NO. 79491-4-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of

SHARMILA AHMED

Appellant,

v.

SERV WAHAN

Respondent.

AMICUS CURIAE BRIEF OF CHILD USA

Christopher E. Love
WSBA No. 42832

PFAU COCHRAN
VERTETIS AMALA, PLLC
911 Pacific Avenue
Suite 200
Tacoma, WA 98402
Tel: (253) 777-0779
chris@pcvalaw.com

Attorney of Record

Marci A. Hamilton, Esq.
Admitted to Practice in Pennsylvania
and the District of Columbia
CEO & Academic Director

CHILD USA
Fels Institute of Government
Professor of Practice
UNIVERSITY OF PENNSYLVANIA
3814 Walnut Street
Philadelphia, PA 19104
Tel: (215) 539-1906
marcih@sas.upenn.edu

On behalf of CHILD USA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Washington law prioritizes the best interest of the child in family court cases. Children with disabilities, including autism, require unique and individualized support from a community of expert individuals in order to maintain their health, safety, and well-being. It is in the best interest of the child for Washington courts to carefully consider the expert opinions of the child's current medical providers along with the opinions of experts in the field when crafting the appropriate parenting plan.

In this case, B.W. is a child with autism and disabilities stemming from a traumatic brain injury he sustained as an infant, RP 1193-97, for whom this Court must develop an appropriate parenting plan. CP 1399; RP 1201. He has a brother, C.W., who is not disabled. RP 1192. The trial court adopted a parenting plan in 2015 for B.W. and his brother that relied on feedback from B.W.'s therapist and doctor, giving Dr. Ahmed, the mother, primary decision-making and time, while Dr. Wahan, the father, was given custody every other weekend and one weeknight evening. CP 45, 130-31; 1287-88; 1465. Both brothers, B.W. and C.W., adjusted well to the 2015 parenting plan. See, e.g., CP 204; Ex. 105 (#00069-00073), 107; RP 651, 1203, 1700-01.

After a request for modification proceedings initiated by the father in 2017, CP 55-56, a different trial court granted a temporary order in January 2018, (CP 1981-84) that drastically altered the 2015 parenting plan. The court's decision relied on a 2017 interim report produced by a Guardian Ad Litem who had no formal training on autism and who did not consult

experts or B.W.'s current doctors. CP 279-357; RP 1324, 1710. It did not, therefore, follow the views of treating doctors or experts in the field of autism. The new plan ordered mutual decision making and doubled the time C.W. and B.W. spent at the father's home. CP 358-62. At this point, B.W. began beating his head, even getting his first concussion since his original injury. RP 1276, 1420-21. He also became anxious and started acting out in school. RP 1297, 1326. B.W. began individual therapy and expressed stress about the schedule and voiced a desire to return to the old schedule. RP 1329, 1712, 1718-20; Ex. 78, at 3-4. After seeing how the new parenting plan negatively impacted B.W., CP 1353 (#65); 2247-57, the court reinstated B.W.'s previous schedule. RP 424; CP 1051-53; 1287-88.

During the resulting 2018 trial for permanent modification of the parenting plan, B.W.'s current providers did not recommend any changes to the 2015 parenting schedule. RP 497, 1288. In fact, Dr. Golombek attributed much of B.W.'s stress to the changes the court made to his schedule in early 2018. RP 424. Conversely, the GAL disagreed that the schedule change caused anxiety for B.W., attributing his stress to other sources. RP 1595-96. In December 2018, the trial court entered an order on the final parenting plan, CP 1309-13, giving the father the freedom to pick up B.W. for variable evenings, returning him to the mother by 5:00pm. CP 1287. The plan also appoints a parenting coordinator with the capacity to alter the residential schedule. CP 1294. The changes to the parenting plan inject further uncertainty into B.W.'s schedule and they do not align

with the recommendations of his doctors or with experts in the field of autism.

