No. 13-4544

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DAVID E. RAWDIN, M.D.,

Appellant,

v.

AMERICAN BOARD OF PEDIATRICS

Appellee.

On Appeal from the United States District Court,
Eastern District of Pennsylvania

BRIEF OF AMICI CURIAE THE ASSOCIATION ON HIGHER EDUCATION AND DISABILITY; THE BAZELON CENTER FOR MENTAL HEALTH LAW; THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES; THE CENTER FOR LAW AND EDUCATION; THE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES; DISABILITY RIGHTS ADVOCATES; EVERYONE READING, INC.; EYE TO EYE, INC.; THE INTERNATIONAL DYSLEXIA ASSOCIATION; THE NATIONAL COUNCIL ON INDEPENDENT LIVING; AND THE NATIONAL DISABILITY RIGHTS NETWORK

IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

None of the Amici has any parent corporation or any publicly held corporation that owns 10% or more of its stock.

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INTERESTS OF AMICI CURIAE[1]

The Association on Higher Education And Disability ("AHEAD") is a not-for-profit organization committed to full participation and equal access for persons with disabilities in higher education and the application of disability rights laws to standardized testing. Its membership includes faculty, staff, and administrators at colleges and universities across the United States, not-for-profit service providers and professionals, and college and graduate students planning to enter the field of disability practice. AHEAD members strive to ensure that institutions and organizations comply with applicable disability rights protections, including the provision of accommodations to students, employees, and individuals sitting for standardized tests in connection with admissions, education, professional licensing, credentialing, and employment.

The Bazelon Center for Mental Health Law is a national public-interest law organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Center has engaged in litigation, policy advocacy, public education, and training to promote equal opportunities for individuals with mental

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party's counsel has authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than amici curiae or their counsel—contributed money that was intended to fund preparing or submitting the brief.

disabilities in all aspects of life, including in licensure and employment. The majority of the Bazelon Center's work involves efforts to remedy disability-based discrimination through enforcement of the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq. (as amended) (the "ADA").

The American Association of People with Disabilities ("AAPD"), founded in 1995, is the largest national non-profit disability rights organization in the United States. AAPD promotes equal opportunity, economic power, independent living, and political participation for people with disabilities. Its members, including people with disabilities and family, friends, and supporters, represent a powerful force for change. AAPD works to ensure effective enforcement and implementation of the ADA and other civil rights laws.

The Center for Law and Education, Inc. ("CLE") is a national nonprofit organization that works with parents, advocates, and educators to improve the quality of education for all students, and, in particular, indigent students. CLE addresses systemic barriers that impede low-income students, who are disproportionately students of color and students with disabilities, from accessing a rigorous curriculum aligned to state standards through effective instruction. CLE's priorities include a focus on student assessment reform that relies upon policy-related strategies. This work deals with the use of assessments for school improvement and accountability, use of assessment for high-stakes decisions

(graduation, promotion, placement) about students, and use of classroom-based assessment as part of authentic instruction. CLE is committed to ensuring that professional standards and tests used to make high-stakes decisions about students are based on assessment systems capable of accurately determining each student's proficiency.

The Council of Parent Attorneys and Advocates ("COPAA") is a not-for-profit organization for parents of students with disabilities, their attorneys, and advocates. COPAA does not undertake individual representation for students with disabilities, but provides training and resources for attorneys and advocates to help each student obtain the free appropriate public education and special education services and supports guaranteed by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C § 1400 et seq., and other statutes. The primary goal of COPAA is to secure appropriate educational services for students with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1) (2008). Improving educational results for students in order to enhance and ensure equality of opportunity, full participation, independent living, and economic self-

sufficiency can be achieved only if all students are given the same opportunities to participate in testing without discrimination.

Disability Rights Advocates ("DRA") is a non-profit public-interest legal center that specializes in high-impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, employment, technology, and housing. DRA's clients, staff, and board of directors include people with various types of disabilities. With offices in Berkeley, California and New York City, DRA strives to protect the civil rights of people with all types of disabilities.

Everyone Reading, Inc. (formerly known as the New York Branch of the International Dyslexia Association) is a not-for-profit organization that provides public information, referrals, training, and support to professionals, families, and affected individuals regarding the impact and treatment of people with dyslexia and related learning disorders. Its members are actively engaged in providing special educational services, including targeted educational interventions and the provision of accommodations for students with disabilities at all levels of education and in high-stakes standardized testing. It is an active advocate in matters regarding public policy and the legal concerns of people with dyslexia and related learning disorders throughout their lives, including access to public

services, public accommodations, employment, and high-stakes standardized testing.

