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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Ninth Circuit's decision conflicts with the decisions of other courts, which have uniformly adopted the well-settled reasonable accommodation standard to judge accommodations for licensing examinations and every other type of test. Pet. 13-26. Respondent's ("Enyart's") self-contradictory response only underscores the need for certiorari.

Enyart essentially agrees that a single standard should govern all testing accommodations because the same basic statutory and regulatory language governs all contexts. Opp. 15-21. Remarkably, however, she argues that there is no reasonable accommodation standard for *any* testing activities under

the ADA, and that the Ninth Circuit's more onerous standard governs all cases instead. *Id.* If that were true (and it is not), it would mean every case applying the usual standard, *see* Pet. 13-20, is wrong, thereby magnifying the need for certiorari.

The Ninth Circuit's unique departure from the universal reasonableness standard has created legal and practical disuniformity that only this Court can resolve. To do so, the Court need not "invalidate" the DOJ regulation issued under 42 U.S.C. § 12189. Opp. 14, 15, 25. Rather, the regulation should be applied *consistently* with the reasonableness standard, as the courts, DOJ and other agencies have been doing for years.

As Enyart does not dispute, the Ninth Circuit's standard has resulted in significant practical difficulties, including directly contrary court decisions for the *same* person seeking the *same* accommodations for the *same* test, stemming solely from the difference in the governing legal standard. If all plaintiffs are entitled to their personal "best" accommodation—untethered to notions of reasonableness—standardized tests will become non-standardized, as every disabled person demands his or her own idiosyncratic, ideal format.

Enyart's "vehicle" concerns are no reason to deny certiorari. As in numerous other cases where this Court has granted certiorari in the preliminary injunction context, this petition presents a conflict involving a pure question of law governing all phases of the case. And because the Ninth Circuit's decision effectively removes the irreparable harm preliminary injunction factor in every testing case (itself reason for certiorari), this Court's review is even more imperative now.

I. THE CONFLICT IS REAL AND CONSEQUENTIAL.

A. Every Court Other Than The Ninth Circuit Has Applied A Reasonableness Standard To Testing Accommodations.

NCBE has shown that the Ninth Circuit's decision conflicts with the decisions of every other court to have considered disability-related testing accommodations—including tests conducted by federal funds recipients, employers, schools, and licensing entities—all of which have applied the settled reasonable accommodation standard. Pet. 13-20.

In response, Enyart argues that the reasonable accommodation standard does not govern *any* tests covered by the ADA and the Ninth Circuit's different "best ensure" standard governs every case. *See*, *e.g.*, Opp. 20 ("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."); *id.* at 20-21. Her premise is correct: there should be one uniform standard governing testing accommodations. But she is wrong to assert that the proper standard is something other than reasonable accommodations and that the Ninth Circuit's decision does not conflict with other courts' adoption of that standard.

Enyart stresses that ADA language in Title I governing employment tests is similar to the DOJ regulation applied by the Ninth Circuit. *Id.* The petition notes the same point. Pet. 26. The similarity is no coincidence, because the language was taken from pre-existing Rehabilitation Act regulations. *Id.* at 26-29. But the import is the opposite of Enyart's position. Because the Rehabilitation Act has always

mandated reasonable accommodations, including in testing, Congressional and agency incorporation of that Act's standards shows that no change was intended or effected.

Indeed, while Enyart stresses Title I's language that employers are to administer tests "in the most effective manner to ensure" that results do not reflect disabilities, 42 U.S.C. § 12112(b)(7), she ignores that Congress defined "reasonable accommodations" to include "appropriate adjustment or modifications of examinations." *Id*. § 12111(9)(b). *See* Pet. 15. Thus, Congress mandated a reasonable accommodation standard for employment testing. And because the regulatory language of the Rehabilitation Act and all Titles of the ADA is materially identical, that language can and should be interpreted *consistently* with, not in place of, the reasonable accommodation standard. *Id*. at 26-27.

Contrary to Enyart's contentions, that is what every court—except the Ninth Circuit—has held. She argues that *none* of the many courts that have stated that the reasonable accommodation standard applies to testing actually adopted the standard. Opp. 24-27. That is wrong. For example, Enyart's contention that *Fink* v. *N.Y. City Dep't of Personnel*, 53 F.3d 565 (2d Cir. 1995), "never directly confronted the proper standard to be applied in the testing context," Opp. 29, is specious, as shown by the appellate court's holding that "[t]he district court properly granted summary judgment" where "[t]he defendants demonstrated without contradiction that they made reasonable accommodation." *Id*. at 567.

