No. 00-1250

In the

Supreme Court of the United States

US AIRWAYS, INC.,

Petitioner,

v.

ROBERT BARNETT,

Respondent.

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

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, BAZELON CENTER FOR MENTAL HEALTH LAW, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC. (DREDF) AND EIGHT OTHER DISABILITY ORGANIZATIONS IN SUPPORT OF RESPONDENT

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National Employment Lawyers Association (NELA)
The Arc of the United States (The Arc)
The Association of Higher Education and Disability (AHEAD)
American Association of People with Disabilities (AAPD)
The Disability Rights Education and Defense Fund, Inc. (DREDF)
HalfthePlanet Foundation
The Judge David L. Bazelon Center for Mental Health Law
Lambda Legal Defense and Education Fund, Inc. (Lambda)
The National Association of Protection and Advocacy Systems (NAPAS)
The National Association of Rights Protection and Advocacy (NARPA)
National Mental Health Association (NMHA)
The National Mental Health Consumers' Self-Help Clearinghouse

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INTEREST OF THE *AMICI CURIAE*[1]

This case involves the scope and interpretation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, which protects people with disabilities against discrimination. *Amici* are national organizations that advocate on behalf of people with disabilities. Because many of the members and clients of these organizations have encountered discrimination in a variety of employment settings, *amici* are concerned about the implications that this Court's decision will have for reasonable accommodation of people with disabilities. (A description of each of the *amici* appears in Appendix A.)

SUMMARY OF ARGUMENT

I. The ADA specifically identifies "reassignment to a vacant position" as a reasonable accommodation. 42 U.S.C. § 12111(9)(B). The plain meaning of the ADA's reassignment language requires the employer to reassign a qualified employee with a disability to a vacant position, if required as an accommodation, rather than (as the Petitioner contends) force the employee to "bid" on the vacant position.

Petitioner's construction is not only contrary to the statute's plain language, it renders the ADA's reassignment language meaningless. Petitioner's construction is

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[1] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for any party authored this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. *Amicus* NELA also wishes to disclose that a member of its Executive Board, Patricia A. Shiu, is employed by the same organization employing counsel for respondent, Claudia Center, but that Ms. Shiu played no part in the *amicus* decision-making process or the drafting of this brief.

also contrary to the legislative history, the EEOC's interpretation, and Congress' expressed public policy goals. Furthermore, the difference in the protection afforded *applicants*, who are entitled to no hiring preference, and the treatment to be afforded *current employees*, who require reassignment, was intentional. There is nothing in the legislative history or the general findings that can overcome the plain language of the statute on this point.

II. In the instant case, the mail room position that the Respondent sought was vacant. Petitioner would have the Court interpret "vacant" to exclude any position "reserved" under a non-contractual seniority system, in contravention of the plain language of the statute. Such a construction would allow employers to unilaterally create a broad exemption from the ADA's central requirement of providing reasonable accommodations. Furthermore, the ADA cannot be interpreted to give employees with disabilities lesser protection than the Rehabilitation Act regulations afforded, 42 U.S.C. § 12201(a), and the "floor" created by those regulations, together with the legislative history of the ADA, prohibits construing a seniority system as an absolute bar to reassignment. Petitioner's contrary construction would result in a wholesale restriction on all kinds of reasonable accommodations, whether seniority-related or not. That construction is not necessary to afford employers meaningful protection; rather, such protection is properly considered, on a case-by-case basis, under the undue hardship defense.

III. Finally, Petitioner essentially seeks to shift the burden of disproving the undue hardship defense onto the plaintiff, once again contrary to the express language of the statute, by requiring the plaintiff to prove the reasonableness of any accommodation sought through a cost-benefit analysis. This is also illogical, and contrary to the accepted pre-ADA definition of the term reasonable accommodation (upon which the ADA's definition is based). A

"reasonable" accommodation is one that is effective in allowing the plaintiff to perform the job. The defendant has the burden of showing that the accommodation would impose an undue hardship, relying on the cost and other factors listed in the statute.

ARGUMENT

I. THE NINTH CIRCUIT CORRECTLY HELD THAT A DISABLED EMPLOYEE WHO SEEKS THE REASONABLE ACCOMMODATION OF "REASSIGNMENT TO A VACANT POSITION" HAS PRIORITY UNDER THE ADA FOR SUCH REASSIGNMENT.

A. Interpreting "Reassignment to a Vacant Position" to Mean "Considering an Employee for Reassignment to a Vacant Position" Violates the Plain Meaning of the Text and Leads to an Absurd Result.

In the instant appeal, it is uncontested that Respondent had a disability and needed an accommodation. Petitioner assumes that the only accommodation that would have been effective was reassignment.[2] Yet the Petitioner refused to reassign the Respondent, causing him to lose his job. Petitioner attempts to justify its refusal to accommodate by arguing that reassignment only means allowing an employee to "bid" on a vacant job—something the Respondent had the right to do anyway. The plain language of the statute forecloses that contention.

In contrast to the ADA, the Rehabilitation Act (the ADA's predecessor) did not define the term "reasonable accommodation," and its implementing regulations did not

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[2] Respondent contests this, suggesting that additional accommodations were available, and that the position Respondent sought did not constitute a reassignment. While we agree with these contentions, we limit our argument to the issues raised by Petitioner.

include reassignment in the definition of that term. *See, e.g.*, 29 C.F.R. § 84.12(b). As a result, the pre-ADA case law usually rejected any obligation to reassign an employee. *See, e.g., Gile v. United Airlines, Inc.*, 95 F.3d 492, 497 (7th Cir. 1996) (collecting pre-ADA cases).

The ADA, however, expressly states that reasonable accommodation may include "reassignment to a vacant position." 42 U.S.C. § 12111(9)(B). Reassignment is the noun form of the verb "reassign," meaning to assign again. Webster's Third New International Dictionary (1969). "Assign" is a transitive verb meaning "to appoint (one) to a post or duty." *Id. See also* the Oxford English Dictionary (1971) ("To appoint, designate, ordain, depute (a person) for an office, duty, or fate."). By definition then, reassignment means to appoint an employee to a new position. "An employee who is allowed to compete for jobs precisely like any other applicant has not been 'reassigned'; he may have changed jobs, but he has done so entirely under his own power, rather than having been appointed to a new position." *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1302 (D.C. Cir. 1998) (en banc).

