

No. 10-35233

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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TRISH JOHNSON,

Plaintiff-Appellant

v.

BOARD OF TRUSTEES OF BOUNDARY COUNTY  
SCHOOL DISTRICT NO. 101, *et al.*,

Defendants-Appellees

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

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BRIEF FOR THE UNITED STATES AND EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION AS *AMICI CURIAE* SUPPORTING  
PLAINTIFF-APPELLANT AND URGING REVERSAL

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**STATEMENT OF THE ISSUE**

This brief will address the following issue:

Whether the district court erred in holding that plaintiff was not a “qualified individual with a disability” under Title I of the Americans with Disabilities Act, 42 U.S.C. 12111 *et seq.*, because the lapse of her teaching certificate meant she was no longer qualified under state law to hold a teaching position.

## **INTEREST OF THE UNITED STATES**

This case involves the definition of a “qualified individual” with a disability within the meaning of Title I of the Americans with Disabilities Act. See 42 U.S.C. 12111(8). The Attorney General has authority to enforce Title I against state and local governmental employers. 42 U.S.C. 12117(a). The EEOC enforces Title I with respect to private employers, and is authorized to issue regulations under that Title. 42 U.S.C. 12116, 12117(a). The EEOC has issued regulations pursuant to that authorization, see 29 C.F.R. Pt. 1630, as well as the Interpretative Guidance on Title I, see Appendix to 29 C.F.R. Pt. 1630. Accordingly, the federal government has a significant interest in the resolution of this case.

### **STATEMENT**

#### *1. Statutory And Regulatory Background*

Title I of the ADA prohibits an employer from discriminating against “a qualified individual on the basis of a disability.” 42 U.S.C. 12112(a). A “qualified individual” with a disability is a disabled individual “who, with or without reasonable accommodation, can perform the essential functions of the employment position.” 42 U.S.C. 12111(8). The forms of discrimination prohibited by Title I include “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 [the employer] can demonstrate that the

accommodation would impose an undue hardship on the operation of the business.” 42 U.S.C. 12112(b)(5)(A).

A section of Title I entitled “Defenses” states that “[i]t may be a defense to a charge of discrimination under [the ADA] that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation.” 42 U.S.C. 12113(a).

The ADA requires the EEOC to issue regulations to carry out the provisions of Title I, and the EEOC, following public notice and comment, has issued regulations pursuant to that mandate. 42 U.S.C. 12116; 56 Fed. Reg. 35,726. EEOC regulations implementing Title I define the term “qualified individual with a disability” to mean “an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.” 29 C.F.R. 1630.2(m). “Essential functions” are “fundamental job duties of the employment position \* \* \* not includ[ing] the marginal functions of the position.” 29 C.F.R. 1630.2(n)(1).

Pursuant to its Interpretive Guidance on Title I, the EEOC applies a two-step process to determine whether an individual with a disability is “qualified.” 29 C.F.R. Pt. 1630, App. 1630.2(m). “The first step is to determine if the individual satisfies the prerequisites for the position,” such as possessing “licenses.” *Ibid.* For example, the EEOC Interpretive Guidance provides that “the first step in determining whether an accountant who is paraplegic is qualified for a certified public accountant (CPA) position is to examine the individual’s credentials to determine whether the individual is a licensed CPA.” *Ibid.* The purpose of this step is to determine “whether the individual is ‘otherwise qualified’ for the position.” *Ibid.*

The second step is to “determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation.” 29 C.F.R. Pt. 1630, App. 1630.2(m). The purpose of this second step is “to ensure that individuals with disabilities who can perform the essential functions of the position held or desired are not denied employment opportunities because they are not able to perform marginal functions of the position.” *Ibid.*

According to the EEOC’s Interpretive Guidance, “[t]he determination of whether an individual with a disability is qualified is to be made at the time of the employment decision.” 29 C.F.R. Pt. 1630, App. 1630.2(m). This determination

“should be based on the capabilities of the individual with a disability at the time of the employment decision,” rather than based on “speculation” about such individual. *Ibid.*

Another regulation promulgated by the EEOC prohibits employers from using qualification standards, tests, or other selection criteria that discriminate on the basis of a disability, unless the requirement “is shown to be job-related for the position in question and is consistent with business necessity.” 29 C.F.R. 1630.10. The EEOC’s Interpretive Guidance explains that an employer’s qualification standard “may not be used to exclude an individual with a disability if that individual could satisfy the criteria with the provision of a reasonable accommodation.” 29 C.F.R. Pt. 1630, App. 1630.10. The purpose of this provision is two-fold. It ensures that “individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job,” and ensures “a fit between job criteria and an applicant’s (or employee’s) actual ability to do the job.” *Ibid.*

## 2. *Facts*

Elementary and secondary school teachers in Idaho must have a valid teaching certificate. 2 ER 40.<sup>1</sup> Idaho teaching certificates are valid for five years.