Eye to Eye, Inc., a not-for-profit organization, is the only national mentoring movement pairing children with learning disabilities ("LD") and attention deficit hyperactivity disorder ("ADHD") with similarly labeled college students. Using an arts-based curriculum, Eye to Eye helps children with LD and ADHD embrace their abilities as "different thinkers," to value their own unique minds, build their self-esteem, and learn the skills to become self-advocates. The organization has grown from a small four-chapter initiative in 1998 serving less than 100 students to a visible national player in the education space with 56 chapters across 20 states working directly with thousands of students, annually. This year alone, Eye to Eye's student volunteers will provide over 60,000 hours of volunteer service.

The International Dyslexia Association ("IDA") is the oldest learning disabilities organization in the nation dedicated to helping individuals with dyslexia, their families, and the communities that support them. IDA works to meet the organization's mission of providing education, research, and advocacy through its 47 branches across the United States and Canada and in conjunction with its global partners throughout the world. Its goal is to provide a comprehensive forum for parents, educators, and researchers to share experiences,

methods, and knowledge. It is also an active advocacy group in matters of public policy or legal concern.

The National Council on Independent Living ("NCIL") is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership comprises centers for independent living, state independent living councils, people with disabilities, and other disability rights organizations. NCIL's mission is to advance the independent living philosophy and to advocate for the human rights of, and services for, people with disabilities to further their full integration and participation in society.

The National Disability Rights Network ("NDRN") is the non-profit membership association of Protection and Advocacy ("P&A") agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. P&A agencies are authorized pursuant to various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy. NDRN also works to create a society in which people with disabilities are afforded equality of opportunity and are able to participate fully by exercising choice and

self-determination, including the opportunity to secure and maintain competitive, integrated employment.

SUMMARY OF ARGUMENT

1. The district court erred as a matter of law in deciding that plaintiff-appellant David Rawdin, M.D. did not have a disability. The district court's decision cannot be squared with the Americans with Disabilities Act Amendments Act of 2008 (the "ADA Amendments Act" or "ADAAA"). In enacting the ADA Amendments Act, Congress expressly rejected case law and reasoning that excluded from coverage under the ADA academically successful individuals with learning disabilities—such as Dr. Rawdin. In concluding that Dr. Rawdin did not have a disability, the district court wrongly relied on this outmoded case law and reasoning that Congress expressly swept aside.

2. The district court also erred as a matter of law in determining that, even if he had a disability, Dr. Rawdin was provided adequate accommodations for his disability. The district court improperly granted defendant-appellee the American Board of Pediatrics ("ABP") deference that is accorded to educational institutions concerning academic matters, without finding that ABP has particular expertise in determining the specific testing methodologies that best measure the knowledge and skills required of pediatricians. In addition, the district court erroneously applied the "reasonable accommodation" standard rather than the "best ensure" standard that applies to testing entities and determined that the accommodations

that Dr. Rawdin sought were not reasonable and would place an undue burden on ABP.

INTRODUCTION

Congress enacted the ADA Amendments Act in 2008. Pub. L. No. 110-325, 122 Stat. 3553, 42 U.S.C. § 12101 (2008). Congress made far reaching changes in the ADAAA designed to overrule prior case law and to eliminate the type of reasoning used by the district court in this case to conclude that Mr. Rawdin did not have a disability: measuring test outcomes that an individual achieves, often with tremendous extra effort and adaptive measures, rather than considering the condition, manner, or duration in which the person learns, takes tests, or performs other major life activities compared to most people. While the district court acknowledged the 2008 amendments to the ADA, it nonetheless applied precisely the type of analysis and cited the very cases that Congress directly rejected.

BACKGROUND

The district court recognized that Dr. Rawdin "is, by all accounts, an excellent pediatrician." JA4.[2] In 1987, while he was in college, Dr. Rawdin was diagnosed with a brain tumor. JA5. To treat the tumor, he underwent brain surgery, chemotherapy, and radiation therapy. *Id.* After his treatment, Dr. Rawdin began to experience difficulty taking multiple-choice examinations. *Id.*

[2] All references to the Joint Appendix are cited by a prefix JA and the page number.