Not only is Petitioner's argument contrary to the plain language of the statute, but Petitioner cites no other statutory language in the reasonable accommodation provision (or indeed, anywhere in Title I) that supports its reading. Petitioner simply seeks to *imply* a limitation that is not found in the clear statutory language. Such a limitation is a matter that must be addressed with Congress, not this Court.

The ADA must be read in such a way as to attribute meaning to every provision,[3] and a narrow construction of

[3] It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *South Carolina v.* (continued...)

the ADA should be rejected when "inconsistent with the literal text of the statute as well as its expansive purpose." *PGA Tour, Inc. v. Martin*, ___ U.S. ___, 121 S. Ct. 1879, 1892, 149 L. Ed. 2d 904, 922 (2001) (interpreting the analogous provision in Title III). Petitioner's argument that reassignment only means allowing an employee to "bid" on a vacant job renders the reassignment provision meaningless. Petitioner's position would mean that the reassignment provision only prohibits an employer from *refusing to consider* an employee with a disability for a particular job. But that is already barred by the ADA's anti-discrimination provision. *See* 42 U.S.C. § 12112(a). Petitioner's argument leaves nothing in the reassignment provision that the anti-discrimination provisions do not already cover.

> An employee who on his own initiative applies for and obtains a job elsewhere in the enterprise would not be described as having been "reassigned"; the core word "assign" implies some active effort on the part of the employer. Indeed the ADA's reference to reassignment would be redundant if permission to apply were all it meant; the ADA already prohibits [such] discrimination. . . .

Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304 (D.C. Cir. 1998) (en banc) (footnote omitted). *See also Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164-1165 (10th Cir. 1999) (en banc).

Of course, Petitioner contends that "plenty is left" of the reassignment provision even under its restrictive interpretation, and gives three reasons for its argument. First, it

[3] (...continued)
Catawba Indian Tribe, Inc., 476 U.S. 498, 510 n.22 (1986). *See also Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988). Even Petitioner admits that by adding reassignment to the ADA's definition of reasonable accommodation, Congress intended to require more than was required by the Rehabilitation Act. Pet. Br. at 26, n.8.

suggests that the reassignment provision simply means that the employer must consider the feasibility of assigning the worker to a different job in accordance with the employer's neutral selection criteria. Pet. Br. at 25-26. Petitioner thus claims that including the term reassignment in the list of reasonable accommodations was simply a way to distinguish earlier Rehabilitation Act precedent that found reassignment was never required.

What is missing from the Petitioner's analysis, however, is a recognition that this Court *had* found that even under the Rehabilitation Act, while employers were not required to reassign an employee with a disability, they could not "deny an employee alternative employment opportunities reasonably available under the employer's existing policies." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 289 n.19 (1987). Thus, Petitioner's interpretation of the ADA's language is nothing more than what this Court had already determined was required by the Rehabilitation Act without this language. And as discussed above, the requirement that an employer consider an employee with a disability for another job "in accordance with the employer's neutral selection criteria" is already governed by another section of the ADA. 42 U.S.C. § 12112(a).

Petitioner's second explanation for why "plenty is left" is that including reassignment in the definition of reasonable accommodation is a way to make clear that if an employee with a disability transfers to another job, the employer may need to consider an accommodation in the new position. Pet. Br. at 26-27. This argument is simply belied by the placement of reassignment within the reasonable accommodation definition. 42 U.S.C. § 12111(9). More to the point, it cannot be rationally argued that mention of reassignment was required in order to ensure that an employer offered needed accommodations in any job that its employee with a disability might hold. The statute expressly requires accommodations for both applicants and

employees. 42 U.S.C. § 12112(b)(5)(A). The legislative history is consistent.[4]

In a last attempt to find some substance to its view of reassignment, Petitioner argues that including the word reassignment will "typically" require the employer "to work with a disabled employee to identify available positions and to determine the employee's ability to perform the responsibilities of (and his degree of interest in) any such positions." Pet. Br. at 27. Such assistance may well be part of an accommodation (although there is nothing in the statute about it), and as pointed out above, the statute already requires a reasonable accommodation in a new position, if necessary. But whatever the value of such help from the employer, it is surely not a reassignment.

Petitioner's interpretive efforts are also contrary to the ADA's legislative history and the EEOC's interpretation of the Act. The legislative history refers to an actual "transfer" to prevent unemployment, not merely "considering" an employee for another position. Specifically, Congress found:

> Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, *a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work* and [the] employer from losing a valuable worker. (emphasis added).

H.R. REP. NO. 101-485(II), at 63 (1990). Not surprisingly, perhaps, Petitioner never once cites this passage, nor the

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[4] "The duty to make reasonable accommodations applies to all employment decisions, not simply to hiring and promotion decisions . . . [and] has been included as a form of non-discrimination on the basis of disability for almost fifteen years under . . . the Rehabilitation Act . . . ." H.R. REP. NO. 101-485(II), at 62; S. REP. 101-116, at 31.

very similar language found in the Senate Report, S. REP. 101-116 at 32.

Moreover, the EEOC flatly rejects Petitioner's view. The agency's guidance, written in question and answer format, states:

> Does reassignment mean that the employee is permitted to compete for a vacant position? No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.

EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 29 (3/1/99), <http://www.eeoc.gov/docs/accommodation.htm>. According to the EEOC, Petitioner's interpretation "nullifies the clear statutory language stating that reassignment is a form of reasonable accommodation," since "even without the ADA, an employee with a disability may have the right to compete for a vacant position." *Id.* at n.87.[5]

Finally, there are strong public policy reasons for rejecting Petitioner's extra-textual view. When considering the ADA, Congress was well aware that unemployment among people with disabilities was an enormous problem[6] with huge financial and social costs.[7] Congress also saw the inadequacies of the Rehabilitation Act, expressly noting that despite that law, employment rates and income of people with disabilities continued to fall.[8] Congress recognized that reassignment could help to address those serious problems, finding that "a transfer to another

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[5] As an administrative interpretation of the ADA, this guidance at least "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986). To the extent that the EEOC interpretive guidance is interpreting the EEOC's own regulations, that interpretation may be entitled to greater deference. *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

[6] Statistically, Congress found that two-thirds of all working age Americans with disabilities were not working at all, yet two-thirds of those who were not working *wanted* to work—over 8 million people. H. REP. NO. 101-485(II), at 32; S. REP. NO. 101-116, at 9. The ADA's legislative history noted that "'not working' is perhaps the truest definition of what it means to be disabled in America." H.R. REP. NO. 101-485(II), at 32.

(continued...)

