No. 10-___

IN THE

Supreme Court of the United States

NATIONAL CONFERENCE OF BAR EXAMINERS,
Petitioner,

v.

STEPHANIE ENYART,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

GREGORY C. TENHOFF
LORI R. MASON
WENDY J. BRENNER
LAURA A. TERLOUW
COOLEY L.L.P.
3175 Hanover Street
Palo Alto, CA 94306
(650) 843-5000

JONATHAN S. FRANKLIN*
ROBERT A. BURGOYNE
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

QUESTIONS PRESENTED

1. Whether private testing organizations covered by Section 309 of the Americans With Disabilities Act, 42 U.S.C. § 12189—unlike every other party subject to the ADA—must provide the "best" accommodations, rather than reasonable accommodations, to disabled individuals.

2. Whether a delay in taking an examination with requested accommodations constitutes irreparable harm sufficient to justify the extraordinary remedy of a mandatory preliminary injunction.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was defendant and appellant in the proceedings below, is the National Conference of Bar Examiners ("NCBE"). NCBE is a non-profit corporation and has no parent corporation, and no publicly held company owns any NCBE stock.

Respondent Stephanie Enyart was the plaintiff and appellee in the proceedings below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Blank Page

IN THE

Supreme Court of the United States

No. 10-___

NATIONAL CONFERENCE OF BAR EXAMINERS,

Petitioner,

v.

STEPHANIE ENYART,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

National Conference of Bar Examiners ("NCBE") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Ninth Circuit is reported at 630 F.3d 1153 and reproduced at page 1a of the Appendix to this petition ("App."). The district court's orders granting the preliminary injunctions appealed from are unreported and are reproduced at App. 30a, 49a.

JURISDICTION

The judgment of the Ninth Circuit was entered on January 4, 2011. The Ninth Circuit denied a timely petition for rehearing en banc on February 11, 2011. App. 28a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The text of relevant statutes, regulations and regulatory guidance is set forth in the Appendix.

INTRODUCTION

In this case, the Ninth Circuit adopted a radical interpretation of the Americans With Disabilities Act ("ADA") that puts it at odds with every other court to have construed the statutory requirement that accommodations be provided to disabled individuals. The court held that private entities that conduct application, licensing, certification, or credentialing examinations must do more than comply with the ADA's reasonable accommodation requirement. Instead, they must provide whatever accommodations will "best" ensure that a test does not reflect a particular person's disability. For all other entities covered by the ADA—including testing entities governed by other provisions of the ADA—reasonable accommodations are what the ADA requires. But according to the Ninth Circuit, reasonable is not enough when it comes to taking standardized tests like the Multistate Bar Examination: instead, the "best" accommodation must be provided to disabled examinees, as inevitably determined by the examinees themselves.

This marked departure from established precedent warrants this Court's review. The well-

settled—and, until now, universal—reasonable accommodation standard allows testing organizations the flexibility to choose from a range of reasonable options to sensibly accommodate disabilities while meeting legitimate cost, security and other programmatic concerns. By contrast, the Ninth Circuit's mandate that NCBE must provide whatever accommodation is "best" for a specific individual requires a potentially endless array of testing modifications, as each person requests whatever accommodations he or she believes will lead to the best score. Test administrators are now subject to different legal standards in different parts of the country, and the standard in the Ninth Circuit defies application.

Moreover, the Ninth Circuit exacerbated its error by holding that a delay in taking an exam with requested accommodations necessarily constitutes irreparable harm warranting a preliminary injunction. This holding conflicts with *Winter* v. *NRDC*, 129 S. Ct. 365 (2008), and with the decisions of other circuits.

The Court should grant certiorari to address these issues of national importance and restore uniformity to the law.

STATEMENT OF THE CASE

A. Facts.

Respondent Stephanie Enyart is legally blind. App. 2a. By 2004, when she took the Law School Admission Test ("LSAT"), Enyart had become "fully dependent on reading by listening." Ninth Cir. Excerpts of Record ("ER") at 464. Her primary accommodations for the LSAT were a human reader, a scribe to fill in answers, and double time. ER289, 468. The LSAT is a half-day examination comprised

of an essay and 100 multiple-choice questions that test reading comprehension and reasoning skills. *See About the LSAT* (www.lsac.org/jd/LSAT/about-the-LSAT.asp). Enyart scored well and was admitted to eight law schools, including UCLA, which she attended. ER293-94; ER754. Her visual impairment has not materially changed since she took the LSAT with a human reader. ER460-61.

In 2009, Enyart sought to take the Multistate Professional Responsibility Examination ("MPRE") and the Multistate Bar Examination ("MBE"), which she needed to pass to be licensed to practice law in California. App. 3a. Both tests have a similar format to the LSAT. The MPRE is a two-hour, 60-question, multiple-choice exam testing knowledge of professional conduct standards. *Id.* The MBE is a six-hour, 200-question, multiple-choice exam that tests knowledge of the law in various subjects. *Id.* NCBE develops the MPRE and the MBE. NCBE contracts with another company, ACT, to administer the MPRE and makes the MBE available for purchase by the California Committee of Bar Examiners ("CCBE") for use in its bar exam. *Id.*

Because test questions are reused, examination security is crucial to NCBE's mission of providing examinations that state authorities can rely upon in licensing attorneys. ER415. The MBE and MPRE are administered in paper-and-pencil format, not by computer. ER410-11.

When Enyart registered to take the March 2009 MPRE, she requested extra testing time, a private room, hourly breaks, and permission to use a lamp, digital clock, sunglasses, yoga mat, and medication during the exam. App. 3a. She also asked to take the exam on a computer equipped with "JAWS" and

"ZoomText" software. App. 4a. JAWS is a screen-reader program that reads text aloud. *Id.* ZoomText magnifies screen text. *Id.*

Although Enyart had successfully used a human reader on the LSAT, she now claimed that the combination of JAWS and ZoomText was "the only method" through which she could "effectively read and comprehend lengthy or complex material." App. 33a. No other examinee had ever taken the MPRE or MBE on a computer using these two software programs, and only a handful had previously been permitted to use one of the programs by itself. ER414.[1]

ACT granted all of Enyart's requested MPRE accommodations, except the computer equipped with JAWS and ZoomText. NCBE provides the MPRE in an electronic format—an audio version of the test played on a portable CD player—but does not provide a computer-based format. ER414-418. NCBE does not allow examinees to use laptops because of "security risks associated with permitting computer aids to be used in multiple-choice tests." App. 34a. NCBE re-uses questions, and examinees' use of their own laptops could permit them to surreptitiously record questions in an undetectable manner. ER415-16. Laptops also make questions vulnerable to widespread theft given the ease of transmitting electronic information. ER416. Therefore, NCBE cannot simply put the exam on a disk for examinees to use on their own laptops.