Dr. Rawdin was evaluated by a neuropsychologist, Laura Slap-Shelton, Psy.D. JA6. Dr. Slap-Shelton determined that as a result of his brain tumor and subsequent treatment, Dr. Rawdin had sustained a cognitive impairment, diagnosed as Cognitive Disorder-Not Otherwise Specified, an acquired learning disability. *Id.* Dr. Slap-Shelton further determined that this impairment interfered significantly with Dr. Rawdin's performance when taking multiple-choice examinations. *Id.* His difficulty in taking multiple-choice tests is the result of an impairment centered on aspects of recall.

Due to a recurrence of his tumor, Dr. Rawdin left the medical profession for a number of years, and changed his specialty from surgery to pediatrics. *Id.* In 2003, he began clinical practice as a pediatrician at the Children's Hospital of Philadelphia ("CHOP"). JA7. Dr. Rawdin's performance during his tenure at CHOP was exemplary. *Id.*

Under CHOP's bylaws, physicians employed by the hospital must be board-certified in their specialties within five years of employment. *Id.* ABP is responsible for certifying physicians in the field of pediatrics. JA8. To obtain certification, pediatricians must meet a number of requirements, including passing a multiple-choice exam known as the General Pediatrics Certifying Examination (the "Exam"). *Id.* Dr. Rawdin met all the requirements for certification other than passing the Exam, which he has taken and failed five times. *Id.* Dr. Rawdin was

granted an extension on obtaining certification by CHOP based on his excellent work and his impairment. JA11. After failing the Exam for a fourth time, Dr. Rawdin was terminated in January 2010. *Id.*

In 2011, Dr. Rawdin took the Exam for a fifth time. JA12. Dr. Slap-Shelton sent ABP a letter on Dr. Rawdin's behalf, advising ABP of Dr. Rawdin's diagnosis and recommending a number of accommodations. JA12–13. ABP provided Dr. Rawdin some accommodations, but denied a number of Dr. Slap-Shelton's recommendations due in part to the cost. JA13-14. In October 2011, Dr. Rawdin failed the Exam for a fifth time. JA14. He then filed this lawsuit seeking injunctive relief under the ADA. *Id.*

The district court entered judgment in favor of ABP. JA37. It found that Dr. Rawdin had a "memory impairment" and that the impairment impacted the major life activity of test-taking. JA24–25. Nevertheless, it determined that Dr. Rawdin did not have a disability under the ADA because his impairment did not substantially limit his ability to engage in test-taking. JA26. The district court reasoned that Dr. Rawdin could not be substantially limited in test-taking because the evidence did not show that his test-taking abilities were "lower than those of the average person in the general population." *Id.*

The district court went on to decide that, even if Dr. Rawdin had a disability, the accommodations he sought were not reasonable and would have imposed an

undue burden and cost on ABP. JA35. The court recognized that ABP is *not* an educational institution. JA32. It nonetheless extended ABP the same level of deference that is granted to educational institutions in academic decision-making. *Id.* Further, although the district court recognized that ABP was required to demonstrate that its exam best ensures that it is testing an individual's ability and not his disability, it wrongly evaluated the accommodations that ABP provided based on the "reasonable accommodations" standard rather than the "best ensure" standard. JA33.

ARGUMENT

I. CONGRESS ADOPTED THE ADA AMENDMENTS ACT, AND THE EEOC PROMULGATED IMPLEMENTING REGULATIONS, TO PREVENT PRECISELY THE KIND OF DECISION REACHED BY THE DISTRICT COURT HERE.

In enacting the ADA Amendments Act in 2008, Congress specifically rejected a line of cases holding that an individual who had achieved academic success cannot have a disability under the ADA related to test-taking or learning activities. While paying lip service to the ADA Amendments Act, the district court held that Dr. Rawdin did not have a disability based precisely on this rejected reasoning. The district court failed to take into account Dr. Rawdin's impairment based on his substantial limitation, and instead decided that he did not have a disability based on outcomes that he was able to achieve despite his impairment.

The district court's decision is out of step with what Congress intended in passing the ADAAA and should therefore be reversed.