(...continued)

[7] Congress expressly found that employment discrimination persisted, 42 U.S.C. § 12101(a)(3), and that people with disabilities occupied an inferior status in our society, and were severely disadvantaged vocationally and economically. 42 U.S.C. § 12101(a)(6). The legislative record documented the human costs relating to unnecessary dependency, *e.g.*, H.R. REP. NO. 101-485(II), at 43, as well as the huge dollar cost of such dependency to the country. 42 U.S.C. § 12101(a)(9) (disability discrimination "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity"); *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 801 (1999). *See also* S. Rep. No. 101-116, at 9.

In fact, support programs for people with disabilities were costing our country billions. Robert Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. Civ. Rights-Civ. Lib. L. Rev. 413, 425 nn. 68-69 (1991). *See also* H.R. REP. NO. 101-485(II), at 43 (statement by then-President Bush).

See also Smith v. Midland Brake, Inc., supra, 180 F.3d at 1168 ("the ADA has multiple objectives, and by defining discrimination as it did to include the failure to offer reasonable accommodations, one of Congress' objectives was to facilitate economic independence for otherwise qualified disabled individuals."); *Ransom v. Arizona Bd. of Regents*, 983 F. Supp. 895, 901 (D. Ariz. 1997) (one purpose of the ADA was "to reduce societal costs of dependency and nonproductivity").

[8] The ADA's legislative history documented, among other things, that (1) despite the best efforts, "many persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence," and (2) despite the Rehabilitation Act, the Census Bureau reported (in July 1989) that the percentage of men with a work disability who were working full time fell 7 percent between 1981 and 1988, and the income of workers with disabilities dropped sharply compared to other workers. H.R. REP. NO. 101-485(II), at 32 (1990). These census results were also reported in Bonnie Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. Ill. L. Rev. 923, 926 n.22 (1989).

vacant job for which the person is qualified may prevent the employee from being out of work and [the] employer from losing a valuable worker." H.R. REP. NO. 101-485(II), at 63. Public policy "is served best when qualified disabled employees are reassigned to vacant positions, regardless of whether a more qualified non-disabled person has expressed interest in the position or the job has been posted." John E. Murray and Christopher J. Murray, *Enabling the Disabled: Reassignment and the ADA*, 83 Marq. L. Rev. 721, 739-740 (Summer 2000). In fact, this is the only interpretation of the reassignment language that ensures that no one, whether able-bodied or not, loses their employment. *Id.* at 740.

Sound public policy strongly supports this "plain text" reading of reassignment. Congress might have chosen a different way to balance the competing concerns of high unemployment and a history of discrimination on the one hand, and employer autonomy on the other. The fact is that Congress did not; we must follow the statute that Congress enacted.

B. According to the Statutory "Reassignment" Language Its Plain Meaning Does Not Impermissibly Demand "Preferential Treatment" of Employees with Disabilities.

As explained above, the statutory "reassignment to a vacant position" language must mean that an incumbent employee who faces a disability-related obstacle to continued employment is entitled to priority in reassignment. Petitioner argues, however, that the statutory text cannot be given its plain import, because to do so would purportedly require granting "preferential treatment" to workers with disabilities. Pet. Br. at II.B. In making this argument, Petitioner leans heavily on general statutory findings and passages in the legislative history that do not even purport

to address this specific issue. Neither of these sources can overcome the plain import of the statutory text.

At the outset, we should note that the concept of "preferential treatment" does little to aid analysis here. On the one hand, it is clear (as Petitioner concedes, Pet. Br. at 19) that the ADA's "reasonable accommodation" requirement demands that an employer provide some things to employees with disabilities that the employer may deny to non-disabled employees. To use Petitioner's own example, an employer may be required to give breaks during the workday to enable an employee with a disability to take medication, even if it has a firm policy of denying breaks to employees generally. Pet. Br. at 19. On the other hand, there is nothing in the statute that requires an employer, in making an initial hiring decision, to choose a qualified candidate with a disability where an equally or more qualified nondisabled candidate also applies.[9] In the break-time case, all parties here might agree that the ADA requires something "extra" regardless of whether that "extra" is characterized as the removal of a barrier to equal opportunity or as "preferential treatment." In the hiring-decision case, on the other hand, all parties would likely concede that the statute requires nothing "extra" at all.

In the case of an incumbent employee who seeks reassignment to a vacant position to overcome a disability-related barrier to continued employment, the text makes plain that the ADA does require that the employee with a disability receive priority. Against that plain text, Petitioner points to general language in two congressional findings. One of these findings (42 U.S.C. § 12101(a)(8)) declares that:

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[9] Of course, the employer would not be permitted to discriminate against the applicant with a disability on the basis of that applicant's disability or need for accommodation. *See* 42 U.S.C. § 12112(a), (b)(1), (b)(5)(B).

> [T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.

The other finding (42 U.S.C. § 12101(a)(9)) states that:

> [T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

Pointing to the "equality of opportunity" and "opportunity to compete on an equal basis" language in these findings, Petitioner argues that the ADA could never require that an employer give an employee with a disability priority in selection for a given position—even in the context of reassignment. To support this reading, Petitioner cites two passages in the legislative history that state that "the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability." H.R. REP. 101-485 (II), at 56; *accord* S. REP. NO. 101-116, at 26-27.

These statements cannot bear the weight Petitioner places on them. Even assuming that the statute makes clear that its only purpose was to provide "equality of opportunity" to people with disabilities, such a general invocation of a contested concept[10] would be an unstable foundation on which to construct a wholesale rejection of the unambiguous statutory language providing for job reassignment. After all, the reasonable accommodation

[10] *See, e.g.*, J. Harvie Wilkinson III, *The Dimensions of American Constitutional Equality*, 55 Law & Contemp. Probs. 235, 242 (Winter 1992) ("[E]quality of opportunity is the most open-ended dimension of equality that I have discussed. It presents a staggering definitional difficulty, especially for the courts.").

requirement (and the specific application of that requirement to require priority in reassignment) plainly advances equality of opportunity by assuring that people with disabilities are not deprived of opportunities to work due to arbitrary, unnecessary, and thoughtless obstacles to employment. In any event, however, the very findings on which Petitioner relies make clear that "equality of opportunity"—however defined—cannot be cabined in the manner Petitioner suggests as the *only* purpose of the statute. Rather, the findings speak as well of "full participation, independent living, and self-sufficiency," 42 U.S.C. § 12101(a)(8), and of avoiding the "billions of dollars in unnecessary expenses resulting from dependency and nonproductivity," 42 U.S.C. § 12101(a)(9). Giving incumbent employees with disabilities the option of non-competitive job reassignment plainly advances these statutory purposes, for it provides the intervention necessary to keep people with disabilities in the workforce and off of the disability benefits rolls (from which rolls few ever emerge).[11] Cf. *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36 (1987) (holding that "[w]hile improving working conditions was undoubtedly one of Congress' concerns it was certainly not the only aim of the FLSA" and refusing to depart from

