No. 16-796

In the Supreme Court of the United States

ANGELO BINNO, PETITIONER

v.

THE AMERICAN BAR ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF MICHIGAN AND OHIO IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Should access to law schools and the legal profession be unnecessarily limited by the American Bar Association's refusal to allow waivers so the blind and visually impaired are not subjected to an entrance exam that asks questions that require spatial reasoning and are typically answered using diagrams?

2. Can a standard-setting entity such as the ABA fail to protect the blind and visually impaired from a discriminatory entrance exam and then insulate itself by arguing that it cannot be sued for alleged violations, that it does not "offer" the exam under Title II of the ADA, and that a claim under Title V of the ADA depends on whether it offers the exam?

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INTEREST OF *AMICI CURIAE*[1]

Angelo Binno alleges that the American Bar Association is violating the Americans with Disabilities Act because the ABA's accreditation standards effectively compel law schools to base admission in part on the Law School Admissions Test. The LSAT unfairly winnows out qualified blind and visually impaired students by asking questions that require spatial reasoning and are typically answered using diagrams. Pet. App. 3–4. Until 1997, the ABA allowed schools to waive the LSAT for those physically incapable of taking the examination.

Although much needs to be discovered about this waiver retraction and the ABA's relationship to the Law School Admissions Council (LSAC), several things are clear: blind and visually impaired residents in every State are currently inhibited from obtaining a legal education, and the ABA has the power to remedy that problem.

This case is important to the people, universities, and government agencies of the *amici* States, who have a keen interest in ensuring that their blind and visually impaired citizens have the opportunity to receive a legal education, to work in the legal profession, and to find related jobs. States and indeed the nation as a whole suffer when access to legal education is limited and talent is wasted.

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[1] Consistent with Rule 37.2(a), the *amici* States provided notice to the parties' attorneys more than ten days in advance of filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is important to give talented individuals access to a legal education, especially at a time when technological advances make it increasingly feasible to provide that access to the blind and visually impaired. Yet the ABA is choosing instead to close the doors to legal education for the blind.

The ADA is designed to eliminate discrimination against individuals with disabilities. Access to education was a key component of the ADA. Congress enacted the ADA, in part, because individuals with disabilities are "severely disadvantaged" in terms of educational opportunities. 42 U.S.C. § 12101(a)(6). Congress recognized that this is partly due to "exclusionary qualification standards" and the failure to modify existing practices. 42 U.S.C. § 12101(a)(5). And that strikes at the very heart of this case: the ABA's refusal to modify an existing accreditation standard (Standard 503) that Binno alleges to be exclusionary and injurious to the blind and visually impaired. Standard 503 requires a law school entrance examination that is valid and reliable, and it considers only the LSAT to be presumptively valid and reliable—even though it contains an analytic-reasoning (logic games) section that disadvantages the blind and visually impaired.

As the accreditation body for our profession, the ABA is the gatekeeper for who obtains a legal education. A law degree from an accredited institution is not only essential for practicing law, but also coveted in many professions outside the law. So the ABA's steadfast refusal to reinstitute its previous waiver policy

uniquely affects the talent pool for both the legal profession and our national leadership. It also needlessly subjects the blind and visually impaired to a test that does not accurately reflect their aptitude to work as a lawyer and does not permit them to compete for all available places in the law schools to which they apply. And for reasons that are unclear, especially given its public-interest role, the ABA resists any discovery that would shed further light on the scope of its relationship to the LSAC, the reasons it stopped allowing waivers for the blind, and the obstacles law schools have faced in trying to use an entrance examination other than the LSAT.

The three legal issues Angelo Binno presents in his petition for certiorari have a common thread: they all represent the ABA's attempt to insulate itself from the plight of the blind and visually impaired LSAT test taker and to convince onlookers that it is not the elephant in the room.

The ABA first claims that Angelo Binno has no standing to sue the ABA because the ABA does not develop LSAT content or reject blind law-school applicants such as Binno. But ABA Accreditation Standard 503 requires an admissions test and then recognizes only one test as presumptively valid and reliable—the LSAT—a test that disadvantages the blind and visually impaired as compared with sighted test takers. And although the ABA does not tell law schools how to weight the LSAT or whom to admit, it understands full well, as most in the profession do, that law schools risk losing accreditation and falling in rankings when they accept law students with lower LSAT scores.

