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 IN OPPOSITION

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QUESTIONS PRESENTED

Title III of the Americans With Disabilities Act requires that a party administering professional licensing examinations "offer such examinations . . . in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals." 42 U.S.C. § 12186(b). Two decades ago, the Attorney General exercised his delegated rulemaking authority to provide that covered examinations must be "administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level," subject to undue burden and fundamental alteration defenses. 28 C.F.R. § 36.309. The Ninth Circuit in this case became the first court of appeals to consider the validity of the regulation's "best ensure" standard.

The Questions Presented are:

1. Whether this regulation represents "a reasonable construction of the statutory term[s]." *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 840 (1984).

2. Whether the court of appeals erred in its application of the irreparable harm standard established in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), to the facts of this particular case.

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I. Introduction

Petitioner asks this Court to grant certiorari in this case to declare that under 42 U.S.C. § 12189, administrators of professional licensing exams need provide only "reasonable accommodations" to test takers with disabilities. That is exactly the standard the district court applied in this case, and petitioner lost nonetheless, on the basis of factual findings upheld on appeal. That a ruling by this Court would have no bearing on the outcome of this case is reason enough to deny the petition. But there are other reasons as well.

There is no circuit conflict. Petitioner's objections to the legal rule applied by the Ninth Circuit – adopted directly from the governing regulation – have not been considered (much less accepted) by any other court of appeals. Nor is there any reason to think that other courts would accept petitioner's challenge to the Attorney General's interpretation of the statute. Petitioner's complaints are based in large part on a false caricature of the regulation's requirements. Neither the regulation nor the Ninth Circuit has adopted a vague "best" accommodations standard, *contra* Pet. i, much less the requirement that testing entities offer individuals with disabilities their "preferred" accommodations, *id*. 30, or accommodations that the examinee "believes will lead to the best score," *id*. 3. Instead, the regulations require only such accommodations as are necessary to "best ensure" that the "examination's results accurately reflect the individual's aptitude or achievement level" rather

than the individual's disability, 28 C.F.R. § 36.309(b)(1)(i), unless doing so would impose an undue burden or fundamentally alter the nature of the exam. Pet. App. 17a. That rule is consistent with testing standards employed elsewhere in the Americans with Disabilities Act (ADA) and under the regulations issued to enforce the ADA's precursor, Section 504 of the Rehabilitation Act. Petitioner's contrary claim that Congress enacted a single "reasonable accommodation" standard that governs all claims of discrimination under both Acts is belied by the text of the statutes and their long-standing regulations. The petition should be denied.

II. Statutory And Regulatory Background

A. Statute

Congress enacted the ADA to establish a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It implemented that goal through dozens of specific statutory requirements governing a wide range of regulated activities.

Of particular relevance to this case, two provisions specifically address exams. First, a provision of Title I requires that employment tests be administered

> in the *most effective manner* to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test

> purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C. § 12112(b)(7) (emphasis added).

A separate provision of Title III addresses professional licensing exams:

> Any person that offers 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.

B. Implementing Regulations

Congress charged the Attorney General with issuing regulations to implement Title III, including the licensing examination requirements of Section 12189. 42 U.S.C. § 12186(b). Congress further directed that the ADA and its implementing regulations should not "be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 *et seq*.) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a).

When Congress enacted the ADA, the regulations implementing Section 504 of Title V of the Rehabilitation Act provided that college entrance

exams (like employment tests under Title I), be administered

> so as *best to ensure* that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the 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) (1980) (emphasis added). Likewise, Section 504 regulations required that course examinations at federally funded post-secondary institutions be administered so as to

> *best ensure* that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

45 C.F.R. § 84.44(c) (1977) (emphasis added).

Consistent with his obligation to interpret the ADA to provide no less protection than was afforded under the Section 504 regulations, the Attorney General construed Title III's licensing examination provision to require that covered exams be

> selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or

> speaking skills, the examination results accurately reflect the individual's aptitude or achievement level.

28 C.F.R. § 36.309(b)(1)(i). The regulation further provided that a covered testing entity need not provide "a particular auxiliary aid" if doing so "would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden." *Id*. § 36.309(b)(3).

III. Factual And Procedural Background

1. Respondent Stephanie Enyart suffers from Stargardt's Disease, a form of macular degeneration that "causes her to experience a large blind spot in the center of her visual field and extreme sensitivity to light." Pet. App. 3a.

In spite of the disease, Enyart has excelled academically, first graduating from Stanford University in 1999 with honors, then earning a J.D. from the University of California, Los Angeles School of Law in 2009, where she was a law review editor. After law school she obtained a prestigious public interest Skadden Fellowship to "provide legal assistance to homeless people with disabilities." Enyart Reply Decl. ¶ 21.

Enyart's condition has worsened over time. Pet. App. 3a. As her vision has deteriorated, her methods for overcoming the disease's effects have evolved. In high school, for instance, she used closed-circuit television (CCTV), a video device that magnifies objects, to read text and complete math homework. Enyart Dep., Doc. 33, Ex. 55. By college, she could use CCTV only sparingly, mostly to refresh her memory of short sentences. *Id.* Instead, by the time

she graduated from college, Enyart's primary method of reading consisted of using two computer programs – known as JAWS and ZoomText – in tandem, one of the most common reading methods among people suffering from Stargardt's disease. Enyart Decl. ¶ 8; Enyart Reply Decl. ¶ 2; Rainey Dep., Doc. 35, Exhibit 52. The programs work by providing synchronized audio and visual information about text: a voice reads the text while a blinking cursor helps the reader focus her eyes on the portion of magnified text being read aloud. Enyart Decl. ¶ 10. As Enyart has explained, this combination "enables me to stay oriented throughout the reading process and minimizes eye fatigue, making it possible for me to read lengthy texts." *Id.*

Enyart's experiences have demonstrated the risks of completing an examination without the use of JAWS/ZoomText. When Enyart inquired about accommodations for the Law School Admission Test ("LSAT"), the exam administrator refused her request to use these computer programs. To avoid prejudicing her "standing with potential law schools by appearing overly litigious," but against her better judgment, Enyart agreed to take the LSAT with only the assistance of a human reader and extra time. Enyart Reply Decl. ¶ 6. This accommodation hindered Enyart's performance: for example, Enyart explained that during the exam's reading comprehension section, she needed "to refer back to specific areas in the passage in order to answer a particular question," but it was "time-consuming" and tiring to "explain to the reader precisely which text from the passage I wanted to have reread." *Id.* ¶ 7. Worse still, at one point during the exam,

Enyart's reader "was so exhausted from trying to read at high speed for over five hours that he fell asleep." *Id.* ¶ 8. Enyart nonetheless overcame these impediments and scored sufficiently high to gain admission to law school.

While in law school, Enyart used JAWS and ZoomText to prepare for class, study, and take all but one of her exams. *Id*. ¶ 14. CCTV, on the other hand, was by then completely ineffective for academic purposes, inducing nausea and disorientation among other side effects. Enyart Decl. ¶ 7.

2. With her LSAT experience in mind, Enyart contacted petitioner in 2009 to request accommodations for taking the Multistate Bar Examination ("MBE") and the Multistate Professional Responsibility Exam ("MPRE"). Passing both exams is required to practice law in California.

As relevant here, Enyart requested to use her standard JAWS/ZoomText accommodation during both examinations. Petitioner denied this request, instead offering the use of CCTV, a human reader, an audio recording of the exam's questions, or a large-print or Braille version of the exam.[1] Pet. App. 5a. As already discussed, Enyart's past experiences proved that CCTV and a human reader were inadequate; an audio recording alone would be

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[1] Enyart also requested several minor accommodations that petitioner granted without objection, including use of sunglasses (to mitigate light sensitivity), a large digital clock (to keep track of time), a yoga mat (to allow occasional stretching so as to ensure blood flow to her eyes), regular breaks (to allow her to rest her eyes), and migraine medication. Pet App. 34a.

insufficient because moving back and forth to review questions and answer choices would be extremely difficult and time-consuming; Enyart cannot make effective use of large print texts without audio input; and she is not proficient in reading Braille, *see* Enyart Decl. ¶ 20. Nevertheless, petitioner repeatedly refused to grant Enyart the JAWS/ ZoomText accommodation. Enyart consequently canceled her test registrations. Pet. App. 3a-5a.

Enyart subsequently made several attempts to persuade petitioner to allow her to take the exams with her required accommodations, but to no avail. She eventually became concerned about the impact these false starts would have on her likelihood of passing the exam when she eventually took it, as well as the impact the delay would have on her career prospects. Though her Skadden Fellowship provided temporary employment, Enyart "worried that the gap between my date of law school graduation and my date of admission to the Bar will hurt my chances with future employers." Enyart Reply Decl. ¶ 21.

As a result, Enyart filed this suit alleging, among other things, violations of the ADA. She sought declaratory and injunctive relief. Pet. App. 5a.

3. With the bar examinations approaching, Enyart moved for a preliminary injunction requiring petitioner to allow her to utilize the JAWS/ZoomText accommodation during the February 2010 MBE and the March 2010 MPRE. Pet. App. 5a. Applying the standard this Court established in *Winter v. Natural Res. Def. Council*, *Inc.* 129 S. Ct. 365, 374 (2008), District Judge Breyer granted the motion.