Numerous other decisions likewise hold that the reasonable accommodations standard applies to

testing.[1] These include cases arising under 42 U.S.C. § 12189. For example, the Florida Supreme Court squarely held—relying on § 12189 and DOJ's regulation—that the State Bar "must reasonably accommodate [a plaintiff] in administering the bar exam" and the requested accommodation was "not a reasonable accommodation." *In re Florida Bd. of Bar Exam'rs*, 707 So. 2d 323, 325 (Fla. 1998). *See also In re Petition of Rubenstein*, 637 A.2d 1131, 1135 (Del. 1994) ("The Board properly recognized * * * that the continuing nature of Rubenstein's learning disability * * * required it to make reasonable accommodations

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[1] *See*, *e.g.*, *Zukle* v. *Regents of the Univ. of Cal.*, 166 F.3d 1041, 1049, 1050 (9th Cir. 1999) ("[T]he Medical School was only required to provide Zukle with reasonable accommodations. Accordingly, we examine the reasonableness of Zukle's requested accommodations."); *Kaltenberger* v. *Ohio College of Podiatric Med.*, 162 F.3d 432, 436-37 (6th Cir. 1998) ("We find that the College did not fail to reasonably accommodate plaintiff's learning disability by refusing to waive its policy regarding the retaking of examinations."); *Pandazides* v. *Va. Bd. of Educ.*, 13 F.3d 823, 833 (4th Cir. 1994) ("Sufficient evidence was introduced that Pandazides * * * could perform under circumstances of reasonable accommodation, and that the accommodation offered was not reasonable"); *Wynne* v. *Tufts Univ. Sch. of Med.*, 932 F.2d 19, 20 (1st Cir. 1991) ("This appeal addresses the obligation of an academic institution * * * when it seeks to demonstrate as a matter of law that there is no reasonable means available to accommodate a handicapped person"); *In re Reasonable Testing Accommodations*, 722 N.W.2d 559, 564 (S.D. 2006) ("[W]e must determine whether Lafleur satisfied his ultimate burden of proving that those alternatives did not provide reasonable accommodations for his disability."); *Bartlett* v. *N.Y. Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1131 (S.D.N.Y. 1997) (Sotomayor, J.) ("Because I find that plaintiff * * * was denied reasonable accommodations in taking the bar examination * * * I must find that her rights under the ADA and under Section 504 were violated."), *aff'd in part and vacated in part on other grounds*, 156 F.3d 321 (2d Cir. 1998).

for her learning disability if she was permitted to take the Bar Examination for the fourth time."). All these decisions held that a reasonable accommodation standard governs testing activities, and that holding was necessary to the resolution of each case.

Enyart's position is internally inconsistent. First, she argues the higher "best ensure" standard, rather than reasonableness, applies in *all* testing contexts because the same basic statutory and regulatory language governs all contexts. Opp. 15-21. But then she argues that cases arising in the federal funding, employment, and classroom contexts are irrelevant "because courts adopt different standards to implement *other* statutory and regulatory language." *Id*. at 28.

There is no reason for different standards to exist in these testing contexts, which often overlap in the same case and are governed by essentially the same statutory and regulatory language. And the single standard should be the reasonableness standard applied everywhere but the Ninth Circuit. The Court should grant certiorari to resolve the conflict and hold that this single, uniform standard applies to this case and all requests for testing accommodations under the ADA.

B. The Court Need Not "Invalidate" The DOJ Regulation.

Contrary to Enyart's repeated contention, to resolve the conflict the Court need not "invalidate" the DOJ regulation. Rather, as courts, other agencies, and DOJ itself have shown, the "best ensure" regulatory language can and should be applied *consistently* with a reasonableness requirement. That language was taken directly from

a regulation implementing the Rehabilitation Act, which has always required reasonable accommodations. Opp. 4-5; Pet. 14-15. Likewise, similar language was used to implement Title I of the ADA, which is also governed by a reasonableness requirement. Pet. 26-27. As the EEOC has stated, the Title I regulatory language should be "read together" with the reasonableness requirement. 29 C.F.R. pt. 1630, App. § 1630.11.