The ABA also attempts to insulate itself from liability under Title III of the ADA by claiming it does not "offer" the LSAT simply because it does not physically administer the test—even though by giving it the exclusive stamp of approval it essentially selects the LSAT as *the* examination. Although Congress did not define the term "offer," it could not have meant to have it defined so narrowly as to encourage entities to select a discriminatory exam and then contract away liability to a third party.

Finally, the ABA attempts to insulate itself from liability under Title V of the ADA by claiming that an interference claim is dependent on a claim under another provision of the Act. This Court should resolve the circuit split on this issue and set a national standard for review of those claims.

The States of Michigan and Ohio respectfully ask this Court to grant the petition.

ARGUMENT

I. The ABA's refusal to allow law schools to waive the LSAT for the blind and visually impaired erects discriminatory barriers to a legal education.

ABA Standard 503 requires every law school applicant to take a valid and reliable test, and the LSAT is the only test the ABA considers presumptively valid and reliable. *ABA Standards & Rules of Procedure for Approval of Law Schools 2016–2017*, Standard 503, Interpretation 503-1. The ABA requires that at least *some* consideration be given to the test in order to "assist the school and the applicant in assessing the applicant's capability of satisfactorily completing the school's program of legal education." ABA Standard 503. While the logic-games portion of the LSAT might assess a sighted person's ability to engage in complex analysis (because a sighted person can engage in the spatial reasoning required of sorting, matching, and sequencing, and can diagram to help answer the game), it does not typically serve this purpose for a blind person. And a blind person is unlikely to ever be asked to draw a diagram in law school. Yet even minimal weight given to the LSAT could prevent a blind or visually impaired person from being accepted into law school or a top-tier law school.

A. Law schools give weight to the LSAT in part because the ABA requires them to give it weight.

The LSAT is a gatekeeper. It is recognized as the standard admissions test for virtually every ABA-accredited law school in the country. Statistical data on

the LSAT scores of incoming students for each accredited school is gathered and reported. 2016 Official Guide to ABA-Approved Law Schools.[2] In addition to providing a baseline for admission and scholarships, that LSAT data is often used as a standardized means to compare schools.

Law schools care about how they are ranked in relation to other schools, and ranking is based in part on LSAT scores. When the *U.S. News & World Report* creates its law school rankings, it heavily weighs the LSAT scores of all new Juris Doctor students at law schools fully accredited by the ABA. Its rankings for 2017, for example, considered the combined median scores on the LSAT of the fall 2015 and early 2016 full-time and part-time entrants to Juris Doctor programs. *U.S. News*, 2017 rankings.[3] Researcher William Henderson found that "90% of the differences in schools' ranks can be explained solely by median LSAT." *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 Ind. L.J. 163, 165 (2006). Others have likewise posited that "median LSAT is a top driver of a school's reputation." Alexia Brunet Marks & Scott A. Moss, *What Makes a Law Student Succeed or Fail? A Longitudinal Study Correlating Law Student Application Data and Law School Outcomes*, Valuewalk, 2015.[4]

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[2] https://officialguide.lsac.org/release/OfficialGuide_Default.aspx.

[3] http://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology?int=9d0608.

[4] http://www.valuewalk.com/wp-content/uploads/2015/07/SSRN-id2627330.pdf.

So while it may be true that Standard 503 does not tell a law school how much weight to place on an applicant's LSAT score, that score will affect the school's data on incoming students. Admitting too many students with low scores would affect ranking and, therefore, the public perception and reputation of the school. The ABA knows that this discourages law schools from accepting a law student with a lower LSAT—even a visually impaired one who has been unfairly disadvantaged by a portion of the test.

Law schools' uniform reliance on the LSAT derives from the ABA's accreditation standards. The U.S. Department of Education has entrusted the ABA with the function of regulating American law schools. Thus, all ABA-accredited law schools are compelled to follow the ABA's accreditation standards. Specifically, ABA Standard 101 requires each law school seeking accreditation to "demonstrate that it is being operated in compliance with the Standards." Law schools that fail to follow these standards face sanctions and potential loss of accreditation. *ABA Standards & Rules of Procedure for Approval of Law Schools 2016-2017* at 58. A law school that chooses to use any test other than the LSAT must jump through hoops to establish that the alternative test is valid and reliable. ABA Standard 503, Interpretation 503-1.