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<sup>1</sup> “\_\_ ER\_\_” refers to the volume and page number of Johnson’s Excerpts of Record.

2 ER 40. To obtain recertification, teachers must obtain at least six professional development semester credit hours within that five-year period, at least three of which must be for college credit. 2 ER 40. In 2007, the Idaho State Board of Education had a provisional authorization policy that allowed school districts to request a one-year provisional certificate for individuals who were not appropriately certified. 2 ER 40.

Beginning in 1997, plaintiff-appellant Trish Johnson was employed as a special education teacher in a public school operated by defendant-appellee Board of Trustees of Boundary County School District No. 101 (Board). 1 ER 2; 2 ER 40. For most of her adult life, Johnson has suffered from bouts of depression arising from bipolar disorder. 1 ER 2; 2 ER 41. During the summer of 2007, she experienced a major depressive episode. 1 ER 2; 2 ER 41. This episode prevented her from completing the continuing education required for renewal of her teaching certificate prior to the 2007-2008 school year. 1 ER 2; 2 ER 41. Johnson's teaching certificate expired on September 1, 2007. 1 ER 2; 2 ER 41. On September 6, 2007, Johnson petitioned the Board to request a provisional one-year certificate for her from the Idaho State Board of Education. 1 ER 2; 2 ER 42. Her request for a provisional certificate would have allowed her additional time to complete her continuing education requirements and maintain her teaching certificate. 1 ER 2. The Board declined her request. 1 ER 2; 2 ER 42. Defendant-

appellee Don Bartling, the School District's Superintendent, immediately informed Johnson that her employment with the School was terminated. 1 ER 2.

3. *District Court's Decision*

Johnson filed a charge of discrimination with the Idaho Human Rights Commission and the EEOC on September 5, 2008. 2 ER 43-44. Johnson filed suit alleging that, among other things, the Board's refusal to seek a provisional one-year certification on her behalf amounted to discrimination in violation of the ADA, the Rehabilitation Act, 29 U.S.C. 794, and state law. 1 ER 4. The parties filed cross-motions for summary judgment. 1 ER 4. The district court granted the Board's motion for summary judgment and denied Johnson's motion for summary judgment on February 9, 2010. 1 ER 4. The court rejected Johnson's disability claims, holding that "at the time she requested accommodation, she was no longer 'qualified' to hold a teaching position in the State of Idaho." 1 ER 20.

The district court began its analysis by considering whether Johnson was a "qualified individual" under the ADA. 1 ER 20.<sup>2</sup> The court stated that

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<sup>2</sup> The district court found that Johnson's ADA claim was time-barred because Johnson conceded that "she did not file a Charge of Discrimination with the [EEOC] within 300 days, as required by law." 1 ER 19. Johnson's Rehabilitation Act and state law disability claims were not time-barred. 1 ER 19. The court properly addressed the "remaining claims together under the analytical framework provided by the ADA." 1 ER 19; see also *Coons v. Secretary of the U.S. Department of the Treasury*, 383 F.3d 879, 884 (9th Cir. 2004) ("The standards used to determine whether an act of discrimination violated the

(continued...)

“qualification for a position is a two-step inquiry,” where “the [c]ourt must first determine whether Johnson satisfies the ‘requisite skill, experience, education and other job-related requirements of the position and then determine whether Johnson, with or without reasonable accommodation,’ can perform the essential functions of the job.” 1 ER 20. With respect to the first step, the court looked to the EEOC’s Interpretive Guidance on the ADA, which provides that, among other factors, courts must consider “whether the position requires the individual to possess any necessary licenses.” 1 ER 21.

Johnson argued that the EEOC’s Interpretative Guidance “place[d] an additional obstacle in the way of employees seeking ADA protection [that is] not contemplated by the language of the statute.” 1 ER 21. In support of her argument, Johnson cited *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 990 (9th Cir. 2007) (en banc), for the principle that the plain language of the definition of a qualified individual with a disability, under 42 U.S.C. 12111(8), “does not require that a person meet each of an employer’s established ‘qualification standards’ \* \* \* to show that he is ‘qualified.’” 1 ER 21-22.