First, the court considered Enyart's likelihood of success on the merits. Enyart argued that her claims were governed by the "best ensure" standard of the applicable regulation, 28 C.F.R. § 36.309(b)(1)(i). Petitioner, on the other hand, argued that despite the plain language of the regulation, it was required only to offer petitioner a "reasonable accommodation." Pet. App. 35a-38a.

The district court "decline[d] at this point to determine whether or not Plaintiff is correct that a different standard applies in this case," because it concluded that Enyart was "entitled to her requested accommodations even under Defendant's more stringent standard." Pet. App. 31a. Based on the evidence before it, the court found that

> the accommodations offered by NCBE would either result in extreme discomfort and nausea, or would not permit Enyart to sufficiently comprehend and retain the language used on the [test]. This would result in Enyart's disability severely limiting her performance on the exam, which is clearly forbidden both by the statute and the corresponding regulation.

Pet. App. 40a. Although the regulation permitted petitioner to show that Enyart's proposed accommodation would create an undue burden (by costing too much) or would fundamentally alter the nature of its testing (by creating an unwarranted security risk or invalidating the test results), 28 C.F.R. § 36.309(b)(3), petitioner declined to assert any such defense. Pet. App. 42a.

Second, the district court held that Enyart was likely to be irreparably harmed unless awarded immediate relief. Pet. App. 42a. "[I]n the absence of a preliminary injunction," the court found, "the time she spent in preparation will have been wasted, she will suffer a serious career setback, [and] will face the prospect of preparing once again at a separate time." *Id.* 43a (internal quotation marks and citation omitted).

Finally, the court found that both the balance of the equities and the public interest favored awarding preliminary relief. Pet. App. 44a.

Accordingly, the court entered a preliminary injunction. At the same time, the court required Enyart to post a $5,000 injunction bond to compensate petitioner for any injury in the event she failed to prevail on the merits at final judgment. Pet. App. 45a. Petitioner immediately appealed the preliminary injunction. *Id.* 8a.

4. While the appeal was pending, Enyart took the February 2010 MBE and the March 2010 MPRE. Although petitioner provided her a computer to use for the exam, the security settings petitioner placed on it prevented her from adjusting the font to a usable type and size, resulting in eye strain and precluding her from "complet[ing] all the questions within the allotted time." Pet. App. 49a-50a. As a result, Enyart – like the majority of first-time

California bar examinees[2] – did not pass the exams on her first attempt.

The district court then entered a second preliminary injunction to allow Enyart to retake the exams in July and August 2010. Pet. App. 58a. Once again, Enyart posted a $5,000 bond, and once again, petitioner appealed. *Id*. 60a.

5. The Ninth Circuit consolidated both appeals and affirmed.

After concluding that the case had not become moot on appeal,[3] the Ninth Circuit held that the district court "did not abuse its discretion in holding that Enyart demonstrated a likelihood of success on the merits." Pet. App. 23a. The Ninth Circuit rejected petitioner's request to "invalidate" the governing regulation on the ground that it "imposes an obligation beyond the statutory mandate." *Id*. at 16a. Instead, applying the standard of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court determined that

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[2] *See* California Bar Association General Statistics Report, Feb. 2010, *available at* http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=rPhUshzu4Q%3d&tabid=2269 (the passage rate of the California bar exam during the winter 2010 examination was 49.7 percent for first-time takers).

[3] The court held that "even though the injunctions only related to the March and August 2010 MPRE exams and the February and July 2010 California Bar Exams, which have since come and gone, NCBE's appeals are not moot because the situation is capable of repetition, yet evading review." Pet. App. 10a.

Attorney General's regulatory construction of the statute was permissible. *Id.* 16a-17a. The court noted that although Congress adopted a "reasonable accommodation" standard elsewhere in the statute, it was "[n]otabl[e]" that "Congress did *not* incorporate" that standard into Section 12189 of the ADA. *Id.* at 17a (emphasis in original). Section 12189's requirement that licensing exams be "accessible," the court held, is reasonably construed to require that testing entities "provide disabled people with an equal opportunity to demonstrate their knowledge or abilities to the same degree as nondisabled people taking the exam – in other words, the entities must administer the exam 'so as to best ensure' that exam results accurately reflect aptitude rather than disability." *Id.*

The Ninth Circuit then held that Judge Breyer's finding that "only ZoomText and JAWS make the text 'accessible' to Enyart," was "supported by the evidence." Pet. 23a. The Ninth Circuit thus upheld the trial court's factual finding that "the combination of ZoomText and JAWS is the only way [Enyart] can fully comprehend the material she reads." *Id*. 17a. The evidence showed that Enyart "would suffer eye fatigue, disorientation, and nausea if she used a CCTV," *id*., and a reader or audio recording would be inadequate, given that "auditory input alone is insufficient to allow Enyart to effectively comprehend and retain the language used on the exam," *id.* 17a-18a.

In light of those findings, the Ninth Circuit concluded, the district court did not abuse its discretion in finding Enyart was likely to prevail. *Id*. 23a.

Next, the Ninth Circuit upheld the district court's determination that Enyart likely would suffer "irreparable harm in the form of the loss of opportunity to pursue her chosen profession" in the absence of an injunction. Pet. App. 23a. The court rejected petitioner's claim that Enyart would suffer no real injury because she could engage in "limited activities under the supervision of an attorney" as a "certified law student" while waiting for a trial. Pet. App. 25a. Because her Skadden Fellowship was of "limited duration, '[a] delay, even if only a few months, pending trial represents precious, productive time irretrievably lost' to Enyart." *Id*.

The court similarly upheld the district court's findings that the balance of the equities and the public interest favored Enyart. Pet. App. 25a-27a.

6. While the appeals were pending in the Ninth Circuit, Enyart received the results of her 2010 exams. In spite of the distraction of the ongoing litigation – not to mention the stress of not knowing until the last moment what accommodations she would be permitted to use on the exams – Enyart passed the MPRE. *Id.* 9a. She did not, however, pass the bar exam. *Id*.

Meanwhile, the underlying case has moved toward trial on the merits, in order to resolve petitioner's entitlement to the injunction bonds. Pet. App. 26a. Enyart filed a motion for summary judgment on June 10, 2011. D.Ct. Docket Entry 141. If summary judgment is denied, the trial is scheduled to begin on January 9, 2012. D.Ct. Docket Entry 138, at 2.

REASONS FOR DENYING THE WRIT

There is no reason for this Court to review the Ninth Circuit's interlocutory decision affirming the preliminary injunctions in this case. Any difference between the "best ensure" standard adopted by regulations and the "reasonable accommodation" standard petitioner prefers made no difference to the outcome of this case – petitioner lost in the district court under the very standard it advances here, on the basis of factual findings the Ninth Circuit upheld on appeal. Nor has any court accepted petitioner's assertion that the Section 12189 regulation is invalid. To the contrary, the regulation reasonably requires only that test administrators ensure that their licensing examinations measure what they purport to measure, and not a person's disability, while providing a defense against having to make adjustments that would fundamentally alter the nature of the test or cause an undue burden. Petitioner's assertion that this requirement is out of step with *other* statutory provisions of the ADA, relating to other kinds of tests and activities, is not only incorrect but, because those provisions are distinct, provides no basis to grant review in this case in any event.

Nor is there any reason for this Court to review the court of appeals' application of established preliminary injunction standards to the specific facts of this case.

I. The Ninth Circuit's Decision Is Correct.

While petitioner focuses its criticism on the Ninth Circuit, its real complaint is with the regulation issued by the Attorney General, whose

standard the court of appeals adopted verbatim. Pet. App. 14a. To the extent there is a meaningful difference between a "best ensure" and "reasonable accommodations" standard, the Ninth Circuit could accept petitioner's interpretation only by invalidating the regulation. No court has done so, and for good reason. The regulation reasonably implements a long-established conception of non-discrimination in the testing context. Petitioner is able to argue otherwise only by mischaracterizing both the standard the Attorney General adopted and the law in other contexts.

A. The Regulation Is A Reasonable Construction Of Section 12189.

Because Congress delegated to the Attorney General responsibility for promulgating regulations interpreting Section 12189, the Ninth Circuit was compelled to accept the regulatory standard so long as it is "based on a reasonable construction of the statutory term[s]." *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 840 (1984). It is.

1. Petitioner argues that the Attorney General was required to adopt the "reasonable accommodation" standard that, it says, prevails in every context of federal disability rights law. Pet. 13. That argument fails at its premise. While the Act's "reasonable accommodation" requirement is perhaps the statute's best known mandate, it is but one of many specific requirements in a detailed statute tailored to rooting out discrimination in a broad range of contexts.

For example, the "reasonable accommodation" provision of Title I is one of *seven* subdivisions of the

statute's definition of prohibited employment discrimination:

> As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes –
>
> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
>
> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);
>
> (3) utilizing standards, criteria, or methods of administration--
>
> (A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection

> criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and
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> (7) *failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).*

42 U.S.C. § 12112(b) (emphasis added). Notably, the final definition of discrimination, emphasized above, addresses employment testing in terms that closely parallel the "best ensures" standard petitioner challenges here.

