No. 10-___

IN THE

Supreme Court of the United States

NATIONAL CONFERENCE OF BAR EXAMINERS,
Petitioner,
v.
STEPHANIE ENYART,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

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

STATUTORY AND REGULATORY PROVISIONS INVOLVED

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

INTRODUCTION

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

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

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

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

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

STATEMENT OF THE CASE

A. Facts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. District Court Proceedings.

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

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

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

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

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

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

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

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

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

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

28 C.F.R. § 36.309(b)(i).

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

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

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

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

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

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

C. Ninth Circuit Proceedings.

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

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

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

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

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

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

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

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

REASONS FOR GRANTING THE WRIT

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

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

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

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

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

1. Tests Conducted By Entities Receiving Federal Funds.

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

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

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

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

2. Employment Tests.

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

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

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

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

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

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

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

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

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

4. Tests Conducted By Private Schools.

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

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

5. Tests Offered By Private Entities Other Than Schools.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHANIE ENYART *Plaintiff-Appellee*, v. NATIONAL CONFERENCE OF BAR EXAMINERS, INC. *Defendant-Appellant.*	No. 10-15286 D.C. No. 3:09-cv-05191-CRB
STEPHANIE ENYART *Plaintiff-Appellee*, v. NATIONAL CONFERENCE OF BAR EXAMINERS, INC. *Defendants-Appellant.*	No. 10-16392 D.C. No. 3:09-cv-05191-CRB OPINION

Appeals from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted
December 6, 2010—San Francisco, California

Filed January 4, 2011

Before: Robert E. Cowen*, A. Wallace Tashima, and Barry G. Silverman, Circuit Judges.

Opinion by Judge Silverman

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* The Honorable Robert E. Cowan, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

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OPINION

SILVERMAN, Circuit Judge:

Stephanie Enyart, a legally blind law school graduate, sought to take the Multistate Professional Responsibility Exam and the Multistate Bar Exam using a computer equipped with assistive technology software known as JAWS and ZoomText. The State Bar of California had no problem with Enyart's request but the National Conference of Bar Examiners refused to grant this particular accommodation. Enyart sued NCBE under the Americans with Disabilities Act seeking injunctive relief. The district court issued preliminary injunctions requiring NCBE to allow Enyart to take the exams using the assistive software, and NCBE appealed. We hold that in granting the injunctions, the district court did not abuse its discretion. We affirm.

I. Background

Enyart suffers from Stargardt's Disease, a form of juvenile macular degeneration that causes her to experience a large blind spot in the center of her visual field and extreme sensitivity to light. Her disease has progressively worsened since she became legally blind at age fifteen. Enyart relies on assistive technology to read.

Enyart graduated from UCLA School of Law in 2009. Before she could be admitted to practice law in California, Enyart needed to pass two exams: the Multistate Professional Responsibility Exam, a 60-question, multiple-choice exam testing applicants' knowledge of the standards governing lawyers' professional conduct; and the California Bar Exam. The Bar Exam spans three days, on one of which the Multistate Bar Exam is administered. The MBE is a six-hour, 200-question, multiple-choice exam that tests applicants' knowledge of the law in a number of subject areas. NCBE develops both the MPRE and the MBE. NCBE contracts with another testing company, ACT, to administer the MPRE and licenses the MBE to the California Committee of Bar Examiners for use in the Bar Exam.

Enyart registered to take the March 2009 administration of the MPRE and wrote to ACT requesting a number of accommodations for her disability: extra time, a private room, hourly breaks, permission to bring and use her own lamp, digital clock, sunglasses, yoga mat, and migraine medication during the exam, and permission to take the exam on a laptop equipped with JAWS and ZoomText software. JAWS is an assistive screen-reader program that reads aloud text on a computer screen. ZoomText is a screen-magnification program

that allows the user to adjust the font, size, and color of text and to control a high-visibility cursor.

ACT granted all of Enyart's requests with the exception of the computer equipped with JAWS and ZoomText. ACT explained that it was unable to offer this accommodation because NCBE would not make the MPRE available in electronic format. In lieu of Enyart's requested accommodation, ACT offered her a choice between a live reader or an audio CD of the exam, along with use of closed-circuit television for text magnification. Enyart sought reconsideration of ACT's denial of her request to use JAWS and ZoomText, asserting that the options offered would be ineffective because they would not allow her to synchronize the auditory and visual imputs. After ACT denied Enyart's request for reconsideration, Enyart cancelled her registration for the March 2009 MPRE.

In April 2009, Enyart applied to take the July 2009 California Bar Exam, requesting the same accommodations she asked for on the MPRE. The California Committee of Bar Examiners granted all of Enyart's requested accommodations with the exception of her request to take the MBE portion of the test using a computer equipped with ZoomText and JAWS. The Committee denied this request because NCBE would not provide the MBE in electronic format. Because of this denial, Enyart cancelled her registration for the July 2009 Bar Exam.

Enyart registered for the November 2009 MPRE and requested the same accommodations she previously sought for the March 2009 administration. NCBE again declined to allow Enyart to take the MPRE using a computer equipped

with ZoomText and JAWS. Instead, they offered to provide a human reader, an audio CD of the test questions, a Braille version of the test, and/or a CCTV with a hard-copy version in large font with white letters printed on a black background. Because of NCBE's denial of her request to use a computer with ZoomText and JAWS, Enyart cancelled her registration for the November 2009 MPRE.

After these repeated denials of her requests to take the MPRE and MBE using assistive technology software, Enyart filed this action against NCBE, ACT, and the State Bar of California, alleging violations of the ADA and the Uhruh Act, California's civil rights law. Enyart sought declaratory and injunctive relief.

Enyart moved for a preliminary injunction, asking the district court to order NCBE to allow Enyart to use a computer equipped with ZoomText and JAWS on the February 2010 MBE and the March 2010 MPRE. After hearing oral argument, the court granted Enyart's motion, addressing the factors for deciding whether to issue a preliminary injunction in a well-reasoned order:

> Because the accommodations provided by NCBE will not permit Enyart to take the exam without severe discomfort and disadvantage, she has demonstrated the test is not "accessible" to her, and that the accommodations [offered by NCBE] therefore are not "reasonable." Therefore, this Court concludes, based on the current record and moving papers, that it is more likely than not that Enyart will succeed on the merits at trial.
>
> * * *

NCBE spends a good portion of its brief disputing Enyart's factual claims that the accommodations offered by NCBE will not permit her to comfortably complete the exam. NCBE points out that in the past Enyart has "successfully utilized a number of different accommodations." Opp. at 2. She used readers and audiotapes during her undergraduate years at Stanford, and used CCTV while working as an administrative assistant before law school. *Id.* Further, NCBE points out that Enyart used a reader to help her complete her LSAT prep program, and used audiotapes and the services of a human reader on her examinations. *Id.*

These factual claims, however, are somewhat beside the point. First, Enyart avers that hers is a progressive condition, so there is no reason to believe an accommodation that may or may not have been sufficient during Enyart's undergraduate coursework would be sufficient. Second, none of those examinations compare to the bar exam, which is a multi-day, eight hour per day examination. Hence, an accommodation that might be sufficient for a law school examination is not necessarily sufficient for the bar exam. Third, the relevant question is not whether Enyart would be able, despite extreme discomfort and disability-related disadvantage, to pass the relevant exams. NCBE points to no authority to support the position that an accommodation which results in "eye fatigue, disorientation and nausea within five minutes, which become fully developed several minutes after that" is "reasonable."

* * *

The facts as outlined in the attachments to Plaintiff's motion therefore strongly suggest 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 [42 U.S.C. § 12189] and the corresponding regulation [28 C.F.R. § 36.309].

NCBE's citation to other regulations and cases does not overcome this factual presentation. * * * [T]he examples [of auxiliary aids] offered in the regulation and the statute cannot be read as exclusive, nor do those examples support the conclusion that such accommodations are reasonable even where they do not permit effective communication. On the contrary, the statute and relevant regulations all emphasize access and effective communication. The statute itself illustrates that the central question is whether the disabled individual is able to employ an "effective method[] of making visually delivered materials available." The evidence submitted by Plaintiff strongly suggests that the *only* auxiliary aid that meets this criteria is a computer with JAWS and ZoomText. While NCBE may be successful at trial in establishing that this is not the case, the record presently before this Court more strongly supports the conclusion that only ZoomText and JAWS make the test "accessible" to Enyart. *See* 42 U.S.C. § 12189.

Order Granting Prelim. Inj. 5-9, Feb. 4, 2010 (footnotes omitted). The district court required Enyart to post a $5,000 injunction bond. NCBE immediately appealed the preliminary injunction.

Meanwhile, while NCBE's appeal of the preliminary injunction was pending, Enyart learned that her score on the March 2010 MPRE was not high enough to allow her to qualify for admission to the California Bar. She moved for a second preliminary injunction, asking the court to order NCBE to provide her requested accommodations on the August 2010 MPRE and "any other administration to Ms. Enyart of the California Bar Exam, the Multistate Bar Exam ('MBE') and/or the MPRE." After filing her motion, Enyart learned that she did not pass the July 2009 Bar Exam. The district court granted a second preliminary injunction ordering NCBE to allow Enyart to take the July 2010 MBE and the August 2010 MPRE on a computer equipped with ZoomText and JAWS, stating:

> The relevant question here is whether the auxiliary aids offered by NCBE make the test's "visually delivered materials available" to Enyart. As this Court has previously concluded, they do not. * * * NCBE continues to argue that Enyart is not entitled to her preferred accommodations, and in so doing continues to miss the point. She does not argue that she simply "prefers" to use JAWS and ZoomText.
>
> On the contrary, she has presented evidence that the accommodations offered by NCBE do not permit her to fully understand the test material, and that some of the offered accommodations

> result in serious physical discomfort. CCTV makes her nauseous and results in eye strain, and the use of human readers is not suited to the kind of test where on must re-read both questions and answers, and continually shift back and forth between different passages of text. * * * Such accommodations do not make the test accessible to Enyart, and so do not satisfy the standard under the ADA.