A. Congress Enacted the ADA Amendments Act To Restore the Broad Coverage of Disabilities Intended in the ADA.

Congress passed the ADA Amendments Act to reverse a series of court decisions narrowly construing the scope of the ADA and to restore broad coverage of disabilities under the ADA. Congress intended, for example, to ensure that a person with a specific learning disability—like Dr. Rawdin—is not excluded from coverage under the ADA because he or she performs well academically.

Congress designed the ADA Amendments Act to require expansive interpretation of the term "disability." As set forth in the Preamble, Congress passed the law to "restore the intent and protections of the Americans with Disabilities Act of 1990." Pub. L. No. 110-325. "Congress intended that the [ADA] … provide *broad coverage*." *Id.* § 2(a)(1) (emphasis added). Congress adopted the ADAAA in response to a series of Supreme Court decisions that had "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect." *Id.* § 2(a)(4).

In one of those cases, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), the Supreme Court had interpreted the terms "substantially" and "major" to create "a demanding standard for qualifying as

disabled." *Id.* at 197; Pub. L. No. 110-325, § 2(b)(4). In another case, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), Congress noted that the Supreme Court decided "that whether an impairment substantially limits a major life activity [was] to be determined with reference to the ameliorative effects of mitigating measures." Pub. L. No. 110-325, § 2(b)(2). And as a result of these Supreme Court cases, Congress noted, "lower courts ha[d] incorrectly found in individual cases that people with a range of substantially limiting impairments [were] not [considered] people with disabilities." *Id.* § 2(a)(6).

Congress therefore enacted the ADA Amendments Act "to carry out the ADA's objectives … by reinstating a broad scope of protection to be available under the ADA." *Id.* § 2(b)(1). Congress rejected the requirement that impairments be considered with reference to "the ameliorative effects of mitigating measures" (i.e., the requirement that an individual who effectively managed his or her impairment through mitigating measures did not have a disability regardless of the additional effort involved in those mitigating measures). *Id.* § 2(b)(2). It also rejected the "demanding standard for qualifying as disabled" set forth in *Toyota Motor*. *Id.* § 2(b)(4).

Instead, Congress made clear that "the question of whether an individual's impairment [was] a disability under the ADA" was not to be given "extensive analysis." *Id.* § 2(b)(5). Congress went so far as to adopt "Rules of Construction

regarding the Definition of Disability" to ensure that courts applied the broad standard it intended rather than the crabbed meaning applied under the rejected Supreme Court case law. These Rules provided that "[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." *Id.* § 4(a)(4)(A).

The ADAAA's legislative history underscores Congress's resolve that the courts should construe "disability" broadly. The Statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008 ("Statement of Managers"), makes plain Congress's "intent that the courts must interpret the definition of disability broadly rather than stringently":

- "'substantially limits' … is not meant to be a demanding standard";
- "the correct standard … will make the disability determination an appropriate threshold issue but not an onerous burden";
- "the definition of disability in the ADA is to be interpreted broadly and inclusively";
- "[t]he definition of disability should not be unduly used as a tool for excluding individuals from the ADA's protections."

154 Cong. Rec. S8841–42 (daily ed. Sep. 16, 2008).

The House of Representatives and the Senate were of one mind. The House Committee on Education and Labor, for example, stated in its report that "the ADA was intended to be broad and inclusive," but that "the courts ha[d] narrowed the interpretation of disability and found that a large number of people with

substantially limiting impairments [were] not to be considered people with disabilities," rather than evaluating whether a qualified individual had experienced discrimination. Committee on Education and Labor Report together with Minority Views (to accompany H.R. 3195), H.R. Rep. No. 110-730 part 1, 110th Cong., 2d Sess. (June 23, 2008) ("2008 House Comm. on Educ. and Labor Report").

Likewise, the Committee on the Judiciary Report made clear that the ADA provided a "broad mandate." The Committee on the Judiciary Report together with Additional Views (to accompany H.R. 3195), H.R. Rep. No. 110-730 part 2, 110th Cong., 2d Sess. (June 23, 2008). Congress enacted the ADAAA because "the courts began interpreting and applying the definition of disability strictly." As a result, "individuals ha[d] been excluded from the protections that the ADA affords because they are unable to meet the demanding judicially imposed standard for qualifying as disabled." *Id.* at 5. Echoing the Senate's Statement of Managers, the House Judiciary Committee wrote that "Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage." *Id.*

The Committee on the Judiciary also rejected the view that an individual who effectively managed his or her impairment through mitigating measures could not be considered to have a disability despite the additional effort involved in those mitigating measures. "[T]he last message we would want to send to Americans

with disabilities … is the less you manage your disability, the less you try, the more likely you are to be protected under civil rights laws." *Id.* at 10 (quoting Cheryl Sensenbrenner, then-Chair of the American Association of People with Disabilities Board of Directors).