Title II makes no mention of "reasonable accommodations" at all, adopting instead the broad antidiscrimination mandate of Section 504 of the

Rehabilitation Act. *Compare* 42 U.S.C. § 12132 (Title II) *with* 29 U.S.C. § 794 (Section 504). At the time the ADA was enacted, Section 504 had been given more precise definition by various regulations. But, again, the "reasonable accommodations" standard upon which petitioner places so much weight was simply one of many regulatory requirements. *See generally* 28 C.F.R. §§ 41.51-41.58.

Finally, Title III, like Title I, defines the scope of regulated parties' duties in a number of ways depending on the setting. *See* 42 U.S.C. § 12182(b). Only one of Title III's many provisions requires "reasonable modifications." *Id*. § 12182(b)(2)(A)(ii).

2. Accordingly, in judging the validity of the licensing examination regulation, the Ninth Circuit properly looked to the applicable statutory text rather than to some generic characterization of the general gist of the ADA.

The Attorney General recognized that for a licensing exam to be "*accessible* to persons with disabilities," 42 U.S.C. § 12189 (emphasis added), it must provide "the individual with a disability an *equal opportunity* to demonstrate his or her knowledge or ability," 56 Fed. Reg. 35,544 (July 26, 1991) (emphasis added), if that opportunity can be provided without imposing an undue burden or fundamentally altering the exam. The Attorney General rightly determined that an exam is not accessible to individuals with disabilities if it is administered in a way that prevents those with sensory impairments from demonstrating the knowledge or competencies the test purports to measure. Refusing to administer a test in a way that accurately reports a person's abilities is no different

from offering the test in a building the person cannot enter. In either case, the person with a disability is denied access to the central benefit of the test – the ability to use its results to demonstrate her true qualifications.

The Attorney General's interpretation is particularly reasonable in the context of high-stakes licensing and credentialing exams given "the importance of ensuring that the key gateways to education and employment are open to individuals with disabilities." 56 Fed. Reg. 35,544, 35,572. Indeed, such tests are often a critical step in professional pursuits for which one spends many years and significant resources preparing.

The regulation is also consistent with established conceptions of accessibility and equal treatment in the testing context, understandings that formed the background against which Section 12189 was adopted. As noted above, when directly addressing disability discrimination in the testing context in Title I, Congress did not apply a general "reasonable accommodation" requirement, but rather used language remarkably similar to Title III's licensing exam regulation, requiring that tests be administered in the "*most effective manner* to ensure" that the test measures an individual's ability and not her disability. 42 U.S.C. § 12112(b)(7) (emphasis added).

Similarly, at the time the ADA was enacted, regulations in two closely related testing contexts already imposed the "best ensure" standard petitioner challenges in this case. *See* 45 C.F.R. § 84.44(c) (1977) (Health and Human Services regulation regarding postsecondary course examinations at federally funded schools); 34 C.F.R.

§ 104.42(b)(3) (1980) (Department of Education regulation regarding admission testing for federally funded postsecondary schools).

The Attorney General did not act unreasonably in applying the same standard to licensing examinations under Title III. Indeed, the Attorney General had no other choice, given Congress's directive that the ADA not be construed "to apply a lesser standard than the standards applied under [Section 504] of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a); *see also Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) (explaining that the ADA must be interpreted "to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act").

3. Petitioner's objections to the Attorney General's interpretation are premised in large part on a mischaracterization of its requirements. Contrary to petitioner's assertion, the regulation does not require a testing agency to offer "the format that will 'best ensure' [an examinee's] success," or maximize her score. Pet. 30. Instead, as the regulation explicitly states, it merely requires that the testing entity to administer the exam in a manner that best ensures that the "examination results *accurately reflect the individual's aptitude or achievement level*," 28 C.F.R. § 36.309(b)(1)(i) (emphasis added), consistent with the undue burden and fundamental alteration defenses, *id.* § 36.309(b)(3). Thus, the regulation does not entitle individuals with disabilities to their "preferred accommodation," Pet. 30, or "whatever accommodations they or their retained experts say is

best for them," *id*. 31. If an individual with a disability requests more than is required to allow an accurate assessment of her abilities, the provider is free to reject the request.[4]

Nor does the "best ensure" standard require testing entities to provide accommodations that would significantly undermine the integrity of the testing results, impose unwarranted security risks, or cost too much. The regulations specifically provide that a test provider need not provide auxiliary aids when doing so "would fundamentally alter measurement of the skills or knowledge the examination is intended to test or would result in an undue burden." 28 C.F.R. 36.309(b)(3). Although it complains to this Court at length about the expense and burden of Enyart's required accommodations, petitioner made no attempt to raise an undue burden or fundamental alteration defense below. *See* Pet. App. 26a n.6, 31a.

B. Petitioner Is Wrong To The Extent It Claims That The Ninth Circuit Misapplied The Regulation.

Petitioner also appears to argue that if the regulation is valid, the Ninth Circuit misapplied it by construing it to require something more than "reasonable accommodations." *See* Pet. 26-29. This

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[4] To be sure, in some cases what measures are required under the "best ensure" standard may be subject to dispute or litigation. *See* Pet. 32. But the same is true of the "reasonable accommodation" standard petitioner proposes, or any other standard that treats people as individuals with different conditions and accommodation needs.

is an odd argument. Petitioner has no ground to complain unless "best ensure" means something materially different from "reasonable accommodation." Yet if that is true, it is indisputable that "best ensure" is what the regulation requires. What petitioner advocates is disregard for, not an interpretation of, the regulation.

Petitioner nonetheless insists that the regulatory language does not mean what it says, pointing to settlement agreements between the Department of Justice and testing agencies. Pet. 28. But language in a settlement agreement necessarily "embodies a compromise," *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971), and therefore hardly constitutes an agency's authoritative interpretation of the meaning of its regulations. In fact, the Department of Justice has made clear that its settlement agreements in no way renounce the plain meaning of its regulation implementing Section 12189. In a similar case, the Department has called petitioner's reliance on its settlements "misplaced" and urged the court not to rely on "cherry-picked statements" from a few compromises with testing agencies. *See* App. 25a-26a (Statement Of Interest Of The United States Of America In Opposition To The Motion To Dismiss at 18-19, *Elder v. Natl. Conference of Bar Exam'rs*, No. 10-CV-01418 (N.D. Md. July 9, 2010)).[5] In any

[5] Petitioner likewise mischaracterizes the EEOC's interpretation of its testing regulation under Title I. Rather than asserting that Title I's specific testing provision is subsumed by the more general reasonable accommodation requirement, Pet. 26-27, the interpretive guidance petitioner

event, deference to an agency's interpretation of its regulations "is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). And here the regulation unambiguously adopts the "best ensure" standard the Ninth Circuit applied.[6]

II. There Is No Conflict Over The Validity Of The Attorney General's Testing Regulation.

The petition further does not warrant review because the Ninth Circuit is the only court to have considered the validity of the regulation's "best ensure" standard.

A. Only The Ninth Circuit Has Addressed The Validity Of The Regulation.

Petitioner claims that "every court to have applied [Section 12189] – other than the Ninth Circuit – has understood it simply to incorporate the well-settled reasonable accommodation standard." Pet. 18. But none of the four cases petitioner identifies as arising under Section 12189 – two circuit court and two state supreme court cases – considered the question presented by the petition, much less

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cites simply acknowledges that both requirements apply to employment testing. 29 C.F.R. Pt. 1630, App., § 1630.11.

[6] If the Attorney General decided to abandon that interpretation of the ADA, he would be required to make that change through notice and comment procedures, which he has not done. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (noting APA rulemaking would be required if an agency "adopted a new position inconsistent" with its "existing regulations").

held, contrary to the Ninth Circuit, that the regulation's "best ensure" standard conflicts with the requirements of the statute.

The "only question in" *Gonzalez v. National Board of Medical Examiners*, 225 F.3d 620 (6th Cir. 2000), was "whether Gonzales is disabled within the meaning of the ADA." *Id*. at 626. The court accordingly had no occasion to decide whether the accommodations the plaintiff was offered satisfied the statute or whether the regulation's "best ensure" standard was invalid. In fact, the opinion's only mention of the regulation is its favorable description of the regulation as "provid[ing] that an examination covered by [Section 12189] be selected and administered to accurately reflect the individual's aptitude or achievement level, rather than his impairment." *Id.* at 625. At the same time, *Gonzalez* mentions "reasonable accommodations" only in its general description of the ADA, citing to a provision of Title I. *See Gonzalez*, 225 F.3d at 626. Nothing in the opinion holds, or even suggests, that the Sixth Circuit concluded that this standard – from a different and inapplicable section of the statute – displaced the regulation.

Similarly, the only question in *Soignier v. American Board of Plastic Surgery*, 92 F.3d 547 (7th Cir. 1996), was whether the plaintiff's ADA claim was time-barred. *Id*. at 549. While the decision mentioned the "reasonable accommodation" standard in the course of describing the elements of an ADA claim, *id.* at 554, the question of the proper accommodation standard was not at issue in the case and the decision makes no mention of the regulation.

