11-3355

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DEANNA L. JONES,

Plaintiff-Appellee

v.

NATIONAL CONFERENCE OF BAR EXAMINERS,

Defendant-Appellant

ACT, INCORPORATED,

Defendant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE AND URGING AFFIRMANCE

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STATEMENT OF THE ISSUE

The United States will address the following issue only:

Whether the district court correctly concluded that the requirement under Section 309 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12189, that examinations for professional licensing be offered in a manner "accessible to persons with disabilities," requires, pursuant to its implementing regulation, 28

C.F.R. 36.309(b)(1)(i), that testing accommodations be offered that "best ensure" that the examination results reflect the applicant's aptitudes rather than disabilities.

INTEREST OF THE UNITED STATES

The United States has substantial responsibility for the enforcement of Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* See 42 U.S.C. 12188(b). Pursuant to 42 U.S.C. 12186(b), the Department of Justice (Department) has issued regulations to carry out the provisions of Title III. This case presents the issue of the proper interpretation of Section 309 of the ADA, and its implementing regulation, 28 C.F.R. 36.309(b)(1)(i). Section 309 requires that licensing examinations be offered in a manner "accessible to persons with disabilities." The regulation requires that such examinations be administered so as to "best ensure" that the examination reflects the applicant's aptitude or achievement level rather than her disability. Because the issue presented concerns the validity and proper interpretation of the Department's regulation addressing the accessibility of professional examinations, the United States has an interest in presenting its views.

STATEMENT OF THE CASE AND RELEVANT FACTS

1. The plaintiff, Deanna Jones, is currently a law student at Vermont Law School. She has atypical retinitis pigmentosa with macular degeneration in each

eye, and has been legally blind since age five. SA 3.[1] In 2003, she was identified as having a learning disability that affects her reading. As a result, Geoffrey Howard, an assistive technology expert, recommended that she use two computer software programs to assist her in reading: ZoomText, a computerized magnification program, and Kurzweil, a text-to-speech software. SA 4. This software "enables plaintiff to listen to a vocalization of the electronic text, visually track highlighted lines and words as they are vocalized, magnify the displayed text, and navigate within the text in a manner that is similar to the access provided by sighted reading." SA 5. Prior to this time, she had used only a hand magnifying glass and closed circuit television (CCTV) that magnifies text. SA 4.

Throughout law school plaintiff used, and continues to use, a laptop computer with ZoomText and Kurzweil 3000 software for all her exams and reading assignments. SA 5. It is the most effective method by which she can access written text, and she has performed well in law school using it. SA 5.

In March 2011, plaintiff's learning disability was further assessed by the Stern Center, a professional diagnostic testing and evaluation organization. The

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[1] Citations to "SA __" are to page numbers in the Special Appendix attached to Appellant's opening brief. Citations to "JA ___" are to page numbers in the Joint Appendix. Citations to "R. __at__" are to documents as listed on the district court docket sheet and page numbers within the documents. Citations to "Br. __" are to page numbers in the Brief of Appellant National Conference of Bar Examiners.

Stern Center concluded that plaintiff has a learning disability and auditory memory deficiency, and "most effectively processes information by seeing it in a magnified version and having words and sentences highlighted through the use of color and spoken aloud by a synchronized voice." SA 6. The Stern Center concluded that the use of a computer with the ZoomText and Kurzweil software, *i.e.*, "[m]ultisensory presentations," is the "preferred and necessary" accommodation for plaintiff so that she can read and listen to written information simultaneously. R. 2-6 at 18.

2. Defendant, the National Conference of Bar Examiners (NCBE), is a non-profit organization that develops and owns four standardized examinations related to the practice of law: the MultiState Professional Responsibility Examination (MPRE); the MultiState Bar Examination (MBE); the MultiState Essay Examination (MEE); and the MultiState Performance Test (MPT). Defendant has contracted with ACT, Inc. to administer the MPRE in Vermont, although defendant determines the format in which the test is offered.[2] SA 2.

The MPRE is a sixty-question standardized test. It is designed to last approximately two hours and is typically administered as a "paper-and-pencil"

[2] Plaintiff also named ACT, Inc. as a defendant, but plaintiff and NCBE entered into a stipulation whereby plaintiff voluntarily dismissed ACT, Inc. as a defendant without prejudice and ACT, Inc. agreed to abide by any final determination of the court, including injunctive relief. R. 22.

examination. The test is offered three times a year – March, August, and November. An applicant must timely register for and pay a fee to take the examination. If unsuccessful, an applicant may retake the examination. SA 2.

