TESTIMONY

of

JOHN D. ELLIOTT

on behalf of the

AMERICAN BAR ASSOCIATION

for the

Hearing on House Bill 3538

before the

SUBCOMMITTEE ON GENERAL LAWS

COMMITTEE ON JUDICIARY

SOUTH CAROLINA HOUSE OF REPRESENTATIVES

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Chairman Bannister and distinguished members of the House of Representatives Judiciary Subcommittee on General Laws:

My name is John Elliott of the Law Office of John D. Elliot in Columbia, South Carolina. I submit this written testimony on behalf of the American Bar Association (ABA), for which I serve as the South Carolina Bar Delegate to the House of Delegates. The American Bar Association is among the world’s largest voluntary professional organizations, with a membership of over 400,000 lawyers, including a broad cross-section of lawyers, judges, academics, and law students dedicated to protecting the rights of and improving the lives of families and children. The ABA continuously works to improve the American system of justice and to advance the rule of law throughout the world. I submit this testimony at the request of ABA President Linda Klein to present to the Committee on Judiciary the ABA’s position on the right of persons with disabilities to parent.

In February 2017 the American Bar Association adopted policy urging state governments to “enact legislation and implement public policy providing that custody, visitation, and access shall not be denied or restricted, nor shall a child be removed or parental rights be terminated, based on a parent’s disability, absent a showing—supported by clear and convincing evidence—that the disability is causally related to a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, and other reasonable modifications.” The policy further urges state governments to enact legislation providing that a prospective parent’s disability shall not be a bar to adoption or foster care when the adoption or foster care placement is determined to be in the best interests of the child. Nothing in this policy limits the rights of the state to protect abused or neglected children, but helps ensure that decision-making is driven by child-centered devotion to their well-being and the law, not disability biases or assumptions.

The U.S. Supreme Court has long recognized that the fundamental right of parents to make decisions concerning the care, custody, and control of their children is protected under the Due Process Clause of the Fourteenth Amendment. Yet, people with disabilities have been, and continue to be, denied full enjoyment of this right based solely on discriminatory biases and stereotypes about disabilities and the ability to parent, instead of individualized determinations supported by objective evidence. Many parents with disabilities are denied access to appropriate family-based services, support, and other reasonable modifications that would provide them with a full and equal opportunity to keep or reunite with their child.

There has been a rising number of disability discrimination complaints from parents with disabilities who have had their children taken away or their visitation and access rights restricted, or who have been denied reasonable accommodations, as well as from prospective parents with disabilities who have not been given equal opportunities to become foster or adoptive parents. In August 2015, the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Justice (DOJ) issued joint technical assistance to state and local child welfare
agencies and courts “to help ensure that parents and prospective parents with disabilities are not discriminatorily deprived of custody of their children, or denied the opportunity to adopt or serve as foster parents, because of stereotypes and unfounded assumptions about persons with disabilities, which we have seen in our complaints.”

Twenty-six years after the enactment of the Americans with Disabilities Act, it is time to ensure that individuals with disabilities and their children have a right to live free from discriminatory state actions that can result in traumatic separations of parents and their children.

H. 3538 safeguards the right of people with disabilities to parent and have custody of, or visitation with, a child by prohibiting discrimination solely on the basis of disability. Furthermore, this legislation would provide people with disabilities the right to access supportive services such as adaptive parenting equipment and instruction in adaptive parenting techniques and reasonable accommodations. The ability to access these services would help parents with disabilities compensate for those aspects of their disability that affect the ability to care for a child and enable them to fulfill parental responsibilities adequately. Notably, the bill does not limit the state’s right to protect the child’s health and safety.

In closing, we appreciate the Committee’s consideration of the ABA’s perspective on these important issues and are happy to provide any additional information that the Committee might find helpful. Thank you for the opportunity to provide these remarks.