Nor does anything in the Florida Supreme Court's decision in *Florida Board of Examiners re S.G.*, 707 So. 2d 323 (Fla. 1998), cast any doubt on the validity of the regulation. To the contrary, although the decision referred in passing to the Board's obligation to "reasonably accommodate" test takers with disabilities, *id.* at 324, it explained – in terms that closely mirror the language of the regulation – that Section 12189 requires testing agencies to administer the bar exam in a manner that "ensure[s] that the exam reflects the substantive legal knowledge, reasoning ability, and analytical skills it is intended to test rather than [one's] disability." *Id.* at 325. In the end, the court was not called upon to decide the appropriate standard of accommodation, finding that the plaintiff's request for a modification in the method for *scoring* her exam "is, by its very nature, a modification which 'fundamentally alters the measurement of the skills or knowledge the examination is intended to test.'" *Id.* at 325 (quoting 28 C.F.R. § 36.309(b)).

Finally, in *Petition of Rubenstein*, 637 A.2d 1131 (Del. 1994), the Delaware Supreme Court ordered the Board of Bar Examiners to admit plaintiff to the Delaware Bar despite her inability to pass the bar exam. *Id*. at 1140. The court accordingly did not consider any request for accommodations during the exam, and did not consider the regulation's validity, or even mention it. The "reasonable accommodation" language petitioner cites is a quotation from a law review article, which the court merely cited in the

course of a general description the ADA. *See id.* at 1138.[7]

B. Petitioner's Citation To Cases Involving Other Provisions And Statutes Does Not Establish A Circuit Conflict Warranting This Court's Review.

Petitioner also attempts to cobble together a circuit conflict by suggesting that the Ninth Circuit applied a different standard to licensing examinations covered by Section 12189 than other courts have applied to other activities governed by different provisions of the ADA and other statutes. Pet. 13. The argument fails for three reasons.

First, petitioner is simply wrong to the extent it suggests that under the Ninth Circuit's holding, identical *licensing* exams are subject to different

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[7] The petition also cites two other cases involving licensing examinations without claiming that either directly addresses the question presented by the petition, and neither does. In *Powell v. National Board of Medical Examiners*, 364 F.3d 79 (2d Cir. 2004), the Second Circuit mentioned neither Section 12189 nor its implementing regulation, but merely concluded that "even if the plaintiff is disabled, she has produced no evidence to show she is otherwise qualified to continue in medical school." *Id*. at 89. Likewise, the plaintiff in *In re Reasonable Testing Accommodations of Lafleur*, 722 N.W.2d 559 (S.D. 2006), did not cite to Section 12189 or its implementing regulation, providing that court no reason to decide whether the regulatory standard should apply to licensing examination claims. *Id*. at 565.

Petitioner also cites a number of district court cases. *See*, *e.g.*, Pet. 19 n.4. But like the circuit court cases discussed above, neither the holdings of these cases nor their dicta directly address the validity of the Section 12189 regulation.

standards depending on whether the entity administering the exam receives federal funding or is a governmental entity. To the contrary, by its terms, Section 12189 applies to "*[a]ny person*" that offers such examinations, § 12189(a) (emphasis added), whether the person accepts federal funding or not. Moreover, because "'person' is defined generally in the ADA to cover public entities," Section 12189 "has unanimously been held to apply to public entities" and private entities alike. *Bartlett v. N.Y. State Board*, 970 F. Supp. 1094, 1128-29 (S.D.N.Y. 1997) (Sotomayor, J.) (citing 42 U.S.C. § 12111(7) and collecting cases), *aff'd in part and vacated in part on other grounds*, 156 F.3d 321 (2d Cir. 1998).

Second, petitioner's assertion that courts have applied the "reasonable accommodation" standard to other kinds of tests not governed by Section 12189 (*e.g.*, employment or classroom tests), *see* Pet. 14-18, would provide no basis for review, even if true. A circuit conflict over whether the Attorney General has reasonably interpreted this particular statutory provision does not arise simply because courts adopt different standards to implement *other* statutory and regulatory language.

Third, and in any event, petitioner has not substantiated its claim of a considered conflict over the appropriate standard in disparate testing contexts. None of the cases petitioner cites evaluated the proper standard for judging testing accommodations, either because the parties did not dispute the governing standard or because the case was resolved on other grounds. For example, the appeal in *Panazides v. Virginia Board of Education*, 13 F.3d 823 (4th Cir. 1994), raised "the sole question

of the availability of jury trial under § 504" of the Rehabilitation Act, *id*. at 824; the decision does not discuss the proper testing accommodation standard under Section 504 or any implementing regulation. Likewise, the court in *Moritsky v. Broward County*, 80 F.3d 445 (11th Cir. 1996), explained that "the issue the Court must address is narrow: Will knowledge that an applicant for employment has a disability be imputed to a prospective employer from knowledge that the applicant has taken special education courses and cannot read or write." *Id*. at 447. The court held nothing about the proper testing standard under Title I. *Fink v. New York City Department of Personnel*, 53 F.3d 565 (2d Cir. 1995), involved a complaint "addressed not to the accommodations provided by the defendants, but to the manner in which two reader-assistants carried out their duties." *Id.* at 567. The court noted that under Section 504, employers must make reasonable accommodations for an employee's disability, *id.*, but never directly confronted the proper standard to be applied in the testing context. Finally, *McGuinness v. University of New Mexico Medical School*, 170 F.3d 974 (10th Cir. 1998), did not involve any request for testing accommodations. *See id*. at 977 (medical student informed his professors "he needed no test-taking accommodations," but instead requested that he be permitted to advance without receiving satisfactory grades in his courses).

III. This Case Is A Poor Vehicle For Review.

Even if the petition presented a question warranting this Court's review, this case presents an extraordinarily poor vehicle for deciding it.

A. Deciding The First Question Presented Would Not Affect The Outcome Of This Case.

The choice between the "reasonable accommodation" and "best ensures" standard is poorly posed in this case because the answer makes no difference to the outcome.

Judge Breyer determined that Enyart "is entitled to her requested accommodations" even under the reasonable accommodation standard proposed by petitioner. Pet. App. 31a. The district court pointed to undisputed evidence that Enyart can fully comprehend lengthy reading material only by using the ZoomText software in conjunction with the JAWS program because the combination allows her to synchronize seeing and hearing the text while also allowing her to move quickly back and forth through the questions and answers during the course of the exam. Pet. App. 39a. Petitioner's proposed alternative accommodations of a live reader or a closed circuit television "would either result in extreme discomfort and nausea, or would not permit Enyart to sufficiently comprehend and retain the language used on the [test]." Pet. App. 40a. Petitioner could point to "no authority" suggesting accommodations that cause such extreme discomfort could be "reasonable" under the ADA. *Id*. The Ninth Circuit upheld the factual basis for the district court's conclusions on appeal. Pet. App. 22-23a.

Even if petitioner had grounds for disputing those factual findings, or application of the "reasonable accommodations" standard to those findings, that case-specific objection would not warrant this Court's review. *See Easley v. Cromartie*,

532 U.S. 234, 242 (2001) ("Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not 'lightly overturn' the concurrent findings of the two lower courts.") (quoting *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972)).

B. The Procedural Posture Of The Case Renders It A Poor Vehicle For Review.

The Court routinely denies petitions for certiorari that, as in this case, challenge interlocutory determinations. *See, e.g., Va. Mil. Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (describing the interlocutory nature of a decision as "a fact that of itself alone furnishe[s] sufficient ground for the denial of" certiorari). Petitioner identifies no reason to depart from that practice here.

Though petitioner asks this Court to decide the validity of the licensing examination regulation, the only question properly before the Court at this stage is whether the district court abused its discretion in determining that petitioner was *likely* to succeed on the merits. *See Brown v. Chote*, 411 U.S. 452, 457 (1973) ("In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion."). Accordingly, the Court could affirm the district court's decision without ever reaching the question presented.

Furthermore, the factual record for a preliminary injunction is necessarily "less complete than in a trial on the merits" because the purpose of a preliminary

injunction is merely to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Indeed, in this case, the district court recognized that at the upcoming trial on the merits, both sides would undoubtedly present new evidence. For example, the district court noted that petitioner had "declined to make an undue burden argument" at the preliminary injunction stage, but "[p]resumably" would do so at trial. Pet. App. 31a. Accordingly, further factual development may materially change the factual context of the case and may even render irrelevant the dispute petitioner presents to this Court.

IV. The Decision Below Correctly Applied This Court's Precedent On Irreparable Harm And Did Not Create A Circuit Split.

Petitioner further argues that the Ninth Circuit's affirmance of the district court's finding of irreparable harm warrants review because the court of appeal's decision "conflicts with this Court's and other circuits' precedents." Pet. 33. Neither assertion is true.