So it is the ABA that controls the process, even though the LSAC administers the LSAT. And although the LSAC offers blind and visually impaired test takers certain accommodations for the LSAT—among them, Braille, use of a reader, rest time, and additional testing time—it offers no specific accommodation for the logic-games portion of the test. Nor

could it. As Northwestern University Professor Steven Lubet, a specialist in legal ethics, has opined, "[I]t is impossible to use the [LSAT] test in a way that would give you an accurate assessment of a blind student[']s capabilities . . . ." Naseem Stecker, *What's the Score: The LSAT and the Blind*, 80 Mich. B.J. 46, 47 (2001).

For decades, the ABA recognized this, too. It acknowledged that the blind and visually impaired were physically incapable of taking the LSAT, and so it allowed schools to waive the test for those individuals. But it ended this waiver without explanation in 1997 (see August 1996 ABA Journal 1996 Rep. to House of Delegates, at 136),[5] demonstrating (not so subtly) that it controls the shots. Unfortunately, the ABA's refusal to reinstate the waiver option continues to harm the legal profession.

B. The blind and visually impaired are being denied access to the legal profession.

According to U.S. Bureau of Labor Statistics, the disabled are less likely to work in legal occupations than those without a disability. BLS Statistics, Persons With a Disability: Labor Force Characteristics, table 3.[6] This loss of opportunity affects the visually impaired: according to the National Federation of the Blind, approximately 30.5% of people age 21–64 with a visual impairment are living below the poverty line.

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[5] http://books.google.com/books?id=FkPTYkQ3jhMC&pg=PA136&lpg=PA136&d.

[6] https://www.bls.gov/news.release/disabl.t03.htm.

The unemployment rate for blind individuals is a staggering 60%.[7]

Although there is no specific data for the blind, the ABA's annual census data reflects that low percentages of its membership report having a disability:

Year	Percentage
2007	7.18%
2008	6.69%
2009	6.76%
2010	6.87%
2011	4.56%
2012	4.65%
2013	8.00%

ABA Commission on Disability Rights Goal III reports, 2007–2013.[8]

In contrast, U.S. Census Bureau statistics for the last census (2010) showed that 19% of the population reported having a disability and about 3.3% of the population, or about 8.1 million people, had difficulty seeing, including 2 million people who were blind or unable to see. Matthew Brault, U.S. Census Bureau, Household Economic Studies, *Americans with Disabilities: 2010* (July 2012).[9]

The ABA itself has recognized this disparity, acknowledging that its disabled-member percentages

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[7] https://nfb.org/blindness-statistics.

[8] http://www.americanbar.org/diversity-portal/Goal_3_Reports.html. Since 2013, the ABA's Goal Reports have not reported this statistic.

[9] http://www.census.gov/prod/2012pubs/p70-131.pdf.

are "far lower than one would expect given the national statistics on the percentage of Americans with disabilities." ABA Comm'n on Mental and Physical Disability law, *ABA 2010 Goal III Report* 6–7.[10] The ABA has even characterized the fact that disabled individuals are less likely to apply and be admitted to law school as a "pipeline problem." ABA 2011 Disability Statistics Report, III(C)(i).[11] And it has opined that one likely cause for this disparity is that "relatively few college students with disabilities attend law school due to factors ranging from lack of funds to problems with attaining accommodations for the Law School Admissions Test." *Id*. Yet the ABA has the ability to take a major step toward solving the "pipeline" problem: it could reinstate an LSAT waiver option for the blind and others physically incapable of taking the test.

Nothing stops the ABA from reinstituting the waiver. Tellingly, the ABA is not categorically opposed to this type of waiver. In August 2014, for example, it revised its standards to waive the LSAT on a case-by-case basis for certain students—those already enrolled in the institution's undergraduate program and those seeking a dual degree who could meet

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[10] http://www.americanbar.org/groups/disabilityrights/initiatives_awards/goal_3.html.

