No. 10-1304

IN THE

Supreme Court of the United States

NATIONAL CONFERENCE OF BAR EXAMINERS,

Petitioner,

v.

STEPHANIE ENYART,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF ASSOCIATION OF AMERICAN MEDICAL COLLEGES, LAW SCHOOL ADMISSION COUNCIL, GRADUATE MANAGEMENT ADMISSION COUNCIL, NATIONAL BOARD OF MEDICAL EXAMINERS, NATIONAL COUNCIL OF EXAMINERS FOR ENGINEERING AND SURVEYING, FEDERATION OF ASSOCIATIONS OF REGULATORY BOARDS, FEDERATION OF STATE MEDICAL BOARDS, AND NATIONAL COUNCIL OF ARCHITECTURAL REGISTRATION BOARDS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE AND INTRODUCTION[1]

[1] Pursuant to this Court's Rule 37.2(a), *amici* state that counsel of record for all parties received notice at least 10 days prior to the due date of the *amici*'s intention to file this brief.

With tens of millions of standardized tests administered every year, "[n]ever has the nation's education system been so reliant on standardized tests and the companies that make them." Vincent R. Johnson, *Standardized Tests, Erroneous Scores, and Tort Liability*, 38 Rutgers L. Rev. 655, 661 (2007) (citations omitted). *Amici* are uniquely qualified to address the importance of those tests. Some of the *amici* develop and administer the standardized tests relied on by many of the Nation's colleges, universities, and professional-licensing boards in making admissions or licensing decisions. Other *amici* are professional licensing bodies that rely on the validity and predictability of standardized tests to carry out their important public mandate.

What all *amici* share is a compelling interest in this case. That is because the ADA accessibility standard announced by the Ninth Circuit threatens to undermine the ability of national testing organizations—like many of the *amici*—to conduct their examination programs in a manner that is administratively workable, fair to all examinees, and consistent with the valuable role that standardized tests play in providing an objective means of assessment. In turn, the other *amici* on this brief—professional licensing boards that rely on standardized tests—will find it more difficult to assess which practitioners

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Pursuant to Rule 37.6, counsel for *amici* certifies that no party, or counsel for a party, authored or paid for this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici*, their members, or their counsel made a monetary contribution to the brief. The parties have consented to the filing of this brief; copies of the consent letters have been filed with the Clerk.

merit licenses, and which do not—which could have real and significant consequences. After all, licensing boards rely on standardized examinations, among other information, to identify who is qualified to practice medicine, law, or other professions. Compromising those determinations will jeopardize public welfare and inhibit consumers' ability to seek qualified practitioners in a wide array of professions.

The Ninth Circuit's rule poses these risks by declaring that testing organizations are not subject to the well-settled "reasonable accommodation" standard—the same standard that governs accessibility determinations under every ADA Title—but rather to a newly minted "best ensure" success standard. That interpretation of the statute—one that no other court has embraced—injects needless uncertainty and confusion into an area that depends on consistency and predictability. Under the Ninth Circuit's "best ensure" standard, disabled individuals throughout the Western United States now enjoy some greater (though ill-defined) prerogative to demand the custom-tailored accommodation of their choosing.

But standardized tests are no longer *standardized* tests if individuals can demand idiosyncratic alterations that, in the view of individual examinees, will "best ensure" their success. Disabled individuals *are* entitled under the ADA to a "reasonable accommodation." *Amici* take seriously the importance of providing precisely that relief so that disabled test-takers enjoy an equal opportunity to have their true abilities—not their impairments—measured or assessed. To insist, however, that testing organizations offer something beyond a "reasonable accommodation"—

something that is *more* than reasonable—undermines not only the fairness and validity of standardized tests but also the very purposes of the ADA. Congress passed the statute to ensure that all aspects of civil society would become reasonably accessible to individuals with disabilities; it did not intend to confer an advantage on them by bestowing extra-reasonable accommodations that will "best ensure" personal success.

Amici share an obvious interest in preventing the degradation of standardized testing and the attendant risks to the overall fairness of testing programs that play a crucial role in a broad range of academic admissions, professional licensure, and certification contexts. These *amici* consist of:

The Association of American Medical Colleges (AAMC) is a not-for-profit organization whose mission is to improve the Nation's health by supporting academic medicine. Founded in 1876, the AAMC represents all 134 accredited U.S. medical schools, nearly 400 major teaching hospitals and health systems, including 62 VA medical centers, and thousands of medical students and resident physicians. Among other activities, the AAMC develops and administers the Medical College Admission Test (MCAT), which is used by medical school admission committees around the country to fill the limited number of seats that are available each year in medical schools. The MCAT is a standardized, multiple-choice examination designed to assess an examinee's critical thinking, problem solving, writing skills, and knowledge of science concepts and principles. Approximately 80,000 MCAT exams are administered each year.