Petitioner first claims the Ninth Circuit defied this Court's precedent in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), by "repackag[ing]" the old Ninth Circuit standard this Court overruled in *Winter*. Pet. 33. In *Winter*, this Court held that a party seeking a preliminary injunction must show a likelihood, not just a possibility, of irreparable harm. 129 S. Ct. at 375. In this case, the district court expressly acknowledged that *Winter* requires a plaintiff to demonstrate harm

is "likely," not just possible, absent an injunction. Pet. App. 44a; *see also id.* 53a (noting *Winter* distinguishes between harm that is "merely possible or truly imminent"). The court then applied the *Winter* standard to the facts of this case, *id.* at 43a, 53a, concluding that without an injunction, Enyart would "suffer a serious career setback" that could not be fully remedied through a retrospective damages award, *id*. 43a. The Ninth Circuit likewise recognized that *Winter* required Enyart to demonstrate that irreparable injury was "likely" and that "[m]ere possibility of harm is not enough." Pet. App. 23a. The court then faithfully applied that standard to this case, affirming because absent an injunction, Enyart would "*likely* lose the chance to pursue her chosen profession," causing irreparable harm. *Id.* 24a (emphasis added).

Petitioner nonetheless claims the Ninth Circuit created a circuit conflict by crafting a "categorical rule" that "any delay in the 'opportunity' to pursue a profession, no matter how short, is necessarily irreparable harm warranting an injunction." Pet. 35-36. But the Ninth Circuit created no such general rule. Instead, it engaged in a fact-specific analysis and based its ruling on the particular circumstances of this case. *See* Pet. App. 23a-25a.

Nor have the Second or Seventh Circuits created any contrary categorical rule against awarding preliminary relief in testing accommodation cases. To the contrary, like the Ninth Circuit's decision in this case, the decisions petitioner relies upon simply applied settled law to the specific facts of particular cases, facts that are materially distinguishable from those in this case. In *Doe v. New York University*,

666 F.2d 761 (2d Cir. 1981), the Second Circuit held that a plaintiff who left medical school after completing only one semester, then applied for an injunction when she sought to be readmitted five years later, had not demonstrated that she would suffer irreparable harm absent an injunction. *Id.* at 771-74. In so holding, the Second Circuit focused on the case-specific facts that after leaving medical school, the plaintiff had obtained a master's degree from Harvard and was "gainfully employed" when she applied for the injunction. *Id.* at 770, 773.

Similarly, the Seventh Circuit held in *Martin v. Helstad*, 699 F.2d 387 (7th Cir. 1983), that a plaintiff who sought admission to law school would not suffer irreparable harm absent a preliminary injunction when he was enrolled in law school elsewhere and would suffer no delay in his legal education. *Id.* at 392 n.7. The Seventh Circuit held that this particular plaintiff had shown "insufficient" facts "militating in favor" of relief. *Id.* at 392.

By contrast, in this case, the Ninth Circuit correctly recognized that Enyart faced a more immediate and irreparable harm than the plaintiffs in *Doe* and *Martin*. Unlike the plaintiff in *Doe*, who would need several years to earn her medical degree even with an injunction, or the plaintiff in *Martin*, who faced no delay in becoming an attorney because he was already attending law school, Enyart had already earned her law degree and was suffering an immediate and ongoing harm in being prevented from putting her degree to use. And while the *Doe* plaintiff had invested only a semester's worth of time and tuition into medical school five years earlier, Enyart has already put three years of effort and

money into earning her law degree, which is all but useless until she becomes a licensed attorney.[8]

Thus, nothing about *Doe* or *Martin* suggests these cases would compel a different result in Enyart's case had she brought her claim in the Second or Seventh Circuits. *Cf. D'Amico v. N.Y. State Bd. of Law Exam'rs*, 813 F. Supp. 217 (W.D.N.Y. 1993) (holding that plaintiff met irreparable harm requirement when bar examiners refused to provide required accommodations).

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[8] In any case, discrimination in violation of the ADA constitutes irreparable harm *per se*. *See* Pet. App. 23a (finding it unnecessary to reach this argument). *Cf. Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir.) (due to "subtle, pervasive, and essentially irremediable nature of racial discrimination," irreparable harm presumed when plaintiff shows likelihood of success on housing discrimination claim), *cert. denied*, 105 S. Ct. 249 (1984).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 24, 2011

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

TIMOTHY R. ELDER, *et al.*,

Plaintiff,

v.

NATIONAL CONFERENCE OF BAR EXAMINERS,

Defendant.

Civil Action No.: 10-cv-01418 (JFM)

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA IN OPPOSITION TO THE MOTION TO DISMISS

Introduction

The United States files this Statement of Interest, pursuant to 28 U.S.C. § 517, because this litigation implicates the proper interpretation and application of title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; 28 C.F.R, pt. 36 ("ADA"). Under the ADA, professional licensing examinations must be administered in a manner that is accessible to persons with disabilities. 42 U.S.C § 12189; 28 C.F.R. § 36.309. Defendant, National Conference of Bar Examiners ("NCBE"), has moved

to dismiss this case arguing that plaintiffs fail to state a claim, that the Court lacks subject matter jurisdiction, and that the examination formats are reasonable as a matter of law. Notwithstanding NCBE's arguments to the contrary, the United States urges the Court to deny the motion to dismiss because the plaintiffs have adequately pled claims sufficient to withstand a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, because NCBE is covered by the ADA, and because this Court has jurisdiction to review this matter. Finally, the Court should not decide as a matter of [2] law that the formats in which NCBE offers the examination are reasonable. Instead, pursuant to the specific language of the statute and regulation, the Court should evaluate the facts of the Plaintiffs' case to determine whether appropriate auxiliary aids are available that will best ensure that the examination measures the Plaintiffs' knowledge and abilities and not their disabilities.

Statutory and Regulatory Background

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101(b)(1). In enacting the ADA, Congress found that "discrimination against individuals with disabilities persists in such critical areas as employment" and further found that, "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary

expenses resulting from dependency and nonproductivity." 42 U.S.C. §§ 12101(a)(2), (a)(8). Congress required the Attorney General to issue regulations implementing the ADA and understood that the interpretation of the ADA and requirements to eliminate discrimination against persons with disabilities would evolve over time with the advent of new technology. 42 U.S.C. § 12101(b)(3); *see* H.R. Rep. No. 101-485(II), at 108 (1990); 42 U.S.C. § 12186(b). The House Committee on Education and Labor stated:

> The Committee wishes to make it clear that technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities. Such advances may require public accommodations to provide auxiliary aids and services in the future which today would not be required because they would be held to impose unique burdens on such entities. Indeed, the Committee intends that the types of accommodations and services provided to individuals [3] with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times.

H.R. Rep. No. 101-485(II), at 108 (1990).

Consistent with this approach, the Department stated in the preamble for the title III regulations that the regulations should be interpreted to keep pace with developing technologies. *See* 28 C.F.R. pt. 36, app. B at 706 (2009).

Section 309 of the ADA provides:

> Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary 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.

The legislative history found in the Report for the House Committee on the Judiciary explains:

> The purpose of this amendment is to fill a gap which is created when licensing, certification, and other testing authorities are not covered by Section 504 of the Rehabilitation Act or Title II of the ADA. Any such authority that is covered by Section 504, because of the receipt of federal money, or by Title II, because it is a function of a state or local government, must make all of its programs accessible to persons with disabilities, which includes physical access as well as accommodations in the way the test is administered, e.g. extended time or assistance of a reader . . . this provision was adopted in order to assure that persons with disabilities are not foreclosed from educational, professional, or trade opportunities because an examination or course is conducted in an inaccessible site or without an accommodation.

H.R. Rep. No. 101-485 (III), at 68-69 (1990).

Following notice and comment rulemaking for the title III regulations, the Department of Justice issued 28 C.F.R. § 36.309, consistent with Section 309 of the statute, which applies to any private entity that offers the specified types of examinations or courses. Section 36.309(b) [4] of the regulation provides:

> (1) Any private entity offering an examination covered by this section must assure that –
>
> (i) The examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or 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) . . .
>
> (2) Required modifications to an examination may include changes in the length of time permitted for completion of the examination and adaptation of the manner in which the examination is given.
>
> (3) A private entity offering an examination covered by this section shall provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills, unless that private entity can demonstrate that offering a particular auxiliary aid would fundamentally alter the measurement of the

> skills or knowledge the examination is intended to test or would result in an undue burden."

28 C.F.R. § 36.309(b).[9]

Fact Background

All three Plaintiffs are law school graduates with visual disabilities who seek to take the Maryland Bar Examination. (Compl. ¶ 2.) All three individuals require the use of adaptive software as an appropriate auxiliary aid as a result of vision impairments: Zoomtext Screen Magnification software in the case of Mr. Witwer; Jaws screen-reading software in the case of Mr. Elder; and both Zoomtext and Jaws in the case of Ms. Blackfield. (Compl. ¶¶ 39, 18, 29.) [5] Without the use of this adaptive software, they are unable to read in a manner comparable to other individuals. (Comp. ¶¶ 16, 27, 38.)