The MPRE and MBE, but not the MPT and MEE, are considered "secure" tests; the questions are not disclosed after the examination because they may be re-used in future years. Defendant routinely offers its unsecured tests in an electronic format and allows them to be taken with computer software such as ZoomText and Kurzweil 3000. SA 2-3. With a few exceptions, it does not offer these options with respect to the MPRE and MBE examinations because of security concerns, *i.e.*, the test taker might electronically copy the questions onto the computer's hard drive or an external memory device. SA 2-3; see also Br. 8-9. Defendant, however, "has never had a known security breach with the computer-based format of the MPRE exam." SA 3.

3. Plaintiff timely registered for the August 5, 2011, MPRE and submitted her request for testing accommodations, noting both her vision and learning disabilities. The request included reports from Geoffrey Howard, the Stern Center, her optometrist, and her retinal specialist. SA 7. Plaintiff sought several testing accommodations, including the use of a laptop computer equipped with ZoomText 9.12 and Kurzweil 3000 v. 11.05 software. SA 7-8; Br. 13.

On June 29, 2011, defendant, through the test administrator ACT, responded that it would provide several of the requested testing accommodations, but not a computer with her requested software. Defendant also offered to administer the examination in one of the accessible formats that it makes available: Braille, an audio CD, large print, use of a human reader, and the use of CCTV. Plaintiff responded that these testing accommodations did not adequately address her disabilities. Defendant subsequently offered additional accommodations, but not the use of a computer with her requested software. SA 8; see also JA 15-16.

4. On July 1, 2011, plaintiff filed her complaint alleging that defendant's refusal to permit her to take the examination on a computer with the requested software violated Section 309 and its implementing regulations, including 28 C.F.R. 36.309(b)(1)(i) and (b)(3). JA 9. Also on July 1, 2011, plaintiff filed a motion for a preliminary injunction requiring defendant to provide her with an opportunity to take the August 5, 2011, MPRE examination on a computer with the requested software. R. 2-1.

On July 20, 2011, defendant filed an opposition to plaintiff's motion. R. 34. Defendant argued that Section 309 requires only a "reasonable accommodation" as that phrase is used in other parts of the ADA, and not the "higher 'best ensures' standard." R. 34 at 19 n.8. Defendant further asserted that the "best ensures" language in the regulation "cannot be read to change or expand upon the statutory

language of the ADA." R. 35 at 6, 13. Defendant also argued that it offered several reasonable accommodations for plaintiff's disabilities (*i.e.*, other examination formats) that are routinely used by persons with vision disabilities, and therefore the accommodations it offered were "reasonable as a matter of law." Finally, defendant argued that plaintiff is not entitled to her *preferred* accommodation, *i.e.*, a computer with specific accessibility software. R. 34 at 18-19.

5. On August 2, 2011, the district court granted the preliminary injunction and required defendant to provide plaintiff with the use of a laptop computer with the requested software for the August 5 MPRE (along with other testing accommodations). The court concluded that the regulation's "best ensure" standard is a reasonable interpretation of the statute, and therefore entitled to deference. SA 14-15. The court explained that under this standard, a testing entity may not provide an accommodation that is not as effective in affording a test taker an equal opportunity to reach the same level of achievement as persons without a disability. SA 15.

The court also concluded that even if it applied a reasonable accommodation standard, "a different outcome would not result" because under either standard what must take place is a "fact specific, individualized analysis of the disabled individual's circumstances" and "not a one-size-fits-all approach." SA 16-17

(citation omitted). The court noted that defendant concedes that plaintiff has two disabilities, and that none of the auxiliary aids offered to plaintiff "fully or reasonably address her learning disorder." Therefore, "[r]ather than make an individualized inquiry regarding Plaintiff's needs, Defendant has taken the position that its menu of accommodations is 'reasonable' even though the 'menu' in question is designed only for the visually impaired," and not for persons who also have a learning disability. SA 16.

6. On August 4, 2011, defendant filed a motion to modify the preliminary injunction and a motion for a stay. R. 51. Defendant requested that the order be modified to provide that defendant "does not have to provide an official score report of Plaintiff's scores earned on the August 5, 2011, * * * MPRE * * * until after NCBE receives a ruling on its expedited appeal." R. 51 at 3.

Plaintiff took the MPRE on August 5, 2011. On August 15, 2011, defendant filed a timely notice of appeal of the district court's August 2, 2011, order granting the preliminary injunction. JA 497.

On September 7, 2011, the district court denied defendant's motion to modify the preliminary injunction and motion for a stay. JA 500. On September 8, 2011, the parties agreed to stay discovery and trial preparation pending appeal. The parties acknowledged that plaintiff intends to the take the MBE in July 2012, and agreed, in part, that if the appeal is not resolved by that time, a stipulated

preliminary injunction would issue permitting plaintiff to take the MBE using the same accessibility software she used to take the MPRE, subject to defendant's right to appeal the stipulated preliminary injunction. JA 503.