[11] http://www.americanbar.org/content/dam/aba/uncategorized/2011/20110314_aba_disability_statistics_report.authcheckdam.pdf.

other testing or academic-success measures. But despite this pending litigation, it did not do so for the blind or visually impaired.[12]

Through a waiver option for the blind, the ABA could uphold its twin goals of eliminating bias and enhancing diversity. ABA Mission and Goals.[13] It could reach the goal expressed by its immediate past president, Paulette Brown: to make diversity and inclusion "part of the fabric of everything we do."[14] And it could make good on its professed commitment to promoting "the full and equal participation [of the disabled] in the legal profession." ABA, Lawyers with Disabilities.[15] It could, but it will not.

C. Barriers to education harm national leadership interests and rob our profession of talent.

Law schools are training grounds for state and national leadership. *Grutter* v. *Bollinger*, 539 U.S. 306, 332 (2003) ("Individuals with law degrees occupy

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[12] See American Bar Association Revised Standards for Approval of Law Schools, August 2014, new Standard 503-3. http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201406_revised_standards_clean_copy.authcheckdam.pdf. The ABA has since stopped this program, without explanation.

[13] http://www.americanbar.org/about_the_aba/aba-mission-goals.html.

[14] http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/CDR_Goal3_2016Accessible.authcheckdam.pdf.

[15] http://www.americanbar.org/portals/lawyers_with_disabilities.html.

roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives." (citing an *amicus* brief for the Association of American Law Schools)). Law schools should not exclude talented and qualified disabled individuals based on a test that discriminates against them and does not accurately reflect their aptitude to work as a lawyer.

Many of today's blind judges and attorneys did not have to take the LSAT. One of Michigan's Supreme Court Justices, Richard Bernstein, has been blind since birth. In 1995, before the ABA stopped allowing schools to waive the LSAT, Bernstein requested an accommodation of additional testing time, and the LSAC responded by recommending that he ask law schools to waive the LSAT requirement. (LSAC ltr. to Bernstein, Am. Compl., Ex. C.) Northwestern University School of Law did so, admitting him based on his academic record, extracurricular activities, and letters of recommendation. Bernstein says, "There are lots of people like myself who are unable to complete the LSAT. They can't perform and do logic games that require charts and diagrams and graphs." Stecker, *What's the Score: The LSAT and the Blind*, 80 Mich. B.J. at 46. "So many are intimidated by the process that they don't even bother to take the first step." *Id.*

Dana Lamon, a retired administrative law judge who served the California Department of Social Services for over thirty years, is also blind. At the time he applied to law schools in 1973, the LSAT was not even administered in Braille, so the schools did not require it. But while his applications were pending, the test

began to be administered in Braille. He refused to take it, and three law schools—USC, Yale, and Berkeley Law—granted him waivers and accepted him; he graduated from Yale Law School in 1977. December 9, 2016 phone interview.

Illinois' Paul W. Rink, who for many years served as an appellate administrative law judge handling Workers' Compensation cases, says that back in 1967 when he was applying to law school, the LSAC refused to administer the LSAT to him because of his blindness, and instead told him to request a waiver. Both law schools Rink applied to—Northwestern and University of Chicago—waived the LSAT for him. "I don't see how I could get into the legal profession today," he says. "There is no way I could complete the logic games section of the test." Rink earned a J.D. from Northwestern University School of Law and prior to his years on the bench was a senior attorney with Continental Illinois National Bank and Trust Company of Chicago. December 21, 2016 phone interview.

The rich and varied careers of these and other talented attorneys and judges underscore that our legal profession suffers a loss when qualified blind individuals are barred from a legal education. And it is incongruous that this barrier now exists at a time where developments in assistive technology—from screen magnification software programs to optical character recognition technology and voice- or speech-recognition software programs—are making it more and more feasible for the blind and visually impaired to complete a legal education and flourish in the practice of law. "Accessible technology is the new wheelchair-access ramp or the paddle for opening the door," says

Dr. Cynthia Overton, Ph.D., the lead contractor who wrote the National Council on Disability's 2016 Report to Congress and the White House.[16] December 23, 2016 interview.