[11] *See, e.g.*, Richard V. Burkhauser & Mary C. Daly, *Employment and Economic Well-Being Following the Onset of a Disability: The Role for Public Policy, in Disability, Work, and Cash Benefits* 59, 77-86 (Jerry L. Mashaw et al., eds., 1996) (observing that "only a tiny percentage of those who go into [disability benefits] programs ever return to the workforce" and urging interventions, like the ADA, "that attack the employment problem before individuals begin to receive disability transfers"); Richard V. Burkhauser, *Lessons from the West German Approach to Disability Policy, in Disability & Work: Incentives, Rights, and Opportunities* 85 (Carolyn L. Weaver, ed. 1991) (noting the "positive attribute" of the ADA that "it seeks to keep people who become work-impaired on the job; through its job accommodation mandate it intervenes before these workers have left their jobs and become trapped in the disability system").

the plain meaning of the FLSA's "hot goods" provision where it served other statutory purposes).

Two sentences in committee reports cannot override the plain import of the statutory text. But neither of the passages quoted by Petitioner addresses the situation at issue here—reassignment of an incumbent worker who faces a disability-related obstacle to continued employment.[12] Rather, both deal with the situation of an initial applicant. They simply make the uncontested point that an employer need not prefer an initial applicant with a disability over an equally or more qualified nondisabled applicant. Where an incumbent employee with a disability is concerned, however, reassignment can keep the employee in the workforce and away from dependency on disability benefits programs. The text accordingly makes clear that such an incumbent employee must have priority in reassignment.

II. THE NINTH CIRCUIT CORRECTLY HELD THAT A SENIORITY SYSTEM IS NOT A *PER SE* BAR TO REASSIGNMENT AS A REASONABLE ACCOMMODATION.

A. Interpreting "Vacant" to Mean "Vacant Unless Someone Else Has Rights to the Job under a Seniority System" Does Violence to the Plain Meaning of the Text and to the Purpose of the Reassignment Provision.

The only defense to the accommodation obligation is undue hardship. But Congress qualified the reassignment obligation in another way. Under the terms of the statute, reasonable accommodation includes reassignment *to a vacant position*. 42 U.S.C. § 12111(9)(B). Petitioner argues

[12] The various passages from the EEOC regulations and interpretive guidance cited by Petitioner (Pet. Br. at 11, n.2) similarly do not address the reassignment situation.

that reassignment is never available when the employer has a seniority policy, because under such a plan, no job is ever "vacant," but is instead "reserved" for an unknown (but senior) applicant.[13] Moreover, Petitioner contends that such job openings are "reserved" even though the unknown applicant in this case had no contractual right to the position. This, too, contradicts the plain meaning of the words Congress chose.

Vacant means "not filled or occupied by an incumbent," Webster's Third New International Dictionary (1969), or "[n]ot filled, held, or occupied; in respect of which a successor to the previous incumbent or holder has not been appointed." Oxford English Dictionary (1971). The EEOC's Enforcement Guidance reflects the word's plain meaning. In the view of the agency, "vacant" means that the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become available within a reasonable amount of time. Furthermore, a position is considered vacant even if an employer has posted a notice or announcement seeking applications for that position. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (3/1/99), "Reassignment." Petitioner's extraordinary construction is nothing more than an attempt to engraft limiting language onto the statute that Congress did not use.

[13] Pet. Br. at 37.

B. Additional Statutory Language, and the Legislative History Regarding Collective Bargaining Agreements, Further Support the Conclusion That Seniority Systems Cannot Be an Absolute Bar to Reassignment as a Reasonable Accommodation.

Petitioner's position would also necessarily forbid contravening the terms of a collectively bargained seniority systems. This result is contrary to the legislative history regarding collective bargaining agreements.

At the time of the ADA's adoption, Congress noted that the Rehabilitation Act regulations provided that "a recipient's obligation to comply with this subpart [employment] is not affected by any inconsistent term of any collective bargaining agreement to which it is a party." H.R. REP. NO. 101-485(II), at 63, citing 45 C.F.R. § 84.11(c).[14] Congress' intention that even bargained-for seniority systems do not trump statutory protections also extends to the ADA. *Id.*; 42 U.S.C. § 12201(a), quoted in *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act . . . or the regulations issued by Federal agencies pursuant to such title."). Therefore, "an employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this Act." H.R. REP. NO. 101-485(II), at 63.[15] The Report continues:

[14] Note that this regulation by its term applies to the subpart on employment, of which the reasonable accommodation requirement, 45 C.F.R. § 84.12, is a part.

[15] Furthermore, the language in 45 C.F.R. § 84.11(c) is not limited to union contracts that represent intentional subterfuge, contrary to Judge Posner's analysis in *Eckles v. Conrail*, 94 F.3d 1041, 1046 (7th Cir. 1996).

(continued...)

> The collective bargaining agreement could be relevant, however, in determining whether a given accommodation is reasonable. For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it *may* be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job. *However, the agreement would not be determinative on the issue.*

Id. (emphasis added). Petitioner's view, on the contrary, requires a rejection both of legislative history, *Aka*, supra, 156 F.3d at 1304, and of the "floor" established by the Rehabilitation Act regulations.[16] Of course, this Court need not decide the proper balancing of the ADA's mandate and any seniority rights under a collective bargaining agreement, since the seniority policy in the instant case was unilaterally imposed by Petitioner. It conferred no statutory or contractual rights to anyone.

C. Accepting Petitioner's Extra-Statutory Construction Would Result in a Substantial Narrowing of Virtually All Reasonable Accommodations.

The relevant accommodation here is *reassignment*, not the waiver of the seniority policy. And the reassignment is both specifically provided for by statute, and is clearly eliminating a disability-related barrier to continued em-

[15] (...continued)
See also 45 C.F.R. § 84.12(a)(4) ("A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with . . . labor unions . . . .").