SUMMARY OF ARGUMENT

Plaintiff seeks to take the bar examination on a computer using assistive software to accommodate her vision and learning disabilities. Defendant asserts that it is required only to provide accommodations that are, in a general sense, reasonable. Section 309, however, specifically addresses professional examinations, and provides that they must be offered in a manner that is "accessible to persons with disabilities." The implementing regulation provides that the examination must be administered so as to "best ensure" that the examination results accurately reflect the applicant's aptitude or achievement level, rather than reflect the individual's disability. The district court correctly concluded that the regulation is a reasonable construction of the statute and is entitled to deference under *Chevron*. Therefore, the "best ensure" standard in the regulation is an authoritative interpretation of the statute and applies in this case. The more generalized reasonableness standard, used in other provisions of the ADA, does not override the more specific regulation directed at disability-based discrimination in testing.

Defendant takes a different view. It argues that the ADA applies one standard to testing, regardless of the context, which is a "reasonable accommodation," the "uniform vehicle by which accessibility and equal opportunity are provided under the statutes." Br. 33. Defendant further asserts that Section 309 is not ambiguous, but applies the reasonable accommodation standard, and therefore no *Chevron* analysis is warranted. Br. 32-33. Defendant bolsters its argument with a straw man, arguing that, under the "best ensure" standard, it would be required to give each testing applicant his or her *preferred* accommodation or the one that will lead to the best score. See Br. 2-3, 36, 38. Finally, defendant asserts that the accommodations it offered plaintiff are reasonable because they have been accepted and used by other persons in similar cases.

These arguments are not correct and have been rejected by other courts. Although defendant is correct that a similar standard applies to examinations under the various titles of the ADA, that standard is not a reasonableness or "reasonable accommodation" standard, but rather the heightened "best ensure" standard under Section 309 (or the "most effective manner to ensure" standard under Title I) that is tailored to the unique context of testing. In this regard, the district court correctly concluded that Section 309's use of the term "accessible" is ambiguous, and that the "best ensure" regulation is a reasonable construction of Section 309

and entitled to deference. That standard does not mean, however, that the applicant is necessarily entitled to her preferred testing accommodation; it simply means what it says – the testing accommodation must ensure that the test results accurately reflect the applicant's aptitude or achievement level and not her disability. Like the reasonableness standard, this is both a fact specific and plaintiff specific inquiry, a point defendant entirely ignores. Therefore, it is not dispositive that in some other cases certain testing accommodations (*e.g.*, Braille) afforded an applicant access to an examination, a point of particular importance here because plaintiff has *both* a learning disability and a vision disability.

ARGUMENT

SECTION 309 AND ITS IMPLEMENTING REGULATION REQUIRE THAT EXAMINATIONS BE ADMINISTERED IN A MANNER THAT WILL "BEST ENSURE" THAT THE EXAMINATION RESULTS REFLECT THE INDIVIDUAL'S APTITUDE RATHER THAN DISABILITY

A. Section 309's Implementing Regulation Is A Reasonable Construction Of The Statute And Therefore Is Entitled To Deference Under Chevron

1. Title III of the ADA prohibits discrimination against persons with disabilities by public accommodations, *i.e.*, private entities offering various services to the public. It does so in several distinct anti-discrimination provisions. Section 302(a) contains a general prohibition on discrimination. 42 U.S.C. 12182(a). Section 302(b) contains numerous more specific provisions addressing various activities and actions that constitute disability discrimination. 42 U.S.C.

12182(b). Among these is the failure to make "reasonable modifications" in policies, practices, or procedures, when necessary to afford services to individuals with disabilities, unless the entity can demonstrate that the modifications would fundamentally alter the nature of the services. 42 U.S.C. 12182(b)(2)(A)(ii).

A separate section of Title III addresses professional and licensing examinations. Section 309 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 (emphasis added). The term "accessible" is not defined in the statute.

The Attorney General is charged with issuing regulations to carry out the provisions of Title III. 42 U.S.C. 12186(b). Pursuant to that authority, the Department promulgated 28 C.F.R. 36.309, which addresses "[e]xaminations and courses." Section 36.309(b)(1)(i) provides (emphasis added):

> Any private entity offering an examination covered by this section must assure that * * * [t]he 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).

The regulation further provides:

> 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. 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.