Order Granting Prelim. Inj. 5-6, June 22, 2010. The court required Enyart to post an additional $5,000 injunction bond. NCBE immediately appealed, and the appeal was consolidated with NCBE's appeal of the first preliminary injunction.

Enyart has since learned that she received a high enough score on the August 2010 MPRE to qualify for admission to the California Bar but that she did not pass the July 2010 California Bar Exam.[1]

II. Discussion

A. Jurisdiction and Standard of Review

We have jurisdiction to review the district court's orders granting these preliminary injunctions pursuant to 28 U.S.C. § 1292(a)(1). Our review is for an abuse of discretion. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996). "[I]n the context of a trial court's factual findings, as applied to legal rules," to determine whether a district court has abused its discretion, "the first step of our abuse of discretion test is to determine de novo whether the trial court identified the correct legal rule to apply to the relief

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[1] The MBE constitutes only a portion of the California Bar Exam. Enyart does not know what her score was on the MBE portion of the exam.

requested. If the trial court failed to do so, we must conclude it abused its discretion." *United States v. Hinkson*, 585 F.3d 1247, 1259, 1261-62 (9th Cir. 2009) (en banc) (footnote omitted). If the trial court identified the correct legal rule, "the second step * * * is to determine whether the trial court's application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.' " *Id.* at 1262 (footnote and citation omitted). We may affirm the district court on any ground supported by the record. *Canyon County v. Sygenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008).

B. Mootness

[1] As an initial matter, we hold 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. "The test for mootness of an appeal is whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor. If it can grant such relief, the matter is not moot." *Garcia v. Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986). An established exception to mootness applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (internal quotation marks and citation omitted).

There is a reasonable expectation that NCBE will be subject to another preliminary injunction in this case. After failing to achieve a passing score on the February 2010 California Bar Exam, Enyart took the test again in July 2010. Now that she failed the July 2010 exam, it is reasonable to expect that she will sign up for a future administration and that she will seek another preliminary injunction. The situation is capable of repetition, satisfying the first prong of the capable-of-repetition-yet-evading-review exception to mootness.

These preliminary injunctions also evade review. On February 4, 2010, the district court issued the first preliminary injunction in this case, which required NCBE to allow Enyart to use JAWS and ZoomText for the February 2010 MBE and the March 2010 MPRE. Once Enyart took these two exams, the terms of the preliminary injunction were fully and irrevocably carried out. The second injunction issued June 22, 2010, and required NCBE to allow Enyart to use JAWS and ZoomText for the July 2010 MBE and the August 2010 MPRE. Again, once Enyart took these exams, the terms of the second preliminary injunction were fully and irrevocably carried out. Due to the limited duration of these injunctions—little more than a month passed between the issuance of the injunctions and the final execution of their terms—NCBE could not practically obtain appellate review of the district court's orders until after the administration of the exams. Because the duration of these injunctions is too short to allow full litigation prior to their expiration, they meet the "evading review" prong of the capable-of-repetition-yet-evading-review exception to mootness.

C. Preliminary Injunctions

[2] A plaintiff seeking a preliminary injunction must show that: (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 374 (2008) (citations omitted). The district court correctly identified the *Winter* standard as controlling in this case.

1. Likelihood of Success on the Merits

Congress enacted the ADA in order to eliminate discrimination against individuals with disabilities. *See* 42 U.S.C. § 12101(b). The ADA furthers Congress's goal regarding individuals with disabilities: "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals[.]" 42 U.S.C. § 12101(a)(8). The ADA contains four substantive titles: Title I relates to employment; Title II relates to state and local governments; Title III relates to public accommodations and services operated by private entities; and Title IV relates to telecommunications and common carriers. *See generally* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 and 47 U.S.C. §§ 225, 611.

[3] 42 U.S.C. § 12189, which falls within Title III of the ADA, governs professional licensing examinations. This section requires entities that offer examinations "related to applications, licensing, certification, or credentialing for * * * professional, or trade purposes" to "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. § 12189 (emphasis added). The purpose of this section is "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), *reprinted in* 1990 U.S.C.C.A.N. 445, 491-92.

The Attorney General is charged with carrying out many of the provisions of the ADA and issuing such regulations as he deems necessary. Relevant here, the Attorney General is responsible for issuing regulations carrying out all non-transportation provisions of Title III, including issuing accessibility standards. 42 U.S.C. § 12186(b).

[4] Pursuant to its authority to issue regulations carrying out the provisions of Title III, the Department of Justice has adopted a regulation interpreting § 12189. This regulation defines the obligations of testing entities:

> 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 …[.]

28 C.F.R. § 36.309(b)(1)(i) (emphasis added). The regulation continues:

> 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 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.

Id. § 36.309(b)(3).

Enyart argues that DOJ's regulation requires NCBE to administer the MBE and MPRE "so as to best ensure" that her results on the tests accurately reflect her aptitude, rather than her disability. NCBE argues that the regulation is invalid and asks this court to apply a reasonableness standard in lieu of the regulation's "best ensure" standard. The district court declined to rule on the validity of 28 C.F.R. § 36.309, and instead held that "even assuming NCBE's more defendant-friendly standard applies," Enyart had demonstrated a likelihood of success on the merits.

We defer to an agency's interpretation of a statute it is charged with administering if the statute "is silent or ambiguous with respect to the specific issue" and the agency's interpretation is "based upon a permissible construction of the statute." *Contract Mgmt., Inc. v. Rumsfeld*, 434 F.3d 1145, 1146-47 (9th Cir. 2006) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). We hold that 28 C.F.R. § 36.309 is entitled to *Chevron* deference.

[5] Section 12189 requires entities like NCBE to offer licensing exams in a manner "accessible" to

disabled people or to offer "alternative accessible arrangements." 42 U.S.C. § 12189. Congress's use of the phrases "accessible" and "alternative accessible arrangements" is ambiguous in the context of licensing exams.[2] Nowhere in § 12189, in Title III more broadly, or in the entire ADA did Congress define these terms. The phrase "readily accessible" appears in Titles II and III, but only with respect to physical spaces, i.e., facilities, vehicles, and rail cars. *See* 42 U.S.C. §§ 12142-12148, 12162-12165, 12182-12184. The phrase is not defined; instead, the Act directs the Secretary of Transportation to issue regulations establishing accessibility standards for public transportation facilities, vehicles, and rail cars, 42 U.S.C. §§ 12149, 12163-12164, and 12186(a), and directs the Attorney General to issue regulations establishing accessibility standards for new construction and alterations in public accommodations and commercial facilities, 42 U.S.C. § 12186(b). The text of these other ADA provisions does not resolve the ambiguity in § 12189's use of term "accessible" because an examination is not equivalent to a physical space.[3]

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[2] "Accessible" can mean "capable of being used as an entrance;" "capable of being reached or easily approached;" "easy to get along with, talk to, or deal with;" "capable of being influenced or affected;" or "capable of being used, seen, known, or experienced." *Webster's Third New International Dictionary, Unabridged* 11 (2002). The last definition, "capable of being used, seen, known, or experienced," is most relevant here. This definition alone does not provide guidance as to what an entity must do to administer an exam in an "accessible" manner.

[3] Of course an exam takes place in a physical location, and § 12189 requires entities such as NCBE to offer the exams in a "place" accessible to people with disabilities. 28 U.S.C. § 12189. But the statute also requires exams to be administered in a

[6] Because § 12189 is ambiguous with respect to its requirement that entities administer licen[s]ing exams in a manner "accessible" to individuals with disabilities, we defer to DOJ's interpretation of the statute so long as that interpretation is based upon a permissible construction of the statute. *See Contract Mgmt., Inc.*, 434 F.3d at 1146-47. NCBE seeks to invalidate 28 C.F.R. § 36.309, arguing that the regulation imposes an obligation beyond the statutory mandate. Instead of the regulation's requirement that entities administer licensing exams in a manner "so as to best ensure" that the results reflect whatever skill or aptitude the exam purports to measure, NCBE argues that the ADA only requires such entities to provide "reasonable accommodations."

The "reasonable accommodation" standard advocated by NCBE originated in the Department of Health and Human Services' regulations implementing the Rehabilitation Act of 1973. *See* 45 C.F.R. 84.12(a) (requiring employers to make "reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity."). When Congress enacted the ADA, it incorporated 45 C.F.R. 84.12's "reasonable accommodation" standard into Title I, which applies in the employment context. *See* H.R. Rep. No. 101-485(II), at 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304 ("Title I of the ADA * * * incorporates many of the standards of discrimination

"manner" accessible to people with disabilities, and that is where the term "accessible" becomes ambiguous.

set out in regulations implementing section 504 of the Rehabilitation Act of 1973, including the obligation to provide reasonable accommodations unless it would result in an undue hardship on the operation of the business.").