[16] Petitioner's view also makes the legislative history regarding "bumping" meaningless. *Compare* S.REP. 101-116, at 31; H.R.REP. 101-485(II), at 63.

ployment. Petitioner in essence is complaining that reassignment gets the Respondent something he would not have received otherwise. But that is the point of the accommodation mandate—that sometimes employees must get something that they would not have gotten otherwise. That does not mean that the accommodation, in this case reassignment, is not eliminating a disability-related barrier to continued employment.

Adopting Petitioner's view would have an effect far beyond the factual context in this case. For one thing, it would prohibit any other accommodation that was contrary to an employer's seniority policies. In Petitioner's view, an employer with a "neutral" policy of granting more leave to those employees with more seniority can refuse to grant additional leave to a junior employee with a disability. Why? Because (the employer will argue) it is the employee's "lack of seniority," not the disability, that poses the barrier to his or her continued employment. Likewise, an employer that reserves its offices for senior employees, and only provides desks in a common area to those more junior, can argue that it need not provide an office to an employee with a disability who requires one (e.g., for the proper functioning of speech dictation software, or because the "pool" is not wheelchair-accessible). Why? Again, in Petitioner's view, it is the "lack of seniority" that poses the obstacle. Or suppose that the employer generally assigns its employees to one of three shifts on a "first come, first served" basis. The new employee whose therapy needs or medication side effects require a certain preferred shift is out of a job, not because of his or her disability, but because (Petitioner will argue) of a "lack of seniority."

Petitioner's view would also create a "neutral policy" defense even in situations that are not seniority-related. Suppose in the example above, offices are reserved not for the most senior employees, but for partners, or vice-presidents, or anyone meeting certain performance standards. Again the employer can defend its refusal to accommodate by arguing that it is the lack of status or rank, not the disability, that is the obstacle. But such "semantics" are contrary to the text and framework of the ADA.

In each case above, there is certainly nothing wrong with the employer's decision to adopt the neutral policies described. But they must give way to the need for a reasonable accommodation, unless that need would cause an undue hardship. *Cf. PGA Tour, Inc. v. Martin*, ___ U.S. ___, 121 S. Ct. 1879, 149 L. Ed. 2d 904 (2001). In each case, the requested accommodation might arguably impact other employees negatively, although it does not have any direct monetary impact on them. The potential exists for adverse effects on morale, although by itself, such office grumbling certainly does not rise to the level of an undue hardship. Under certain facts, any of the accommodations described above could be an undue hardship, but that would depend on a much more specific showing of harm than is present in the instant case.

D. Employers' Needs for Stability and Smooth Business Operations Are Legitimately Considered, on an Individualized Basis, under the "Undue Hardship" Defense.

We do not contend that a reassignment in contravention of a seniority policy is always required. Clearly it is not. But Congress mandated that a resolution of this issue be made on an individualized basis under the undue hardship defense.[17]

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[17] In determining the scope of its protections, the ADA generally requires an individualized, case-by-case approach. This Court's precedent supports such an individualized assessment in determining virtually all aspects of the ADA that the Court has considered, including the definition of "disability," *Sutton v. United Air Lines, Inc.*, 527 U.S. 471,

(continued...)

The ADA's reasonable accommodation obligation is written in mandatory terms. 42 U.S.C. § 12112(b)(5)(A); *Board of Trustees v. Garrett*, 531 U.S. 356, ___, 121 S. Ct. 955, 960, 148 L. Ed. 2d 866, 875 (2001). An accommodation *must* be offered, with one exception—undue hardship on the operation of the business. *Id.* By contrast, Petitioner argues that reassignment to a vacant position need not be offered in certain situations, even when it is not an undue hardship, or, indeed, is not a hardship at all. Petitioner simply intends to create a new defense to reassignment that is not in statute.[18] This is impermissible. It is also contrary to traditional notions of statutory construction. When a statute lists with particularity the limitations on a particular provision, but does not include other provisions among the limitations, it may be presumed that

[17] (...continued)
483 (1999), who is a "qualified individual," *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987) (decided under the Rehabilitation Act), what constitutes a reasonable "modification" to policies, *PGA Tour, Inc. v. Martin*, ___ U.S. ___, 121 S. Ct. 1879, 1896, 149 L. Ed. 2d 904, 927 (2001), what constitutes a reasonable accommodation, *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805 (1999) (noting that "the matter of 'reasonable accommodation' may turn on highly disputed workplace-specific matters"), and other defensive matters such as "fundamental alteration," *PGA Tour, Inc. v. Martin*, supra, 121 S. Ct. at 1896 and 1897-1898, 149 L. Ed. 2d at 927 and 929, "undue burden," *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 606 n.16 (1999) (decided under Title II, but also noting the individualized nature of "undue hardship"), and "direct threat." *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569 (1999).

The legislative history clearly supports this view. S. REP. NO. 101-116, at 31 (reasonable accommodation involves a "fact-specific, case-by-case approach"); H.R. REP. NO. 101-485(II), at 62 (same); H.R. REP. NO.101-485(III), at 39 (a "reasonable accommodation should be tailored to the needs of the individual and the requirements of the job"). *See also* U.S. Commission on Civil Rights, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL DISABILITIES 102 (1983) ("[i]individualizing opportunities is this definition's essence").

[18] *See Smith*, supra, 180 F.3d at 1169 ("Anything more, such as requiring the reassigned employee to be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history.").

Congress did not include the unmentioned limitation. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("Expressio unius est exclusio alterius"). Petitioner's argument also denigrates the defense that Congress *did* choose to write into the statute. Moreover, Congress expressly rejected the notion of *per se* undue hardships.[19] Yet a *per se* standard is exactly what the Petitioner is advocating.

Finally, reasonable accommodation, of course, is only required for persons with disabilities as defined by statute, and many workers with disabilities require no accommodation at all.[20] Moreover, the reassignment obligation is already sufficiently and appropriately limited by the statute and consistent regulations.[21] These limitations include:

1. Reassignment need be only to an existing vacant job,[22] so an employer need not create a new job,[23] or "bump" another employee.[24]

[19] Robert Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. Civ. Rights-Civ. Lib. L. Rev. 413, 462-463, nn.246-247 (1991). The House Judiciary Committee rejected an amendment that would have limited accommodations to those costing no more than ten percent of the employee's salary, because the intent was to establish a flexible approach. *See* H.R. REP. NO. 101-485(III), at 41. *See also* n.49 below.

[20] H.R. REP. 101-485(II), at 67; S. REP. 101-116, at 35.