---

[1] An NCBE computer with ZoomText was provided for a deaf and legally blind examinee who could not use auditory formats. *Id.* NCBE conducted a limited JAWS pilot program but concluded that this format could not feasibly be provided on a larger scale. ER414-15.

It is also expensive to administer secure examinations in a computer-based format. NCBE determined that providing secure laptops loaded with assistive software would cost approximately $5,000 per accommodated examinee, which vastly exceeded the $60 registration fee. ER417-18. This includes the costs of providing the computers, shipping them, training the personnel who administer the tests, and retrieving the computers. *Id.* And even this option would not eliminate security concerns. *Id.*

Instead of a computer-based format, NCBE offered Enyart several alternative formats as reasonable accommodations. It offered her a choice between a human reader or an audio CD of the exam, along with use of closed-circuit television ("CCTV") or a large-print format for text magnification, and a scribe to record answers; a Brailled version of the MPRE was also available. App. 4a-5a; ER411, 447. Enyart, however, rejected all these alternatives and cancelled her registration for the March 2009 MPRE. *Id.*

Enyart then applied to take the July 2009 California bar exam, requesting the same accommodations she had sought for the MPRE. App. 4a. The CCBE granted all of them except her request to take the MBE using a computer equipped with ZoomText and JAWS. *Id.*

As with the MPRE, Enyart was offered numerous alternative formats for the MBE, including a human reader, an audio CD with the test questions pre-recorded, a large-print exam in her requested font size, and a CCTV. App. 34a. The CCBE also agreed to provide double testing time, a private room, extra breaks, and a scribe, and authorized Enyart to use her lamp, clock, sunglasses, yoga mat, and

medication. *Id.* Enyart rejected the alternatives and cancelled her registration for the July 2009 bar exam. *Id.*; ER512.

Enyart next registered for the November 2009 MPRE and requested the same accommodations. App. 4a-5a. NCBE again declined to provide the MPRE on a computer equipped with ZoomText and JAWS, but offered the other reasonable alternatives. App. 5a; ER413, 440-41. Enyart rejected them, cancelled her registration, and filed this lawsuit. App. 5a; ER413.

The formats that were available to Enyart—a human reader, audio CD version, Brailled examination, and large-print version—are precisely the suite of formats that the U.S. Department of Justice ("DOJ") has urged testing organizations to offer visually impaired individuals in order to give them a "fair opportunity to demonstrate their knowledge and ability in high-stakes standardized testing."[2] The National Federation of the Blind has referred to these formats as "the four standard media routinely used by blind persons to access standardized tests." ER271. In contrast, NCBE knows of no national testing program involving secure standardized tests that makes its exams available in an alternative computer-based format with JAWS and ZoomText.

B. District Court Proceedings.

Enyart sued NCBE alleging violations of the ADA and California state law.[3] She sought a declaration

---

[2] Notice of Consent Decree at 2 (July 6, 2000) (www.justice.gov/opa/pr/2000/July/383cr.htm).

[3] Enyart also sued ACT and the California State Bar. Those defendants were dismissed after stipulating that they would

that she was "entitled to reasonable accommodations" on the MBE and MPRE including a laptop equipped with her preferred software, and a corresponding injunction. Compl. 11 (Dkt. 1).

Enyart alleged a violation of Section 309 of the ADA, which provides that entities offering "examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals." 42 U.S.C. § 12189. Section 309 is part of Title III of the ADA.

The district court granted a preliminary injunction allowing Enyart to take the March 2010 MPRE and the MBE portion of the February 2010 California bar exam using JAWS and ZoomText. The court described a "central dispute between the parties" as the "proper legal standard to apply under the [ADA]." App. 31a. Enyart sought "a standard that is more lenient for plaintiffs than the traditional 'reasonable accommodation' standard" whereas NCBE sought "the typical 'reasonable accommodation' standard." *Id.*

Enyart relied on a DOJ regulation providing that examinations conducted by private testing entities must be conducted

> so as to best ensure that, when the examination is administered to an individual with a disability * * *, the examination results accurately reflect the individual's aptitude or

---

furnish accommodations as ordered by the court or agreed to by NCBE. Dkt. 24, 27.

> achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure).

28 C.F.R. § 36.309(b)(i).

The district court, however, declined to resolve this dispute over the governing legal standard. Stating that Enyart's interpretation of DOJ's "best ensure" language "appears to be in some conflict with the statutory language itself, which requires only that examinations shall be 'accessible to persons with disabilities,'" App. 37a (quoting 42 U.S.C. § 12189), the court "decline[d] [Enyart's] invitation to determine whether the 'best ensure' language requires a test administrator to offer the 'best' available and most comprehensive technology in accommodating a disability." *Id.* Instead, it granted a preliminary injunction assuming the traditional "reasonable accommodation" standard applied. *Id.* The court also found irreparable harm in "the professional stigma and psychological impact at issue in this case." App. 44a.

The injunction provided Enyart numerous accommodations for the February 2010 MBE and the March 2010 MPRE, including double time, a private room, extra breaks, a scribe, and the exams loaded onto a laptop equipped with JAWS and ZoomText. App. 46a. NCBE was also ordered to ask ACT to provide Enyart with sufficient time beforehand to attach peripherals, and to permit her to use an ergonomic keyboard, a trackball mouse, a large monitor, and her own lamp, sunglasses, yoga mat, digital clock and medication. App. 47a.

NCBE appealed. While the appeal was pending, Enyart tested with her requested accommodations but failed both the MPRE and the California bar exam. App. 8a. Accordingly, she sought a second preliminary injunction covering the July 2010 MBE, the August 2010 MPRE and "any other administration" of the MBE or MPRE. *Id.*

In granting the second preliminary injunction, the district court noted the "unforeseen detail" that Enyart had not asked to have the exams provided in 14-point Arial font; the exams were provided in 12-point Times New Roman font. App. 49a-50a. Enyart claimed to experience additional eye fatigue because of the font size and type, and asserted that this affected her performance. App. 50a.