[7] Notably, Congress did *not* incorporate 45 C.F.R. 84.12's "reasonable accommodation" standard into § 12189. Instead, § 12189 states that entities offering licensing exams "shall offer such examinations * * * in a place and manner accessible to persons with disabilities or offer alternative arrangements for such individuals." 42 U.S.C. § 12189. One reasonable reading of § 12189'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—in other words, the entities must administer the exam "so as to best ensure" that exam results accurately reflect aptitude rather than disabilities. DOJ's regulation is not based upon an impermissible construction of § 12189, so this court affords *Chevron* deference to 28 C.F.R. § 36.309 and applies the regulation's "best ensure" standard.

[8] Applying 28 C.F.R. § 36.309's "best ensure" standard, we conclude that the district court did not abuse its discretion by holding that Enyart demonstrated a likelihood of success on the merits. The district court found that the accommodations offered by NCBE did not make the MBE and MPRE accessible to Enyart. This finding is supported by evidence that Enyart would suffer eye fatigue, disorientation, and nausea if she used a CCTV, so CCTV does not best ensure that the exams are accessible to her; that auditory input alone is

insufficient to allow Enyart to effectively comprehend and retain the language used on the exam; and that, according to Enyart's ophthalmologist, the combination of ZoomText and JAWS is the only way she can fully comprehend the material she reads.

NCBE argues that because Enyart has taken other standardized tests using accommodations comparable to those offered by NCBE, the district court erred in finding that those accommodations did not make the MPRE and MBE accessible to her. In support of this argument, NCBE points out that Enyart took the SAT college admissions test using large-print exam booklets; that she used CCTV for her Advanced Placement tests; and that she relied on a human reader and scribe during the LSAT. Although Enyart's prior experiences with the accommodations offered by NCBE may be relevant to establishing whether those accommodations make the MPRE and MBE accessible, they are not conclusive, especially as to whether those accommodations best ensure that the exams are accessible. Enyart graduated from college more than a decade ago, and took the LSAT six years ago. Enyart's disability is a progressive one, and as the district court noted, an accommodation that may or may not have been sufficient years ago is not necessarily sufficient today. Moreover, assistive technology is not frozen in time: as technology advances, testing accommodations should advance as well.[4]

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[4] The record does not even indicate when the ZoomText and JAWS software programs became available.

NCBE also argues that because it offered to provide auxiliary aids expressly identified in the ADA, the regulations, a DOJ settlement agreement, and a Resolution of the National Federation for the Blind, courts should not require it do more. We do not find this argument persuasive. The issue in this case is not what might or might not accommodate other people with vision impairments, but what is necessary to make the MPRE and MBE accessible to Enyart given her specific impairment and the specific nature of these exams.

As NCBE concedes, the lists of auxiliary aids contained at 42 U.S.C. § 12103 and at 28 C.F.R. § 36.309 are not exhaustive. *See* 42 U.S.C. § 12103(1) ("the term 'auxiliary aids and services' includes (A) qualified interpreters *or other effective methods* of making aurally delivered materials available to individuals with hearing impairments; (B) qualified readers, taped texts, *or other effective methods* of making visually delivered materials available to individuals with visual impairments; * * * and (D) *other similar services and actions*.") (emphases added); 28 C.F.R. § 309(b)(3) ("Auxiliary aids and services required by this section may include taped texts, interpreters o*r other effective methods* of making orally delivered materials available to individuals with hearing impairments, Brailled or large print texts or qualified readers for individuals with visual impairments * * * *and other similar services and actions*.") (emphases added). To hold that, as a matter of law, an entity fulfills its obligation to administer an exam 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:

> 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 they would not be required because they would be held to impose undue burdens on such entities.
>
> Indeed, the Committee intends that the types of accommodations 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. 101-485(II), at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 391.

NCBE points next to a July 2000 settlement between DOJ and the American Association of State Social Work Boards in which the AASSWB agreed to adopt a policy allowing vision-impaired candidates to choose among a list of available accommodations for the social work licensing exam. The list included an audiotaped version of the exam, a large print test book, a Braille version of the exam, extra time, a private room, a qualified reader, and a flexible start time. NCBE argues that because it offered Enyart the accommodations listed in the AASSWB settlement, the court should conclude that the accommodations offered satisfied NCBE's obligations under § 12189 as a matter of law. We find this argument unpersuasive. There is no reason that this decade-old settlement agreement should define the

maximum NCBE can be required to do in order to meet its obligation to make the MBE and MPRE accessible to Enyart.[5]

Finally, NCBE makes much of a Resolution of the National Federation for the Blind from 2000 that called upon the American Council on Education to ensure that it administered the GED exam in "the four standard media routinely used by blind persons to access standardized tests: large print, Braille, tape, and live reader." This NFB Resolution appears to have been written to address a specific problem identified in the administration of the GED exam, namely the prohibition on the use of live readers. Moreover, the NFB has no power to define testing entities' obligations under the ADA. The fact that the NFB ten years ago urged the American Council on Education to allow test-takers to choose among large print, Braille, tape, and live reader accommodations does not lead to the conclusion that, as a matter of law, the accommodations offered by NCBE made the MBE and MPRE accessible to Enyart.

The sources described above—the lists of auxiliary aids contained in the statute and regulation, the AASSWB settlement agreement, and the NFB's Resolution—possibly support a conclusion that the accommodations offered by NCBE are sufficient to meet their obligations with respect to many blind people in many situations. As we have tried to make clear already, accommodations that make an exam accessible to many blind people may not make the

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[5] Moreover, a settlement is, by definition, a compromise and does not necessarily embrace the maximum reach of the statute.

exam accessible to Enyart, and our analysis depends on the individual circumstances of each case, requiring a "fact-specific, individualized analysis of the disabled individual's circumstances." *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999).

Enyart provided the district court with evidence that the accommodations offered by NCBE will put her at a disadvantage by making her nauseated or by preventing her from comprehending the test material. Enyart presented evidence that she used JAWS and ZoomText for all but one of her law school examinations; that a combination of JAWS and ZoomText is the only way she can effectively access the exam; and that use of a CCTV causes her to suffer nausea and eye fatigue. In a sworn statement, Enyart's ophthalmologist stated that the only way Enyart can fully comprehend the material she reads is if she is able to simultaneously listen to and see magnified test material, as JAWS and ZoomText allow.

The district court reviewed the evidence of Enyart's disability and her history of using auxiliary aids including JAWS and ZoomText, and concluded 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 text. 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." The court compared Enyart's evidence to that offered by NCBE, and found that the balance "more strongly supports the conclusion that only ZoomText and JAWS make the text 'accessible' to

Enyart." This is a logical conclusion, supported by the evidence, and therefore we conclude that the district court did not abuse its discretion in holding that Enyart demonstrated a likelihood of success on the merits.

2. Irreparable Harm

A plaintiff seeking a preliminary injunction must demonstrate that irreparable injury is likely in the absence of preliminary relief. *Winter*, 129 S. Ct. at 375. Mere possibility of harm is not enough. *Id.* The district court correctly identified this legal rule and concluded that Enyart had established a likelihood of irreparable harm. Because the court "got the law right," this court should not reverse unless the district court clearly erred in its factual determinations. *Earth Island Institute v. Carlton*, ___ F.3d ___, 2010 WL 4399138, at *2 (9th Cir. 2010).

The district court found that, in the absence of preliminary relief, Enyart would likely suffer irreparable harm in the form of (1) the loss of the chance to engage in normal life activity, i.e., pursuing her chosen profession, and (2) professional stigma. Enyart additionally argues that, as a matter of law, she faced irreparable injury from the fact of NCBE's violation of the ADA. We need not decide whether discrimination in violation of the ADA constitutes irreparable harm *per se*, or whether irreparable harm can be presumed based on such a statutory violation, because we agree with the district court's conclusion that Enyart demonstrated irreparable harm in the form of the loss of opportunity to pursue her chosen profession.

In her declaration in support of her first preliminary injunction motion, Enyart stated that

she would not be able to complete a lengthy exam using NCBE's proposed accommodations, even with extended time. The district court was entitled to give credence to that declaration. If Enyart cannot complete the MPRE or the MBE using NCBE's proposed accommodations—and the evidence suggests that she can only use CCTV for about five minutes before becoming nauseated and disoriented, and that without simultaneous visual and auditory input, she cannot comprehend lengthy written material—then those proposed accommodations do not comply with the ADA, when other technology is readily available that will make the exam accessible.

The district court further inferred that, as a result of her likely failure, Enyart would probably suffer professional stigma and the loss of the opportunity to pursue her chosen profession. NCBE is correct that no evidence in the record supports a finding that, in the absence of preliminary relief, Enyart would *likely* suffer professional stigma. But the district court did not err in concluding that Enyart would likely lose the chance to pursue her chosen profession. If she fails the Bar Exam or scores too low on the MPRE to qualify for admission, Enyart cannot be licensed to practice law in California. This conclusion is not speculative, but rather is prescribed by California law. *See* State Bar Act, Cal. Bus. & Prof. Code § 6060(f) and (g) (requiring passage of general bar exam and professional responsibility exam to qualify for admission and licence to practice law).

[9] NCBE argues that Enyart can pursue her chosen profession without admission to the bar, because California Rule of Court 9.42 allows Enyart to represent clients before passing the bar exam so long as she is supervised by a licensed attorney.