In short, in enacting the ADAAA, Congress rejected court cases narrowly interpreting the ADA and restored broad coverage of disabilities that had been judicially eroded. With great and manifest purpose, Congress set a low bar for showing disability—one that did not demand "extensive analysis." Pub. L. No. 110-325, § 2(b)(5).

B. Congress Confirmed that Individuals with Learning Disabilities who Achieve Academic Success Are Protected by the ADAAA and Specifically Rejected Case Law to the Contrary.

In the ADA Amendments Act, Congress also explicitly and in no uncertain terms rejected case law deciding that an individual who had a learning disability but is nevertheless successful academically was not covered under the ADA. It is "critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking." 154 Cong. Rec. at S8842; *see also* 2008 House Comm. on Educ. and Labor Report at 10 (stating the same in nearly identical language).

The House Committee on Education and Labor noted that "some courts ha[d] found that students who ha[d] reached a high level of academic achievement [were] not to be considered individuals with disabilities under the ADA." *Id.* The Committee Report singled out—and rejected—the decisions in *Price v. National Board of Medical Examiners*, 966 F. Supp. 419, 427 (S.D. W.Va. 1997); *Gonzales v. National Board of Medical Examiners*, 225 F.3d 620 (6th Cir. 2000); and *Wong v. Regents of Univ. of Cal.*, 379 F.3d 1097 (9th Cir. 2004). In each of these three cases, the courts had held that an individual who performs well academically cannot have a disability under the ADA.

In *Price*, the plaintiffs sought injunctive relief compelling the National Board of Medical Examiners ("NBME") to provide them with accommodations based in part on their specific learning disabilities. 966 F. Supp. at 421–23. The court agreed that they had learning difficulties, but denied them coverage under the ADA based on their "history of significant scholastic achievement." *Id.* at 427–28. The court reasoned that individuals with "superior intellectual capacity" whose impairments resulted in average performance levels were not covered by the ADA because they could still learn "as well as the average person." *Id.* at 427.

Similarly, in *Gonzales*, the plaintiff also sought injunctive relief compelling the NBME to provide him with accommodations. 225 F.3d at 622. The NBME did not dispute that the plaintiff had a mental impairment. *Id.* at 626.

Nevertheless, the Sixth Circuit denied the plaintiff coverage under the ADA based on the fact that the he had been academically successful and could "read as well as the average person." *Id.* at 629.

Finally, in *Wong*, the district court found there was no dispute that the plaintiff had a learning disability and that the limitations alleged involved major life activities. 379 F.3d at 1106. Nevertheless, the Ninth Circuit denied coverage because it found that he did not have a disability. *Id.* at 1108. The plaintiff's "claim to be 'disabled' [was] fatally contradicted by his ability to achieve academic success, without special accommodations." *Id.* The plaintiff was "not less able to 'learn' than most people. His record proves the contrary." *Id.* at 1109.

Congress expressly rejected the decisions in *Price*, *Gonzales*, and *Wong* that "an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking." Statement of Managers, 154 Cong. Rec. at S8842. "[I]ndividuals with specific learning disabilities that substantially limit a major life activity will be *better* protected under the amended Act." 2008 House Comm. on Educ. and Labor Report at 11 (emphasis added).

C. EEOC Regulations Implementing the ADAAA Demonstrate That Pre-ADAAA Cases Conflating Academic Success With No Disability Are No Longer Valid.

The EEOC's regulations implementing the ADAAA likewise provide that an individual's academic success does not exclude that individual from coverage under the ADA based on a specific learning disability.[3] According to those regulations:

- "[S]omeone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population." 29 C.F.R. § 1630.2(j)(4)(iii).
- The requirement that an individual with a disability must be compared to the general population "does not mean that disability cannot be shown where an impairment, such as a learning disability, is clinically diagnosed based in part on a disparity between an individual's aptitude and that individual's actual versus expected achievement…" *Id.* § 1630.2(j)(1)(v).