The second injunction ordered NCBE to make the July 2010 MBE and August 2010 MPRE available on computers equipped with ZoomText and JAWS. App. 58a-60a. The court again found irreparable harm, but this time based upon Enyart's claim that she was "prevented from pursuing her chosen profession." App. 53a. The second injunction gave Enyart all her original requested accommodations plus the font size and type that she preferred. App. 58a-59a. NCBE appealed.

Although Enyart passed the August 2010 MPRE, she again failed the California bar exam in July 2010. App. 9a. In fact, on both the February 2010 and July 2010 MBE—each taken with her requested accommodations—Enyart's scored in only the fourth percentile nationally, meaning that 95% of test-takers scored higher. Decl. of Douglas Ripkey ¶¶ 3, 4 (Dkt. 125).

C. Ninth Circuit Proceedings.

The Ninth Circuit consolidated the appeals from the two preliminary injunctions and affirmed, but its analysis differed from the district court's in a critical respect. Whereas the district court declined to answer the "thorny question" whether the usual "reasonable accommodation" standard applies to private testing organizations under Title III, App. 37a, the Ninth Circuit reached that question and decided it in Enyart's favor. It held that private testing entities—unlike every other entity covered by the ADA or similar disability discrimination statutes—cannot simply provide accommodations that are reasonable, but instead have a greater obligation. App. 17a.

Under the ADA, private testing entities must provide their examinations "in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements * * *." 42 U.S.C. § 12189. The Ninth Circuit concluded that the word "accessible" is "ambiguous in the context of licensing exams." App. 14a-15a. And it rejected NCBE's contention that this term should be applied consistently with the rest of the ADA (and the earlier Rehabilitation Act upon which it was modeled) to require reasonable accommodations. Noting that Congress had incorporated the reasonable accommodation standard into Title I of the ADA, which governs employment, the Ninth Circuit held that "Congress did *not* incorporate [the] 'reasonable accommodation' standard into § 12189." App. 17a (original emphasis).

The court did not explain why Congress would have subjected private testing organizations to a different legal standard than the well-settled reason-

able accommodation standard that governs every other aspect of disability law, including other forms of testing. Instead, it deferred to Enyart's interpretation of the DOJ regulation, which the district court had stated "appears to be in some conflict with the statutory language itself." App. 37a.

According to the Ninth Circuit, it is not sufficient that a testing entity covered by § 12189 provide reasonable accommodations to disabled examinees. Rather, such an entity "must administer the exam 'so as to *best ensure*' that exam results accurately reflect aptitude rather than disabilities." *Id.* at 17a (quoting 28 C.F.R. § 36.309) (emphasis added). "Applying [this] 'best ensure' standard," the court "conclude[d] that the district court did not abuse its discretion by holding that Enyart demonstrated a likelihood of success on the merits." App. 17a. Notably, the court did not find that any of NCBE's alternative accommodations were unreasonable. Once the court rejected the reasonable accommodation standard, the term "reasonable" appeared nowhere in the rest of its opinion. App. 18a-29a. The court did not explain how a testing entity (or a court) is ever to know what accommodation is "best" for a particular person.

The Ninth Circuit further held that "Enyart demonstrated irreparable harm in the form of the loss of opportunity to pursue her chosen profession," since she could not become licensed *if* she received a low MBE or MPRE score. App. 23a. Even though Enyart had failed the MPRE and the California bar exam *with* her requested accommodations, the court held it was "not speculative" to think that the absence of those accommodations would prevent her from passing. App. 24a. The court held that a mere

delay in being able to take an exam with requested accommodations is irreparable harm, because "'[a] delay, even if only a few months, pending trial represents precious, productive time irretrievably lost' to Enyart." App. 25a (citation omitted).

NCBE petitioned for rehearing and rehearing en banc, which was denied. App. 28a-29a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH EVERY OTHER CASE ADDRESSING ACCOMMODATIONS FOR DISABLED TEST-TAKERS.

Until the decision below, federal law prohibiting disability discrimination had only one standard covering all regulated testing entities, whether recipients of federal funds, employers, schools, universities, or testing organizations. All were required to provide "reasonable accommodations." The Ninth Circuit, however, singled out one group of covered entities—providers of standardized tests such as NCBE—and imposed on them a more onerous, and unworkable, burden. This stark conflict warrants the Court's review.

A. All Other Courts Have Interpreted Federal Law To Mandate Reasonable Accommodations For Disabled Test-Takers.

Like everyone, disabled people take many exams, whether to apply for or during school, to get jobs and promotions, or for certifications or licenses needed to practice professions. Each step of the way, those examinations are governed by federal statutes that prohibit discrimination based on disability. What unifies the disability anti-discrimination provisions

is the "accommodation theme," *Tennessee* v. *Lane*, 541 U.S. 509, 537 (2004) (Ginsburg, J., concurring)—a "'comprehensive view of the concept of discrimination'" that "embrace[s] failures to provide 'reasonable accommodations.'" *Id.* (citation omitted).

1. Tests Conducted By Entities Receiving Federal Funds.

Under the Rehabilitation Act of 1973, the disabled may not be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). This general provision has long been interpreted to require "a reasonable accommodation of the plaintiff's disability," including in testing. *Fink* v. *N.Y. City Dep't of Personnel*, 53 F.3d 565, 567 (2d Cir. 1995); *see also Wynne* v. *Tufts Univ. Sch. of Med.*, 932 F.2d 19, 25-26 (1st Cir. 1991); *Pandazides* v. *Va. Bd. of Educ.*, 13 F.3d 823, 833 (4th Cir. 1994).

In *Fink*, the Second Circuit applied this settled standard to hold that an employer did not violate the Rehabilitation Act when it reasonably accommodated visually impaired individuals in its administration of a civil service exam. As the court held, the law "does not require * * * every accommodation the disabled employee may request, so long as the accommodation provided is reasonable." 53 F.3d at 567. The defendants complied with the law because "they made reasonable accommodation" by providing a tape recording of the exam, readers, a private room, and double time—even though the readers may have hindered the examinees' performance by distracting them. *Id.*

Because the ADA was modeled on the Rehabilitation Act, "Congress intended courts

construing the ADA to use relevant precedent developed under the Rehabilitation Act." *Bartlett* v. *N.Y. Bd. of Law Examiners*, 970 F. Supp. 1094, 1116-17 (S.D.N.Y. 1997) (Sotomayor, J.), *aff'd in part and vacated in part on other grounds*, 156 F.3d 321 (2d Cir. 1998). *See also Mershon* v. *St. Louis Univ.*, 442 F.3d 1069, 1076 n.4 (8th Cir. 2006); 28 C.F.R. pt. 36, App. B, § 36.103.