The National Board of Medical Examiners (NBME) is a not-for-profit organization whose mission is to protect the health of the public through state-of-the-art assessment of health professionals. Founded in 1915, NBME, together with the Federation of State Medical Boards, co-sponsors the United States Medical Licensing Examination (USMLE), a three-step examination for medical licensure in the United States. USMLE is designed to assess a prospective physician's ability to apply knowledge, concepts, principles, and skills that constitute the basis of safe and effective patient care. Over 130,000 USMLE examinations are administered each year.

Established in 1912, the Federation of State Medical Boards (FSMB) is a national not-for-profit organization representing the 70 medical boards of the United States and its territories. The FSMB also co-sponsors the USMLE, which is relied upon by all allopathic (M.D.) and composite (M.D. and D.O.) medical licensing boards in the United States in meeting their statutory requirement to assess physicians before issuing an initial medical license. The member boards thus have a strong interest in protecting the integrity and reliability of USMLE scores as part of their efforts to protect the public welfare.

The Law School Admission Council (LSAC) is a non-profit corporation that was founded in 1947 to facilitate and enhance the law school admission process. LSAC provides programs and services related to legal education, and is best known for developing and administering the Law School Admission Test (LSAT). The LSAT helps law schools make sound admission decisions by providing a standard measure of reading and verbal reasoning

skills. Approximately 140,000 prospective law students take the LSAT each year.

The Graduate Management Admission Council (GMAC) is a not-for-profit organization that assists business school programs around the world. Founded in 1953, GMAC developed and administers the Graduate Management Admission Test (GMAT). The GMAT is a standardized test that measures an individual's verbal, mathematical, and analytical writing skills. GMAT scores are used by admissions officers as one predictor of academic performance in business and graduate management programs. Approximately 250,000 GMAT examinations are administered each year.

The National Council of Examiners for Engineering and Surveying (NCEES) is a national non-profit organization comprising the engineering and surveying licensing boards of all States and U.S. territories. NCEES develops standardized examinations that help assess the competency of professional engineers and surveyors. Approximately 80,000 NCEES exams are administered each year.

The Federation of Associations of Regulatory Boards (FARB) is a not-for-profit membership corporation formed in 1974. FARB's members are associations with their own members: namely, state licensing boards that rely on standardized examinations as part of their licensure process. FARB's members include the American Association of Veterinary State Boards, Association of Regulatory Boards of Optometry, Association of State and Provincial Psychology Boards, National Association of Long Term Care Administrator Boards, National Association of Boards of Pharmacy, National Association of State

Boards of Accountancy, National Association of State Contractors Licensing Agencies, and National Council of Architectural Registration Boards. FARB's mission is to promote regulatory excellence in order to enhance public protection.

The National Council of Architectural Registration Boards (NCARB) is a non-profit membership organization whose members are the architectural registration boards of the 50 states, the District of Columbia, and three U.S. territories (Guam, Puerto Rico, and the U.S. Virgin Islands). NCARB's mission is to protect the public health, safety, and welfare by leading the regulation of the practice of architecture through the development and application of standards for licensure and credentialing of architects. NCARB administers the Architect Registration Examination, which all architects wishing to become licensed in any State in the country must pass.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S DECISION FUNDAMENTALLY THREATENS THE FAIRNESS, VALIDITY, AND ADMINISTRATION OF STANDARDIZED TESTS THROUGHOUT THE COUNTRY.

Despite slight differences in wording, all three Titles of the ADA share a common nondiscrimination mandate: to ensure access and equal opportunity, regulated entities must provide "reasonable accommodations" to individuals with disabilities. That foundational principle applies to virtually every aspect of public life in the United States regulated by the ADA: whether measuring the obligations of an employer in the workplace under Title I of the Act, *see, e.g.*, *US Airways, Inc.* v. *Barnett*, 535 U.S. 391,

400-405 (2002), or the duties of state and local governments under Title II, *see, e.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 523-525 (2004), or the responsibility of every place of public accommodation throughout this Nation—from theaters to cruise ships to golf courses—under Title III, *see, e.g.*, *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119, 129 (2005); *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 676-682 (2001). And because that familiar rule applies across the board to every claim of disability discrimination, it has been interpreted countless times in countless contexts, thus providing a degree of predictability and certainty to disabled persons, regulated entities, and the courts that must ultimately assess ADA compliance.