The Maryland Bar Examination consists of three parts, including the Maryland State Law portion, the Multistate Performance Test, and the Multistate Bar Examination ("MBE"). The Maryland Board of Law Examiners ("Board") has agreed to provide the requested testing accommodations to the plaintiffs and has purchased the necessary hardware and

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[9] The requirement that the examination must "best ensure" fair examination of the test-taker's knowledge was adopted from the Rehabilitation Act's Section 504 requirements for admissions examinations in post-secondary institutions. 28 C.F.R. pt. 36, app. B at 715 (2009).

software to permit the plaintiffs to use the adaptive software. (Compl. ¶¶ 3, 19, 20, 30, 31, 39, 40, 41.)

NCBE develops and offers the MBE to the various State Bar licensing boards for use in each state's bar examinations. (Ex. B. to Def. Mem. In Supp. Mot. To Dismiss, Moeser Decl. ¶ 3.) The MBE consists of two hundred multiple choice questions that are identical in all jurisdictions. *Id.* NCBE will not release the MBE for use by a state except under very specific conditions. *Id.* Even if a state chooses to offer a broad variety of auxiliary aids to persons taking the test, NCBE refuses to provide the MBE in a format electronically readable by many broadly-available software programs that facilitate reading and comprehension by persons who are blind. (Ex. B. to Def. Mem. In Supp. Mot. To Dismiss, Moeser Decl. ¶ 12.) NCBE has a stated interest in protecting the contents of the examination from being distributed in any fashion. *Id.*

Plaintiffs requested the use of adaptive software to take the Maryland Bar Examination using the appropriate procedures set out by the Board. (Compl. ¶¶ 18, 29, 39.) The Board has agreed to provide the plaintiffs the Maryland Bar Examination, allowing plaintiffs to use the requested auxiliary aids and adaptive software. The Board has even taken the steps of purchasing laptop computers and several licenses of Zoomtext and Jaws, and has trained personnel on the use of Zoomtext and Jaws so that they may properly provide the examination to [6] the Plaintiffs and other potential applicants. (Compl. ¶¶ 3, 20, 31, 41.) Defendant NCBE provides the MBE to the Board and controls the administration of the MBE insofar as what testing accommodations and

appropriate auxiliary aids may be given to MBE examinees. (Compl. ¶ 12.) NCBE refuses to make the MBE available in an electronic format for use with adaptive software. (Compl. ¶ 3; Moeser Decl. ¶ 11.)

Argument

A. The Motion to Dismiss Should be Denied Because Plaintiffs Have Stated a Claim Sufficient to Withstand A Challenge Pursuant To Fed. R Civ. P. 12(b)(6).

1. Fourth Circuit Standards For Review Under Fed. R Civ. P. 12(b)(6).

In the Fourth Circuit, the standards for reviewing a motion to dismiss pursuant to Rule 12(b)(6) in a civil rights case, such as this one, provide:

> [T]he purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint." *Edwards v. City of Goldsboro,* 178 F.3d 231, 243 (4th Cir. 1999). A 12(b)(6) motion "'does not resolve contests surrounding the facts [or] the merits of a claim.'" *Id.* (*quoting, Republican Party v. Martin,* 980 F.2d 943, 952 (4th Cir. 1992)). Accordingly, an appellate court "may only affirm the dismissal of the complaint if 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 249-50 (1989) (*quoting Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984)). Moreover, when a complaint alleges a civil rights violation, "we must be especially solicitous of the wrongs alleged and must not

> dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief *under any legal theory*" that could be proved consistent with the allegations. *See Edwards,* 178 F.3d at 244 (overturning dismissal of suspended government employee's First Amendment claims).

Smith v. Frye, 488 F. 3d 263, 274 (4th Cir. 2007); *cert. denied* 552 U.S. 1039 (2007).

In assessing a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the court must accept the factual allegations contained in the complaint as true. [7] *Fitzgerald v. Barnstable Sch. Comm.,* __ U.S. __, 129 S. Ct. 788, 792 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A court must determine whether a complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570).

The factual allegations in the complaint must be sufficient "to raise a right to relief above the speculative level," *Twombly,* 550 U.S. at 545, and ". . . a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right of relief above the speculative level." *Twombly*, 550 U.S. at 545. If the Court concludes that the "complaint has not 'nudged [his] claims…across the line from conceivable to plausible,'" then such claims cannot be sustained under the pleading requirements. *Iqbal,* 129 S. Ct. at 1951 (citing *Twombly*).

2. NCBE Is A Covered Entity Within The Plain Meaning of Section 309.

NCBE argues that the Plaintiffs fail to state a claim because NCBE is not a covered entity within the meaning of Section 309. (Def.'s Mem. Supp. Mot. Dismiss at 21.) However, NCBE's argument is belied by the plain meaning of the law. In addition, the legislative history of Section 309 of the ADA, and its implementing regulations make clear that Congress intended Section 309 to apply to "any private entity who offers examinations . . . related to . . . licensing. . . . for. . . professional, or trade purposes. . . ." 28 C.F.R. § 36.309(a). There can be no dispute that NCBE is a private entity and a corporation, and that the MBE is an examination related to licensing for professional purposes – a license to practice law.

Courts have consistently held that private entities that offer exams to licensing boards or jurisdictions such as the NCBE are covered by Section 309. *See Boggi v. Medical Review and* [8] *Accrediting Council*, WL 2951022, at 10 (E.D. Pa. 2009) (holding that an "independent non-profit entity that provided tests for health professions but did not license physicians" is covered by Section 309); *Biank v. Nat'l Bd. of Med. Examiners*, 130 F. Supp.2d 986, 988 (N.D. Ill. 2000) (holding that NBME, "as a private entity offering examinations related to licensing, is subject to ADA under Section 12189").

Defendant NCBE, like the National Board of Medical Examiners ("NBME") in *Biank*, is a non-profit organization that develops tests and

establishes standards for admission to a profession. NCBE describes its mission as:

> work[ing] with other institutions to develop, maintain, and apply reasonable and uniform standards of education and character for eligibility for admission to the practice of law; and . . . assist[ing] bar admission authorities by providing standardized examinations of uniform and high quality for the testing of applicants for admission to the practice of law. . . .

National Conference of Bar Examiners, ABOUT THE NATIONAL CONFERENCE OF BAR EXAMINERS, Available: http://www.ncbex.org/. (last visited Jul. 9, 2010). The NCBE thus performs functions like those of the NBME.

As discussed below, while although the NCBE does not actually administer the MBE on test day, it is the sole determinant of the test's contents, its timing, and structure. *See generally*, National Conference of Bar Examiners, ABOUT THE NBE AND INTRODUCTION, Available: http://www.ncbex.org/. (last visited Jul. 9, 2010); (Moeser Decl.; Gavin Decl. ¶¶ 6 and 7.) The NCBE develops and offers the MBE, which is used in most every jurisdiction in the country. (Compl. ¶ 12; Moeser Decl. ¶ 3a ("48 states use the MBE, including Maryland.") The Multistate Bar Examination is designed, as the name connotes, to cover areas of law common to the various states; it tests fundamental legal principles rather than the case or statutory law of [9] local jurisdictions. National Conference of Bar Examiners, Available: http://www.ncbex.org/. (last visited Jul. 9, 2010).

Individual state Boards of Law Examiners, like the Board, separately test areas of law specific to their respective states, but the MBE is an essential component of the bar examination process. *See* Fact Background, *supra* at 4. Maryland, for example, uses the MBE, the Multistate Performance Test, which is also developed and owned by the NCBE, and then asks ten questions relevant to Maryland law that the Board develops. (Moeser Decl. ¶ 7.)[10]

While the individual jurisdictions are responsible for on-site monitoring of the administration of the MBE, the MCBE controls the manner in which the examination is to be administered. (Gavin Decl. Ex. A.; Gavin Decl. ¶¶ 7-9.) It provides jurisdictions with a lengthy booklet, complete with step-by-step checklists, specifying exactly how the jurisdiction shall administer the MBE. (Gavin Decl. Ex. A.; *See* Gavin Decl. ¶¶ 7-9.)

Finally, and most relevant to this case, the NCBE and not the Board has exclusive control over the accessible formats in which the MBE is provided. (Moeser Decl. ¶ 6.) NCBE provides its materials to state testing authorities, like the Board, in formats that are not compatible with generally-available auxiliary aids and services. (*See* May 10, 2010 Letter from Attorney General, Ex. C to Declaration of Timothy Elder ("Elder Decl."); Ex. C to Declaration of Anne Blackfield ("Blackfield Decl."); Ex. D to

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[10] While not used by Maryland, the NCBE also develops and owns the MPRE, the Multistate Professional Responsibility Examination, which is used in 47 jurisdictions across the country. (Moeser Dec. ¶ 5.)

Declaration of Michael Witwer ("Witwer Decl."); Letter from Robert Burgoyne to Daniel Goldstein dated May 18, 2010, Ex. E to Elder Decl., at 3; and May 21, 2010 memorandum from Erica Moeser to Bar Admission Administrators re: Electronic Delivery of MBE materials, Ex. B to Gavin Decl., at 1.)