2. Employment Tests.

Title I of the ADA covers employment. As the Ninth Circuit recognized, Congress "incorporated" the Rehabilitation Act's reasonable accommodation standard into Title I. App. 16a. Title I broadly prohibits discrimination against the disabled and defines that discrimination to include "not making reasonable accommodations." 42 U.S.C. §§ 12112(a), 12112(b)(5)(A).

Title I expressly covers exams that employers give job applicants and employees, and provides that the required "reasonable accommodations" include "appropriate adjustment or modifications of examinations." 42 U.S.C. § 12111(9)(B). *See, e.g.*, *Morisky* v. *Broward County*, 80 F.3d 445, 447-49 (11th Cir. 1996) (employment test requires reasonable accommodations). As the EEOC has explained, "*[t]he accommodation * * * does not have to be the 'best' accommodation possible*, so long as it is sufficient to meet the job-related needs of the individual being accommodated." 29 C.F.R. pt. 1630, App., § 1630.9 (emphasis added).

3. Tests Conducted By Public Schools And Other Governmental Entities.

Title II of the ADA covers governmental entities. Mirroring the Rehabilitation Act, it provides that the

disabled shall not "by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Although this general prohibition does not expressly require reasonable accommodations, the law defines a protected disabled individual as someone who is qualified for a program or service "with or without reasonable modifications to rules, policies, or practices." 42 U.S.C. § 12131(2). *See* 28 C.F.R. § 35.130(b)(7) ("[a] public entity shall make reasonable modifications").

Title II does not require "any and all means" to make services accessible. *Lane*, 541 U.S. at 531-32. Rather, it requires only "reasonable modifications." *Id.* By requiring only reasonable modifications, "Title II's affirmative obligation to accommodate persons with disabilities [is] * * * a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Id.* at 533.

Title II applies to exams conducted by public schools and universities—including millions of classroom exams conducted nationwide. *See* 28 C.F.R. §§ 35.102(a), 35.130(b)(6). Like the Rehabilitation Act and Title I, the law requires schools to provide "reasonable accommodations." *See Wong* v. *Regents of the Univ. of Cal.*, 192 F.3d 807, 817 (9th Cir. 1999); *Zukle* v. *Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045-46 (9th Cir. 1999); *McGuinness* v. *Univ. of New Mexico Sch. of Med.*, 170 F.3d 974, 979 (10th Cir. 1998).

Title II imposes the same obligation on public entities—like State Bar authorities—conducting licensing or professional exams. *See Bartlett* v. *N.Y. Bd. of Law Exam'rs*, 156 F.3d 321, 329 (2d Cir. 1998)

(individual "entitled to reasonable accommodations in taking the bar examination" under Title II and the Rehabilitation Act), *vacated on other grounds*, 527 U.S. 1031 (1999), *on remand*, 226 F.3d 69 (2d Cir. 2000); *In re Reasonable Testing Accommodations*, 722 N.W.2d 559, 563 (S.D. 2006).

4. Tests Conducted By Private Schools.

Title III of the ADA covers "public accommodations." It contains a general anti-discrimination provision and provides that such discrimination includes "a failure to make reasonable modifications in policies, practices, or procedures." 42 U.S.C. §§ 12182(a), 12182(b)(2)(A)(ii).

The public accommodations covered by Title III include all private schools, from nursery schools through post-graduate institutions. 42 U.S.C. § 12181(7)(J). Thus, under Title III, any private school conducting a classroom or other examination must provide reasonable accommodations for the disabled. *See, e.g.*, *Amir* v. *St. Louis Univ.*, 184 F.3d 1017, 1028 (8th Cir. 1999); *Kaltenberger* v. *Ohio College of Podiatric Med.*, 162 F.3d 432, 436-37 (6th Cir. 1998). This is the same requirement imposed on examinations conducted by federal fund recipients under the Rehabilitation Act, by employers under Title I, and by public entities under Title II. *See* H.R. Rep. No. 101-485(II), at 84 (1990) (Title II's anti-discrimination provisions are "identical to those set out in the applicable provisions of titles I and III"); S. Rep. No. 101-116, at 44 (1989).

5. Tests Offered By Private Entities Other Than Schools.

When drafting the ADA, Congress decided that it needed "to fill a gap which is created when licensing,

certification and other testing authorities are not covered by * * * the Rehabilitation Act or title II of the ADA" because they neither receive federal funds nor are public entities. H.R. Rep. No. 101-485(III), at 68-69 (1990).

The drafters understood that entities already covered by those other provisions "must make all of [their] programs accessible to persons with disabilities," including providing "accommodations in the way the test is administered," and they wanted to extend the same accessibility mandate to other testing authorities not already covered. *Id.* Congress filled this gap by adding Section 309 to Title III, which provides, in relevant part, that entities offering examinations "related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes" must offer them "in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements." 42 U.S.C. § 12189.

In line with § 12189's stated purpose of "filling a gap" by covering testing entities not already subject to other anti-discrimination provisions, every court to have applied that provision—other than the Ninth Circuit—has understood it to simply incorporate the well-settled reasonable accommodation standard that governs all other areas of disability discrimination law. For example, in *Gonzales* v. *Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620 (6th Cir. 2000), the Sixth Circuit recognized that under § 12189 "a covered entity discriminates against a disabled individual when it fails to make 'reasonable accommodations to known physical or mental limitations.'" *Id.* at 626 (citation omitted). *Accord Soigner* v. *Am. Bd. of*

Plastic Surgery, 92 F.3d 547, 554 (7th Cir. 1996) (noting in § 12189 case that "the law required * * * reasonable accommodations during the test").[4]

State supreme courts have likewise uniformly interpreted § 12189 to require only reasonable accommodations. In *In re Florida Bd. of Bar Exam'rs*, 707 So.2d 323 (Fla. 1998), the Florida Supreme Court held that under § 12189 and the DOJ regulation, the State Bar "must reasonably accommodate [a plaintiff] in administering the bar exam to ensure that the exam reflects the substantive legal knowledge, reasoning ability, and analytical skills it is intended to test rather than [her] disability." *Id.* at 324-25. It held that the plaintiff's requested accommodation "would result in preferential treatment and is not a reasonable accommodation." *Id.* at 325.

Likewise, in *In re Petition of Rubenstein*, 637 A.2d 1131 (Del. 1994), the Delaware Supreme Court, applying § 12189, recognized that "the *sine qua non* for bar examiners' compliance with the ADA '[is] principally a matter of making reasonable accommodations for disabled individuals to take the examination and to communicate with the licensing board.'" *Id.* at 1138 (citation omitted).