But the Ninth Circuit's decision declares that this universal standard does not reach one peculiar aspect of American life: the administration of standardized tests governed by § 12189 of the ADA. *See* Pet. App. 17a. According to the Court of Appeals, an organization that administers standardized tests must do something more than offer a "reasonable accommodation" to an individual with a disability. Instead, that organization must "administer the exam 'so as to best ensure' that the exam results accurately reflect aptitude rather than disabilities." *Id.* (citation omitted). However, this unique rule cannot be harmonized with the text or purposes of the ADA.

A. Congress Did Not Intend To Hold Testing Organizations To A Nondiscrimination Standard That No Employer, Public Agency, Or Private Party In This Country Faces.

In enacting the ADA, Congress declared that the "Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency." 42 U.S.C. § 12101(a)(8). As this Court has recognized, Congress was concerned with ameliorating obstacles that "bar those with disabilities from participating fully in the Nation's life." *Barnett*, 535 U.S. at 401 (citing 42 U.S.C. §§ 12101(a) and (b)).

The "reasonable accommodation" mandate plays a central role in eliminating these obstacles and thereby allowing disabled persons to "compete on an equal basis" with others—whether for a job, admission to medical school, or taking an examination. Under that standard, employers covered by Title I of the Act may be required—within reason—to change the physical arrangements of the workplace, provide new or modified equipment, alter job responsibilities, or permit a modified work schedule. *See* 42 U.S.C. § 12111(9). The same "reasonable accommodation" standard is also what compels State and local governments covered by Title II to take reasonable steps to make courthouses, libraries, parks, streets, and sidewalks accessible as a practical matter to individuals with disabilities. *See* 42 U.S.C. §§ 12131-12132. And the same "reasonable accommodation" standard ensures that, to the extent reasonably practicable, private entities covered by Title III—restaurants, hotels, supermarkets, movie theaters, and stadiums (to name just a few)—be accessible and

thus allow disabled individuals to "participat[e] fully in the Nation's life." *Barnett*, 535 U.S. at 401 (citing 42 U.S.C. §§ 12101(a) and (b)). The important point is that, in virtually every aspect of American civic life, the "reasonable accommodation" standard fully effectuates Congress's principal objective in enacting the ADA: "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for those with disabilities. 42 U.S.C. § 12101(a)(8).

The Ninth Circuit nevertheless held that Congress wanted to impose an entirely different obligation on one narrow slice of American life: the administration of standardized tests offered by private organizations. But nothing in the ADA suggests that Congress thought that the "reasonable accommodation" standard was inadequate as applied to standardized tests. All the Act says about testing is that organizations offering certain types of tests must do so "in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals." 42 U.S.C. § 12189.

Of course, as the panel noted, the word "accessible" is not defined in § 12189. But that is not surprising: This provision appears at the end of Title III, by which point Congress had already articulated its exhaustive findings and had set forth accessibility standards in employment, local government, and public accommodations. Having made clear that "reasonable accommodations" are the method of guaranteeing disabled individuals an "opportunity to compete on an equal basis" with others in all aspects of public life, 42 U.S.C. §§ 12101(a)(8), 12111(9), 12112(b)(5)(A), 12182(b)(2)(A)(ii), Congress did not

need to spell out that this same standard should likewise measure the "accessibility" of standardized tests.

The Ninth Circuit's contrary view—that Congress intended to impose a different and more stringent accessibility standard on testing organizations—thus finds no support in the text or purpose of the Act. Of all the aspects of public life, there is no reason why Congress would have wanted to impose a unique (and uniquely demanding) accessibility standard on standardized testing instead of, say, access to courthouses or city hall or banks or stores or workplaces. Given that the ADA was designed to break down entrenched barriers that had long precluded disabled individuals from fully participating in civic life, if Congress really wanted to impose a two-tiered accessibility standard, singling out standardized testing for greatest scrutiny seems a curious choice indeed.