Thus, when DOJ applies its own regulation in enforcing § 12189, it has consistently required reasonable accommodations, even *after* the Ninth Circuit's decision. *See* Pet. 28-29. Although Enyart dismisses these public pronouncements as mere settlements, they show conclusively that the agency has applied its own regulation (which binds all agency action) in a manner requiring only reasonable accommodations. As applied, the regulation states what the accommodations seek to accomplish, but does not license prospective examinees to demand and receive their preferred accommodations.

Nor does Enyart explain why Congress or an agency would mandate a different accommodation standard for testing than for other services or facilities governed by the ADA. It may be that providing a test that is not "accessible" to a disabled person, 42 U.S.C. § 12189, "is no different from offering the test in a building the person cannot enter." Opp. 19-20. But if that person can reasonably enter a building, he cannot also demand whatever means of entry he claims are "best" for him. The standard should be no different for the testing itself.

Enyart argues that NCBE "has no ground to complain unless 'best ensure' means something mat-

erially different from 'reasonable accommodation.'" Opp. 23. NCBE petitions the Court for exactly that reason. The Ninth Circuit imposed a different standard, rather than recognizing—as have all other courts—that the testing statutes and regulations require no more than reasonableness. Here, as in every other context, the ADA does not "demand action beyond the realm of the reasonable." *U.S. Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401 (2002).

C. The Practical Difficulties Engendered By The Decision Below Are Undisputed.

Enyart does not contest that maintaining a uniform standard for accommodations on standardized tests is an issue of national importance. Nor does she contest the enormous practical difficulties engendered by the Ninth Circuit's unique rule, exemplified by diametrically opposite results in cases brought by the *same* person seeking the *same* accommodations for the *same* test, based *solely* on the different legal standard governing in the Ninth Circuit. *Compare Elder* v. *NCBE*, __ F. Supp. 2d __, No. C-11-00199, 2011 WL 672662 (N.D. Cal. 2011) *with Elder* v. *NCBE*, No. 1:10-cv-01418 (D. Md. 2010) (Dkt. 49, at 73); *see* Pet. 22-23. That would be intolerable in any area of the law, but is all the more so when the object of regulation is *standardized* testing. *See* Br. for Amici Curiae Ass'n of Am. Medical Colleges et al.

Nor does Enyart credibly dispute that untethering testing accommodations from "reasonableness" is inherently unworkable. Inevitably, every person will demand whatever idiosyncratic accommodations she (or a retained expert) thinks "best" for her, even where reasonable alternatives have been offered. Indeed, Enyart has already changed her mind about

what software combination is "best" for her, *see* Pet. 24-25, and the number and permutations of putatively "best" accommodations for other disabled people is endless. Just since the Ninth Circuit's decision, NCBE has already confronted demands for multiple software products, different software combinations, and different versions of the same software, from examinees with physical and mental impairments. Each requires expensive and time-consuming attention to avoid technical problems during exam administration while protecting the exams' security and integrity. *See Bonnette* v. *D.C. Court of Appeals*, No. 11-CV-1053 (D.D.C.) (Dkts. 17, 17-2).

Enyart's only response is that a testing entity can reject an accommodation if it can affirmatively prove the accommodation will cause an "undue burden" or "fundamentally alter" the test. 28 C.F.R. 36.309(b)(3). This inquiry, however, is not the same as reasonableness. Reasonableness considers the impact in the "run of cases" whereas undue burden considers "typically case-specific" factors applying to particular circumstances. *Barnett*, 535 U.S. at 401-02; *see also Borkowski* v. *Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995) (reasonableness "requires an inquiry not only into the benefits of the accommodation but into its costs as well"). The obligation to show that a requested accommodation causes an undue burden also arises only if the regulated party fails to offer a reasonable alternative accommodation. *Pierce* v. *County of Orange*, 526 F.3d 1190, 1217 (9th Cir. 2008).[2]

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[2] *Cf. Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 68 (1986) (finding "no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable

Because of a need for consistent policies, a rule imposed on a testing agency in a given case applies beyond the individual litigant. Enyart's accommodation alone has cost at least $5,000 per test, Pet. 6, but jettisoning the reasonableness inquiry will have far greater consequences. It will jeopardize the very foundation of standardized testing, by requiring administrators to accede to every demand for a personally-perceived "best" accommodation, on pain of litigation.