Powell v. *Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79 (2d Cir. 2004), shows why it makes no sense to apply

---

[4] *See also Rumbin* v. *Ass'n of Am. Med. Colleges*, __ F. Supp. 2d __, 2011 WL 1085618 at *8 (D. Conn. 2011); *Shaywitz* v. *Am. Bd. of Psychiatry & Neurology*, 675 F. Supp. 2d 376, 390-91 (S.D.N.Y. 2009); *Jaramillo* v. *Prof. Examination Serv.*, 544 F. Supp. 2d 126, 130 (D. Conn. 2008); *Scheibe* v. *Nat'l Bd. of Med. Exam'rs*, 2005 WL 1114497, *3 (W.D. Wis. 2005); *Pazer* v. *N.Y. State Bd. of Law Exam'rs*, 849 F. Supp. 284, 286 (S.D.N.Y. 1994).

different standards when evaluating claims for testing accommodations. There, the plaintiff sought accommodations on a licensing exam needed to advance in medical school. She sued both her medical school, a state agency covered by Title II and the Rehabilitation Act, and the National Board of Medical Examiners, a testing organization covered by Title III. The Second Circuit recognized that all the claims were governed by the *same* "reasonable accommodation" standard. As the court held, "the Rehabilitation Act and Titles II and III of the ADA prohibit discrimination against qualified disabled individuals by requiring that they receive 'reasonable accommodations' that permit them to have access to and take a meaningful part in public services and public accommodations." *Id.* at 85.

Then-Judge Sotomayor employed a similar analysis in *Bartlett*, *supra*. There, a dyslexic woman sued the New York Board of Law Examiners seeking accommodations on the bar exam. The court held that the defendant was subject to both Title II of the ADA and § 12189 of Title III, as well as the Rehabilitation Act. 970 F. Supp. at 1118-19, 1128-29. And as in *Powell*, the court employed a uniform "reasonable accommodation" standard. *Id.* at 1131 ("Because I find that plaintiff is disabled and that she was denied reasonable accommodations in taking the bar examination * * * I must find that her rights under the ADA and under Section 504 were violated.").

B. Unlike Every Other Court, The Ninth Circuit Has Mandated That Private Testing Organizations Provide More Than Reasonable Accommodations.

By contrast, the Ninth Circuit has now held that "Congress did *not* incorporate [the] 'reasonable

accommodation' standard into § 12189." App. 17a (original emphasis). In its view, testing organizations covered by § 12189 have a more onerous obligation than any other entity covered under the ADA, including other entities that administer tests. For testing organizations covered by § 12189, reasonable is not enough. They must provide whatever accommodations will, for a particular individual, "'best ensure' that exam results accurately reflect aptitude rather than disabilities." *Id.*

This ruling directly conflicts with all other precedents governing accommodations for disabled examinees. And it conflicts with the governing statute as well. The statute provides that testing organizations must make exams "accessible" to the disabled or "offer alternative accessible arrangements," 42 U.S.C. § 12189, which on its face does not require anything beyond the reasonable accommodations that have uniformly been held to make examinations—and every other program or activity covered by disability anti-discrimination laws—accessible to the disabled. *See Lane*, 541 U.S. at 537 (Ginsburg, J., concurring) (noting the ADA's "demand for reasonable accommodation to secure access and avoid exclusion"); *Alexander* v. *Choate*, 469 U.S. 287, 301 (1985) (Rehabilitation Act requires "meaningful access" to covered services, and "to assure meaningful access, reasonable accommodations * * * may have to be made").

The conflict is real and inexplicable. Disabled individuals are entitled to reasonable accommodations when they take tests at elementary and secondary schools, at private and public colleges, and on the job. But according to the Ninth Circuit, they are entitled to different, and greater, accom-

modations whenever they take application, licensing, certification, or credentialing examinations covered by § 12189. There is no reason—and the Ninth Circuit offered none—why Congress would have wanted different standards to govern the same activity.

Moreover, as shown by the recent decision in *Elder* v. *NCBE*, __ F. Supp. 2d __, No. C-11-00199-SI, 2011 WL 672662 (N.D. Cal. 2011), NCBE now has a legal obligation to afford different treatment to the *same* disabled person for the *same* exam, based solely on the location where he tests. Timothy Elder, who is blind, first sued NCBE in Maryland seeking to take the MBE portion of the Maryland bar exam on a computer equipped with JAWS. NCBE instead offered the alternative formats that were offered Enyart. Applying the traditional reasonable accommodation standard—and rejecting Elder's reliance on the "best ensure" regulatory language—the Maryland court denied Elder's request for a preliminary injunction, finding that he was not likely to succeed on the merits of his ADA claim. The Maryland court concluded that NCBE had "offered accommodations which are historically sound, [have] been accepted by [DOJ] in other circumstances; [and] which * * * show that it is acting entirely reasonably to make the examinations accessible." *Elder* v. *NCBE*, No. 1:10-cv-01418 (D. Md. 2010) (Dkt. 49, at 73). Elder took the MBE using a human reader and did extremely well, passing the Maryland bar exam.

Elder then sued NCBE in California and asserted the identical ADA claim. This time, a California court reached the opposite conclusion and granted a preliminary injunction requiring NCBE to make the MBE available for Elder on the California bar exam on a computer with JAWS. *Elder*, 2011 WL 672662,

*12. It noted that the Ninth Circuit in *Enyart* had "rejected the argument that section 12189 requires only 'reasonable accommodations,' as that phrase is used in other parts of the ADA" and instead "adopted the higher 'best ensures' standard." *Id.* *6. Under "the higher 'best ensures standard adopted by the Ninth Circuit in *Enyart*," Elder prevailed in California even though he had lost in Maryland on the exact same claim, and scored in the top 14% of all examinees (86th percentile) when his took the MBE in Maryland using a reader. *Id.* at *8.