The tensions and inconsistencies do not stop there. Every circuit court—including the Ninth—has held that public universities and colleges under Title II must make "reasonable accommodations" for disabled students in administering classroom examinations. *See, e.g.*, *Wong* v. *Regents of the Univ. of Cal.*, 192 F.3d 807, 817-818 (9th Cir. 1999); *Zukle* v. *Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045-46 (9th Cir. 1999). But under the panel's decision, the same student is entitled to something *more* than just a "reasonable accommodation" when he or she sits in the same university lecture hall and takes the LSAT or MCAT. That result cannot be squared with the Act's text or Congress's intent. Vision-impaired individuals, for example, will face the same accessibility concerns when taking a standardized test

regardless of whether it is administered by a public university covered by Title II or a testing organization covered by § 12189. Congress could not have wanted to provide that disabled individual with a "reasonable accommodation" in the former situation but offer him or her a more muscular "best ensure" success accommodation in the latter. Certiorari is warranted to correct the glaring asymmetry that the Ninth Circuit's rule introduces.

The Ninth Circuit's rule does more than just misread the ADA; it undermines its objectives. As this Court has emphasized in the employment context, the ADA "will sometimes require affirmative conduct to promote entry of disabled people into the work force." *Barnett*, 535 U.S. at 401. The statute "do[es] not, however, demand action beyond the realm of the *reasonable*." *Id.* (emphasis added). The term "reasonable" naturally assumes its ordinary meaning in the law: that of "fair, proper," "suitable under the circumstances," or "fit and appropriate to the end in view." Black's Law Dictionary 1272 (7th ed. 1999); *see* XIII Oxford English Dictionary 291 (2d ed. 1989) ("not extravagant or excessive," "[o]f such an amount, size, number, etc., as is judged to be appropriate or suitable to the circumstances or purpose," "[p]roportionate"). When it comes to the narrow field of standardized testing, there is no reason why Congress would have wanted to give disabled individuals an accommodation that was *more* than "fair" or "appropriate to the end."

To give a disabled individual more than what is necessary to reasonably accommodate his or her disabilities would distort the "opportunity to compete on an equal basis" that Congress emphasized in its

findings. The panel's novel rule thus risks endowing some disabled individuals with a *superior* opportunity over their peers on these tests, a result that cannot be harmonized with the ADA's text or purposes. Just as "Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities," neither does § 12189 require a testing organization to provide a potentially limitless array of accommodations. *Lane*, 541 U.S. at 531-532. To the contrary, in both cases the ADA "requires only 'reasonable modifications.'" *Id.* at 532.

B. The Ninth Circuit's Decision Will Invite Mischief, Undermine Basic Fairness, And Jeopardize Public Welfare.

The Ninth Circuit's "best ensure" standard threatens to fundamentally alter how standardized tests are administered. And by radically recalibrating "standardized" tests into choose-your-own-best-regimen tests, the Ninth Circuit's rule will invite problems that are both troubling and pervasive.

Millions of standardized examinations are administered every year in a variety of contexts: admissions to college and professional school; professional licensure (for doctors, lawyers, architects, engineers, nurses, chiropractors, insurance agents, and architects, among others); and certification of skill levels in fields ranging from automobile mechanics to medical specialties. *Amici* alone account for more than 680,000 of these exams. *See supra* at 2-4. That ubiquity exists for a reason: Standardized tests provide third parties with an objective rubric for comparing candidates who have vastly different educational backgrounds. They also play a critical

role in ensuring public welfare. Virtually all professional occupations rely on standardized examinations to evaluate the competency of their practitioners and thereby provide a measure of confidence that the public can rely on their skills and professional judgments.

The essence of standardized exams is "to promote fairness in testing by keeping the exam content, administration, and scoring uniform for all examinees." Stephen G. Sireci, *Unlabeling the Disabled: A Perspective on Flagging Scores from Accommodated Test Administrations*, 34 Educ. Researcher 3, 9 (2005). In short, the "idea behind standardization is to keep the measurement * * * and observation conditions constant so that any differences observed reflect true individual differences, rather than measurement artifacts." *Id.* at 4. The challenge when administering standardized tests to disabled individuals is to screen out those "individual differences" linked to disability while still measuring all other relevant individual differences. Striking the right balance is key. As researchers put it, "the degree to which the accommodation promotes validity is directly related to the degree to which the accommodation alters the construct measured." *Id.* at 5. A standardized test will fail to reflect an individual's true talents when an accommodation ends up accommodating too much or too little.

Relatively speaking, accommodation requests involving physical impairments—this case notwithstanding—have been neither difficult to evaluate nor particularly controversial. Under the Ninth Circuit's rule, however, it will not be enough to simply determine whether an accommodation is reasonable—as

testing organizations, like all other regulated entities under the ADA, have done. Instead, organizations will now have to offer accommodations that somehow "best ensure" that an impairment has no effect on the test-taker's performance. That cannot be implemented in any realistic or reliable fashion, and invites chaos and mischief in the administration of standardized tests. For every standardized test administered in the Ninth Circuit's jurisdiction, testing entities covered by § 12189 now must provide whatever idiosyncratic accommodation each disabled individual insists will "best" ensure his or her success on the exam.