28 C.F.R. 36.309(b)(3) (emphasis added).

The Congress that enacted the ADA expected that the accommodations used to eliminate discrimination against persons with disabilities would evolve over time with the advent of new technology. The House Report stated that "the types of accommodation and services provided to individuals 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. 485, Pt. 2, 101st Cong., 2d Sess. 108 (1990); see also 28 C.F.R. Pt. 36, App. C (Section 36.303, Auxiliary Aids and Services).

2. The district court correctly concluded that the term "accessible" is ambiguous, the regulation is a reasonable construction of Section 309 under *Chevron*, and therefore 28 C.F.R. 36.309(b)(1)(i) provides the standard applicable to professional examinations. SA 14-15.

Under *Chevron*, if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). Further, if Congress has made "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," such "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute" they implement. *Id.* at 843-844. The *Chevron* standard requires a court to accept a "reasonable" construction of the statute, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 843-844). Moreover, a court's prior judicial construction of a statute does not trump "an agency construction otherwise entitled to *Chevron* deference" unless "the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. In other words, "allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute * * * would allow a court's interpretation to override an agency's," and it is "*Chevron's* premise that it is for agencies, not courts, to fill statutory gaps." *Ibid.*

Defendant asserts that there "is no ambiguity in the statutory term 'accessible,'" and therefore there is no reason to turn to the regulation for guidance. Br. 31-32. As the district court correctly noted, however, the term "accessible" in Section 309 could have various meanings, including "accessible at any cost," the "best access available under the circumstances," or "capable of being accessed" even if the access is not effective or meaningful. SA 14. Moreover, the term itself does not suggest what the notion of accessibility should mean in specific circumstances. In this regard, nothing about the term "accessible" compels defendant's assertion that a testing entity must simply provide what *defendant considers* a "reasonable" accommodation. See Br. 33. Because the term is ambiguous, the Department's construction of that term in its regulations is entitled to controlling weight, unless it is arbitrary, capricious, or manifestly contrary to the statute.

As the district court concluded, the regulation – and its "best ensure" standard – is a reasonable construction of the statute. SA 14. In a nearly identical case, the Ninth Circuit stated that "[o]ne reasonable reading of [Section 309's] requirement that entities make licensing exams 'accessible' is that such entities must provide disabled people with an equal opportunity to demonstrate their knowledge or abilities to the same degree as nondisabled people taking the exam." *Enyart* v. *National Conf. of Bar Exam'rs*, 630 F.3d 1153, 1162 (9th Cir.), cert.

denied, No. 10-1304, 2011 WL 4536525 (Oct. 3, 2011). Moreover, as the district court explained, the regulation "reflects the special challenges to the establishment of a level playing field in the administration of professional exams," because "[u]nlike in the employment sector where a 'reasonable accommodation' may be adjusted over time, a professional examination is generally a one-time event wherein the accommodations either ensure equality or do not." SA 15.[3] Further, the regulation was adopted from, and applies the same standard contained in, regulations under the Rehabilitation Act (predating the ADA) that address testing in other contexts,[4] and the ADA must be interpreted to grant at least as much protection as is provided by the Rehabilitation Act. See 42 U.S.C. 12201(a); 28 C.F.R. Pt. 36, App. B, Subpart C.

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[3] In this regard, it is also reasonable that a heightened standard applies in the context of testing because, for many kinds of tests, how well a person performs on a test may matter more than how well she subsequently performs in her new endeavor. Once an applicant passes the examination, the applicant's performance may be acceptable over a wider range of satisfactory performance levels and, if deficient, may be subject to remediation, training, etc., over time. Therefore, it is critical that a test taker's disability affect her test score to the least extent possible.

[4] See 34 C.F.R. 104.42(b)(3) (1980) (Department of Education regulation applying to college admission tests and providing that they must be "selected and administered so as best to ensure that * * * the test results accurately reflect the applicant's aptitude or achievement level * * * rather than * * * the applicant's [disability]"); 45 C.F.R. 84.44(c) (1977) (Health and Human Services regulation addressing postsecondary school examinations at federally funded schools applying similar "best ensure" standard).

For these reasons, the regulation's "best ensure" standard is a reasonable construction of Section 309 and, as such, is an authoritative interpretation of that statute and applies to professional examinations. See *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998) (the Department's views in its Title III regulations are entitled to deference).[5] Other courts that have addressed this issue on similar facts reached the same conclusion. See *Enyart*, 630 F.3d at 1162-1163 (rejecting NCBE's argument that regulation was invalid because it imposed an obligation beyond the statute); *Bonnette* v. *District of Columbia Court of Appeals*, No. 11-1053 (CKK), 2011 WL 2714896, at *15 (D.D.C. July 13, 2011) (the statute "is sufficiently ambiguous that the Court must respect the Justice Department's interpretive regulations"), appeal pending, No. 11-7075 (D.C. Cir.); *Elder* v. *National Conf. of Bar Exam'rs*, No. C 11-00199 SI, 2011 WL 672662 (N.D. Cal. Feb. 16, 2011) (court followed *Enyart* and applied the "best ensure" standard); see also *Doe* v. *National Bd. of Med. Exam'rs*, 199 F.3d 146, 156 (3d Cir. 1999) (addressing accessibility requirement of Section 309); Americans with Disabilities Act Title III

[5] We note that, in addition to the *Chevron* deference due the Department's regulation implementing Section 309, a court must defer to the Department's reading of its own regulation "unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 880 (2011) (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)).