[21] *Smith*, supra, 180 F.3d at 1170 ("Congress has already significantly cabined the obligation to offer reassignment to a qualified employee who is disabled so as to ensure that it is not unduly burdensome, or even particularly disruptive, of an employer's business."); *Aka*, supra, at 1305 ("Recognized constraints on an employer's obligation to reassign a disabled employee further limit the disruption associated with reassignments.").

[22] 42 U.S.C. § 12111(9)(B).

[23] 29 C.F.R. app. § 1630.2(o).

[24] 29 C.F.R. app. § 1630.2(o); S.REP. 101-116, at 31; H.R.REP. 101-485(II), at 63.

2. The employee must be "qualified" for any vacant position.[25]
3. Reassignment does not require a promotion.[26]
4. Reassignment may involve a demotion if no equivalent position is vacant.[27]
5. If more than one appropriate vacancy exists, the employer may select among them.[28]
6. Reassignment only applies to employees, not applicants.[29]
7. Reassignment is the accommodation of last resort, and only need be considered if the employee cannot be accommodated in their current job.[30]
8. No reassignment is required if it poses an "undue hardship."[31]

If further limitations are to be sought, they must come from Congress. *Smith*, supra, 180 F.3d at 1170.

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[25] 42 U.S.C. § 12112(b)(5)(A).

[26] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (3/1/99), "Reassignment."

[27] 29 C.F.R. app. § 1630.2(o) (1997).

[28] 29 C.F.R. app. § 1630.9; H.R. REP. 101-485(II), at 66.

[29] 29 C.F.R. app. § 1630.2(o); S.REP. 101-116, at 31. *See also* Part II.C .

[30] 29 C.F.R. app. § 1630.2(o); S.REP. 101-116, at 31; H.R.REP. 101-485(II), at 63.

[31] 42 U.S.C. § 12112(b)(5)(A).

III. A "REASONABLE ACCOMMODATION" UNDER THE ADA IS A MODIFICATION THAT OPERATES IN AN *EFFECTIVE* MANNER TO ENABLE A PERSON WITH A DISABILITY TO PERFORM A JOB.

Finally, in an argument that applies not only to the facts of this case, but to the issue of reasonable accommodations generally, Petitioner argues that the term "reasonable accommodation" must mean something more than "effective accommodation." Pet. Br. at 15-16. This argument would seriously, and unnecessarily, weaken the ADA's reasonable accommodation requirement. Moreover, it has no support in the statutory text, nor in the history of how the terminology came into being. There is no defense of "unreasonableness." Simply put, a reasonable accommodation only becomes unreasonable if it causes an undue hardship.

A. The Term "Reasonable Accommodation" Is a Term of Art That Does Not Encompass Issues of Cost or Difficulty, Which Are Part of the "Undue Hardship" Analysis.

The concept of requiring "reasonable accommodations" for people with disabilities as part of an anti-discrimination mandate was first introduced in regulations implementing Section 504 of the Rehabilitation Act of 1973,[32] which defined the term through a list of examples.[33] The regulations noted, however, that required modifications should not be excessively burdensome. Such protection for employers was included in a specific limitation: if the

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[32] 45 C.F.R. § 84.12. *See* generally Chai R. Feldblum, *The (R)evolution of Physical Disability Anti-discrimination Law: 1976-1996*, 20 MENTAL AND PHYSICAL DISABILITY LAW REPORTER, 613 (1996) (describing evolution of the reasonable accommodation concept in disability law) (hereinafter *Physical Disability Law*).

[33] 45 C.F.R. § 84.12(b).

recipient could "demonstrate that the accommodation would impose an *undue hardship* on the operation of its program,"[34] then such an accommodation would not be required. Various factors were to be considered in assessing undue hardship.[35] The undue hardship defense was the only place in which the regulations referenced cost considerations.

The Appendix to the regulations explained that "where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination." 45 C.F.R. pt. 84, Appendix A, p. 315 (1985), quoted in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 n.17 (1987). Thus, an accommodation was not reasonable if it was ineffective, or if it constituted an undue hardship.

In interpreting the Rehabilitation Act, most courts followed the agency regulations, and considered cost or operational difficulty as part of the "undue hardship" defense available to employers. The agency, courts, and commentators generally treated the word "reasonable" as synonymous with "effective." As noted, the Appendix explained reasonable accommodation in terms of whether it would "overcome the effects of a person's handicap."[36] Later commentators emphasized that a proposed modification had to be actually *effective* in order to be required under the law.[37] The influential analysis of the reasonable accommodation duty by the U.S. Commission on Civil Rights reflected its view that the term required individualized changes that would be effective in allowing an employee to continue working.[38]

[34] 45 C.F.R. § 84.12(a) (emphasis added).

[35] 45 C.F.R. § 84.12(c).

[36] 45 C.F.R. pt. 84, Appendix A (Reasonable Accommodation).

[37] *See e.g.*, Donald Olenick, *Accommodating the Handicapped: Rehabilitating Section 504 After* Southeastern, 80 COL. L. REV. 171, 184-86 (continued...)

When Congress drafted the ADA, it borrowed in large part[39] from the language and framework of the 504 regulations,[40] defining as a form of discrimination the failure to provide a "reasonable accommodation," unless such accommodations would impose an "undue hardship" on a covered entity.[41] In using the 504 regulations as a basis for the ADA, Congress was adopting a term "reasonable accommo-

[37] (...continued)
(1980); Mark Martin, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. LAW REV. 881 (1980). The general criticism of the commentators was acknowledged and addressed in a later Supreme Court case, *Alexander v. Choate*, 469 U.S. 287, 300, n. 20 (1985). *See* generally, Feldblum, *Physical Disability Law*, at 614-617 (describing evolution of understanding of "reasonable accommodation" by courts and commentators.)

[38] U.S. Commission on Civil Rights, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 102 (1983) ("[T]his chapter uses reasonable accommodation to mean providing or modifying devices, services, or facilities or changing practices or procedures in order to match a particular person with a particular program or activity. *Individualizing opportunities is this definition's essence.*") (emphasis added).

[39] With a few notable differences, as reflected in Part I.A above. While decisions applying the Rehabilitation Act may provide useful guidance in interpreting the ADA when the language of the two statutes are substantially similar, they are certainly less helpful in interpreting text that differs. *Gile v. United Airlines, Inc.*, 95 F.3d 492, 496 (7th Cir. 1996). *See also* Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 Berk. J. Emp. & Lab. L. 201, 206, 223 (1993).

[40] *See* S. REP. 101-116, *passim; Bragdon v. Abbott*, 524 U.S. 624, 631-632 (1998). *See* generally Chai R. Feldblum, *Antidiscrimination Requirements of the ADA*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 35, 37 (L. Gostin & H. Beyer eds. 1992).