Even if Enyart is eligible to represent clients under Rule 9.42, the rule only allows her to undertake limited activities under the supervision of an attorney. She is not allowed to hold herself out as an attorney or appear on behalf of a client in court without having a supervisor physically present, and she must obtain a signed consent from all clients acknowledging her status as a "certified law student." Cal. R. Court 9.42(d); *see also* Ninth Cir. R. 46-4 (permitting law students to participate in appeals under similar circumstances). Assisting clients as a certified law student is simply not the same as practicing law as an attorney. Enyart claims she is unable to take advantage of the opportunity afforded by her two-year, public-interest fellowship as a result of her inability to practice law. Because the fellowship is of limited duration, "[a] delay, even if only a few months, pending trial represents precious, productive time irretrievably lost" to Enyart. *See Chalk v. U.S. Dist. Ct.*, 840 F.2d 701 (9th Cir. 1988) (holding that teacher suffered irreparable harm when he was transferred from classroom position to administrative role because of AIDS diagnosis). Because the district court's finding of irreparable harm in the form of Enyart's likely loss of the ability to pursue her chosen profession is supported by facts in the record, it does not constitute an abuse of discretion. *See Hinkson*, 585 F.3d at 1261.

3. Balance of Equities

[10] The district court compared the harm Enyart would suffer in the absence of preliminary relief to the harm an injunction would cause NCBE, and concluded that the equities weighed in Enyart's favor. The district court rejected NCBE's argument

that the injunction would cause NCBE harm that cannot be undone. NCBE argues that providing Enyart's requested accommodations is expensive[6] and poses a security concern; however, as the district court noted, Enyart posted two $5,000 injunction bonds that will cover NCBE's costs in the event it prevails on the merits at trial, and the injunction minimized security risks by requiring Enyart to use NCBE's laptop rather than her own. Compared to the likelihood that Enyart would suffer irreparable harm by losing the chance to pursue her chosen profession in the absence of an injunction, the potential harm to NCBE resulting from injunctive relief was minimal. The district court did not abuse its discretion in holding that the balance of equities favored Enyart.

4. Public Interest

The district court held that "the public clearly has an interest in the enforcement of its statutes," and concluded that the public interest weighed in favor of granting the injunctions. NCBE argues that the public's interest in having statutes enforced is not sufficient to support a grant of a preliminary injunction.

[11] In enacting the ADA, Congress demonstrated its view that the public has an interest in ensuring the eradication of discrimination on the basis of disabilities. 42 U.S.C. § 12101(a)(9) (finding that "the continuing existence of unfair and unnecessary discrimination and prejudice * * * costs the United States billions of dollars in unnecessary expenses

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[6] NCBE has conceded, however, that the accommodations requested by Enyart would not cause an undue burden on NCBE.

resulting from dependency and nonproductivity"). This public interest is served by requiring entities to take steps to "assure equality of opportunity" for people with disabilities. *See id.* § 12101(a)(8). Although it is true that the public also has an interest in ensuring the integrity of licensing exams, NCBE never argued that allowing Enyart to take the MPRE and MBE using a computer equipped with JAWS and ZoomText would result in unreliable or unfair exam results. The district court did not abuse its discretion in concluding that the issuance of these preliminary injunctions served the public's interest in enforcement of the ADA and in elimination of discrimination on the basis of disability.

III. Conclusion

For the foregoing reasons, we affirm the district court's February 4, 2010 and June 22, 2010 orders issuing preliminary injunctions requiring NCBE to permit Enyart to take the MBE and MPRE using a laptop equipped with JAWS and ZoomText.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHANIE ENYART *Plaintiff-Appellee*, V. NATIONAL CONFERENCE OF BAR EXAMINERS, INC. *Defendant-Appellant.*	**FILED** FEB 11 2010 MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS No. 10-15286 D.C. No. 3:09-cv-05191-CRB Northern District of California, San Francisco ORDER

STEPHANIE ENYART *Plaintiff-Appellee*, V. NATIONAL CONFERENCE OF BAR EXAMINERS, INC. *Defendants-Appellant.*	No. 10-16392 D.C. No. 3:09-cv-05191-CRB Northern District of California, San Francisco

Before: COWEN*, TASHIMA, and SILVERMAN, Circuit Judges.

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* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

The panel has voted to deny Appellant's petition for rehearing. Judge Silverman has voted to reject the petition for rehearing en banc and Judges Cowen and Tashima so recommend.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are

DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHANIE ENYART, Plaintiff, v. NATIONAL CONFERENCE OF BAR EXAMINERS, INC., Defendant. _____/	No. C 09-5191 CRB **ORDER GRANTING PRELIMINARY INJUNCTION AND PRELIMINARY INJUNCTION**

Plaintiff Stephanie Enyart moves for a preliminary injunction requiring the National Conference of Bar Examiners ("NCBE") to provide her with a particular accommodation in light of her disability. Enyart maintains that the accommodations offered by NCBE do not sufficiently accommodate her disability, and that they would result in her suffering a serious disadvantage on the Multistate Professional Responsibility Exam ("MPRE") and the multiple choice Multistate Bar Exam ("MBE"). [1] NCBE maintains that it has offered Enyart a reasonable accommodation, and that it is not obligated to offer Enyart's preferred accommodation.

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[1] Enyart is scheduled to take the bar exam in California. The State Bar Association approved Enyart's request for accommodations on the sections of the exam that are not controlled by NCBE. See Levine Decl., Exs. 5, 6. NCBE, however, which administers the MBE and MPRE, has not agreed to offer the same accommodations.

For the reasons explained below, Plaintiff's motion is GRANTED. One central dispute between the parties concerns the proper legal standard to apply under the American[]s with Disabilities Act ("ADA") for purposes of the success on the merits prong of the preliminary injunction standard. The Plaintiff seeks a standard that is more lenient for plaintiffs than the traditional "reasonable accommodation" standard, relying on language in the relevant Department of Justice ("DOJ") regulation. Defendant, however, seeks to apply the typical "reasonable accommodation" standard. Resolution of this issue raises the question of administrative deference. However, given the evidence presented by Plaintiff, Plaintiff is entitled to her requested accommodations even under Defendant's more stringent standard. Presumably, Defendant will make an argument at the merits stage that requiring the provision of Plaintiff's preferred accommodations in every comparable case will constitute an undue burden. However, for purposes of this motion Defendant has declined to make an undue burden argument. This Court will therefore not address that issue at this time. See Def. Opp. at 5 ("Because NCBE offered reasonable accommodations to Ms. Enyart, the undue burden issue does not arise here."). Therefore, this Court declines at this point to determine whether or not Plaintiff is correct that a different standard applies in this case. The Plaintiff has established her likelihood of success under either standard.

As to the remaining factors – balance of hardships, irreparable harm, and the interest of the public in the issue – all three factors lean in favor of Plaintiff. Defendant's primary concern with provision of

computerized aids is with preserving the confidentiality of test questions, and it argues that this concern tips the balance of hardships and irreparable harm factors in its favor. This concern is minimized by ordering NCBE to use its own computer, which will remain in its possession after Enyart completes the examination.[2] Because there is no reason to believe that Enyart herself poses a security threat, keeping the computer in NCBE possession adequately addresses its security issues.

BACKGROUND

Stephanie Enyart is legally blind. Enyart Decl. ¶ 6. She has been diagnosed with macular degeneration and retinal dystrophy, known as Startgardt's Disease. Id., Levine Decl. ex. 26. According to Enyart, "[o]ver the years, based upon the individual evaluations and recommendations of assistive technology experts and training I have received in using assistive technologies, and practice, I have learned which technologies best suit my reading needs given my specific disability and changes in my vision over time." Enyart Decl. ¶ 7. While Enyart can use CCTV, one typical form assistive technology for blind persons, she "cannot use a CCTV for sustained reading * * * without suffering nausea and eye fatigue. * * * Regardless of the speed at which I try to read passages on the CCTV, the physical activity involved in tracking lines of text, and visually having to navigate like a cursor would through text, causes me symptoms of eye fatigue, disorientation and nausea within five

[2] As explained below, the injunction orders Enyart to post a bond that, assuming NCBE is ultimately successful, will fully compensate it for the costs incurred in provision of a laptop.

minutes, which become fully developed several minutes after that." Id.

Enyart explains that one particular accommodation, namely, "a computer equipped with screen reading software (JAWS) and screen magnification (ZoomText) software," is required for her "to read lengthy texts, legal and academic material, to perform legal work." Id. ¶ 8. Further, "it is what I used to take all of my law school examinations, with the exception of a single multiple choice portion of one law school examination, which I took using only the assistance of a human reader, with disastrous results." Id. In sum, Enyart asserts that "[t]he combination of JAWS and ZoomText is the only method through which I can effectively read and comprehend lengthy or complex material." Id. ¶ 12.

The MPRE and MBE are both multiple-choice tests. Ms. Enyart applied to take the March, August, and November 2009 administrations of the MPRE, and also applied to take the July 2009 administration of the California Bar Exam. Enyart submitted with each application a request for her preferred accommodation. Enyart Decl. ¶¶ 18-23. Along with her requests, Enyart submitted supporting documentation from her vocational rehabilitation counselor, treating opthalmologist, law school dean, and an assistive technology specialist, "each of whom documented her need to use JAWS and ZoomText to access test information." Mot. at 5; see Levine Decl. exs. 15, 16, 19. The State Bar of California approved Enyart's request as to the sections of the exam that it administers. However, the NCBE did not agree to permit Enyart to use

JAWS and ZoomText for either the MBE or the MPRE.