[3] While the EEOC's regulations apply to Title I of the ADA, and this case arises under Title III, the same definition of disability applies throughout the ADA. Notably, the district court cited to the EEOC's regulations throughout its decision. *See, e.g.*, JA21. The Department of Justice, which is charged with promulgating regulations to implement Title III, has recently proposed regulations that are substantially similar to those of the EEOC.

II. IN DETERMINING THAT DR. RAWDIN DID NOT HAVE A DISABILITY, THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD.

A. The District Court Erred as a Matter of Law in Concluding that Dr. Rawdin Did Not Have a Disability Based on *Wong* and *Gonzalez*.

The district court's decision is at war with the ADA Amendments Act. Despite the ADAAA's explicit rejection of *Price*, *Gonzales*, and *Wong*, the district court relied on the exact same reasoning applied in those cases in determining that Dr. Rawdin did not have a disability under the ADA. *Indeed, the court specifically cited Gonzales and Wong in support of its decision*.[4] JA26–27.

The facts in this case closely resemble the facts in *Price*, *Gonzales*, and *Wong*. Dr. Rawdin has a mental impairment. JA4. He has undergone brain surgery, chemotherapy, and radiation therapy to treat a brain tumor. JA5. As a result, he experiences difficulty taking multiple-choice examinations. *Id.* Testing has shown a significant discrepancy between Dr. Rawdin's overall intellectual ability and his ability to take such tests. JA6.

[4] That the district court cited the amended opinion in *Wong*, rather than the opinion cited in the legislative history of the ADA Amendments Act, is of no moment. JA26 (citing *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1054 (9th Cir. 2005)). Both opinions were issued years before Congress adopted the ADAAA, and the reasoning in both opinions is the same.

Based on Dr. Rawdin's neuropsychological test scores, the district court correctly determined that he suffered from an impairment. JA23. The district court also correctly determined that his impairment limited a major life activity, namely test-taking. JA24–25. And the district court properly recognized that "[w]hether an individual's limitation is substantial is measured in comparison to 'most people.'" JA25 (citing 28 C.F.R. pt. 35, App. B § 35.104; 29 C.F.R. § 1630.2(j)(1)(ii)). But it then erroneously concluded, as did the courts in *Price*, *Gonzales*, and *Wong*, that Dr. Rawdin's academic success meant that he did not have a disability. "Despite this relative impairment, however, his test scores are all either in the average or above average range." JA26. The district court then concluded—citing *Wong* and *Gonzalez*—that Dr. Rawdin could not be substantially limited in test-taking because the evidence did not show that his test-taking abilities were "lower than those of the average person in the general population." JA26–27.

Thus, the court incorrectly concluded that Dr. Rawdin's impairment did not rise to the level of a disability under the ADA Amendments Act. *Id.* The district court's decision reintroduced exactly the line of reasoning and relied on the very cases that Congress overruled in passing the ADA Amendments Act.

B. The District Court Erred by Evaluating Dr. Rawdin's Impairment Based on the Results of His Test-Taking Rather Than by Considering the Condition, Manner, or Duration of His Test-Taking Capabilities as Compared to the General Population.

The district court incorrectly concluded that Dr. Rawdin did not have a disability because his test-taking ability was better than the average. A proper evaluation of Dr. Rawdin's impairment would have led to the conclusion that he had a disability because he was substantially limited in ways that most people are not.

In passing the ADAAA, Congress recognized that the treatment of individuals with specific learning disabilities is "one area which may be easily misunderstood." Statement of Managers, 154 Cong. Rec. at S8842. Given that an impairment is to be evaluated as compared to the general population, it is easy to assume "that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking." *Id.* Congress warned that "it is critical to reject [that] assumption." *Id.* It is therefore necessary to analyze an impairment caused by specific learning disabilities in a way that does not simply rely on an individual's academic performance.

The legislative history is instructive in developing such an analysis. In its report, the Committee on Education and Labor observed that "[f]or the majority of the population, the basic mechanics of reading and writing … are effortless,

unconscious, automatic processes … [but] the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow." 2008 House Comm. on Educ. and Labor Report at 11. Therefore, while an individual with a reading disability might be more successful academically than the average person, that individual would still be "substantially limited" as compared to most people, for whom reading was an automatic process.