It is not in the best interest of the child for a court to permit the views of a GAL without expertise in autism to overturn conclusions reached on the basis of the child's treating providers and experts in the field. The GAL in this case did not include significant, current medical recommendations or expert testimony in the proposal to the court. Parenting plans in Washington should not be permitted to be modified where modifications fail to prioritize the recommendations of a child's physicians and experts in cases of a disability or unique need, as in this case.

ARGUMENT

This Court should use its discretion to consider expert and medical provider recommendations over the recommendations of a GAL with no specialized training in autism when adopting a parenting plan for B.W., a child with a disability.

I. IT IS IN THE BEST INTEREST OF CHILDREN WITH DISABILITIES FOR WASHINGTON COURTS TO PRIORITIZE CURRENT MEDICAL PROVIDER AND EXPERT FEEDBACK IN CUSTODY DETERMINATIONS WITHOUT A SPECIALLY-TRAINED GAL

Washington courts must consider the best interest of the child when crafting parenting plans. This Court has the discretion to prioritize testimony from autism experts and recommendations from B.W.'s medical providers when adopting a parenting plan. Doing so will be in the best interest of B.W. and his unique needs.

A. Washington Courts Craft Parenting Plans in the Best Interest of the Child

In the state of Washington, children have a right to conditions that nurture them and protect their health and safety. WASH. REV. CODE ANN. §26.09.002. The Washington State Legislature codified its intention to serve the best interest of a child in parenting plans, stating "[t]he best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents." *Id.*; *see also Matter of Marriage of MacLaren*, 440 P.3d 1055, 1065-66 (Wash. Ct. App. May 6, 2019) (Custodial changes are viewed as highly disruptive to children"). This language emphasizes continuity and stability in parenting plans. A child's "health and safety shall be the paramount concern" in cases where "a child's right to conditions of basic nurture, health, or safety is jeopardized." WASH. REV. CODE ANN. §13.34.020. *See also Jacobson v. Jacobson*, 954 P.2d 297, 299-300 (Wash. Ct. App. Apr. 10, 1998) ("The parents' interests are subsidiary to the consideration of the children's best interests.").

Judges must abide by the best interest standard, and the law "places the best interest determination solely in the hands of the judge." *Troxel v. Granville*, 530 U.S. 57, 67 (2000); *In re Dependency of R.V.*, 54 P.3d 716, 720 (Wash. Ct. App. Sept. 30, 2002) ("Neither the statute nor case law

supports the proposition that the Legislature gave the courts authority to delegate [decisions about frequency of visitation]"); *see also*, WASH. REV. CODE ANN. §26.09.187(3)(b) (specifically mentioning the best interests of the child). In cases involving GALs, the Washington legislature asks courts to "match a child with special needs with a guardian ad litem who has specific training or education related to the child's individual needs." WASH. REV. CODE ANN. §26.12.175(1)(a). However, a court may also disregard the recommendations of a GAL. *In re Marriage of Magnuson*, 141 Wn. App. 347, 350-51, 170 P.3d 65 (2007).

B. Special Needs Cases, Like This Case, Are Uniquely Challenging

Autism is a lifelong developmental disability, which impacts verbal and nonverbal communication, social comprehension and interaction, and other areas of functioning. Daniel W. Hoover & Joan Kaufman, *Adverse childhood experiences in children with autism spectrum disorder*, 31 CO-PSYCHIATRY.COM 128, 129 (Mar. 2018) (hereinafter Hoover). Hallmark of autism include: self-isolation, obsessive-compulsive behaviors, communication abnormalities, disturbances in social and language skills, repetitive activities, stereotyped movements, lack of empathy or reciprocity, difficulty with relationships and understanding group dynamics, inability to recognize facial expressions, difficulty trusting, resistance to change, and sensory defensiveness to stimuli (such as oversensitivity) which can cause easily and highly stressed feelings. Sheila Jennings, *Autism in Children and Parents: Unique Considerations for Family Court Professionals*, 43

FAM. CT. REV. 582, 582-83 (2005) (hereinafter Jennings). Autism is not simply a mental illness or an intellectual disability; it impacts most areas of functioning, with severity depending on location on the spectrum of autistic disorders. *See generally Autism Spectrum Disorder*, NAT'L INST. MENTAL HEALTH (Mar. 2018), available at https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml (hereinafter NIMH).