[10]

As the organization that offers[11] the primary examination for areas of the law common to the various states and the examination that is actually used by most state bars, as well as the MPT and the MPRE, all essential components used by most states, the NCBE plainly is covered by Section 309 of the ADA. The MBE is a significant part of the bar examination in Maryland and most other jurisdictions. To find that the NCBE is not covered by Section 309 would effectively void the statutory provision with respect to a significant number of students applying to take the bar examination. NCBE controls the manner in which the examination is administered and has "veto power" with respect to certain testing accommodations, including exclusive control over which accessible formats that the examination is offered. In sum, NCBE is a private

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[11] The NCBE offers the MBE to jurisdictions including the Board. The Merriam-Webster dictionary definition of the verb "offer" includes the following: "5: to make available: afford; especially to place (merchandise) on sale." available at http://www.merriam-webster.com/dictionary/offer. (last visited Jul. 9, 2010) NCBE provides the MBE to jurisdictions administering the bar exam at a price of $54 per test booklet. (Moeser Decl. ¶ 15.)

entity that offers licensing and credentialing examinations and is subject to the requirements of the Act. Given the allegations of the Plaintiffs and the facts before the Court, the Motion to Dismiss should be denied as to Defendant's coverage under the ADA.

B. The Court Should Consider the Facts and Make a Determination Whether the Requested Auxiliary Aids Are Appropriate.

1. Provision of the Appropriate Auxiliary Aid or Format is Essential.

The crux of NCBE's Motion to Dismiss is that the testing accommodations NCBE is offering of audio CD, human reader, and/or large print are "reasonable" as a matter of law. (Def.'s Mem. Supp. Mot. Dismiss at 25-39.) The Defendant's argument is fundamentally flawed because it ignores the proper standard for determining whether an examination is offered in an accessible manner.

[11]

The applicable standard is articulated in 28 C.F.R. § 36.309, a regulation promulgated by the Department of Justice at the direction of Congress that implements title III in the testing context. 42 U.S.C. § 12186(b). The regulation states that examinations must be

> administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or 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 regulation requires that an examination be offered in a manner that will provide individuals with disabilities an equal opportunity to demonstrate their knowledge or abilities to the same degree as others taking the MBE. *See* 28 C.F.R. pt. 36, app. B. at 735 (2009). The regulation further articulates the requirement that a title III entity must provide modifications to the manner in which the examination is given, or the provision of appropriate auxiliary aids "unless doing so would fundamentally alter the skills or knowledge the examination is intended to test or would result in an undue burden." 28 C.F.R. § 36.309(b)(2), (3).

In general, under title III, whenever a request for an auxiliary aid is made, it is incumbent upon a title III entity to properly assess the need for an auxiliary aid and then to provide the auxiliary aid that allows for effective communication. 28 C.F.R. § 36.303. When the entity being asked to provide an appropriate auxiliary aid is a testing entity, there is an additional obligation to administer the examination so as to "best ensure" that the test-taker will be able to demonstrate "aptitude, achievement level or whatever other factor the examination purports to measure . . . " 28 C.F.R. § 36.309(b)(1)(i).

[12]

Congress intended that the ADA give people with disabilities an equal opportunity to obtain professional or trade licenses and certifications without their disabilities impeding on their opportunity to demonstrate their abilities. When a test contains barriers that have nothing to do with the aptitudes or achievements it purports to measure, it violates this principle and denies individuals with disabilities the opportunity to practice trades and professions that require no more skill or ability than they in fact have. The standard contained in the regulations implementing Section 309 ensures that people with disabilities have access to high stakes licensing examinations and associated employment opportunities and thereby helps to realize a significant part of the ADA's promise. In light of the Plaintiffs' allegations, as discussed *supra* at 4-5, that the testing accommodations offered by NCBE are not in fact the appropriate testing accommodations to best ensure that Plaintiffs can demonstrate their knowledge and abilities on the MBE, Defendant's Motion to Dismiss should not be granted.

2. Provision of Appropriate Auxiliary Aids Does Not Alter "Goods or Services" Provided By An Entity Covered By Title III of the ADA.

NCBE argues that, as a matter of law, it cannot be required to provide the MBE in an accessible format for use with adaptive software because to do so would require changing its goods and services –

something not required by the ADA. (Def.'s Mem. Supp. Mot. Dismiss at 21-23.) In support of its argument, NCBE cites cases[12] that are not on point because they address a concept in the law that is distinguishable from the issue presented to this Court.

[13]

The cited decisions interpreted regulations and guidance issued by the Department and directed at the general obligations under title III to provide goods in an accessible manner. *See* 28 C.F.R. § 36.307; DOJ TITLE III TECHNICAL ASSISTANCE MANUAL § III 4.2500. Each decision highlighted the distinction between *access* to goods and services, on the one hand, and the *provision* of goods that are themselves accessible, on the other, and reasoned that the ADA does not require a seller to alter the content of its goods and services. *Weyer*, 198 F.3d at 1115; *McNeil*, 205 F.3d at 187-188. Each court relied upon the Department of Justice title III regulation and TITLE III TECHNICAL ASSISTANCE MANUAL's example regarding when a title III entity would not have to provide an accessible product. *Weyer*, 198

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[12] *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000) (upholding differences in coverage provided for physical and mental illnesses, reasoning that the ADA does not regulate the terms of insurance policies); *McNeil v. Time Ins. Col*, 205 F.3d 179, 186 (5th Cir. 2000), *cert. denied,* 531 U.S. 1191 (2001) (upholding limitations on coverage for particular illnesses because policy limitations are the content of the defendant's product and therefore not regulated by the ADA.)

F.3d at 1115; *McNeil*, 205 F.3d at 187. However, the Department's example in the guidance was intended to explain when a particular request to provide accessible goods might be unreasonable.[13] Recently, in a case [14] based upon the need for appropriate

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[13] **III-4.2500 Accessible or special goods**

As a general rule, a public accommodation is not required to alter its inventory to carry accessible or special products that are designed for or easier to use by customers with disabilities. Examples of accessible goods include Brailled books, books on audio tape, closed-captioned video tapes, specially sized or designed clothing, and foods that meet special dietary needs.

ILLUSTRATION: A local book store has customarily carried only regular print versions of books. The ADA does not require the bookstore to expand its inventory to include large print books or books on audio tape.

On the other hand, a public accommodation may be required to special order accessible goods at the request of a customer with a disability if –

1) It makes special orders for unstocked goods in its regular course of business, and

2) The accessible or special goods requested can be obtained from one of its regular suppliers. [14]

ILLUSTRATION: A customer of a local bookstore begins to experience some vision loss and has difficulty reading regular print. Upon request by the customer, the bookstore is required to try to obtain large print books, if it normally fills special orders (of any kind) for its other customers, and if large print books can be obtained from its regular suppliers.

The ADA does not require that manufacturers provide warranties or operating manuals that are packed with the product in accessible formats.

auxiliary aids, as in the case at bar, the Ninth Circuit properly rejected the same cases that plaintiffs rely upon here because they are inapplicable. Distinguishing *Weyer*, the Ninth Circuit wrote:

> In arguing that the ADA's requirement of auxiliary aids and services is limited by *Weyer,* Harkins puts the cart before the horse: *Weyer* does not limit subsection 42 U.S.C. § 12182(b)(2)(A)(iii)'s requirement that a public accommodation provide auxiliary aids and services; the requirement that establishments provide auxiliary aids and services limits *Weyer*'s general rule that public accommodations do not have to provide different services for the disabled. Although *Weyer* may be controlling in the provision of goods and services generally, here Plaintiffs are seeking an auxiliary aid, which is specifically mandated by the ADA to prevent discrimination of the disabled.

Arizona v. Harkins Amusement Enterprises, Inc., 603 F.3d 666, 670 (9th Cir. 2010).

Similarly, the *Harkins* court dismissed the comparison to *McNeil* in the context of effective communication:

> The *McNeil* court also noted that "[t]he provisions in §§ 12182(b)(1)(A)(i)-(iii) concerning the opportunity to benefit from or to participate in a good or service do not imply that the goods or services must be modified to ensure that opportunity or benefit. Rather, this section only refers to impediments that stand in the way of a person's ability to enjoy that

> good or service in the form that the establishment normally provides it." The district court in this case relied on this passage to reason that § 12182(b)(2)(A)(iii) does not require accommodations to offer different services. *Harkins,* 548 F. Supp.2d at 728. The district court's [15] reasoning effectively eliminates the duty of a public accommodation to provide auxiliary aids and services. By its very definition, an auxiliary aid or service is an additional and different service that establishments must offer the disabled. For example, a courthouse that was accessible only by steps could not avoid ADA liability by arguing that everyone-including the wheelchair bound-has equal access to the steps. And an office building could not avoid having to put Braille numbering on the buttons in its elevator by arguing that everyone-including the blind-has equal access to the written text. Although *Weyer* and *McNeil* support the proposition that the content of a good or service need not be altered under the ADA, neither of those decisions turn on whether a place of public accommodation must provide an auxiliary aid or service that falls within the mandate of § 12182(b)(2)(A)(iii).

Harkins, 630 F.3d at 670.