By way of analogy, an amputee running, swimming, or biking in the Paralympic Games might well be faster—indeed much faster—than the average person. But that hardly means that this athlete's impairment is not a disability under the ADA. The athlete cannot run, swim, or bike with the same physical mechanics as the average person, and must spend his or her time and energy mitigating the disability in order to perform at the level he or she does. A proper analysis of the physical impairment would therefore focus not on how fast the amputee finished the race, but rather the condition, manner, or duration of how he or she finished the race, as compared to the average person.

In this case, the district court concluded that Dr. Rawdin did not have a disability because his test-taking ability was better than the average. In light of the path Congress charted in the ADAAA, this outcome is flawed. The district court should have focused *not* on the test results that Dr. Rawdin was able to achieve, but

rather on the *condition, manner, or duration* of how he achieved those results, as compared to the average person.[5] Such an analysis would have zeroed in on the substantial discrepancy between intelligence and memory that Dr. Rawdin experienced—a condition and manner that the average person does *not* confront in test taking—and inexorably lead to the conclusion that Dr. Rawdin, when compared to most people, has a disability because his impairment substantially limits major life activities including test-taking, learning, and memory recall.[6]

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[5] Discrepancies between intelligence and memory are scored such that 15 points is one standard deviation from the norm. Thus the 21 point discrepancy here is one-and-a-half deviations below expected, meaning a greater discrepancy than that experienced by 94 percent of the population. The probability that a discrepancy of this magnitude exists as a matter of chance is less than 5% in the general population. *See* JA874 (Dr. Slap-Shelton's 2007 Report of Neuropsychological Testing). Dr. Rawdin has a significant discrepancy between intelligence and recall, establishing a substantial impairment of a major life activity. Although the ADAAA does not require such a formal statistical comparison, 29 C.F.R. § 1630.2(j)(3)(v), these numbers reflect a substantial limitation compared to most people in the general population.

[6] Although not argued directly in the district court, this conclusion also follows from the fact that Dr. Rawdin's impairment is the direct result of surgery, chemotherapy, and radiation therapy to treat a brain tumor. *See* JA5. Dr. Rawdin's inability to take multiple-choice tests commensurate with his other intellectual capabilities is thus the product of a physical impairment resulting from "[ab]normal cell growth" and abnormal "neurological" functions, which the statute identifies as major life activities. 42 U.S.C. § 12102(2)(B) ("a major life activity also includes the operation of a major bodily function"). The EEOC's implementing regulations state that cancer is "virtually always" a disability because, in virtually all cases, it substantially limits normal cell growth. 29 C.F.R. § 1630.2(j)(3)(iii).

III. THE DISTRICT COURT ERRED IN DETERMINING THAT DR. RAWDIN WAS NOT ENTITLED TO THE ACCOMMODATIONS HE SOUGHT.

The district court's determination that the accommodations sought by Dr. Rawdin were not appropriate rests on two flawed premises. First, the court improperly granted a testing entity the deference that is accorded to educational institutions. Second, the court applied the "reasonable accommodation" standard rather than the "best ensure" standard that applies to testing entities.

A. The District Court Granted ABP Deference to Which It Was Not Entitled.

There is no support in the case law for the district court's bald conclusion that a testing entity should be accorded deference. The district court—without explanation—cited a number of cases that considered academic decisions made by *educational institutions*. *See* JA31–32.

Decisions by academic institutions are regularly granted deference as courts are "particularly ill-equipped to evaluate academic performance." *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1047 (9th Cir. 1999). As the court recognized however, ABP is not an educational institution. JA32.

The district court's explanation of why it paid deference to ABP's decision is scant at best. *See id.* And the district court's decision to defer to ABP's decision finds no support in the mountain of cases involving testing entities. Amici were able to locate *no* testing case—other than this one—where a court extended special

deference to a testing entity. *See, e.g., Enyart v. NCBE*, 630 F.3d 1153, 1160-65 (9th Cir. 2011) (discussing merits of ADA claim against testing entity without giving deference to the testing entity). Indeed, the cases granting academic deference are premised on First Amendment concerns that are absent in this context. *See, e.g., Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom... That freedom is therefore a special concern of the First Amendment.").