While the NCBE declined to permit Enyart to use her preferred computer programs, it did agree to a number of accommodations. NCBE agreed to offer the combination of a CCTV to magnify the print exam and a human reader to read the text aloud. Levine Decl., exs. 17, 20, 31. NCBE also offered to provide a large-print exam in addition to an audio CD with the test questions pre-recorded. Id. exs. 47, 51, 52. NCBE also offered to permit Plaintiff the option of taking the MBE with JAWS alone as part of a pilot program. Mot. at 7. NCBE also offered double the standard time, a private room, a five minute break every hour, a scribe to fill in the answers, use of Enyart's lamp, a large print digital clock, sunglasses, yoga mat, and migraine medication. Moeser Decl. ¶ 6. However, NCBE would not permit Enyart to use ZoomText.

NCBE justified its denial of Enyart's request because it fears security risks associated with permitting computer aids to be used in multiple-choice tests. NCBE reuses some of the questions on both the MPRE and the MBE, and fears both that the use of laptops would permit a test-taker to surreptitiously record the questions, and that the very existence of these laptops make the test questions vulnerable to theft.

Enyart has registered for the February 2010 administration of the California Bar Exam, and the March 2010 administration of the MPRE.

DISCUSSION

Enyart seeks a preliminary injunction under the ADA ordering the NCBE to permit her to use JAWS

and ZoomText. The NCBE opposes any such order, arguing that it has already offered to reasonably accommodate Enyart's disability, and that it is not obligated to provide Enyart's choice of accommodation. Essentially, the NCBE argues that it is only obligated to provide a reasonable accommodation, which it believes it has done.

Because the accommodations provided by NCBE will not permit Enyart to take the exam without severe discomfort and disadvantage, she has demonstrated the test is not "accessible" to her, and that the accommodations therefore are not "reasonable." Therefore, this Court concludes, based on the current record and moving papers, that it is more likely than not that Enyart will succeed on the merits at trial. This Court further concludes that the balance of equities tips in Enyart's favor, that she will be irreparably harmed in the absence of preliminary relief, and that the public interest supports issuance of the preliminary injunction.

1. Legal Standard

A plaintiff seeking a preliminary injunction must satisfy four factors: (1) that she is likely to succeed on the merits, (2) that she is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in her favor, and (4) that an injunction is in the public interest. Winter v. NRDC, 129 S. Ct. 365, 374 (2008).

2. Likelihood of Success on the Merits

NCBE argues that Enyart's requested accommodation is not reasonable, and that it has already offered a series of reasonable accommodations. Opp. at 5-12. Enyart, on the other

hand, argues that the "reasonable accommodation" framework simply does not apply to actions taken under 42 U.S.C. § 12189. That section provides that "[a]ny person that offers examinations * * * related to * * * certification * * * shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals." The relevant DOJ regulations provide that a test administrator is required to 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 * * * rather than reflecting the individual's impaired sensory * * * skills." 28 C.F.R. § 36.309(b)(1)(i). Those regulations also provide that 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." Id. § 36.309(b)(3).

The regulations promulgated under § 12189 do not mention the phrase "reasonable accommodation." While that phrase is used elsewhere in the C.F.R., see e.g. 29 C.F.R. § 1630.9 (2010), those regulations are promulgated under different sections of the U.S. Code, and hence do not apply directly to actions taken under 42 U.S.C. § 12189. Plaintiff asks this Court to look solely at the regulations promulgated

under § 12189, particularly the phrase: "best ensure that * * * the examination results accurately reflect the individual's aptitude * * * rather than reflecting the individual's impaired sensory * * * skills" (emphasis added). Plaintiff contends that this phrase obligates NCBE to provide the accommodation that "best ensures" that her performance is not limited by her disability, and that it is not enough for NCBE to simply offer a "reasonable" accommodation.

This is a thorny question. Plaintiff is correct that neither § 12189 nor the accompanying regulations use the term "reasonable accommodation." Therefore, there does not appear to be statutory or regulatory support for adopting that legal framework. However, the "best ensure" phrase is by no means clear. Plaintiff's interpretation appears to be in some conflict with the statutory language itself, which requires only that examinations shall be "accessible to persons with disabilities." 42 U.S.C. § 12189. Indeed, NCBE points to similar language elsewhere in the regulations that has been interpreted by EEOC as "not requir[ing] that an employer offer every applicant his or her choice of a test format. Rather, this provision only requires that an employer provide . . . alternative, accessible tests to [disabled] individuals." 29 C.F.R. Part 1630, App., at 385 (2009). However, this interpretation is offered in commentary on 29 C.F.R. Part 1630, which does indeed utilize the "reasonable accommodation" framework. See 29 C.F.R. § 1630.9 (titled "Not making reasonable accommodation").

This Court declines Plaintiff's invitation to determine whether the "best ensure" language requires a test administrator to offer the "best"

available and most comprehensive technology in accommodating a disability. Such an interpretation is not necessary to establish Plaintiff's likelihood of success on the merits. Instead, even assuming NCBE's more defendant-friendly standard applies to this case, Enyart has met her burden.

NCBE spends a good portion of its brief disputing Enyart's factual claims that the accommodations offered by NCBE will not permit her to comfortably complete the exam. NCBE points out that in the past Enyart has "successfully utilized a number of different accommodations." Opp. at 2. She used readers and audiotapes during her undergraduate years at Stanford, and used CCTV while working as an administrative assistant before law school. Id. Further, NCBE points out that Enyart used a reader to help her complete her LSAT test prep program, and used audiotapes and the services of a human reader on her examinations. Id.

These factual claims, however, are somewhat beside the point. First, Enyart avers that hers is a progressive condition, so there is no reason to believe an accommodation that may or may not have been sufficient during Enyart's undergraduate coursework[3] would be sufficient. Second, none of those examinations compare to the bar exam, which is an multiday, eight hour per day examination. Hence, an accommodation that might be sufficient for a law school examination is not necessarily sufficient for the bar exam.[4] Third, the relevant

[3] Enyart obtained her undergraduate degree in 1999. Enyart Decl. ¶ 3.

[4] Moreover, Enyart avers that the only law school exam for which she was not permitted use of JAWS and ZoomText was a "disastrous" experience. Enyart Decl. ¶ 8.

question is not whether Enyart would be able, despite extreme discomfort and disability-related disadvantage, to pass the relevant exams. NCBE points to no authority to support the position that an accommodation which results in "eye fatigue, disorientation and nausea within five minutes, which become fully developed several minutes after that" is "reasonable."

Nor does NCBE dispute Enyart's characterization of her experience with CCTV. Indeed, the medical evidence supports the conclusion that methods of magnification other than ZoomText are not well suited to her particular disability. See Levine Decl. ex. 26, Report of Dr. Sarraf (ZoomTest and JAWS "are the only way she can fully comprehend the material she reads. * * * For example, if she is using a live reader instead of the software, she is not able to synchronize seeing and hearing the text (which diminishes her comprehension of the material.)"); id. ("If Stephanie was not granted the accommodation to use this software on the entire test * * * she'd completely lose the ability to rely on her residual vision to assist in comprehension of the test material.").

NCBE also places some emphasis on the availability of the pilot program offering the JAWS program. However, as Enyart explains, "[a]lthough the auditory input from the JAWS program facilitates my reading process, it is not sufficient on its own for me to effectively read lengthy or complex text. The problems with just relying on auditory input are compounded when the auditory input is in the form of a human reader rather than the JAWS program." Id. ¶ 16.

The facts as outlined in the attachments to Plaintiff's motion therefore strongly suggest 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 text. 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.

NCBE's citation to other regulations and cases does not overcome this factual presentation. First, NCBE cites to 28 C.F.R. § 36.309(b), which provides a definition of "auxiliary aid." Section 36.309(b) provides that such aids may include "[b]railed or large print examinations and answer sheets or qualified readers for individuals with visual impairments." NCBE explains that this tracks the ADA's definition of "auxiliary aids and services" as including "qualified readers, taped texts, or other effective methods of making visually delivered materials available * * *." 42 U.S.C. § 12102(1)(b) (emphasis added). See also 28 C.F.R. Part 36, App. B, § 36.303, at 726 ("The auxiliary aid requirement is a flexible one," and regulated parties "can choose among various alternatives as long as the result is effective communication." (emphasis added)). As the underlined portions above illustrate, however, the examples offered in the regulation and statute cannot be read as exclusive, nor do those examples support the conclusion that such accommodations are reasonable even where they do not permit effectively communication. On the contrary, the statute and relevant regulations all emphasize access and effective communication. The statute itself illustrates that the central question is whether

the disabled individual is able to employ an "effective method[] of making visually delivered materials available." The evidence submitted by Plaintiff strongly suggests that the only auxiliary aid that meets this criteria is a computer with JAWS and ZoomText. While NCBE may be successful at trial in establishing that this is not the case, the record presently before this Court more strongly supports the conclusion that only ZoomText and JAWS make the test "accessible" to Enyart. See 42 U.S.C. § 12189.