Likewise, this Court should refuse to rely upon upon *Weyer* or *McNeil.* Rather, the analysis in *Harkins* controls when evaluating the need for an auxiliary aid to ensure effective communication, a core requirement of the ADA. When the issue is

providing an appropriate auxiliary aid for persons who are blind or have low vision in testing situations, the law similarly requires delivery of written text in an accessible format.[14] Moreover, this case does not deal with [16] the creation of inventory of accessible

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[14] NCBE presents a veritable barrage of inapplicable case law to support their incorrect application of the reasonable accommodations standard to testing under Section 309. *Fink* and *Jaramillo,* the only cases dealing with testing cited by NCBE, were both wrongly decided under the Rehabilitation Act. *Fink v. NY City Dept. of Personnel*, 855 F. Supp. 68 (S.D.N.Y., 1994) (incident giving rise to litigation occurred prior to the passage of the ADA); *Jaramillo v. Prof. Exam. Svc., Inc*., 544 F. Supp.2d 126 (D. Conn., 2008). The remaining cases involve varying interpretations of wholly inapplicable provisions of the ADA or the Rehabilitation Act. *See Mason v. Corr. Med. Serv., Inc.*, 559 F. 3d 880, 887 (8th Cir. 2009) (Title II case involving accommodations for prisoner); *Carter v. Bennett*, 840 F.2d 63 (D.C. Cir. 1988) (Employment case under the Rehabilitation Act); *Dobard v. San Francisco BART*, 1993 U.S. Dist. WL 3722256 (N.D. Cal. 1993) (Title II case regarding the provision of auxiliary aids at a public meeting); *Memmer v. Marin County Courts*, 169 F.3d 630, 634 (9th Cir. 1999) (Title II case on accommodations in municipal court where plaintiff did not get reader of choice but was offered alternative reader); *Line v. Calif Dept. of Rehab.*, 1999 WL 1178967 (9th, Cir. 1999) (Employment case decided under title I where plaintiff was provided with computer and screen reader but not Braille equipment); *Paulus v. Kaiser Permanente Med. Grp.,* 1999 WL 342041 (9th Cir. 1999) (Title I case decided on definition of disability not accommodations); *Lors v. Dean*, 595 F.3d 831 (8th Cir. 2010) (Employment case decided under title I); *Talbot v. Acme Paper & Supply Co*., 2005 WL 2090699, *5 (D. Md. 2005) (Employment case decided under Title I); *Scott v. Montgomery Cty Gov't,* 164 F. Supp. 2d 502 (D. Md. 2001) (Same). *Marinoff v.* [16] *Duncan*, 2000 WL 1835391, *3 (D. Md. 2000) (same).

goods. Making the MBE compatible with accessible software does not alter the test for anyone else – it merely enables individuals with disabilities to take the examination on an equal basis with those without disabilities. It has no effect on the content of the examination or on other test takers.

3. Electronic Examinations for Use With Adaptive Software Constitute Appropriate Auxiliary Aids.

The ADA title III regulations make no reference to screen-reading or screen-magnification software or the provision of examinations in electronic form. Indeed, the software that Plaintiffs require for this examination was not yet widely available when the regulations were first issued. (Ex. 18 to Def. Mem. In Supp. Mot. To Dismiss, Decl. of Chen.) The regulations do provide examples of testing accommodations, such as reading an examination aloud, or providing examinations on tape or in Braille, that could constitute appropriate testing accommodations within the meaning of the Act. 28 C.F.R. 36.309(b)(3). Neither the regulation nor the statutory language of the ADA limits covered entities to the enumerated, but by no means exhaustive, types of testing accommodations included in the statutory or regulatory text. Indeed, following a long list of examples of auxiliary aids, Section 36.309(b)(3) of the regulation includes the category, "similar services and actions":

Auxiliary aids and services required by this section may include taped examinations, interpreters or other effective methods of making orally delivered materials available to individuals with hearing

impairments, Brailled or large print examinations and answer sheets or qualified readers for individuals with visual impairments or learning disabilities, transcribers for individuals with manual impairments, and other similar services and actions.

[17] *id.* (emphasis added).

This language echoes the definition of auxiliary aids in the statute found at 42 U.S.C. § 12103(1). That definition also includes the phrase "other similar services and actions," *id.*, as does the regulatory definition at 28 C.F.R. § 36.303(b)(4), and the relevant regulatory language for Section 309. 28 C.F.R. § 36.309(b)(3). In the preamble for the auxiliary aids and services section, the Department of Justice clarified "that the list is not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. . .such an attempt would omit new devices that will become available with emerging technology.") 28 C.F.R. pt. 36, app. B, at 725 (2009). Adaptive software is the next generation of taped materials or having text read aloud. *See generally Achieving the Promise of the Americans with Disabilities Act in the Digital Age—Current Issues, Challenges and Opportunities: Hearing before the Subcomm. on the Constitution, Civil Rights and Civil Liberties,* (statement of Samuel R. Bagenstos, Principal Deputy Assistant Attorney General for Civil Rights); 111th Cong. (April 22, 2010); http://judiciary.house.gov/hearings/pdf/Bagenstos100422.pdf (last visited Jul. 9, 2010). The court in *Enyart v. National Conf of Bar Examiners, Inc.,* Slip Copy, 2010 WL 475361 *5 (N.D.Cal., 2010), found that the electronic format of the MBE that is usable with

adaptive software is an auxiliary aid within the meaning of Section 309.

NCBE offers, in support of its theory, two of the Department's early settlements with testing entities.[15] As a general matter, settlements are

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[15] NCBE pointedly ignores the Department's settlements that do not support its position and glosses over the fact that, even for the agreements that they do point to, the auxiliary aids and services are appropriate to the individuals in questions. For example, in the Department's 2002 agreement with the Law School Admissions Council, the settlement included the following preliminary statement:

> Pursuant to Tile III of the ADA, private entities that administer [18] examinations relating to applications for post-secondary education must offer the examinations in a place and manner accessible to persons with disabilities. 42 U.S.C. § 12189 and 28 C.F.R. § 36.309. Pursuant to U.S.C. § 12189 and 28 C.F.R. § 36.309, private entities that administer such examinations are required to provide reasonable modifications to the examination and appropriate auxiliary aids and services (i.e., testing accommodations) for persons with disabilities to ensure that the "examination results accurately reflect the individual's aptitude or 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)(1)(i). A testing entity is required to provide appropriate auxiliary aids and services for persons with impaired sensory, manual, or speaking skills that result in a substantial limitation in one or more major life activities, unless that entity can demonstrate that offering a particular auxiliary aid would fundamentally alter the measurement of the skills or knowledge the

inherently a compromise and are not [18] controlling as to what the law fully requires. *See United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). ("Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms . . . Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.") NCBE's reliance upon dated Department settlements[16] in support of its argument is therefore misplaced. The settlements were agreed to prior to the wide-spread use of adaptive software. The testing accommodations that were agreed upon in the past sufficiently met the [19] needs of the individual complainants at the time of

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examination is intended to test or result in an undue burden. 28 C.F.R. § 36.309(b)(3).

See Settlement Agreement Between the United States of America and The Law School Admission Council, Inc., *available at* http://www.ada.gov/lsac.htm#anchor262953. (last visited Jul. 9, 2010).

[16] It is worth noting that the settlement with the College Entrance Examination Board and Educational Testing Services only applied to administrations of the SAT from June 1994 to June 1995. *See* Settlement Agreement Among the U.S., Jaclyn Okin, the College Entrance Examination Board, and the Educational Testing, *available at* http://www.justice.gov/crt/foia/nyindex.php. (last visited Jul. 9, 2010) Similarly, the Settlement with the American Association of State Social Worker Boards was reached in 1998. *See* United States of America v. American Association of State Social Worker Boards, *available at* http://www.justice.gov/crt/foia/iowaaaswb.php. (last visited Jul. 9, 2010)

the settlement and were thus, appropriate auxiliary aids given the circumstances. The Court should not rely on cherry-picked statements from early settlements between the Department and certain testing entities to determine the scope of appropriate auxiliary aids in this instance. Rather, the Court must consider whether in denying the use of widely-available software while taking the MBE, the plaintiffs are being denied an equal opportunity to demonstrate their knowledge and ability to the same degree as others taking the MBE, in violation of title III of the ADA and its implementing regulation.[17]

Conclusion

For all the reasons stated above, the Court should deny the motion to dismiss filed by the National Conference of Bar Examiners. With the Court's

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[17] NCBE also argues that plaintiffs lack a private right of action pursuant to the title III regulation, citing the Eleventh Circuit's recent decision in *American Association of People with Disabilities v. Harris*, 2010 WL 1855851 (11th Cir. Fla. May 11, 2010). (Def.'s Mem. Supp. Mot. Dismiss at 34.) The *AAPD* decision is not controlling. There, the panel held that 28 C.F.R. § 35.151 was not enforceable through a private right of action. The panel's overly broad ruling applied *Sandoval* where such a discussion was patently unnecessary. There, as here, the regulation at issue is fully consistent with, and an authoritative interpretation of, a statutory provision that is enforceable through a private right of action. Indeed, the Court in *Sandoval* recognized that "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." 532 U.S. at 284 (internal citations omitted). NCBE's argument that plaintiffs lack a private right of action to bring a challenge pursuant to the regulation should be rejected.

permission, counsel for the United States will be present at upcoming hearings.

[20]

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