Even if ABP were entitled to deference, however, it is inapplicable here. Academic deference, even when appropriate, may not be used to mask discriminatory conduct. *See, e.g., Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 817 (9th Cir. 1999). Moreover, deference is limited to academic decisions. Deference may therefore be appropriate as to the *content* of an exam, but it is not appropriate as to the *validity* of an exam—whether a successful test outcome correlates with successful job performance.[7] And courts routinely evaluate whether tests are valid—and pay no deference even to academic institutions when conducting such evaluations.

[7] While ABP may have expertise in the subject matter of the test, ABP has not demonstrated that it has expertise concerning the selection of particular testing methodologies or the validity of the methodologies it has chosen.

In determining what accommodations might be appropriate, there is no record evidence showing that ABP consulted with testing professionals with expertise in learning disabilities to ensure that the Exam was equally accessible to Dr. Rawdin. *See, e.g., D'Amico v. New York State Board of Law Examiners*, 813 F. Supp. 217, 223 (W.D.N.Y. 1993) ("The Board's opinion as to what is 'reasonable' for a particular applicant can be given very little weight when the Board has no knowledge of the disability or disease, no expertise in its treatment, and no ability to make determinations about the physical capabilities of one afflicted with the disability or disease.").

B. The District Court Failed to Apply the "Best Ensure" Standard Applicable to Testing Entities.

The district court also erred because it failed to comprehend and take into account the distinction between the "reasonable accommodation" standard and the "best ensure" standard that applies to testing entities. ABP is subject to 42 U.S.C. § 12189, which specifically applies to entities that offer "examinations or courses related to … professional, or trade purposes." This provision requires that such entities offer examinations or courses in a place and manner accessible to individuals with disabilities or offer alternative accessible arrangements for such individuals. As the Ninth Circuit recognized in *Enyart*, "Congress did *not* incorporate [the] 'reasonable accommodation' standard into § 12189." 630 F.3d at 1162 (emphasis in original). Instead, § 12189 is ambiguous with respect to its

requirement that entities administer licensing exams in a manner "accessible" to individuals with disabilities. *Id.*

In light of this ambiguity, the Department of Justice's interpretation of the statute, as set forth in 28 C.F.R. § 36.309, is entitled to deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984); *see also Robert Wood Johnson Univ. Hosp. v. Thompson*, 297 F.3d 273, 281 (3d Cir. 2002) (applying *Chevron* deference). And under this Department of Justice regulation, the testing entity must design and administer the examination "so as to *best ensure* that … the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills." *Id.* (emphasis added); *see also* Br. for the U.S. as Amicus Curiae, at 14–15.

The district court failed to apply this proper standard when it determined that Dr. Rawdin was not entitled to the accommodations he sought. Thus, as administered to Dr. Rawdin, the Exam reflected his impairment and failed to measure his aptitude and achievement level, which were far beyond his performance on ABP's test. The district court, using the correct standard, would have determined that the test did not best ensure that it measured Dr. Rawdin's

aptitude and achievement level. After all, as the district court recognized, he was "by all accounts an *excellent pediatrician*." JA4 (emphasis added).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief of Appellants was prepared in Microsoft Word, Times New Roman, 14 point font. According to the computer's word count function, and in accordance with the computation rules set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), 29(d), and Local Appellate Rule 29.1(b), the brief contains 5,053 words. The text of the electronic brief is identical to the text in any paper copies. I certify that the electronic version of this document has been checked for computer viruses using Symantec Endpoint Protection software, and found to be virus free.

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 28.3(d), I hereby certify that I am a member of the bar of this Court.

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CERTIFICATE OF SERVICE

I certify that on March 21, 2014, I electronically filed the foregoing Brief of Amici Curiae The Bazelon Center for Mental Health Law; The Association on Higher Education And Disability; The American Association of People with Disabilities; The Center for Law and Education; The Council of Parent Attorneys and Advocates; Disability Rights Advocates; Everyone Reading, Inc.; Eye to Eye, Inc.; The International Dyslexia Association; The National Council on Independent Living; and The National Disability Rights Network In Support of Plaintiff-Appellant with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the Appellate CM/ECF system and that seven paper copies identical to the brief filed electronically were sent to the Clerk of the Court by first class mail pursuant to L.A.R. 31.1 and the April 29, 2013 Order of the Court re Reduced Number of Copies of Briefs Required. I further certify that counsel of record are CM/ECF participants and will be served electronically by the Appellate CM/ECF system pursuant to L.A.R. 113.4(a).

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