The *Elder* cases show not only the direct conflict over the governing legal standard but also that the conflict can be outcome determinative. Whereas NCBE was not required to afford Elder a computer with JAWS when he took the MBE in Maryland, it was required to do so when he took the same test in California, solely because of the Ninth Circuit's different legal standard. Applying a reasonableness standard, the Maryland court denied Elder's request for his preferred test format. By contrast, the California court—applying the Ninth Circuit's higher standard—held that a computer equipped with JAWS was necessary because it "will best ensure Elder's success on the MBE and the bar exam as a whole," even though he had scored extremely well without the requested accommodations. *Id.*

Here, the alternative accommodations offered to Enyart (and Elder) were plainly reasonable. Indeed, DOJ had previously agreed that the *same* accommodations are reasonable for blind individuals taking another similar licensing exam. ER351-72. Moreover, Enyart had performed well on other tests using auditory formats without the requested software—including on the LSAT, which is similar to

the MPRE and MBE. *See also* ER383 (statement by Enyart that she requested a reader for the standardized Graduate Record Examination and that the "reader option is not a bad deal * * * because they can perform like Jaws").

If testing organizations must provide whatever accommodation will "best ensure" a particular person's success on an exam, there is literally no end to the kinds of aids and services that will be requested. Here, for example, the court initially ordered NCBE to provide its tests on a computer using Enyart's preferred software, JAWS and ZoomText. The second injunction added a requirement that NCBE provide its exams in 14-point Arial rather than 12-point Times New Roman type. App. 46a-50a. Enyart also sought, and was granted, double time and the right to bring a yoga mat to the exam. *Id.*

Other examinees, however, might claim that they need different software, in 16-point type and with a different font, along with unlimited testing time and their own preferred aids to "best ensure" their success. And it will be virtually impossible for a defendant to rebut such subjective assertions as to what specific accommodations would "best" ensure a particular examinee's success. If the standard is "best" rather than "reasonable," nothing less than the best will do, and the examinee will invariably be deemed to know what is best for him or her.

Further, what an examinee thinks is best may also change, as shown in this case. Enyart recently sought a *third* preliminary injunction in the district court, requesting that NCBE be ordered to use a *different* software program than ZoomText—called "MAGic"—because "she has been informed that MAGic * * * may work better with the most recent

version of JAWS than ZoomText does." Mot. for Third Preliminary Inj. 2-3 (Dkt. 117).

The reasonable accommodation standard avoids this kind of one-sided absolutism. The ADA does not "demand action beyond the realm of the reasonable." *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401 (2002). An employer, for example, "is not required to provide a disabled employee with an accommodation that is ideal from the employee's perspective, only an accommodation that is reasonable." *Lors* v. *Dean*, 595 F.3d 831, 835 (8th Cir. 2010). Likewise, a state entity covered by Title II is not required to provide a visually impaired individual's preferred accommodations, only reasonable ones. *Memmer* v. *Marin County Courts*, 169 F.3d 630, 634 (9th Cir. 1999).

While there is a range of reasonable options, only one can be "best." The reasonable accommodation standard allows covered entities the flexibility to select from among that reasonable range an accommodation that will make its facilities or programs accessible to the disabled but that will also meet legitimate cost or programmatic objectives. *See* 29 C.F.R. pt. 1630, App., § 1630.9 (accommodating party "has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide"); *see also* 42 U.S.C. § 12103(1)(B) *and* 28 C.F.R. § 36.303(b)(2) (identifying various auxiliary aids and services as appropriate for the visually impaired). Here, for example, NCBE properly offered aids that would reasonably accommodate Enyart's disability without compromising security or imposing extraordinary costs.

By rejecting this universal reasonableness standard and instead requiring whatever accommo-

dations an examinee deems "best," the Ninth Circuit set itself apart from all other courts in a manner that warrants this Court's intervention.

C. The Ninth Circuit's Decision Conflicts With Regulatory Precedent And Agency Action.

The Ninth Circuit's departure from precedent cannot be explained on the ground that the court applied idiosyncratic regulatory language. The language that it relied upon has been used elsewhere by Congress and by agencies when implementing the usual requirement of reasonable accommodation.

The Ninth Circuit applied a DOJ regulation, 28 C.F.R. § 36.309, whose language was lifted, virtually word-for-word, from a regulation promulgated by the Department of Education in 1980 under the Rehabilitation Act. *See* 56 Fed. Reg. 35,544, 35,573 (1991). Under that regulation, universities subject to the Act must select and administer tests "so as best to ensure" that test results "accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure)." 34 C.F.R. § 104.42(b)(3).

Congress used virtually the *same* language in Title I of the ADA to describe what it means to reasonably accommodate test-takers in the employment context. *See* 42 U.S.C. § 12112(b)(7)(using the words "in the most effective manner to ensure" rather than "so as to best ensure"). As the EEOC has explained, the Title I language (repeated in an EEOC regulation, *see* 29 C.F.R. § 1630.11), is to be "[r]ead

together with the reasonable accommodation requirement." 29 C.F.R. pt. 1630, App., § 1630.11.

Because the DOJ regulation contains the same regulatory language as the Department of Education and EEOC regulations—which in turn apply the reasonable accommodation requirement of the Rehabilitation Act and Title I—it is properly interpreted as imposing the same requirement. Indeed, courts other than the Ninth Circuit have uniformly cited the DOJ regulation while also employing the reasonable accommodation standard.[5] Because 42 U.S.C. § 12189 requires only that examinations be "accessible," applying a regulation to require anything other than the settled accessibility standard mandated for all other examinations would be an unreasonable interpretation of the statute. *See Am. Ass'n of People With Disabilities* v. *Harris*, 605 F.3d 1124, 1131-37 (11th Cir. 2010) (holding, in case involving visually and manually impaired voters, that regulatory language requiring accommodations "to the maximum extent feasible" went beyond Title II's non-discrimination mandate).

Like Congress, DOJ intended its regulation to "fill the gap" created when testing organizations are not otherwise covered by Title II or the Rehabilitation Act. 56 Fed. Reg. at 35,572. And not surprisingly, DOJ has applied its regulation together with—not in

---

[5] *See, e.g., Gonzales*, 225 F.3d at 625 & n.10; *In re Florida Bd. of Bar Examiners*, 707 So.2d at 325; *Bartlett*, 970 F. Supp. at 1129; *Falchenberg* v. *N.Y. Dept. of Educ.*, 642 F. Supp. 2d 156, 162-63 (S.D.N.Y. 2008), *aff'd*, 338 Fed. App'x 11 (2d Cir. 2009); *Love* v. *Law Sch. Admission Council*, 513 F. Supp. 2d 206 (E.D. Pa. 2007); *Ware* v. *Wyo. Bd. of Law Examiners*, 973 F. Supp. 1339, 1352-57 (D. Wyo. 1997); *Argen* v. *N.Y. Bd. of Law Exam'rs*, 860 F. Supp. 84, 87 (W.D.N.Y. 1994).

place of—the reasonable accommodation standard. In a 2002 settlement agreement, DOJ stated that 28 C.F.R. § 36.309 requires testing entities "to provide reasonable modifications to the examination and appropriate auxiliary aids and services (i.e., testing accommodations) for persons with disabilities." Settlement Agreement (Feb. 22, 2002) (www.ada.gov/lsac.htm).