Next, NCBE cites to a series of cases in which a plaintiff was denied his or her preferred accommodation, and argues that these cases support the proposition that a plaintiff is not entitled to his or her "preferred" accommodation, but only a "reasonable" accommodation. For example, in Fink v. New York City Department of Personnel, 855 F. Supp. 68 (S.D.N.Y. 1994), two visually impaired individuals sued under the Rehabilitation Act for failure to provide a test in Braille. The court declined to require that accommodation. However, this case is distinguishable. Fink did not concern a plaintiff with evidence that the offered accommodations did not, in fact, accommodate her disability. Instead, the Court concluded that "the accommodations offered by defendants . . . afforded sufficient aid so that plaintiffs' blindness should not have been a disadvantage to them in taking the examination." Id. No such conclusion can be made in this case in light of the evidence submitted by Enyart. The accommodations offered by NCBE would, on the contrary, put Enyart at "a disadvantage * * * in taking the examination." Id. See also Jaramillo v. Professional Exam. Serv., Inc.,

2008 NDLR (LRP) LEXIS 205 (D. Conn. 2008) (holding that a given accommodation was reasonable where Plaintiff was granted the accommodation she requested, but later decided that a different accommodation would have been more effective).

It should also be noted that the relevant regulations provide that an examiner "shall provide appropriate auxiliary aids * * * unless * * *[it] would result in an undue burden." 28 C.F.R. § 36.309. NCBE, however, does not make an undue burden argument. Instead, relying on reasonable accommodation case law, NCBE argues that "the 'undue burden' issue arises only if a covered entity has failed to offer reasonable accommodations, and then seeks to justify its refusal to provide an accommodation requested by plaintiffs." Opp. at 4-5. Therefore, a holding that provision of JAWS and ZoomText is an undue burden would be inappropriate.

2. Irreparable Harm

Enyart argues that "[i]rreparable harm may be presumed when the offending party engages in acts or practices prohibited by federal statute that provides for injunctive relief." Mot at 11. NCBE disagrees, arguing that the Supreme Court's recent Winter decision cuts the other way.

Defendant has the best of this argument. While Enyart is correct that prior cases seem to presume irreparable harm from statutory violations, these same cases alternatively describe their holdings as not requiring a showing of irreparable harm where a statutory violation is concerned. See, e.g., Burlington Northern R.R. Co. v. Wash. Dep't of Revenue, 934 F.2d 1064, 1075 (9th Cir. 1991) ("When

the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown." (emphasis added; citations omitted)). To the extent prior Ninth Circuit case law concluded that irreparable harm need not be shown in certain statutory contexts, that case law is in conflict with Winter. 129 S. Ct. 374.

However, Enyart argues in the alternative that she also satisfies the traditional test for irreparable harm. She cites to D'Amico v. N.Y. State Bd. of Law Examiners, 813 F. Supp. 217 (W.D.N.Y. 1993), which found a threat of irreparable harm in a similar case. That case explained that "[t]he issuance of injunctive relief is appropriate when a disabled person loses the chance to engage in a normal life activity." Id. at 220. That case went on to explain that "[w]hile plaintiff's injury is related to her ability to be admitted to practice law and secure legal employment and income, it goes well beyond these monetary considerations. Plaintiff's injury is the result of ongoing discrimination based on her medical disability." Id.

This analysis is equally persuasive in this case. Enyart argues that in the absence of a preliminary injunction, the time she spent in preparation will have been wasted, she will suffer a serious career setback, will face the prospect of preparing once again at a separate time, and will face the "professional stigma of failure because of her medical disability." Id. See also Chalk v. U.S. Dist. Court Cent. Dist. of Cal., 840 F.2d 701, 710 (9th Cir. 1988) ("Here, plaintiff is not claiming future monetary injury; his injury is emotional and psychological -

and immediate. Such an injury cannot be adequately compensated for by a monetary award after trial.").

Given the professional stigma and psychological impact at issue in this case, this Court follows D'Amico and Chalk in concluding that Enyart has established that she is likely to suffer irreparable harm in the absence of preliminary relief.

3. Balance of Equities

Enyart argues that the "harm an injunction would cause NCBE is negligible." Mot. at 12. NCBE, however, contends that if the injunctive relief is granted, NCBE will "suffer[] a harm that cannot be undone." Opp. at 13.

NCBE does not adequately support its position. It writes that "[i]f Ms. Enyart or other applicants were to use their own computer with JAWS and ZoomText, NCBE could not prevent the questions from being copied onto the applicant's hard drive, or ensure that the computer is completely wiped clean of all test questions after the examination." Opp. at 13-14. However, the injunction does not permit Enyart to use her own computer, ordering instead that the test be loaded onto NCBE's own device. Moreover, the proposed injunction would apply only to Enyart. Therefore, for purposes of this order, there is no concern with "other applicants." NCBE seeks to alter the balance by supposing that an entire class of individuals would receive the benefit of the injunction, but that is not the case. See also Opp. at 14 (discussing the burden posed by providing computers to sixty test takers). While NCBE's security concerns may indeed be central to its claims under the ADA, particularly whether or not the accommodation would pose an undue burden, there

is no reason to think that Enyart herself, the only beneficiary of the injunction, poses a security risk. Moreover, the terms of the injunction itself were the result of a stipulation between the parties, which further suggests that any harm to NCBE has been minimized.

Finally, and perhaps most importantly, this Court notes that Enyart will be ordered to post a $5000 bond. In the event that Enyart loses at trial, that bond will be available to compensate NCBE for the cost of providing a laptop. Therefore, because NCBE's security concerns are addressed by using its own computer, and it will be compensated for the financial expenditure in the event it prevails at trial, it has failed to establish that the equities are in its favor.

4. Public Interest

In this context, the question of whether the public interest would be served by the issuance of an injunction turns on the merits analysis. As explained above, the Court is persuaded that failure to provide Enyart's preferred accommodation is likely a violation of the ADA, and the public clearly has an interest in the enforcement of its statutes. See e.g., Jones v. City of Monroe, 341 F.3d 474, 490 (6th Cir. 2003) ("The public interest is clearly served by eliminating the discrimination Congress sought to prevent in passing the ADA.").

In light of the statutory interests at stake in this case, this Court concludes that the public interest weighs in favor of the issuance of the injunction.

CONCLUSION

For the reasons stated above, this Court GRANTS Enyart's motion for a preliminary injunction. Because the MBE portion of the bar exam will be administered at the end of February, Defendant's motion for a stay pending appeal is DENIED. Given the inevitable delay in litigating this question in the circuit court, such a stay would unavoidably prevent Plaintiff from receiving the relief to which this Court believes she is entitled. Bond is set at $5000, to be filed with the Clerk of the Court by February 5, 2010, and deposited into the registry of the Court.

The injunction is ordered as follows:

1. NCBE shall provide Ms. Enyart with the following accommodations on the March 2010 administration of the MPRE:

(a) Double the standard time
(b) A private room
(c) One five minute break every hour
(d) A scribe to fill in the answers and
(e) The exam loaded onto a laptop computer equipped with JAWS and ZoomText software

Within two business days of this Order, NCBE shall request ACT to provide Ms. Enyart with sufficient time before the commencement of the test to attach the peripherals and customize the JAWS and ZoomText settings and NCBE shall advise the plaintiff of ACT's response or any lack thereof within five business days thereafter.

Additionally, NCBE shall permit Ms. Enyart to use all of the following during the examination as accommodations, all of which shall be brought to the examination by Ms. Enyart:

(f) An ergonomic keyboard
(g) A trackball mouse
(h) A large monitor
(i) Her own lamp to control lighting conditions
(j) Sunglasses
(k) A yoga mat
(l) Large print digital clock
(m) Migraine medication

The ergonomic keyboard, trackball mouse, and monitor shall be devoid of any storage devices or storage mechanisms and NCBE does not guarantee the interoperability of such devices with the computer it provides. The examination shall be administered by ACT with the above accommodations pursuant to the Stipulation Re: Voluntary Dismissal Without Prejudice of Defendant ACT, Inc. filed with the Court on November 25, 2009.

2. With respect to the February 2010 administration of the California Bar exam, NCBE shall provide the State Bar of California, Committee of Bar Examiners with the MBE loaded onto a laptop computer equipped with JAWS and ZoomText software. Decisions with respect to the administration of the examination shall rest with the State Bar of California, Committee of Bar Examiners. However, in the Stipulation Regarding Dismissal Without Prejudice of Defendant State Bar of California and Order Thereon in this Action, the State Bar of California agreed to furnish the accommodations requested by Ms. Enyart on the MBE portion of the February 2010 California bar examination if the Court in this action determined that such accommodations were required.

IT IS SO ORDERED.

/s/
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

Dated: February 4, 2010

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHANIE ENYART, Plaintiff, v. NATIONAL CONFERENCE OF BAR EXAMINERS, INC., Defendant. _____/	No. C 09-5191 CRB **ORDER GRANTING SECOND PRELIMINARY INJUNCTION**

A preliminary injunction has already been issued in this case, and the parties are familiar with the relevant background facts. Therefore, this order will forego a full recitation of facts and will instead discuss what has changed—and what has not—since the entry of the first preliminary injunction.