Autistic children, regardless of disorder severity, often have a heightened need for environmental control, consistency, and stability. Jennings, at 586. This is also true for B.W., who requires transition over time. RP 379-84. He began engaging in self-harming behaviors after court-ordered changes to his residential schedule based on a GAL's recommendations which conflicted with the recommendations of his treating physicians and experts in the field. RP 1335-36; CP 1465.

Often, autistic individuals, like B.W., need an extraordinary level of care and support, as evidenced by the significant amount of care he has needed. *See* NIMH; Daniel B. Pickar & Ronbert L. Kaufman, *Parenting Plans for Special Needs Children: Applying a Risk-Assessment Model*, 53 FAM. CT. REV. 113, 127 (2015) (hereinafter Pickar); CP 1433-34. Children with autism can also be at greater risk for abuse and the "negative consequences of abuse," and therefore represent a particularly vulnerable population. David S. Mandell, et. al., *The prevalence and correlates of abuse among children with autism served in comprehensive community-*

based mental health settings, 29 CHILD ABUSE & NEGLECT 1359, 1368 (2005); *see* Hoover, at 131.

C. Courts Should Use Their Discretion to Weigh Input of Current Treatment Providers and Experts Over Other Recommendations for a Parenting Plan, Especially in Special Needs Cases

There has been a dramatic increase in custody cases involving children with disabilities. Pickar, at 113. Judges are placed in a challenging position where they are expected to make a decision about the best interest of the child at issue, often without having the necessary and unique training to make these decisions. This burden is especially heavy in cases where parents do not agree on a parenting plan, like this case.

Although they are encouraged to educate themselves on the specific medical needs of each case, Margaret Price, *Special Needs and Disability in Custody Cases: The Perfect Storm*, 46 FAM. L.Q. 177, 181 (2012) (hereinafter Price), judges also have broad discretion to consider expert voices to determine what serves the best interest of a particular child. *See e.g.*, *In re Marriage of Littlefield*, 940 P.2d 1362, 1373 (Wash. 1997); *In re Dependency of J.A.F.*, 278 P.3d 673, 670 (Wash. Ct. App. 2012); *Kirshenbaum v. Kirshenbaum*, 929 P.2d 1204, 1208 (Wash. Ct. App. Jan. 27, 1997) ("Courts frequently rely on the recommendations of mental health professionals in fashioning and making alterations to visitation schedules."); 20 WASH. PRAC., FAM. AND COMM. PROP. L. §33:16. Because of the challenges presented by cases involving disabled children, "it is highly recommended that family court judges use a variety of experts

available to them," including and not limited to "the child's teachers, therapists, or other clinical professionals currently treating the child" because "[t]hese individuals can provide the clinical analysis needed to appropriately evaluate all of the information relevant to a final custody determination and parenting plan." Hindi Mermelstein et al., *Best Interests of the Special Needs Child: Mandating Consideration of the Child's Mental Health*, 54 FAM. CT. REV. 68, 75 (2016); *see also* ABA CHILD CUSTODY AND ADOPTION PRO BONO PROJECT, A JUDGE'S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES 49-50 (ABA, 2nd ed. 2008), available at https://www.drjodipeary.com/wp-content/uploads/2017/10/judges_guide.pdf. By appointing evaluators and receiving testimony from the child's treatment team and other experts, judges are in a better position to order a constructive plan for a child. Donald T. Saposnek, et. al., *Special Needs Children in Family Court Cases*, 43 Fam. Ct. Rev. 566, 571 (2005). The court in 2015 in this case appropriately relied on the recommendations of experts who were able to account for B.W.'s special circumstances in crafting a parenting plan, instead of relying solely on the input of the GAL and the Parenting Evaluator. CP 130, 1574-76. In 2015, the court specifically mentioned the input of testimony from treating physicians, Dr. Orlich and Dr. Stobbe, giving their testimony weight in the parenting plan. CP 130-31. There is no negative downside for this Court to consider the updated input from autism experts and B.W.'s current treatment providers while making a

decision about B.W.'s parenting plan and custody arrangement. Indeed, it is necessary to ensure the best interest of B.W. is served.