Not only will that prove to be an unworkable rule in that vast territory, but it will inevitably skew nationwide standardized test results, given the size and breadth of the territory covered by the Ninth Circuit. According to the 2000 census data, States within the Ninth Circuit contribute 19.3% of the total U.S. population. *See* Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2009, *available at* http://www.census.gov/popest/states/NST-ann-est.html (last checked May 9, 2011). The Ninth Circuit's unique rule will not only saddle administrators with different standards in different states, but also compromise the validity of standardized test results for everyone in the Nation.

These concerns are real. *Amicus* AAMC, for example, was recently sued because it failed to provide an MCAT applicant with various accommodations that he insisted he needed to succeed. They included "having the proctor check that his answers have been entered correctly; having the test administered in a

'distraction free environment because when I am working I do not wish to be interrupted or disturbed since my productive examination time is most valuable'; and up to '11 times' the normal time allotted for the examination." *Rumbin* v. *Association of Am. Med. Colleges*, 2011 WL 1085618, at *4 (D. Conn. Mar. 21, 2011). Although the district court ruled after trial that the plaintiff was not disabled within the meaning of the ADA, *id.* at *1, *11, the nature of his request illustrates the risks inherent in the Ninth Circuit's new "best ensure" success standard. While Mr. Rumbin's accommodation requests would surely be viewed as unreasonable by a fact finder, the analysis might well be different if the question were framed in terms of "best ensuring" that his visual impairment had no affect on his exam performance.

The need for certiorari is heightened still further because the Ninth Circuit's "best ensure" rule applies not just to physical impairments, but to *all* impairments, including Attention Deficit/Hyperactivity Disorder (ADHD) and learning disabilities (LD). That is significant, for the majority of accommodation requests that *amici* receive are based on ADHD and LD diagnoses. For instance, the startling rise in the percentage of accommodated SAT test-takers identified in the NCBE's petition, *see* Pet. 31, was due entirely to the exponential growth in accommodation requests from those claiming LD or ADHD. *See* E. Mandinach *et al.*, *The Impact of Flagging on the Admissions Process: Policies, Practices, and Implications* 8 (2002). While those students accounted for only 15% of all disabled students in 1988, they made up a full 41% of the disabled student population a decade later. *Id.*

LD and ADHD disabilities already present tremendous challenges to testing organizations. It is far more complicated to confirm the existence of these mental impairments, to evaluate the resulting functional limitations, and—this is key—to determine whether the requested accommodations are reasonable and appropriate.[2] The Ninth Circuit's "best ensure" standard will only compound the indeterminacy that inheres with these increasingly prevalent impairments. And because these sorts of impairments resist easy identification and measurement, testing organizations such as *amici* will find it difficult to meaningfully assess the propriety of any requested accommodation under the elastic standard

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[2] These problems are further compounded by an unfortunate though well-documented moral hazard. Individuals competing for scarce academic slots or intensely difficult professional certifications recognize that a diagnosis of LD or ADHD will entitle them to advantages on standardized tests. Research has found that a significant number of individuals fabricate or exaggerate their symptoms. As one study puts it: "Motivated by what they view as attractive benefits associated with diagnoses of * * * [ADHD or LDs], particularly in academic settings, adults undergoing diagnostic evaluations * * * might exaggerate symptomatology on self-report measures and tests of neurocognitive functioning." B. Sullivan *et al.*, *Symptom Exaggeration by College Adults in Attention-Deficit Hyperactivity Disorder and Learning Disorder Assessments*," 14 Applied Neuropsychology 189 (2007). In another study, researchers found that "approximately 20% [of students] significantly exaggerated their symptoms or in fact willfully malingered concerning ADHD in order to receive some secondary gain." A. Harrison, *Adults Faking ADHD: You Must Be Kidding!*, 14 ADHD Report 1, 3 (2006). Among the "considerable secondary gain potentials" sought by these individuals were "academic accommodations (*e.g.*, extended test time, private testing environments, alternative courses) and other forms of assistance available" under the ADA. B. Sullivan, *supra*, at 189.

that the Ninth Circuit has adopted. Likewise, the district courts asked to apply this new rule will enjoy little guidance—other than a plaintiff's own subjective sense—in determining which accommodations "best ensure" success. That sort of fatal indeterminacy squarely conflicts with one the ADA's principal objectives: "to provide clear, strong, consistent, enforceable standards" addressing discrimination. 42 U.S.C. § 12101(b)(2).