The district court disagreed. It distinguished *Bates* on the ground that, in this case, “the qualification standard at issue was not established by the *employer*”

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(...continued)

Rehabilitation Act are the same standards applied under the Americans with Disabilities Act.”).

but rather “is a statutorily mandated certification requirement imposed by the Idaho Legislature.” 1 ER 22. In addition, the court noted that, in this case, “the first and second parts of the ADA qualification inquiry dovetail.” 1 ER 22. Since “school teachers in Idaho must possess a valid teaching certificate,” the court concluded that when “Johnson’s teaching certificate expired she could no longer perform the ‘essential functions’ of the position because she was precluded by State law from doing so.” 1 ER 22-23.

The district court then addressed Johnson’s claim that she could have performed the essential functions of the position had the Board reasonably accommodated her disability by approving her request to seek a one-year provisional certification. 1 ER 23. The court explained that “[w]hether or not an individual is qualified under the ADA is determined at the time the adverse employment decision was made.” 1 ER 23. The court found that it was “undisputed that Johnson’s teaching certificate had expired” five days prior to her request for provisional certification. 1 ER 23. Accordingly, it ruled that “at the time of any adverse employment decision, Johnson was unable to perform the essential functions of the position and was not a qualified individual within the meaning of the ADA, [state law], or the Rehabilitation Act.” 1 ER 23. The district court therefore concluded, as a matter of law, that “the Board was not obligated to reasonably accommodate her disability.” 1 ER 23.

The court nevertheless went on, in *dicta*, to reject the Board's alternative argument that Johnson's request was unreasonable because the Board was precluded from requesting a provisional certificate for her as there were two other teachers in the school district who had teaching certificates and who could have filled her position. 1 ER 24-25. The court found it "*plausible* that [the state board of education] may have granted the provisional certification." 1 ER 25.<sup>3</sup>

### SUMMARY OF ARGUMENT

The district court erred in failing to ask the controlling question: whether plaintiff would have been a "qualified individual" under the ADA if she had received the one-year waiver of the certification requirement from the State board of education. Its failure to do so was in turn based upon its erroneous view that the reasonable accommodation requirement in Title I of the ADA does not apply to job qualification standards. Title I provides that a "qualified individual" with a disability is "an individual who, *with or without reasonable accommodation*, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. 12111(8) (emphasis added). The statute also allows employers a defense against a charge of discrimination when job qualifications

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<sup>3</sup> The district court also rejected plaintiff's due process and breach of contract claims. 1 ER 12-19. Plaintiff does not challenge those rulings on appeal.

“cannot be accomplished by reasonable accommodation.” 42 U.S.C. 12113(a) (emphasis added).

Title I’s plain language establishes that an employer must reasonably accommodate an employee or applicant with a disability, where such an accommodation is available to enable that individual to (1) perform an essential function of the job in question, 42 U.S.C. 12112(a), 12111(8); or (2) satisfy the job’s qualification standards or selection criteria, 42 U.S.C. 12113(a).

The statutory language thus makes clear that, in order to determine whether a person is “qualified” under the ADA, the court must assume that the plaintiff receives the reasonable accommodation he or she is requesting. The district court’s decision in this case essentially reads the phrase “with or without reasonable accommodation” out of the statute, and, as such, is at odds with this Court’s en banc decision in *Bates v. United Postal Service, Inc.*, 511 F.3d 974 (9th Cir. 2007).

The district court similarly misinterpreted the EEOC’s Interpretive Guidance at 29 C.F.R. Pt. 1630, App. 1630.2(m). Nothing in this Section of the Guidance states that an employer cannot also be required to reasonably accommodate an individual, where such an accommodation would enable that individual to satisfy a job qualification standard or other selection criterion. In fact, the EEOC’s Interpretive Guidance and Regulations explicitly contemplate that an employer

must reasonably accommodate an individual whose disability prevents him or her from satisfying a selection criterion. 29 C.F.R. Pt. 1610, App. 1630.10; 29 C.F.R. 1630.15(b)(1).

To be sure, there may be circumstances in which an employer may properly refuse to seek (or accept) a waiver of a licensing requirement. Cf. *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999). But in this case, the district court's incorrect interpretation of the phrase "qualified individual" led it to fail to conduct a proper inquiry into the question of whether plaintiff would have been qualified for the job in question had she obtained the waiver she requested.