Technical Assistance Manual at III-4.6100 (1993), available at http://www.ada.gov/taman3.html (addressing examinations).[6]

B. There Is No Basis Not To Apply A "Best Ensure" Standard To Professional Examinations Covered By Section 309

The crux of defendant's argument is that all entities subject to the ADA, as well as entities that receive federal funds covered by Section 504 of the Rehabilitation Act, are subject to the same obligation with respect to the administration of tests, the "reasonable accommodation" standard. Br. 22. Defendant asserts that Section 309 applies the "reasonable accommodation" standard that has "historically been held to make every other program or activity covered by disability anti-discrimination laws accessible to the disabled under every other provision of the ADA and the Rehabilitation Act." Br. 33.

This argument is not correct and reads out of the ADA numerous provisions more narrowly tailored to disability discrimination in specific contexts, including

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[6] The only decision reaching a contrary conclusion, upon which defendant relies, is *Elder* v. *National Conference of Bar Examiners*, No. 1:10-cv-01418-JFM (D. Md. July 13, 2010), which involved the Maryland MBE examination. The court orally denied Elder's motion for a preliminary injunction, stating that the term "accessible" is not ambiguous and "in context * * * clearly means 'reasonably accessible.'" R. 34-13 at 4. The court added that the "statute is about making the examination accessible, which I think we would all agree is reasonably accessible but that does not convert into best ensure." R. 34-13 at 4. The case was later dismissed as moot because all three plaintiffs passed the examination. See *Elder* v. *National Conf. of Bar Exam'rs*, No. 1:10-cv-01418-JFM (D. Md. Nov. 29, 2010).

testing. Title I contains several different definitions of covered "discrimination," only one of which is directed at the failure to make a "reasonable accommodation." See 42 U.S.C. 12112(b)(5); 42 U.S.C. 12112(b)(1)-(7).[7] One of these provisions expressly addresses employment tests, and requires that such tests be administered "in the most effective manner to ensure" that, for applicants with a sensory disability, the test accurately reflects the skills or aptitude the test purports to measure, rather than the disability. 42 U.S.C. 12112(b)(7); see also 29 C.F.R. 1630.11 (EEOC Title I regulation using similar language). The language in this provision is nearly identical to the "best ensure" standard in the Title III regulation implementing Section 309, and similarly contemplates a heightened standard in the examinations context.[8]

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[7] The phrase "reasonable accommodation" is used only in Title I. See 42 U.S.C. 12111(9), 12112(b)(5).

[8] Defendant attempts to tie the "reasonable accommodation" standard to testing by noting that, in the definitional section of Title I, "reasonable accommodation" is defined to include "appropriate adjustment or modifications of examinations." See 42 U.S.C. 12111(9)(B); Br. 25. This argument ignores 42 U.S.C. 12112(b)(7), which, as noted, more specifically addresses employment tests and applies the "best ensure" standard. See 42 U.S.C. 12112(b)(7). Later in its brief, defendant acknowledges the Title I provision expressly addressing examinations, but asserts that the language was intended to apply only a reasonableness standard. Br. 37-38. That argument ignores the plain language of the statute.

Title II does not use the term "reasonable accommodation," but prohibits discrimination against qualified persons with disabilities. 42 U.S.C. 12132. This language mirrors that in Section 504 of the Rehabilitation Act. See 29 U.S.C. 794.[9] Further, the Title II regulations contain numerous specific provisions addressing various forms of covered discrimination, only one of which refers to the failure to make a "reasonable modification." 28 C.F.R. 35.130(b)(7); see 28 C.F.R. 35.130(b)(1)-(8). Although the Title II regulations do not specifically address examinations, the Title II Technical Assistance Manual states that "public entities are required to ensure that * * * employment tests are modified so that the test reflects job skills or aptitude or whatever the test purports to measure, rather than the applicant's or employee's hearing, visual, speaking, or manual skills." Americans with Disabilities Act Title II Technical Assistance Manual at II-4.3300 (1993), available at http://www.ada.gov/taman2.html. In addition, the Department's September 15, 2010, Guidance to the revisions to the Title II regulations explains that the regulations do not specifically include language addressing examinations and courses because Section 309 applies to "any person," which includes public entities. Nondiscrimination on the Basis of Disability in

[9] As noted above, regulations adopted under Section 504 applied the "best ensure" standard, and the Title III regulation was adopted from these regulations. See note 4, *supra*, and accompanying text.