II. A COURT-APPOINTED GAL SHOULD BE REQUIRED TO CONSIDER CURRENT MEDICAL PROVIDER OPINION AS PART OF THE MANDATE TO SERVE THE CHILD'S BEST INTEREST, WHICH DID NOT OCCUR IN THIS CASE

Guardians ad litem also have a duty to operate under the best interest standard. WASH. REV. CODE ANN. §26.12.175(1)(b). "In the case of a child with special needs, the representative [GAL] has a duty of *vigorous, specific, knowledgeable advocacy* to ensure that a child with such needs receives appropriate services to address the physical, mental, or developmental needs." John Crouch, *The Child's Attorney*, 26 WTR FAM. ADVOC. 31, 32 (2004). This means that a GAL must consider all the best medical input available in a special needs case, in order to best respond to the unique needs of a particular child. Where a GAL does not have expert knowledge of a child's special needs, the GAL should defer to the treating physicians and experts in the field, and, if not, the court should exercise its discretion to prioritize the opinions of experts and current doctors whose training can overcome that gap.

If no specially trained GAL is available to the court, the appointed GAL is expected to become informed about the case, the specific needs of the children, and review material sources, including the views of treatment providers. *Elizabeth A. Turner*, 4A WASH. PRAC., R. PRAC. GALR 2 (7th ed.) (hereinafter GALR 2); Pickar, at 115. Courts maintain list of persons qualified to serve as GALs. To be eligible for such a registry, the GAL must

present a written statement providing evidence of their "[s]pecific training or education related to child disability or developmental issues." WASH. REV. CODE ANN. §26.12.175(3)(d).

Once appointed, the GAL is paid to "investigate and report factual information regarding the issues ordered to be reported or investigated to the court." WASH. REV. CODE ANN. §26.12.175(1)(b). The purpose of a GAL is to increase the likelihood that a child's best interest will be served. *Id*. A GAL must "make reasonable efforts to become informed about the facts of the case and to contact all parties" and impartially "examine material information and sources of information, taking into account the positions of the parties." GALR 2; *see also In re Marriage of Bobbit*, 144 P.3d 306, 314 (Wash. Ct. App. Jul. 25, 2006) ("It has long been a concern of the legislature that GALs . . . work fairly and impartially . . . [the GALRs] are intended to assure that the welfare of children whose parents are involved in litigation concerning them remains the focus of any investigation and report"). Washington law requires that "[i]f a child expresses a preference regarding the parenting plan, the [GAL] shall report the preferences to the court." WASH. REV. CODE ANN. §26.12.175(1)(b). GALs must not omit this information in their reports, nor create false narratives. It is more than reasonable to require GALs to include full opinions of treating physicians and experts in their reports about children with disabilities like B.W.

The same standard should be applied to a parenting coordinator. The Association of Family and Conciliation Courts Model Standards of Practice recommend stringent practices for parenting coordinators. A parenting coordinator should complete continuing education on issues of disability, especially as it relates to the willingness of parents to coparent and coordinate care. *Guidelines for Parenting Coordination*, Ass'n of Family and Conciliation Cts. 5, Appx. A, p. 7 (2019), available at https://www.afccnet.org/Portals/0/PublicDocuments/Guidelines%20for%20PC%20with%20Appendex.pdf?ver=2020-01-30-190220-990. The first two guidelines that a parenting coordinator is encouraged to follow are those of competency and impartiality. *Id*., at 3-5.

The roles of parenting coordinators and GALs are similar in that both are required to assist in achieving the best interest of the child in each case. To that end, both roles require observing a family, gaining expert opinion, and using all resources necessary to make recommendations to the court in the best interests of the child. Where parenting coordinators and GALs similarly function to inform and prepare the court to make a decision, they should be held to similar standards of having professional knowledge and training with respect to the unique issues of a case.