Because the district court's grant of summary judgment for the defendants was based on a faulty legal premise, it should be set aside by this Court, and the case remanded for further proceedings.

## **ARGUMENT**

### **THE DISTRICT COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE INQUIRY INTO WHETHER PLAINTIFF WOULD BE A "QUALIFIED INDIVIDUAL" UNDER THE ADA IF SHE RECEIVED THE WAIVER SHE SOUGHT**

The district court erred in failing to ask the controlling question in granting defendants' motion for summary judgment: whether plaintiff would have been "qualified" for her teaching position if she had received the waiver she sought. For the reasons explained below, its failure to do so was based on its misinterpretation of the unambiguous language of the ADA, as confirmed by this Court's en banc

decision in *Bates*, as well as the EEOC's Regulations and Interpretive Guidance. The court's ruling improperly limits the application of the Act, and accordingly should be overturned by this Court.

1. This Court reviews an order granting summary judgment *de novo*. *Rohr v. Salt River Project Agric. Improvement and Power Dist.*, 555 F.3d 850, 857 (9th Cir. 2009). "Viewing the evidence in the light most favorable to the nonmoving party, [the Court] must determine whether there is a genuine issue of material fact and whether the district court correctly applied the relevant substantive law." *Id.* at 857-858.

2. Although the court dismissed plaintiff-appellant's ADA claim because she had failed to timely file a charge of discrimination under that statute, it relied on the ADA's analytical framework and case law to conclude that her Rehabilitation Act and Idaho Human Rights Act claims also failed. 1 ER 19. The court began with the premise that the ADA prohibits discrimination, including the failure to provide reasonable accommodation to "qualified" individuals. 1 ER 19. "Johnson's claims fail," the court reasoned, "because at the time she requested accommodation, she was no longer 'qualified' to hold a teaching position in the State of Idaho." 1 ER 20.

In reaching this conclusion, the court purported to rely on the EEOC's Interpretive Guidance, 29 C.F.R. Pt. 1630, App. 1630.2(m), which states that the

first step in determining whether an individual is “qualified” is to ascertain whether she “satisfies the prerequisites for the position, such as possessing the appropriate \* \* \* licenses,” while the second step is to determine whether the individual could perform the essential functions of the job with or without a reasonable accommodation. 1 ER 21. The court read the EEOC’s Interpretive Guidance to mean that an employer’s obligation of reasonable accommodation does not apply to job prerequisites, such as a teaching license. 1 ER 21-23. Thus, according to the district court’s rationale, an individual whose disability prevents him or her from obtaining a State-mandated license is *never* entitled to a reasonable accommodation because the individual is not “qualified.” This reading of the ADA, and of the EEOC’s Interpretive Guidance, was erroneous.

3. In any case involving statutory interpretation, the objective is to ascertain the intent of Congress. *Dole v. United States Steelworkers of Am.*, 494 U.S. 26, 35 (1990). To achieve that goal, a court must “start, as always, with the language of the statute.” *Williams v. Taylor*, 529 U.S. 420, 431 (2000).

As explained below, the language of the ADA itself makes clear that an employer has a duty to accommodate an individual with a disability who can perform the essential functions of the job, or satisfy job prerequisites or selection criteria, *with a reasonable accommodation*. Thus, an essential determination in each Title I ADA case is whether the plaintiff will be able to meet applicable job

qualifications and perform the essential functions of the job if she receives the requested reasonable accommodation. The district court's erroneous decision, that an employer is *never* required to seek a waiver of a State-mandated certification requirement, improperly pretermitted consideration of the question of whether plaintiff would be qualified for her teaching position with the waiver she requested, and thus constituted reversible error.

The statute's basic anti-discrimination provision, 42 U.S.C. 12112(a), prohibits discrimination on the basis of disability against a "qualified individual." The statute defines that term as "an individual with a disability who, *with or without reasonable accommodation*, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. 12111(8) (emphasis added). Title I also defines "discriminate" as failing to provide "reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability \* \* \* unless such covered entity can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. 12112(b)(5)(A). Thus, the statute prohibits discrimination on the basis of disability against any individual with a disability who can perform the essential functions of the position in question with a reasonable accommodation.