The current controversy concerns the impact of an unforeseen detail on Plaintiff's attempt to pass the Multistate Bar Examination ("MBE") and Multistate Professional Responsibility Examination ("MPRE"). The parties agree that Plaintiff was not permitted to alter the font type or font size on her examination computer during the administration of the MBE and the MPRE. The test computer provided by Defendant NCBE displayed the test questions in 12-point Times New Roman font, and the security settings installed by NCBE prevented Plaintiff from altering that setting. Goldstein Decl. ¶ 3. Enyart avers that she "typically read[s] all electronic

documents in Ariel 14-point font because it is considerably larger than Times New Roman 12-point font and uses thicker and more sharply defined letters that are easier for me to read." Enyart Decl. ¶ 7. Because of this, Enyart's "reading speed was reduced and [she] experienced eye fatigue more quickly than I normally do." Id. ¶ 10. By the end of the second day of the MBE (out of six total days of testing for the Bar Exam), her "eyes had become puffy and irritated from the strain associated with reading in this font over two days." Id. ¶ 13. On neither day was Enyart able to complete all the questions within the allotted time. Id. ¶¶ 9, 13.

Enyart reports a similar experience with the MPRE, which she took the weekend immediately following the MBE. She was once again not able to change the font to Ariel 14-point. Id. ¶ 17. "As with the MBE, reading for an extended period of time in this font slowed down my reading speed, caused my eyelids to become puffy and irritated, and le[t] eye strain and fatigue to develop more quickly than they ordinarily would." Id. Enyart did not pass the test.

Discussion

1. Legal Standard

A plaintiff seeking a preliminary injunction must satisfy four factors: (1) that she is likely to succeed on the merits, (2) that she is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in her favor, and (4) that an injunction is in the public interest. Winter v. NRDC, 129 S. Ct. 365, 374 (2008).

2. Analysis

The specifics regarding Enyart's disability have not changed since the last injunction was issued, and the only difference now concerns a detail that no party foresaw being an issue when the first motion was litigated. Enyart did not predict that the type and size of the font would be "locked down" such that she would be forced to read both a smaller type size, and a font style that is more difficult for her to read. She has submitted sworn statements that this unfamiliar font caused eye strain and resulted in her not being able to complete all the questions on the test.

Defendant, while it does strenuously oppose Enyart's motion for a second injunction, does not focus on the issue of the font. Instead, it seeks to re-visit many of the issues addressed in the first motion, now with a focus on the fact that Enyart has now tried and failed to pass the examination. It argues that Enyart has not shown a risk of irreparable harm, that she is not entitled to her "preferred" accommodation, that she is not likely to succeed, and has not shown that the equities favor her. These arguments were all addressed in the first motion. As discussed further below, this Court sees no reason to alter its previous findings, and those findings are hereby incorporated. Enyart has shown that she is likely to succeed on the merits, that she is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in her favor, and that the injunction is in the public interest.

a. Irreparable Harm

Defendant's first argument is that Enyart has not shown a risk of immediate irreparable harm as

required under Winter. Defendant takes issue with this Court's prior "holding" that Enyart would suffer psychological harm if she were denied her requested accommodations. Defendant argues that "Enyart has never claimed * * * that she would suffer a psychological injury if she is unable to take [the] examination[s] with her preferred accommodations, much less submitted any evidence supporting such an argument." Opp. at 5.

However, the Court's prior reference to the psychological impact was not an independent factual finding of any clinically defined consequences of denying Enyart's requested accommodations. On the contrary, the reference was merely a shorthand to refer to the various consequences described in Enyart's declaration submitted in support of her first motion for a preliminary injunction. See Dkt. #36, ¶¶ 28-30. These injuries, as with the injuries discussed in Chalk v. U.S. Dist. Court Cent. Dist. of Cal., 840 F.2d 701, 710 (9th Cir. 1988), and D'Amico v. N.Y. State Bd. of Law Examiners, 813 F. Supp. 217 (W.D.N.Y. 1993), are not compensable with monetary damages. Chalk and D'Amico are both cases where the denial of an injunction would have resulted in an individual "los[ing] the chance to engage in a normal life activity." D'Amico, 813 F. Supp. at 220. Chalk in particular, which is a binding Ninth Circuit case, concerned a teacher suffering from AIDS who was prevented from teaching because of his diagnosis. His employer sought to reassign him to an administrative position at the same rate of pay and benefits, but Chalk refused the offer and brought a law suit asking for an order "barring the Department from excluding him from classroom duties." Id. at 704. Chalk argued that the

job he was offered did not utilize his skills, training or experience, and that "[s]uch non-monetary deprivation is a substantial injury which the court was required to consider." Id. at 709. The Court cited to discrimination cases and explained that there was ample support for the proposition that Chalk's "non-monetary deprivation is irreparable." Id. At its core, Enyart's case is similar to Chalk's. Enyart, like Chalk, does not cite to any monetary injury, but rather focuses on being prevented from pursuing her chosen profession because of his disability. Chalk stands for the proposition that such harm can be irreparable for purposes of obtaining a preliminary injunction.

Defendant seeks to distinguish Chalk because it was decided long before the Supreme Court's recent Winter case. By Defendant's reasoning, because all cases decided prior to 2008 were by definition pre-Winter cases, they have all been overruled in toto. Winter, of course, overruled the Ninth Circuit's "sliding scale" standard, under which a plaintiff needed to show only a possibility of irreparable injury in some circumstances, as opposed to a likelihood of irreparable injury. Chalk did indeed recite the pre-Winter "sliding scale" standard, and to that extent is no longer good law. But whether one applies the "likelihood" standard or the now-defunct "sliding scale" standard, there is no reason to think that the very definition of "irreparable harm" has been altered. Winter concerns the likelihood of the harm—whether it is merely possible or truly imminent—but does not concern whether or not any particular harm can be termed "irreparable." Therefore, Winter does not disturb Chalk's

discussion of whether certain non-monetary harms are irreparable.

b. Likelihood of Success

As in its opposition to the first motion for a preliminary injunction, NCBE argues that it has fulfilled its obligations under the ADA to "offer its examinations in a place or manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals." 42 U.S.C. § 12189. It notes that it has offered a series of accommodations, including those listed in the relevant regulations, and that these efforts are by definition sufficient. NCBE relies primarily on Arizona v. Harkins Amusement Enters., Inc., 603 F.3d 666 (9th Cir. 2010). Harkins concerned two plaintiffs seeking to force a chain of movie theaters to provide "open" captioning, in addition to other accommodations. NCBE here is particularly interested in the following quotation: "Entities * * * should be able to rely on the plain import of the DOJ's commentary until it is revised." Id. at 673. NCBE argues that it too "should be able to rely" on the examples of auxiliary aids in listed in the regulation.

The quotation from Harkins, however, is taken entirely out of context. Harkins involved a regulation that plainly states that "[m]ovie theaters are not required by § 36.303 to present open-captioned films." 28 C.F.R. pt. 36, App. B(C), at 727 (2009). Obviously, given clear regulatory guidance that a particular aid is not required, the Court explained that it would be unfair to force a public accommodation to provide such an aid. However, there is no comparable regulation explicitly providing that testing centers need not provide

computer aids. If there were, this would be a far different case. On the contrary, the list of aids in the regulations is open ended, including qualified readers, taped texts, or other effective methods of making visually delivered materials available * * *" 42 U.S.C. § 12103(1)(B) (emphasis added). The statute clearly informs a testing agency that the listed regulations are not exclusive.

The relevant question here is whether the auxiliary aids offered by NCBE make the test's "visually delivered materials available" to Enyart. As this Court has previously concluded, they do not. See First Preliminary Injunction at 5-19. NCBE continues to argue that Enyart is not entitled to her preferred accommodations, and in so doing continues to miss the point. She does not argue that she simply "prefers" to use JAWS and ZoomText. On the contrary, she has presented evidence that the accommodations offered by NCBE do not permit her to fully understand the test material, and that some of the offered accommodations result in serious physical discomfort. CCTV makes her nauseous and results in eye strain, and the use of human readers is not suited to the kind of test where one must re-read both questions and answers, and continually shift back and forth between different passages of text. Dkt #36, ¶ 19, Dkt. #81, ¶ 9. Such accommodations do not make the test accessible to Enyart, and so do not satisfy the standard under the ADA.

NCBE also argues that this Court erred in its first order when it concluded that Enyart's prior success on the LSAT without the aid of JAWS and ZoomText indicates that those accommodations are not necessary to provide her with access. This Court noted that the bar exam is an eight-hour per day

examination, while the LSAT is only a few hours. NCBE disputes this, noting that the MPRE lasts only two hours and the MBE lasts only six hours. NCBE conveniently ignores the fact that the MBE is not administered in a vaccuum, but rather is typically integrated with two other days of testing. As its lawyers are well aware, the LSAT is a one-day examination, while the MBE is typically the second of three days of testing. See http://www.calbar.ca.gov/calbar/pdfs/admissions/GBX/EX102sf.pdf. Therefore, any comparison between the Bar Examination and the LSAT is of only minimal evidentiary value.

Next, NCBE urges this Court to ignore the opinion of Enyart's treating physician, Dr. Sarraf, in favor if its own optometrist's opinion. NCBE points out what it considers to be inadequacies relating to Dr. Sarraf's evidence, such as the fact that he did not testify, that his report "was actually a form that he prepared (or at least appears to have signed) at Ms. Enyart's request," and that the statements in his report "appear simply to repeat what Ms. Enyart presumably told Dr. Sarraf." Opp. at 12. In sum, NCBE asks this court to disregard evidence offered by Enyart's treating physician, suggesting without citing evidentiary support that he merely signed a form prepared by Enyart. Even if he did, there is no reason to believe he was not truthful in his assertions. Given both Enyart's declarations and the evidence supplied by Dr. Sarraf, this Court remains convinced that Enyart has established that she is likely to succeed on the merits. The fact that a non-treating, non-examining witness offers contradicting evidence is not sufficient to outweigh Enyart's evidentiary showing.