[41] 42 U.S.C. § 12112(b)(5).

dation" as the term of art that had developed under such regulations and case law. The ADA's legislative history never discussed the cost or difficulty of a proposed modification or device in explaining the "reasonable" part of reasonable accommodation.[42] Instead, such discussion appeared in the analysis of the "undue hardship" defense.[43] This is perhaps most clear in the committees' focus on the steps to identifying and implementing an appropriate accommodation. The Committee stated that the first step is to "identify barriers to equal opportunity," the second is to "identify possible accommodations," and the third is to

> assess the reasonableness of each *in terms of effectiveness and equal opportunity. A reasonable accommodation should be effective for the employee.* Factors to be considered include the reliability of the accommodation and whether it can be provided in a timely manner . . . . The Committee believes strongly that a reasonable accommodation should provide a meaningful equal employment opportunity. Meaningful equal employment opportunity means an opportunity to attain the same level of performance as is available to nondisabled employees having similar skills and abilities.[44]

The fourth step is to implement the accommodation unless it imposes an undue hardship.[45]

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[42] *E.g.,* S. REP. 101-116, at 35-36; H.R. REP. 101-485(II), at 62-67.

[43] *E.g.,* H.R. REP. 101-485(II), at 67-69; S. REP. 101-116, at 35-36.

[44] S. REP. 101-116, at 35; H.R. REP. 101-485(II), at 66 (emphasis added).

[45] Notwithstanding the manner in which "reasonable accommodation" was ordinarily used under Section 504 regulations and case law, some courts applying the ADA have inappropriately inserted issues of cost and difficulty into the separate term "reasonable." *See, e.g., Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995). Not all courts, however, have made this misinterpretation. *See, e.g. Bryant v. Better Business Bureau of Greater Maryland*, 923 F. Supp. 720, 735-737 (D. Md. 1996) (material differences exist between whether an accommo-

(continued...)

Petitioner contends, however, that the employee has the burden of proving that the accommodation sought is not too expensive, and that its costs are outweighed by its benefits. That makes little sense in light of the clearly specified defense of "undue hardship," on which the employer has the burden of proof,[46] and which has a carefully calibrated definition relating to the financial resources and type of operation of the business. Again it makes little sense if the law first puts the burden on the employee, either to negate these same factors, or to prove that the accommodation is not too costly without taking into account those factors.

Moreover, the definitions of "reasonable" offered by Petitioner would greatly water down the undue hardship defense, which requires proof of "significant difficulty or expense."[47] The statutory language is *very* different from

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[45] (...continued)
dation is "reasonable" and whether it would cause an "undue hardship"; "reasonable accommodation" asks whether the accommodation would be effective); *Dutton v. Johnson County Bd. of Comm'rs*, 859 F. Supp. 498, 507 (D. Kan. 1994) ("For an accommodation to be reasonable, it must be effective in permitting a disabled worker to perform the essential job functions"); *Davis v. York Int'l, Inc.*, 1993 U.S. Dist. LEXIS 17649*23 (D. Md. 1993) ("The actual effect that modifications have on the work performance of a disabled individual lies at the heart of determining whether an employer has made reasonable accommodations for a qualified disabled person."). See also the Ninth Circuit's concurrence by Judge Gould in the instant case, writing separately to underscore this point. The EEOC takes this latter position. 29 C.F.R. app. § 1630.9.

[46] *Garrett*, supra, 121 S. Ct. at 967, 148 L. Ed. 2d at 882-883 ("The Act also makes it the employer's duty to prove that it would suffer such a burden").

[47] 42 U.S.C. § 12111(10). The legislative history gives further descriptions, i.e., "unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program." S. REP. 101-116, at 35; H.R. REP. 101-485(II), at 67.

Petitioner's definition of "reasonable."[48] It would be contradictory to have an extensive description of the *high* standard set by the "undue hardship" defense if, in fact, employers could always prevail under the much more *lenient* "reasonable" standard.

In fact, the extensive negotiations that took place regarding the factors to be considered in making an "undue hardship" determination underscore the fact that all those involved in the passage of the ADA understood that the *core* defense to the provision of a reasonable accommodation would be the "undue hardship" defense.[49] There were *no* negotiations regarding what the "reasonable" part of "reasonable accommodation" meant, and there is nothing in the legislative history supporting Petitioner's argument, because reasonable accommodation was a term of art that did not include consideration of cost or difficulty.

[48] *See* Pet. Br. at 17 (arguing that it is the plaintiff who "must establish that the particular accommodation in question is 'reasonable'—i.e., 'fair,' 'appropriate' or 'suitable' in the circumstances, 'proportionate,' and 'not demanding too much' ").

[49] The Senate bill, as introduced, included the same undue hardship factors that had been listed in the Section 504 regulations at 45 C.F.R. § 84.12(c). These were modified to reflect that the resources and situation of the overall company should be factored in. *See* H.R. REP. 101-485(II), at 68-69; *see also*, Chai R. Feldblum, *Antidiscrimination Requirements of the ADA*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 46 (L. Gostin & H. Beyer eds. 1992) (discussing these negotiations and final changes). During later consideration of the ADA, the undue hardship factors were split into four (rather than three) categories. Feldblum, supra, at 46. Finally, the House of Representatives rejected an amendment that would have created a presumption of undue hardship if a reasonable accommodation cost more than 10% of the annual salary of the employee requesting it. 136 Cong. Rec. H2471 (May 17, 1990).

B. Recognizing that a Reasonable Accommodation Means an Effective One Results in a Logical Apportionment of the Burdens of Proof.

As noted above, the Appendix to the 504 regulations[50] made clear that an accommodation was not reasonable if it was ineffective, or if it constituted an undue hardship. And contrary to Petitioner's argument, the word accommodation does not "assume" effectiveness. Rather, accommodation assumes that a modification is one included in, or similar to, the statutory list of accommodations. This is not a meaningless distinction. Not all of those accommodations will work in every case, and there are numerous cases in which identified accommodations were unavailing because they would have been ineffective.[51]

It logically follows that in litigation, the plaintiff's obligation should be to point out the existence of an accommodation that would likely have been effective, meaning one that would likely have allowed the plaintiff to continue to perform the essential job functions. The defendant then has the burden of establishing that such accommodation would have resulted in an undue burden, based on cost and the other statutory factors. That was essentially the analysis of the most influential Rehabilitation Act deci-

[50] 45 C.F.R. pt. 84, Appendix A, p. 315 (1985), quoted in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 n.17 (1987).