State and Local Government Services, 75 Fed. Reg. 56,164, 56,236 (Sept. 15, 2010). [10]

Finally, as noted above, Title III also contains numerous provisions addressing various forms of discrimination, one of which is the failure to make a "reasonable modification." But Title III also contains Section 309, which specifically addresses examinations and does not use the term "reasonable." Section 309's implementing regulation applies the "best ensure" standard and also does not use the term "reasonable" as a modifier for the testing accommodations – including appropriate auxiliary aids and services – that may be provided for an individual with a disability.[11]

Therefore, the ADA does not apply a "reasonableness" standard in the testing context and, given the language of the Title III regulation specifically applying the "best ensure" standard to testing, there is no reason not to apply that

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[10] The Guidance further explains that the Title III regulation, "because it addresses examinations in some detail, is useful as a guide for determining what constitutes discriminatory conduct in * * * testing situations." 75 Fed. Reg. at 56,236.

[11] Curiously, defendant construes Title III's general antidiscrimination provision (Section 302(a)) and the more specific provision requiring "reasonable modifications" (Section 302(b)(2)(A)(ii)) to apply to tests by private schools, and Section 309 to apply to tests offered by private entities other than schools. Br. 27-30. Section 309, however, expressly applies to examinations relating to "applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes."

standard here. See *Bonnette*, 2011 WL 2714896, at *16 (generalized "reasonable modification" standard does not override the more specific regulatory guidance relating to testing); *Doe*, 199 F.3d at 155 ("the rationale [of] the 'specific governs the general' canon counsels that we treat [Section 309] as Congress's specific definition of what Title III requires in the context of examinations"). Therefore, contrary to defendant's assertion (Br. 22) that the district court "improperly singled out one group of covered entities," providers of standardized tests, and "imposed on them a more onerous * * * burden," the court properly recognized that the "best ensure" standard, specifically directed at examinations in the statute and regulations, applies in this case. Br. 3.

C. Defendant's Other Arguments Supporting The Use Of A Reasonableness Standard Are Baseless

1. In an effort to identify controlling authority from this Court, defendant asserts that the Second Circuit in *Fink* v. *New York City Department of Personnel*, 53 F.3d 565 (2d Cir. 1995), held that a "reasonable accommodation" standard applies under Section 504 of the Rehabilitation Act. Br. 23-24. In that case, where city employees with vision disabilities sought an accommodation during the civil service promotional examination, the court simply noted in discussing Section 504 generally that, "[a]s the Act has been interpreted, it requires the employer to make a reasonable accommodation of the plaintiff's disability." *Fink*, 53 F.3d at 567. Moreover, plaintiff's complaint was "addressed not to the accommodations

provided by the defendants, but to the manner in which two reader-assistants carried out their duties." *Ibid.* Therefore, *Fink* did not address "either the meaning of 'accessibility' or the proper interpretation of the 'best ensures' standard." SA 14.[12] In all events, even assuming *Fink* can be read to conclude that a reasonableness standard applies to Section 309, under *Brand X* such a conclusion would not override the Department's interpretation. See p. 15, *supra*. Further, defendant's citations to ADA cases stating that the statute requires reasonable accommodations is beside the point; the issue here is what standard applies in the testing context, not what standards apply in other circumstances. See, *e.g.*, Br. 26 (citing, *e.g.*, *Wong* v. *Regents of Univ. of Cal.*, 192 F.3d 807, 817 (9th Cir. 1999) (student requesting modified class schedule)).

Defendant also asserts that, other than the Ninth Circuit in *Enyart*, "every other appellate court * * * has interpreted [Section 309] to incorporate the well-

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[12] Defendant also relies on *Jaramillo* v. *Professional Examination Service, Inc.*, 544 F. Supp. 2d 126 (D. Conn. 2008), which rejected plaintiff's request under Section 504 of the Rehabilitation Act for certain accommodations in taking a state licensing examination. The court stated that plaintiff was entitled to "only reasonable accommodations, not necessarily the particular accommodations an individual would prefer." *Id.* at 131. *Jaramillo* also did not address Section 309 and its implementing regulation. Other Section 504 cases cited by defendant, although they generally state that Section 504 and the ADA impose the same requirements, do not address Section 309 and its implementing regulation or the issue of the appropriate standard to apply to testing. See, *e.g.*, *Abrahams* v. *MTA Long Island Bus*, 644 F.3d 110, 115 n.3 (2d Cir. 2011); Br. 24.