The GAL's 2017 report recommendations were not in B.W.'s best interest. In the original 2015 trial, the court rejected the GAL's recommendations, giving Dr. Ahmed the majority of visitation time and decision-making authority, in favor of B.W.'s treatment providers and

experts' input about B.W.'s best interests. CP 44-53; CP 131. The GAL in 2017 and 2018 filed lengthy reports, underscoring one parent's complaints about the other parent's parenting style while disagreeing with medical provider assessments that B.W.'s stress-induced behaviors stemmed from altering his schedule. RP 424, 1595-96; Ex. 61 (000771-775). Both children also indicated to the GAL that they were doing well with the 2015 schedule Dr. Wahan sought to upend, but the GAL did not include this in the 2017 interim report. RP 1700-1701. Rather than seek current provider opinion, the GAL relied only on specific portions of the 2015 trial transcript—mainly the father's testimony rather than the mother's—and years old evaluations. RP 1324; RP 1710; CP 279-357. Current providers indicated that no changes should be made to the custody arrangement, highlighting B.W.'s disability-driven need for stability. RP 497, 1288; Ex. 62 at 10-11. In fact, B.W.'s progress has significantly halted and regressed since the new plan introduced variable scheduling. CP 2247-57. Despite the significant level of evidence from past providers, and what would have been found if current providers were involved in the GALs report, the GAL recommended the entire arrangement be upended. Ex. 61 (785, 798). Had the views of the professionals currently involved in treating B.W. been prioritized over the GAL's recommendations, it would have been clear in 2018 that B.W.'s best interest required returning to the stability of the 2015 parenting plan.

GALs "can provide an essential voice for the child," particularly when the child has a disability, by diligently putting the child's best interest ahead of everything. Price, at 173. Sadly, the GAL did not do so in this case, and the best interest of the child can only be served if this Court exercises its discretion to rely on relevant experts instead.

III. PRIORITIZING THE OPINIONS OF EXPERTS AND CURRENT MEDICAL PROVIDERS IN CASES OF SPECIAL NEEDS IS IN ACCORD WITH CURRENT SCIENTIFIC RESEARCH AND WASHINGTON'S COMPELLING INTEREST IN CHILD PROTECTION

Washington state has a compelling interest in protecting children. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (It is clear that a state's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling."); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("*First*. It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is compelling.") (*quoting Globe Newspaper Co.*, 457 U.S. at 607); *Ashcroft v. Free Speech Coal*, 535 U.S. 234, 263 (2002) (O'Connor, J., concurring) ("The Court has long recognized that the Government has a compelling interest in protecting our Nation's children."); *Troxel v. Granville*, 530 U.S. 57, 60 (2000) (The Court may "grant such visitation rights whenever 'visitation may serve the best interest of the child.'") (*citing* WASH. REV. CODE ANN. §26.10.160(3)); *In re Rankin*, 458 P.2d 176, 179 (Wash. 1969) ("[T]he primary concern of the courts is always the welfare of the child."). Children with disabilities are especially vulnerable to abuse, neglect, and maltreatment. Children's

Bureau, *The Risk and Prevention of Maltreatment of Children With Disabilities*, CHILD WELFARE INFO. GATEWAY 1, 1 (Jan. 2018), available at https://www.childwelfare.gov/pubPDFs/focus.pdf.

Courts are one of many institutions in Washington that are charged with an elevated level of care to protect the interests of children with disabilities and unique needs. *See* WASH. REV. CODE ANN. §26.12.175(1)(a); *Protecting Students with Disabilities*, U.S. DEPT. OF EDUC. (Jan. 10, 2020), available at https://www2.ed.gov/about/offices/list/ocr/504faq.html (provisions for children with disabilities in education); *Children and Youth with Special Health Care Needs*, Wash. State Dept. of Health (last visited Mar. 26, 2020), available at https://www.doh.wa.gov/YouandYourFamily/InfantsandChildren/HealthandSafety/ChildrenwithSpecialHealthCareNeeds (provisions for special needs children in Washington healthcare); *Childhood Maltreatment among Children with Disabilities*, CDC (Sept. 18, 2019), available at https://www.cdc.gov/ncbddd/disabilityandsafety/abuse.html. Washington recognizes that children with disabilities in family court settings, like B.W., should not be forced to suffer costs of their unique needs, merely because those needs diverge from commonly understood "best interests." Washington courts have the discretion to consider expert testimony and current medical provider recommendations to assess the best interests of a child. *Littlefield*, 940 P.2d at 1373. The best interests of the disable child