[51] *E.g., Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041(9th Cir. 1999) ("time off from the clinical portion to study . . . could not have helped"; "decelerated schedule would not have aided Zukle in meeting the Medical School's academic standards"); *Pate v. Baker Tanks Gulf South, Inc.*, 34 F. Supp. 2d 411, 417 (W.D. La. 1999) ("Even with an accommodation consisting of temporary help, the essential functions of Ms. Pate's job were still not being accomplished"); *Logan v. Pennaco Hosiery*, 1997 U.S. Dist. LEXIS 9965*7 (N.D. Miss. 1997) ("even if the employer could make reasonable accommodations that would allow the plaintiff to avoid the heavy lifting required by the position, the plaintiff still could not perform the other physical requirements of the job").

sions,[52] and it has been followed by some courts under the ADA.[53] Though certainly not universally accepted, as Petitioner points out,[54] it not only makes logical sense and is most true to the Rehabilitation Act history, it also has the advantage of placing the burdens of proof on the party most likely to have the relevant evidence.[55]

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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August 31, 2001

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[52] *E.g., Gardner v. Morris*, 752 F.2d 1271, 1280 (8th Cir. 1985); *Treadwell v. Alexander*, 707 F.2d 473, 478 (11th Cir. 1973); *Prewitt v. United States Postal Service*, 662 F.2d 292, 308 (5th Cir. 1981).

[53] *Mason v. Frank*, 32 F.3d 315, 318-319 (8th Cir. 1994) ("Once the plaintiff produces evidence sufficient to make a facial showing that reasonable accommodation is possible, the burden shifts to the employer to prove inability to accommodate").

[54] Pet. Br. at 15-16.

[55] *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1122-1123 (9th Cir. 2000) (en banc) (Gould, J., concurring). Compare 21 CHARLES A. WRIGHT & KENNETH A. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5122, at nn.15-16 (1977).

Appendix A: Interest of *Amici Curiae*

***Amici* Descriptions:**

The National Employment Lawyers Association (NELA) is a voluntary membership organization of more than 3,000 attorney members who regularly represent employees in labor, employment, and civil rights disputes. NELA is the country's only professional membership organization of lawyers who represent employees in discrimination, wrongful discharge, employee benefit, and other employment-related matters. NELA members have brought numerous cases under the Americans with Disabilities Act (ADA), and have represented thousands of individuals in this country who are victims of employment discrimination based on disability status. As such NELA has a compelling interest in ensuring that the goals of the ADA are protected and fully realized. As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to insure that the laws are fully enforced and that the rights of workers are fully protected.

The Arc of the United States (The Arc), through its nearly 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, which have authorized or encouraged segregation of people with mental retardation in virtually all areas of life.

The Arc was one of the leaders in framing and supporting passage of the ADA.

The Association on Higher Education and Disability (AHEAD) is a nonprofit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities. Its membership includes approximately 2,000 institutions (including colleges, universities, not-for-profit service providers and standardized testing organizations), professionals, and college and graduate students planning to enter the field of disability practice. Many of its members are actively engaged in assuring ADA compliance and in providing reasonable accommodations to both students and employees at institutions of higher education, many of which are covered by collective bargaining agreements. In addition, AHEAD members actively work with students in establishing vocational plans and job readiness. AHEAD publishes numerous resources on the implementation of the ADA by postsecondary educational institutions.

The American Association of People with Disabilities (AAPD) is a nonprofit, nonpartisan membership organization of people with disabilities, their family members and supporters. AAPD was founded on the fifth anniversary of the ADA and works to promote policies and programs that further the ADA's goals of equality of opportunity, full participation, independent living and economic self-sufficiency for the more than 56 million children and adults with disabilities in the U.S.

The Disability Rights Education and Defense Fund, Inc. (DREDF), based in Berkeley, California, is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

HalfthePlanet Foundation is a nonprofit organization that offers comprehensive, reliable information, products and services to people with disabilities, their families and friends. The Foundation administers the well-known website—halftheplanet.com—the most comprehensive disability resource on the Web, created by people with disabilities for people whose lives are touched by disability. Halfthe Planet Foundation supports the application of technology to promote the values of the ADA—independent living, social inclusion, equality of opportunity, economic self-sufficiency, and empowerment.

The Judge David L. Bazelon Center for Mental Health Law is a national legal advocacy organization dedicated to advancing the rights and dignity of individuals with mental disabilities. The Center has litigated several cases involving reasonable accommodations under the ADA and has an interest in ensuring that people with mental disabilities are able to continue to contribute to society and to maintain employment through changes in the work environment that allow them to successfully do their jobs.

Lambda Legal Defense and Education Fund, Inc. (Lambda) is a national public interest legal organization dedicated to the civil rights of lesbians, gay men and

people with HIV/AIDS through impact litigation, education and public policy work. Founded in 1973, Lambda is the oldest and largest legal organization addressing these concerns. Lambda has appeared as counsel or amicus curiae in scores of cases in state and federal courts on behalf of people living with HIV or other disabilities. Lambda is particularly concerned with the unique barriers confronting persons with HIV and other stigmatized disabilities whose hopes for equal opportunity in the workplace hinge on the removal of needless barriers to their abilities to work.

The National Association of Protection and Advocacy Systems (NAPAS) is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons 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. NAPAS facilitates coordination of P&A activities and provides training and technical assistance to the P&A network.

The National Association of Rights Protection and Advocacy (NARPA) was formed in 1981 to provide support and education for advocates working in the mental health arena. It monitors developing trends in mental health law and identifies systemic issues and alternative strategies in mental health service delivery on a national scale. Members are attorneys, people with psychiatric histories, mental health professionals and administrators,

academics, and nonlegal advocates—with many people in roles that overlap. Central to NARPA's mission is the promotion of those policies and strategies that represent the preferred options of people who have been diagnosed with mental disabilities. Approximately 40 percent of NARPA's members are current or former patients of the mental health system.

Established in 1909, the **National Mental Health Association (NMHA)**, with its more than 340 affiliates, is dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research and services. NMHA envisions a just, humane and healthy society in which all people are accorded respect, dignity and the opportunity to achieve their full potential free from stigma and prejudice.

The National Mental Health Consumers' Self-Help Clearinghouse is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support services, to provide technical assistance and information to consumers/survivors interested in developing self-help services, and advocating to make traditional services more consumer/survivor-oriented. The Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.