settled reasonable accommodation standard that governs all other areas of disability discrimination law." Br. 28. That is not correct. The cases cited by defendant do not address Section 309 or whether defendant had to satisfy the "best ensure" standard. See *Powell* v. *National Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir.) (court summarized that the Rehabilitation Act and Titles II and III require reasonable accommodations, but does not address Section 309 or the implementing regulation), opinion corrected by 511 F.3d 238 (2004); *Gonzales* v. *National Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000) (issue presented was whether plaintiff was disabled; only mention of the Title III "best ensure" regulation was in court's initial overview of Title III), cert. denied, 532 U.S. 1038 (2001); *Soignier* v. *American Bd. of Plastic Surgery*, 92 F.3d 547, 554 (7th Cir. 1996) (Section 309 claim, but the issue presented was whether the ADA claim was time-barred; court generally noted that defendant was required to provide a reasonable accommodation during the test, but the question of the proper accommodation standard was not addressed), cert. denied, 519 U.S. 1093 (1997).[13]

[13] Defendant also asserts, incorrectly, that two "state supreme court have uniformly interpreted [Section 309] to require only reasonable accommodations," citing *In re Florida Board of Bar Examiners*, 707 So. 2d 323 (Fla. 1998), and *In re Petition of Rubenstein*, 637 A.2d 1131 (Del. 1994). See Br. 29. Neither case addressed the appropriate standard for a testing accommodation under Section 309; the courts mentioned the "reasonable accommodation" standard only as part of a general overview of the ADA.

2. Defendant also relies on the testing accommodations the Department required in certain settlement agreements with specific testing organizations. See Br. 39-40 (referring to a February 23, 2011, Settlement Agreement between the United States and the National Board of Medical Examiners (NBME),[14] and a 2000 Settlement Agreement between the United States and the American Association of State Local Worker Boards).[15] Defendant cites language in the 2011 agreement stating that NBME "shall provide reasonable testing accommodations * * * in accordance with [Section 309 and its implementing regulation.]" Br. 39. The agreement, however, also quotes the "best ensure" standard from the regulation in discussing the obligation of testing entities in administering examinations. See http://www.ada.gov/nbme.htm (paragraph six).

In the 2000 agreement, the testing entity agreed to allow candidates with vision disabilities to choose among a list of accommodations, which included Braille, audiotape, or large print versions of the examination or a qualified reader. Defendant suggests that these accommodations must be reasonable in the instant case because the United States agreed to them in the settlement agreement and urged other testing organizations to follow this agreement. Br. 39-40. As the

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[14] See http://www.ada.gov/nbme.htm.

[15] See http://www.ada.gov/qualread.htm.

Ninth Circuit stated, however, "[t]here is no reason that this decade-old settlement agreement should define the maximum NCBE can be required to do * * * to make the MBE and MPRE accessible to Enyart," and that a settlement agreement is "by definition, a compromise and does not necessarily embrace the maximum reach of the statute." *Enyart*, 630 F.3d at 1164 & n.5; see also *Bonnette*, 2011 WL 2714896, at *16; *Elder*, 2011 WL 672662, at *7 (both also rejecting this argument).[16]

Defendant further suggests that its proposed accommodations were reasonable because the auxiliary aids are those that the ADA and its implementing regulations expressly identify as appropriate means of providing effective access to written text to individuals with vision disabilities. Br. 14. The list of auxiliary aids in 28 C.F.R. 36.309(b)(3), however, is illustrative, not exhaustive. Moreover, as the Ninth Circuit stated, "[t]o hold that * * * an entity fulfills its obligations to administer an examination in an accessible manner so long as it offers some or all of the auxiliary aids enumerated in the statute or regulation would be inconsistent with Congressional intent" that auxiliary aids should keep pace with advances in

[16] We also note that the more recent September 27, 2011, settlement agreement between the United States and the Law School Admission Council, Inc., which administers the Law School Admissions Test (LSAT), applies Section 309 and the "best ensure" standard in 28 C.F.R. 36.309(b)(1)(i) and does not use the phrase "reasonable accommodation" or the term "reasonable" to modify the types of testing accommodations provided. See http://www.ada.gov//lsac_2011.htm.

technology. *Enyart*, 630 F.3d at 1164. More fundamentally, this argument ignores the fact that the testing accommodation must relate to plaintiff's specific disabilities. The defendant cannot simply pick from a non-exhaustive menu of accommodations and take the position that the selected accommodations necessarily satisfy its obligation under Section 309. See SA 16; *Elder*, 2011 WL 672662, at *7.

