inflation, neglecting high unemployment, the communities that are affected will witness the displacement of such marginal workers into the SSI payment rolls.

Martha N. Ozawa, SSI and Adults with Disabilities: Background, Trends, and a Study of Participation, 13 J. Disability Pol'y Studies 153, 161 (2002) (emphasis in original).

CONCLUSION

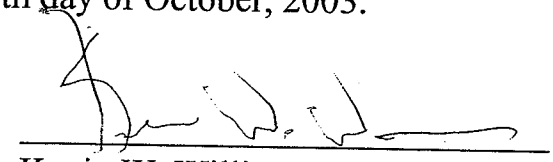
The ADA is the nation's reaction to and is designed to eradicate the effects of a history of extensive discrimination against individuals with disabilities. The District Court's decision provides Pinnacol (and other workers' compensation carriers) with a license to exclude people with mental disabilities from the benefits of the workers' compensation system. The District Court erred in finding Pinnacol's policy was not facial discrimination and in applying the wrong analytical framework to Appellants' ADA claim. This ruling will have significant consequences for the employment of people with mental disabilities, for Colorado and for the nation.

For these reasons, amici curiae respectfully request this Court to reverse the District Court's decision regarding Appellants' ADA claim.

CERTIFICATE REGARDING LENGTH OF BRIEF

As required by Fed. R. App. P. 32(a)(7)(c), undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i), and that this brief contains 6,918 words. Counsel relied on the word count of Word Perfect 10, which was used to prepare this brief.

Respectfully submitted this 10th day of October, 2003.



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Certificate of Service

I hereby certify that on October 10, 2003, a two copies of the foregoing Brief of Amici Curiae, American Association of People with Disabilities, The Arc in Jefferson County, The Arc of Adams County, Inc., The Arc of Arapahoe & Douglas, The Arc of Colorado-Advocating for People with Developmental Disabilities, Arc of Denver, Inc., The Arc of the United States, Association for Community Living in Boulder County, The Association for Persons in Supported Employment, Bazelon Center for Mental Health Law, Cerebral Palsy of Colorado, Colorado Cross-Disability Coalition, Disability Rights Education and Defense Fund, Inc., Disability Rights Action Committee, Employment Link, National Association of Protection and Advocacy Systems, and Self-Advocates Becoming Empowered in Support of Appellants, Urging Reversal, was served by first class mail, postage prepaid on:

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