Similarly, 42 U.S.C. 12113(a) – which deals specifically with "qualification standards, tests, or selection criteria" – permits employers to use such standards

and criteria “that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability [and that have] been shown to be job-related and consistent with business necessity.” 42 U.S.C. 12113(a). The use of such standards and criteria is permissible, however, only where they “*cannot be accomplished by reasonable accommodation.*” *Ibid.* (emphasis added).<sup>4</sup>

Thus, under the plain language of the statute, an employer must reasonably accommodate an employee or applicant with a disability, where such an accommodation is available to enable that individual to (1) perform an essential function of the job in question, 42 U.S.C. 12112(a), 12111(8); or (2) satisfy the job’s qualification standards or selection criteria, 42 U.S.C. 12113(a).

The district court’s decision, however, was not faithful to the language of the statute. By erroneously concluding that the duty to reasonably accommodate is

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<sup>4</sup> As explained above, the text of the statute plainly indicates that the reasonable accommodation requirement applies to job qualification standards under the ADA. Moreover, the legislative history of the Act is consistent with this conclusion. For example, the relevant House Report explains that the term “otherwise qualified individual” in Title I describes “a person with a disability who meets all of an employer’s job-related selection criteria except those criteria he or she cannot meet because of a disability.” See H.R. Rep. No. 485, 101st Cong., 2d Sess. 64-65 (1990). Similarly, the relevant Senate Report explains that “otherwise qualified” means “a person with a disability who meets all of an employer’s job-related selection criteria except such criteria he or she cannot meet because of a disability.” S. Rep. No. 116, 100th Cong., 1st Sess. 33-34 (1989). Thus, the interpretation of Title I’s basic anti-discrimination provision, 42 U.S.C. 12112(a), as including a reasonable accommodation requirement is confirmed by the Act’s legislative history.

inapplicable to job qualification standards, the court failed to conduct the inquiry mandated by the statute; *i.e.*, whether plaintiff would have been “qualified” for the job if she received the waiver she requested.

The district court’s ruling is also inconsistent with this Court’s en banc decision in *Bates v. United Parcel Service, Inc.*, 511 F.3d 974 (9th Cir. 2007). In that case, the Court noted that the reasonable accommodation requirement is a component of both the definition of “qualified individual” in 42 U.S.C. 12111(8) and the “business necessity” defense in 42 U.S.C. 12113(a). *Id.* at 989. The Court observed in *Bates* that that “it would make little sense to require an ADA plaintiff to show that he meets a qualification standard that he undisputedly *cannot* meet because of his disability and that forms the very basis of his discrimination challenge.” *Id.* at 990 (footnote omitted). In addition to “the plain language of the statute,” the Court cited the statute’s legislative history for the proposition that the Act protects a person with a disability who meets all of the selection criteria except one that he cannot meet because of his disability. *Id.* at 990-991 n.6. Although the district court purported to follow *Bates*, it failed even to cite Section 12113(a), which specifically addresses qualification standards and other selection criteria.

The district court similarly misinterpreted the EEOC's Interpretive Guidance at 29 C.F.R. Pt. 1630, App. 1630.2(m).<sup>5</sup> To be sure, the Guidance states that the first step in the "qualified" inquiry is to determine whether an individual satisfies the appropriate *selection criteria* (such as determining whether a paraplegic applicant for a CPA position has a CPA license), and that the second step is to determine whether an individual can perform the *essential functions* of the job with or without reasonable accommodation. Thus, the ADA generally does not require employers to hire individuals with disabilities who fail to meet selection criteria. But this Section does not address the situation where, as here, an individual cannot meet selection criteria because of a disability *but could do so with a reasonable accommodation*.

Rather, that scenario is addressed in the Section of the EEOC's Interpretive Guidance entitled "Qualification Standards, Tests, and Other Selection Criteria," 29 C.F.R. Pt. 1610, App. 1630.10. This provision, which the district court completely overlooked, explicitly contemplates that an employer must reasonably accommodate an individual whose disability prevents him or her from satisfying a

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<sup>5</sup> EEOC's Title I regulations are entitled to controlling weight, see *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73, 84 (2002) (applying *Chevron* deference to the Title I regulations of the EEOC), and the agency's Interpretive Guidance is entitled to considerable deference. See *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (EEOC's Interpretive Guidance is "entitled to a 'measure of respect' under the less deferential *Skidmore* standard.").