3. In any event, defendant does not seek to apply a reasonableness standard as used elsewhere in Title III and the ADA. Rather, defendant seeks to apply its own version of reasonableness, one that simply requires it to offer plaintiff some testing accommodations that are or have in the past generally been used by persons with vision disabilities.

That is not a correct interpretation of the reasonableness standard as used in the ADA. As the district court stated, defendant's argument "that because its proposed accommodations have worked for other visually impaired test takers (but not for ones who also suffer from Plaintiff's learning disorder), they may also work for Plaintiff * * *, is wholly inconsistent with the plain language and underlying objectives of the ADA." SA 22.[17] Where the ADA applies a reasonableness

[17] The district court found that plaintiff had used each of defendant's proposed accommodations, and that they were not effective for her because they did not address her dual disabilities. SA 21-22.

standard, the defendant must offer an accommodation that provides access for the *particular* plaintiff given her particular disabilities and needs and the context of the case. In other words, there must be a "fact specific, individualized analysis of the disabled individual's circumstances." SA 16 (internal quotation marks and citation omitted); see *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 688-690 (2001) (ADA advances a "basic requirement that the need of a disabled person be evaluated on an individual basis"); *Holbrook* v. *City of Alpharetta*, 112 F.3d 1522, 1527 (11th Cir. 1997) (Title I case; "what is reasonable for each individual employer is a highly fact-specific inquiry that will vary depending on the circumstances and necessities of each employment situation"); *Staron* v. *McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995) (Title III case). For this reason, the district court properly found that even under a "reasonableness" standard plaintiff was likely to prevail on the merits. Defendant does not address this point.[18]

4. Finally, defendant tries to buttress its argument that a reasonableness standard applies in the Section 309 context by citing a parade of horribles that it

[18] In this regard, although in many cases, like this one, the plaintiff will prevail under either a reasonableness or "best ensure" standard, it is important to make clear that, given Section 309 and the implementing regulation, as well as the similar provision addressing examinations in Title I, the ADA mandates a more specific accommodation standard in the testing context tailored to the unique circumstance of professional and licensing examinations. It may be that, in some cases, applying a reasonableness standard, rather than a "best ensure" standard, is outcome determinative.

asserts will result from application of the "best ensure" standard. These arguments are largely directed at defendant's straw man – *i.e.*, that "[i]f testing organizations must provide whatever accommodation will 'best ensure' a *particular person's success on the exam*, there is literally no end to the kind of aids and services that will be requested." Br. 36 (emphasis added); see also Br. 23 & n.4, 42. Defendant cites authority stating that an applicant is not entitled to her preferred format or the "best accommodation possible," and therefore concludes that the "best ensure" standard does not apply, and all that is required is a reasonable accommodation. Br. 25, 38. Defendant further asserts that the "best ensure" standard will make it "virtually impossible for test administrators to deny requested accommodations without risk of liability." Br. 42.

These arguments are baseless. We agree that plaintiff is not entitled to "her requested accommodation simply because it is the accommodation she most prefers." See *Bonnette*, 2011 WL 2714896, at *18. Similarly, plaintiff is not necessarily entitled to a format that will best ensure her success or maximize her score. Cf. *National Bd. of Med. Exam'rs*, 199 F.3d at 156. That is not what the regulation says, and that is not what the district court held. Instead, the regulation requires that the test be administered in a manner that best ensures that examination results "accurately reflect the individual's aptitude or achievement level." 28 C.F.R. 36.309(b)(1)(i). Although this is a highly fact specific and

plaintiff specific inquiry, once plaintiff has requested an appropriate testing accommodation, defendant may proffer alternative accommodations. Defendant's proposed accommodations, however, must be at least as effective for plaintiff as plaintiff's requested accommodations. See *Bonnette*, 2011 WL 2714896, at *18. Further, the entity offering an examination need not provide an applicant with auxiliary aids that defendant can show would "fundamentally alter" the nature of the examination or constitute an "undue burden." See 28 C.F.R. 36.309(b)(3). For these reasons, the defendant is not without flexibility in addressing plaintiff's request for a testing accommodation under the "best ensure" standard.

CONCLUSION

This Court should hold that, pursuant to the plain language of Section 309 and its implementing regulation, professional examinations must be offered in such a way, and with such auxiliary aids, to ensure that the examination results reflect the applicant's aptitude or achievement level, rather than disability, and that the defendant does not satisfy this standard by offering an accommodation that may be reasonable as a general matter.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). This brief was prepared with Microsoft Word 2007 and contains 6977 words of proportionately spaced text. The typeface is Times New Roman, 14-point font.

Dated: November 17, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2011, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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