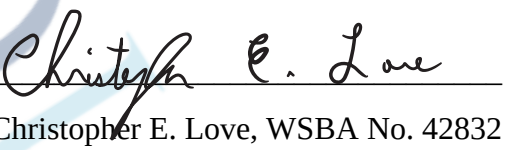
in this case requires this Court to return to the parenting plan that was based on medical and expert opinion, and to reject the GAL plan that put B.W. at risk of self-harm and the downward trajectory he has been suffering.

CONCLUSION

For the foregoing reasons, Amicus Curiae asks this Court to void the current parenting plan and return to the 2015 parenting plan, for the purpose of serving the best interest of B.W. based on the best science.

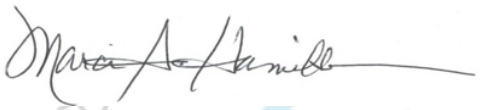
Dated: March 30, 2020

Respectfully submitted,

By: 

Christopher E. Love, WSBA No. 42832
Attorney of Record

PFAU COCHRAN VERTETIS AMALA
911 Pacific Avenue, Suite 200
Tacoma, Washington 98402
Tel: (253) 777-0799
chris@pcvalaw.com



Marci A. Hamilton, Esq.
CEO & Academic Director, CHILD USA
Robert A. Fox Professor of Practice
UNIVERSITY OF PENNSYLVANIA
3814 Walnut Street, Philadelphia, PA 19104
Tel: (215) 539-1906
marcih@sas.upenn.edu

CERTIFICATE OF SERVICE

I declare that on the date noted below I caused a copy of the foregoing **Motion for Leave to File Amicus Curiae Brief by CHILD USA** to be served via the Washington Courts E-Portal:

Counsel for Appellant/Cross Respondent

Patricia Novotny
3418 NE 65th Street, Suite A
Seattle, WA 98115
(206) 525-0711

Counsel for Defendants

Sidney C. Tribe,
WSBA #33160 CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

Caitlin Baird Zellers, WSBA #47855
Stella Pitts, WSBA #16412
S,L PITTS PC, P.S.
719 Second Avenue, Suite 520
Seattle, Washington 98104-7010
Telephone: (206) 447-7745
Facsimile: (206) 447-7746

I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and

DATED this 30th day of March, 2020.

By: _____
Sarah Awes
Legal Assistant

PCVA LAW

March 30, 2020 - 12:13 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	79491-4
Appellate Court Case Title:	In re: Serv S. Wahan, Res/Cross-App v. Sharmila Ahmed, App/Cross-Resp

The following documents have been uploaded:

- 794914_Briefs_20200330121105D1907798_5369.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was 2020-03-30 -- Wahan -- Brief of Amicus Curiae CHILD USA.pdf
- 794914_Motion_20200330121105D1907798_3955.pdf
  This File Contains:
  Motion 1 - Other
  The Original File Name was 2020-03-30 -- Wahan -- Mot for Leave to File Amicus Curiae Brief.pdf

A copy of the uploaded files will be sent to:

- Caitlin.BairdZellers@SLPitts.com
- chris@pcvalaw.com
- dwardseattle@hotmail.com
- kstipe@integrativefamilylaw.com
- maryw@nwjustice.org
- patricia@novotnyappeals.com
- tribe@carneylaw.com

Comments:

Sender Name: Sarah Awes - Email: sawes@pcvalaw.com
Filing on Behalf of: Darrell L. Cochran - Email: darrell@pcvalaw.com (Alternate Email: sawes@pcvalaw.com)

Address:
911 Pacific Ave
Suite 200
Tacoma, WA, 98402
Phone: (253) 617-1642

Note: The Filing Id is 20200330121105D1907798