The fact that ADA plaintiffs themselves often do not know which accommodations will "best ensure" their success only underscores how unworkable the Ninth Circuit's test is. *See* Pet. 9-10 (describing Respondent's evolving accommodation requests). For instance, in *Hartman* v. *National Board of Medical Examiners*, 2010 WL 4461673, No. 09-5028 (E.D. Pa. Oct. 18, 2010), an examinee with a stutter sued the NBME to obtain the unprecedented accommodation of being allowed to use text-to-speech software for the simulated clinical encounters, a key component of the Step 2 Clinical Skills portion of the USMLE. Although the NBME had offered the examinee more time as a reasonable accommodation, the district court issued an injunction allowing the examinee to use his preferred accommodation. As it turns out, the examinee took the exam using only the accommodation offered by the NBME—more time—and passed. His preferred accommodation was thus not only unreasonable; it proved entirely unnecessary (which is why the district court ultimately vacated its injunction as moot. *See id.* at *1).

The panel's decision—by bestowing on disabled individuals a right to be provided accommodations that "best ensure" their success—also promises to tax

testing organizations with new and unnecessary costs. If forced to provide a test-taker with not just a reasonable accommodation but an accommodation that—by the test-taker's own lights—"best ensures" his or her success, testing organizations may incur colossal fees to implement those requests. The costs that NCBE has already incurred in this litigation to implement Respondent's hand-picked accommodations have been substantial. *See* Pet. 31-32. But the costs do not stop there. With increased uncertainty comes an increased likelihood of costly litigation, compounded by the prospect of having to pay attorneys' fees in the event a court disagrees with professional testing organizations about whether a given accommodation will "best ensure" success for a given test-taker.

The ultimate cost, though, may be to the validity and fairness of the standardized tests that *amici* develop and administer. Already testing organizations must grapple with an important question: At what point does an accommodation tilt the playing field rather than level it? By definition, an accommodation allows examinees to take tests under conditions that are different from the conditions that all other examinees face. Of course, if the accommodations are reasonably tailored to ameliorate the disabled individual's limitations—and no more—then both the ADA's nondiscrimination mandate and the interest in standardization are vindicated. But an accommodation that does more than offer a "reasonable" response to a disabled individual's limitations will do neither. It will not promote the ADA because Congress wanted only to ensure that disabled individuals would enjoy an "equal opportunity to compete," not an advantage. And it will surely under-

mine standardization in the same way that giving a calculator to one test-taker but not his or her peers will offer an unrealistic portrait of how that student compares with the general test-taking population. Indeed, research has demonstrated that excessive accommodations—those that do *more* than reasonably accommodate an impairment—"may not be comparable to scores from students who take the test under standard time conditions." Sireci, *supra*, at 7 (citing C. Cahalan *et al.*, *Predictive Validity of SAT I: Reasoning Test for Test Takers with Learning Disabilities and Extended Time Accommodation* (College Bd. Research Rep. No. RR 2002-05); *see also* Nancy Leong, Comment, *Beyond* Breimhorst*: Appropriate Accommodation of Students with Learning Disabilities on the SAT*, 57 Stan. L. Rev. 2135, 2142 (2005) ("researchers found that extra time [on the SAT] would translate to a 5-to-10-point improvement on the verbal section and a 20-point increase on the math section").

But the problems with the Ninth Circuit's "best ensure" rule run deeper still. For instance, there are only so many spaces reserved for aspiring medical students in U.S.-accredited medical schools. Granting one of those precious spaces to a candidate whose scores do not fairly reflect his or her talent yields troubling and inequitable results. For starters, there is an element of individual unfairness: a better qualified student is denied a spot in deference to someone with lesser skill or knowledge. And that, in turn, amplifies a broader—and perhaps more significant—harm when it comes to professional licensure exams. The very essence of professional exams is to protect the public from doctors, lawyers, architects, engineers, accountants, and other professionals

lacking essential knowledge, skill, and judgment. By granting to disabled individuals accommodations that do more than "reasonably" or "fairly" address their limitations, the panel's "best ensure" rule threatens to undermine the important public welfare function of these standardized examinations. This Court should therefore grant the petition, reverse, and clarify that the traditional "reasonable accommodation" standard applies—as with all other regulated areas under the ADA—to standardized testing.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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