Even *after* the Ninth Circuit's decision in this case, DOJ reiterated that testing entities "shall provide reasonable testing accommodations to persons with disabilities * * * in accordance with the requirements of 42 U.S.C. § 12189 and the implementing regulations, 28 C.F.R. § 36.309." Settlement Agreement ¶ 12 (Feb. 23, 2011) (www.ada.gov/nbme.htm). As DOJ recognized "*[a] testing entity can choose among various alternatives* as long as the result is effective communication," and "*[u]se of the most advanced technology is not required.*" *Id.* ¶ 7 (emphasis added); *accord* 28 C.F.R. pt. 36, App. B., § 36.303.

With respect specifically to visually impaired test-takers, DOJ has agreed in a Consent Decree that a private testing entity met its obligations under § 12819 and the "best ensure" regulation by offering the same test formats that were available to Enyart. ER351, 360-61. DOJ urged all testing organizations to "follow this agreement so that the examinations they offer truly test the aptitude and achievement levels of people with disabilities." DOJ Notice, *supra* note 2. That is exactly what NCBE did.

The Ninth Circuit's ruling is thus at odds with DOJ's consistent interpretation of its regulations in settlement agreements reached with testing organizations governed by § 12189. *See SBC*

Comm'ns, Inc. v. *FCC*, 407 F.3d 1223, 1230 (D.C. Cir. 2005) (courts "treat settlements between an agency and a private party as equivalent to agency regulations for deference purposes"). It is also at odds with the approach taken by every other court when evaluating ADA claims involving requests for testing accommodations. That conflict warrants certiorari.

II. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

There are now two standards for determining what accommodations must be provided and what accommodations may be obtained under § 12189 of the ADA, based solely on the locations where a test is held. The Ninth Circuit's novel and unworkable interpretation of DOJ's "best ensure" language thus undermines a central purpose of the ADA, which is "to provide clear, strong, consistent, enforceable standards" addressing disability discrimination." 42 U.S.C. § 12101(b)(2). If left undisturbed, this standard will impose inappropriate financial and administrative costs on test administrators, threaten the integrity of test results, and undermine the fairness of the overall examination process for test-takers and those who rely upon standardized test scores.

The Ninth Circuit's new standard applies not only to Enyart, not only to the visually impaired, and not only to the bar examination. It applies to everyone in the Ninth Circuit claiming a disability and seeking an accommodation on any examination covered by § 12189. Like Enyart, other examinees will claim to be entitled to whatever accommodations they think will best ensure their exam success.

And the standard imposed by the Ninth Circuit is completely unworkable. Because the "best ensure"

inquiry is divorced from notions of reasonableness, it will be virtually impossible for test administrators to deny requested accommodations without risk of liability. Nobody can ever know with certainty, before a test or even afterwards, what accommodation would "best" ensure that a person's scores will not be affected by his disability. There is simply no way a testing entity—or a court—can determine what accommodations will "best ensure" an examinee's impairment has no impact on exam performance. One would have to administer the exam to the examinee twice, once with the examinee's preferred accommodations and once with the accommodations offered by the testing organization, in a way that ensures maximum effort each time. That is not going to happen in any instance, much less every time there is disagreement regarding an examinee's requested accommodations.

This leaves testing organizations in an untenable position. Examinees will invariably say that their preferred accommodations will best ensure that their disability has no impact on performance, and they will have no difficulty coming up with an "expert" to support their claim. Will testing organizations need reports from psychometric experts to refute such claims, in addition to reports from medical experts?

Moreover, an examinee might well be wrong about the format that will "best ensure" her success. Here, for example, Enyart did well on the LSAT with a reader but successfully asserted that testing on a computer using particular software programs was the "only" way for her to take the MPRE and MBE. App. 33a. She then did very poorly on both exams and has since requested a third preliminary injunction that would require NCBE to provide

different software. She scored in the *fourth* percentile nationwide both times that she took the MBE using her then-preferred accommodations. Conversely, while Elder claimed that using JAWS was the only way for him to effectively access the MBE, he did exceptionally well when he took the MBE in Maryland with a reader.

More than 100 million standardized tests are administered every year, including millions of tests covered by § 12189 that assist in making college admission decisions or providing professional licenses or certification. Marguerite M. Clarke, *Retrospective on Educational Testing and Assessment in the 20th Century*, 32 J. Curriculum Studies 159, 160 (2000). And the number of people seeking accommodations on standardized tests is steadily rising. For example, the percentage of accommodated SAT test-takers nearly doubled between 1993 and 2000, to more than 25,000 annually. *See* Ellen B. Mandinach, *The Impact of Flagging on the Admission Process* 8 (2002).

Testing entities thus deal with accommodation requests on a daily basis. The well-settled "reasonable accommodation" standard allows test administrators to accommodate individual disabilities while balancing legitimate programmatic concerns and objectives. That balanced approach is consistent with the entire tenor of the ADA. The Ninth Circuit's rule, by contrast, effectively requires that disabled persons receive whatever accommodations they or their retained experts say is best for them.

The costs of this rule are also significant. Here, NCBE was ordered to provide Enyart accommodations costing $5,000 for each administration of the MBE and MPRE (to date, there have been four).

ER417. While arguably modest in the context of a single test-taker, such security-driven costs must be multiplied by the thousands of people who seek special accommodations on all of the standardized tests covered by the Ninth Circuit's ruling. And the costs will inevitably escalate, as more examinees seek the "best" and most technologically advanced accommodations.

Not acceding to test-takers' demands for preferred accommodations would lead to the even larger costs of litigation, including a risk of paying the examinee's attorneys' fees. *See* 42 U.S.C. § 12205. NCBE had to litigate a second time with Elder, for example, even though the MBE was administered to him in an accessible manner in Maryland using a reader. And this case has required ancillary litigation over belatedly-identified details such as font size and Enyart's shifting software requests. A reasonableness standard, by definition, will keep litigation within reasonable bounds.