Finally, NCBE's arguments as to the equities and the public interest are similarly unavailing. On the balance of the equities NCBE urges this Court to take notice of the fact that "additional test takers with visual disabilities demand the same accommodations as Ms. Enyart * * *." So far as this Court can discern, this is no more than to say that other disabled individuals are seeking to assert their rights under the ADA. NCBE does not concede that these rights are in fact recognized by the ADA, so from their perspective these suits are a burden and a nuisance. However, because these suits simply seek to assert the rights that this Court recognizes, this Court cannot conclude that such suits alter the balance of the equities.

Finally, as to the public interest, NCBE suggests that granting an injunction will undermine the fairness of the test administration. See Opp. at 14 (citing Powell v. Nat'l Bd. of Med. Examiners, 364 F.3d 79, 88-89 (2d Cir. 2004)). However, given the specific terms of the injunction, there is no reason to believe there is any fairness impact. NCBE does not actually argue that the requested accommodations would provide Enyart with an unfair advantage, and so a glancing reference to fairness without any such support cannot be persuasive. The public interest is more clearly served by ensuring that those individuals Congress has sought to protect are, in fact, protected. See e.g., Jones v. City of Monroe, 341 F.3d 474, 490 (6th Cir. 2003) ("The public interest is clearly served by eliminating the discrimination Congress sought to prevent in passing the ADA.").

Therefore, the parties are ORDERED to do as follows:

1. With respect to the August 2010 administration of the Multistate Professional Responsibility Examination (MPRE), NCBE shall provide ACT with the MPRE loaded onto a laptop computer equipped with JAWS and ZoomText software, with the examination displayed in 14-point Arial font. NCBE shall also direct ACT to provide Ms. Enyart with the following accommodations on the August 2010 administration of the MPRE:

(a) Double the standard time;

(b) A private room;

(c) One five minute break every hour;

(d) A scribe to fill in the answers.

NCBE shall deliver the laptop computer to ACT no less than two (2) days prior to the administration of the examination, and request ACT to provide Ms. Enyart with access to the laptop twenty-four (24) hours before the examination to attach her peripherals, customize the JAWS and ZoomText settings, and test the equipment prior to the day the examination is to be taken. ACT shall be responsible for custody of, and access to, the laptop once it is delivered to ACT. In the event ACT declines to provide any of the accommodations specified in this order, counsel are to notify the court one week prior to the day of the examination.

Additionally, NCBE shall direct ACT to permit Ms. Enyart to use all of the following during the MPRE as accommodations, all of which shall be brought to the examination by Ms. Enyart:

(e) An ergonomic keyboard;

(f) A trackball mouse;

(g) A large monitor;

(h) Her own lamp to control lighting conditions;

(i) Sunglasses;
(j) A yoga mat;
(k) Large print digital clock;
(l) Migraine medication.

The ergonomic keyboard, trackball mouse, and monitor shall be devoid of any storage devices or storage mechanisms and NCBE does not guarantee the interoperability of such devices with the computer it provides. The MPRE shall be administered by ACT with the above accommodations pursuant to the Stipulation Re: Voluntary Dismissal Without Prejudice of Defendant ACT, Inc., filed with the Court on November 25, 2009.

2. With respect to the July 2010 administration of the California Bar exam, NCBE shall provide the State Bar of California, Committee of Bar Examiners (the "State Bar") with the Multistate Bar Examination (MBE) loaded onto a laptop computer equipped with JAWS and ZoomText software furnished by NCBE, with the examination displayed in 14-point Arial font. NCBE shall deliver the laptop computer to the State Bar no less than two (2) days prior to the administration of the MBE, and request the State Bar to provide Ms. Enyart with access to the laptop twenty-four (24) hours before the examination to attach her peripherals, customize the JAWS and ZoomText settings, and test the equipment prior to the day the examination is to be taken. The State Bar shall be responsible for custody of, and access to, the laptop once it is delivered to the State Bar. All decisions with respect to the administration of the examination shall rest with the State Bar. The MBE shall be administered by the State Bar with the above accommodations

pursuant to the Stipulation Regarding Dismissal Without Prejudice of Defendant State Bar of California; Order Thereon filed with the Court on December 9, 2009.

3. Plaintiff shall post an additional cash bond in the amount of $5,000 with the Clerk of the Court by July 1, 2010, and deposited into the registry of the Court.

IT IS SO ORDERED.

/s/
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

Dated: June 22, 2010

APPENDIX E

29 U.S.C. § 794(a)
Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705 (20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

* * *

42 U.S.C. § 12101

Findings and Purpose

* * *

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12103

Additional definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

* * *

42 U.S.C. § 12111

Definitions

As used in this subchapter:

* * *

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

* * *

42 U.S.C. § 12112

Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

* * *

(b) Construction

As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes—

* * *

(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;

* * *

(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. § 12131

Definitions

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102 (4) [1] of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132

Discrimination.

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12181

Definitions.

As used in this subchapter:

* * *

(7) Public accommodation

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

* * *

42 U.S.C. § 12182

Prohibition of discrimination by public accommodations

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

* * *

(2) Specific prohibitions

(A) Discrimination

For purposes of subsection (a) of this section, discrimination includes—

* * *

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

* * *

42 U.S.C. § 12189

Examinations and courses

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.

28 C.F.R. § 35.130

General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or

person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

* * *

28 C.F.R. § 36.303

Auxiliary aids and services.

(a) General. A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.

(b) Examples. The term "auxiliary aids and services" includes—

* * *

(2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;

* * *

28 C.F.R. § 36.309

Examinations and courses.

(a) *General.* Any private entity 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.

(b) *Examinations.* (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);

(ii) An examination that is designed for individuals with impaired sensory, manual, or speaking skills is offered at equally convenient locations, as often, and in as timely a manner as are other examinations; and

(iii) The examination is administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements are made.

(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. 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.

(4) Alternative accessible arrangements may include, for example, provision of an examination at an individual's home with a proctor if accessible facilities or equipment are unavailable. Alternative arrangements must provide comparable conditions to those provided for nondisabled individuals.

(c) *Courses.* (1) Any private entity that offers a course covered by this section must make such modifications to that course as are necessary to ensure that the place and manner in which the course is given are accessible to individuals with disabilities.

(2) Required modifications may include changes in the length of time permitted for the completion of the course, substitution of specific requirements, or adaptation of the manner in which the course is conducted or course materials are distributed.

(3) A private entity that offers a course covered by this section shall provide appropriate auxiliary aids and services for persons with impaired sensory, manual, or speaking skills, unless the private entity can demonstrate that offering a particular auxiliary aid or service would fundamentally alter the course or would result in an undue burden. Auxiliary aids and services required by this section may include taped texts, interpreters or other effective methods of making orally delivered materials available to individuals with hearing impairments, Brailled or large print texts or qualified readers for individuals with visual impairments and learning disabilities, classroom equipment adapted for use by individuals with manual impairments, and other similar services and actions.

(4) Courses must be administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements must be made.

(5) Alternative accessible arrangements may include, for example, provision of the course through videotape, cassettes, or prepared notes. Alternative arrangements must provide comparable conditions to those provided for nondisabled individuals.

29 C.F.R. § 1630.11

Administration of Tests.

It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the 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).

29 C.F.R. pt. 1630, App., § 1630.9

Not Making Reasonable Accommodation

The obligation to make reasonable accommodation is a form of non-discrimination. It applies to all employment decisions and to the job application process. This obligation does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, e.g., specifically assists the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide. Accordingly, an employer would generally not be required to provide an employee with a disability with a prosthetic limb, wheelchair, or eyeglasses. Nor would an employer have to provide as an accommodation any amenity or convenience that is not job-related, such as a private hot plate, hot pot or refrigerator that is not provided to employees without disabilities. See Senate Report at 31; House Labor Report at 62.

* * *

The reasonable accommodation that is required by this part should provide the qualified individual with a disability with an equal employment opportunity. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability. Thus, for

example, an accommodation made to assist an employee with a disability in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the relevant position. The accommodation, however, does not have to be the "best" accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. Accordingly, an employer would not have to provide an employee disabled by a back impairment with a state-of-the art mechanical lifting device if it provided the employee with a less expensive or more readily available device that enabled the employee to perform the essential functions of the job. See Senate Report at 35; House Labor Report at 66; see also *Carter v. Bennett*, 840 F.2d 63 (DC Cir. 1988).

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29 C.F.R. pt. 1630, App., § 1630.11

Administration of Tests

The intent of this provision is to further emphasize that individuals with disabilities are not to be excluded from jobs that they can actually perform merely because a disability prevents them from taking a test, or negatively influences the results of a test, that is a prerequisite to the job. Read together with the reasonable accommodation requirement of section 1630.9, this provision requires that employment tests be administered to eligible applicants or employees with disabilities that impair sensory, manual, or speaking skills in formats that do not require the use of the impaired skill.

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34 C.F.R. § 104.42

Admissions and recruitment.

(a) *General*. Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions*. In administering its admission policies, a recipient to which this subpart applies:

* * *

(3) Shall assure itself that (i) admissions tests are selected and 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); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons;

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