selection criterion. Like the language of the statute, that Section of the Guidance states that qualification standards, tests, or other selection criteria that screen out, or tend to screen out, individuals with disabilities must be job-related and consistent with business necessity. And, in keeping with the statutory language, this Section of the Interpretive Guidance also states that selection criteria related to an essential job function “may not be used to exclude an individual with a disability if that individual could satisfy the criteria *with the provision of a reasonable accommodation.*” 29 C.F.R. Pt. 1610, App. 1630.10 (emphasis added). Additionally, the Guidance contemplates that challenges to selection criteria will most often be resolved by reasonable accommodation. *Ibid.* The district court’s opinion makes no mention of this Section of the Guidance, which is directly contrary to its view that an employer has no obligation to reasonably accommodate an individual who, because of a disability, cannot satisfy the employer’s qualification standards, tests, or other selection criteria.<sup>6</sup>

Thus, under the applicable provisions of the ADA and the EEOC’s Regulations and Interpretive Guidance, defendants would be entitled to summary judgment only if they could show that the state certification requirement was job-

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<sup>6</sup> Similarly, the applicable EEOC regulation, entitled “Charges of discriminatory application of selection criteria,” provides for a business necessity defense, but only “where such performance cannot be accomplished *with reasonable accommodation.*” See 29 C.F.R. 1630.15(b)(1) (emphasis added).

related and consistent with business necessity, *and* that there was no available reasonable accommodation. See 42 U.S.C. 12113(a); 29 C.F.R. 1630.15(b)(1); 29 C.F.R. Pt. 1610, App. 1630.10. The district court's approach, however, essentially ignores plaintiff's argument that *if she received the requested reasonable accommodation* – that is, if she had a waiver – then she *would be* qualified. The district court rejected this argument, reasoning that she is not entitled to the accommodation unless she first shows she is qualified. 1 ER 20-22. That is true, but misses the point (as discussed above) that the statute requires the court to ask whether plaintiff would be qualified *if she had the accommodation*.<sup>7</sup>

4. To be sure, there are circumstances in which an employer may properly refuse to seek (or accept) a waiver of a licensing requirement. For example, in *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999), the employer fired a driver because he did not meet the Department of Transportation's vision standards, as set forth in federal regulations. Although the driver obtained a waiver, as permitted by the regulations, the employer refused to rehire him. *Id.* at 560. The Court held that the employer did not have to accept the waiver because it was part of an experimental program to gather information to determine whether to revise the

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<sup>7</sup> Of course, if plaintiff would *still* not be qualified even if she did receive the requested accommodation, then the employer is not obligated to request it; but it remains the case that the employer must consider whether plaintiff would be qualified if she received the accommodation she has requested.

vision standards already in place, and accordingly “did not purport to modify the substantive content of the general acuity regulation in any way.” *Id.* at 576. Thus, a waiver that is not substantively “on par” with a licensing requirement would not be a reasonable accommodation. *Id.* at 571. See *Lovell v. Chandler*, 303 F.3d 1039, 1055 (9th Cir. 2002) (“We read *Albertson’s* to say that it does not violate the ADA for a private employer to deny an accommodation based on his participation in an experimental government program when that program does not substantively modify the generally applicable governing regulations.”).

*Dicta* in *Albertson’s* suggests that an employer “resting solely” on a licensing requirement must seek (or honor) a waiver where (unlike in *Albertson’s*) the waiver program *is* “on par” with the licensing program. The court of appeals in that case had “assumed that the regulatory provisions for the waiver program had to be treated as being on par with the basic visual acuity regulation,” and thus the employer had to accept the waiver. *Albertson’s*, 527 U.S. at 571. The Supreme Court stated that “[i]f this was sound analysis,” then the court of appeals would have been correct, *ibid.*, and rejected that analysis only because the regulation and waiver were not in fact on par, *id.* at 571-576. *Albertson’s* thus offers no support for the district court’s erroneous conclusion that an employer is *never* obliged to seek an available waiver of State-imposed licensing requirements.

## CONCLUSION

This Court should reverse the district court's grant of summary judgment in favor of defendants, and remand the case for further proceedings.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B), because:

This brief contains 4,960 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: July 28, 2010

## CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2010, I electronically filed the foregoing Brief For The United States And Equal Employment Opportunity Commission As Amici Curiae Supporting Plaintiff-Appellant And Urging Reversal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all of the parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system, except for the following counsel, who will be served a copy of the foregoing document by First Class Mail on the same date:

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