Added costs are only part of the problem with the Ninth Circuit's rule. It is neither feasible nor appropriate to provide each individual his preferred accommodations, given administrative constraints, the need to protect secure questions, and the importance of administering a fair program for all concerned. And unmooring the accommodation standard from notions of reasonableness will inevitably compromise the reliability of standardized tests. *See Powell*, 364 F.3d at 89 (unreasonable accommodation on licensing exam would alter "the substance of the product because the resulting scores would not be guaranteed to reflect each examinee's abilities accurately").

For example, the most requested accommodation on standardized tests is extra time, but it has been shown to give students a scoring advantage. *See, e.g., Law Sch. Admission Council* v. *Love*, 513 F. Supp. 2d 206, 216 n.7 (E.D. Pa. 2007). A reasonableness inquiry helps keep extra time within reasonable bounds. Under a "best ensure" standard, however, future examinees will demand unlimited time: if double time is good, unlimited time is surely best. Such unbounded accommodations would compromise the entire purpose of standardized testing. *See Standards for Educational and Psychological Testing* 61 (1999) ("Without such standardization, the accuracy and comparability of score interpretations would be reduced.").

III. THE NINTH CIRCUIT'S INJUNCTION STANDARD CONFLICTS WITH THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS.

Review is also warranted because the Ninth Circuit's definition of irreparable harm sufficient to warrant a preliminary injunction conflicts with this Court's and other circuits' precedents.

The Ninth Circuit held that Enyart necessarily would suffer irreparable harm if she incurred any delay in taking the examinations with her requested accommodations, pending final resolution of the litigation. The court reasoned that "*[i]f* she fails the Bar Exam or scores too low on the MPRE to qualify for admission, Enyart cannot be licensed to practice law in California." App. 24a (emphasis added).

This is simply a repackaged version of the Ninth Circuit preliminary injunction standard this Court overruled in *Winter*, 129 S. Ct. 365. There, the Court

rejected the Ninth Circuit's "*possibility* of irreparable injury" standard as "too lenient." *Id.* at 375. Instead, a party must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* (original emphasis). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with * * * characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 375-76.

There was no evidence that it was anything more than "possible" Enyart would pass the bar exam with her requested accommodations but fail without them. Indeed, the evidence was to the contrary. Enyart did well on the LSAT with a reader but *twice* failed the California bar exam even *with* her requested accommodations, scoring worse than 95% of MBE examinees both times. The Ninth Circuit's statement that the purported irreparable harm is "not speculative" because California requires a passing score to be a lawyer, App. 24a, is misguided at best. The speculation lies not in that obvious point, but in whether Enyart would likely pass the exam only if she receives her preferred accommodations yet fail if she does not. *That* conclusion is sheer speculation. Enyart may pass or fail the exam with or without her preferred accommodations, and it is only speculation to say that JAWS and ZoomText will make the difference.

Moreover, what the Ninth Circuit characterized as a "loss" of opportunity to pursue one's chosen profession is a mere delay at best. Failing the California bar—which happened to 63% of people who tested in February 2010 and 45% who tested in

July 2010[6]—is hardly an irreparable blow. Like Enyart, those people just take the exam again.

Circuits other than the Ninth have held that mere delay in being able to enter a preferred school, and thereby pursue a profession, pending final resolution of litigation is not irreparable. For example, in *Doe* v. *New York Univ.*, 666 F.2d 761, 773 (2d Cir. 1981), the Second Circuit held that "ordinarily a one-year delay in obtaining admission to a graduate school for the purpose of pursuing professional studies, as distinguished from interruption or termination of attendance already in progress, is insufficient to warrant an injunction." And in *Martin* v. *Helstad*, 699 F.2d 387, 391-92 (7th Cir. 1983), the Seventh Circuit followed *Doe* in holding that a law school applicant would not suffer irreparable harm by waiting until the resolution of litigation to be admitted.[7]

The issue raised by this conflict is important. Under the Ninth Circuit's categorical rule, the irreparable harm requirement has been eliminated for all cases involving licensure examinations—and potentially all cases involving admissions tests for professional school or even college, as the delay in passing any of those tests will delay one's ability to pursue one's chosen profession. Plaintiffs need not prove that requested accommodations will likely

---

[6] *State Bar Announces Results For July 2010 California Bar Exam* (www.calbar.ca.gov/AboutUs/News/201031.aspx); *State Bar Announces Results For February 2010 California Bar Exam* (www.calbar.ca.gov/AboutUs/News/201011.aspx).

[7] *See also Kelly* v. *W. Va. Bd. of Law Exam'rs*, 2008 WL 2891036, *2 (S.D. W.Va. 2008); *Baer* v. *Nat'l Bd. of Med. Exam'rs*, 392 F. Supp. 2d 42, 48-49 (D. Mass. 2005); *O'Brien* v. *Va. Bd. of Bar Exam'rs*, 1998 WL 391019, *2 (E.D. Va. 1998); *Pazer*, 849 F. Supp. at 287-88.

make a difference in passing or failing, or that their personal circumstances are such that a delay has practical consequences.

Rather, any delay in the "opportunity" to pursue a profession, no matter how short, is necessarily irreparable harm warranting an injunction. Whenever a court perceives a likelihood of success on the merits, a preliminary injunction will follow—or, as here, a series of preliminary injunctions, each based upon the same speculative harm. The Ninth Circuit reduced the irreparable harm requirement to a pro forma showing and concluded that the public interest is automatically served by the public's interest in preventing discrimination. App. 26a-27a. In *Winter*, this Court reproached the Ninth Circuit for lowering the bar for preliminary injunctions in just this way. The Court should do the same here.

But regardless, this error only underscores the need to review the propriety of the Ninth Circuit's radical standard for accommodating test-takers. That issue presents a pure question of law requiring no further explication. From now on, every disabled examinee in the Ninth Circuit who desires personalized accommodations that the examinee or an expert says will "best ensure" exam success will have little difficulty obtaining a preliminary injunction—as the *Elder* case illustrated. And once the examinee has taken the requested examination under the injunction, neither party will have much incentive to pursue the case to final judgment. Thus, if the issue is not reviewed now, it may never be susceptible to review in a future case.

CONCLUSION

The petition should be granted and the judgment below reversed.

Respectfully submitted,

GREGORY C. TENHOFF
LORI R. MASON
WENDY J. BRENNER
LAURA A. TERLOUW
COOLEY L.L.P.
3175 Hanover Street
Palo Alto, CA 94306
(650) 843-5000

JONATHAN S. FRANKLIN*
ROBERT A. BURGOYNE
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

* Counsel of Record

Counsel for Petitioner

Blank Page