II. THIS CASE IS AN EXCELLENT VEHICLE TO DETERMINE A PURE QUESTION OF LAW.

This case presents a pure question of law expressly decided below: the *legal* standard governing accommodations in testing. It is immaterial that the issue arises on review of a preliminary injunction. This Court routinely grants certiorari in the preliminary injunction context to resolve important legal standards.[3] As the Ninth Circuit itself recognized, the threshold legal standard is a pure question of law for *de novo* review. Pet. App. 9a. *See*, *e.g.*, *Koon* v. *United States*, 518 U.S. 81, 100

accommodation" and that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship.").

[3] *See*, *e.g.*, *Doe* v. *Reed*, 130 S. Ct. 2811 (2010); *Gonzales* v. *Uniao Do Vegetal*, 546 U.S. 418 (2006); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644 (2003); *HUD* v. *Rucker*, 535 U.S. 125 (2002); *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000); *Saenz* v. *Roe*, 526 U.S. 489 (1999); *Amoco Prod. Co.* v. *Gambell*, 480 U.S. 531 (1987); *Regan* v. *Wald*, 468 U.S. 222 (1984); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972).

(1996) (court "by definition abuses its discretion when it makes an error of law"); *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) (existence of discretion "does not mean that no legal standard governs that discretion").

There is no need to require wasteful litigation to trial and judgment under the wrong standard. Opp. 31. Nor should review be denied because the district court initially decided this case under the reasonable accommodation standard. *Id.* at 30-31. NCBE appealed that decision as an erroneous application of the law. But NCBE never had its appeal resolved under the proper legal standard because the Ninth Circuit accepted Enyart's invitation to jettison the settled reasonable accommodation test for a materially different standard. Pet. App. 17a.

Enyart's assurances that the legal standard makes no difference are dubious given her steadfast insistence, now and below, that a different standard governs. This Court need not "overturn" factual findings to decide that issue. Opp. 31. Only when the proper standard is known can the parties and courts apply it to the facts. Although Enyart catalogues her version of the facts, *id.* at 30, before determining whether the evidence merits injunctive or final relief a reviewing court must know whether the "best" or "reasonable" accommodations are required. As shown by the *Elder* case, this critical difference can be dispositive.

III. THE CONFLICT OVER THE IRREPARABLE HARM STANDARD WARRANTS REVIEW.

The conflict between the Ninth Circuit's irreparable harm ruling and *Winter* v. *NRDC*, 129 S. Ct.

365 (2008), does not vanish merely because the court labeled Enyart's harm "likely." Opp. 32-33. The entire basis for that conclusion was that Enyart would suffer harm "*[i]f*" she fails the bar. Pet. App. 24a (emphasis added). The court did not hold, and Enyart does not argue, that she would "likely" pass with her requested accommodations but fail without them, Pet. 34-35, and her multiple failures make that even more speculative. If such speculation suffices under *Winter*, then *Winter* is virtually a dead letter in the Ninth Circuit.

Nor is bar exam failure "irreparable," as thousands who retake the exam can attest. The Ninth Circuit has set the bar so low for injunctions in testing cases that it appears impossible *not* to find irreparable harm whenever one has invested "effort and money" in a degree. Opp. 34-35; *see* Pet. 35-37. That standard conflicts with other circuits' law. Notwithstanding Enyart's attempt to muddy the issue, the Second and Seventh circuits have held that mere delay in pursuing professional studies, as opposed to interrupting attendance already in progress, is ordinarily "insufficient to warrant an injunction." *Doe* v. *New York Univ.*, 666 F.2d 761, 773 (2d Cir. 1981). *Accord Martin* v. *Helstad*, 699 F.2d 387, 391-92 (7th Cir. 1983). The opposite rule now applies in the Ninth Circuit.

The Ninth Circuit's watered-down injunction standard renders it even more imperative for the Court to review the governing legal standard. Because injunctions in testing cases will now be the rule, rather than the exception, in the Ninth Circuit, certiorari is now even more warranted. Pet. 36.

CONCLUSION

The petition should be granted and the judgment below reversed.

Respectfully submitted,

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