States have been on the forefront of making sure new technologies are accessible to the blind and visually impaired. The Massachusetts Commission for the Blind, for example, has a Technology for the Blind Program that provides adaptive devices for the workplace.[17] And many employers have successfully adapted their procedures to accommodate assistive technology. As another example, during its 2008 term, this Court adapted to the unique needs of its first blind clerk, Isaac Lidsky, by, among other things, sending court emails and attachments in a format compatible with Lidsky's screenreading software and creating a macro for parsing cases into individual documents once they had been downloaded into a single Word document. Linda Corbelli & Melissa Williams, *Working with Isaac: A Visually Impaired Law Clerk and the Supreme Court*, Law Library Insights, Vol. 53, No. 2, Spring 2010, pp. 2–7.[18]

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[16] http://www.ncd.gov/progressreport/2016/progress-report-october-2016.

[17] http://www.mass.gov/eohhs/gov/departments/mcb/assistive-tech/assistive-technology-for-the-blind-prog.html.

[18] http://www.llsdc.org/assets/LLL/53/53-2.pdf.

D. The ABA has placed its stamp of approval on a test that contains questions for which the blind and visually impaired cannot even prepare.

The LSAT's logic games ask three main types of actions of the examinee: sequencing, grouping, and matching. Regardless of the type of game, the LSAT itself recommends diagramming. Likewise, Kaplan, a test-preparation company, advises drawing a sketch or other scratch work to help keep track of the rules and write new information. Hal Dworkin, *Testing for Total Inaccessibility in Examinations Under the ADA: A Case Study of Logic Games*, 2014 U. Ill. L. Rev. 1963, 1974–75 n.96 (citing Kaplan Publishing, LSAT: Comprehensive Program 78–88 (2009 ed.)); see also LSAT Analytical Reasoning (Logic Games) Tutorial, Graduate Admissions Testing[19] ("Very few test takers can handle a typical LSAT logic game without scratching out some sort of diagram that depicts the game's information visually."). The Princeton Review, similarly advises drawing pictures, noting that "[g]ames are a visual exercise" and cautioning that trying to organize the information in one's head is a "recipe for disaster." Adam Robinson & Kevin Blemel, *Cracking the LSAT:* 2013 Edition 126, 128–129 (Selena Coppock ed., 2012) (citing The Princeton Review instructions). Even with extra time and a reader/Braille exam, it is exceptionally difficult for a blind or visually impaired person to fit all the pieces of a logic game together absent diagramming. Dworkin, *Testing for Total Inaccessibility*, 2014 U. Ill. L.R. at 1986.

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[19] http://www.west.net/~stewart/lsat/logic-games-tutorial.htm.

Perhaps this is why test-prep companies do not appear to have methods or advice for the blind or visually impaired in how to solve logic games without diagramming or charting.

II. The legal questions in the petition have a common thread: a standard-setting entity such as the ABA cannot insulate itself from suit or from liability under the ADA.

The petition presents three legal questions—standing, the definition of "offer" under Title III of the ADA, and the viability of an independent claim under Title V of the ADA. All are important here because of the national importance of opening the doors of our profession to the disabled. This Court's intervention is also needed to resolve a circuit split as to the Title V question.

A. *Lujan* does not insulate a standard-setter such as the ABA, which essentially controls the LSAT.

The "injury in fact," "fairly traceable," and redressability requirements of standing are well established. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). And contrary to the Sixth Circuit majority, Pet. App. 9a–12a, they are met here. The harm Binno alleges is not that he cannot get into law school. Rather, it is that he has to sit for a discriminatory examination and then is at a competitive disadvantage when he has to submit the results as part of his law school application. As the Sixth Circuit concurrence noted and the majority did not disagree, "These are particularized injuries judicially cognizable under our standing jurisprudence." Pet. App. 24a.

As to the "fairly traceable" requirement, Judge Griffin below summarized it well: "The net result of the ABA's standards is this: virtually every American law school—though they may give whatever weight they choose to an individual's score—requires each applicant to submit an LSAT score as part of his or her application." Pet. App. 22a.

The ABA has argued that, because Standard 503 refers only to "a valid and reliable test," it does not compel any law school to require the LSAT and that law schools' decisions about use and consideration of the LSAT are wholly independent from Standard 503. But the Sixth Circuit concurrence saw that argument for what it is—"sophistry." Pet. App. 26a.

The ABA makes no secret of preferring the LSAT. That is clear from the ABA standards themselves. And the close ties between the ABA and the LSAC, which "produces" the LSAT, further evidence this preference. For example, annually from 1997 through 2014 the ABA and the LSAC produced a book titled "*ABA-LSAC Official Guide to ABA-Approved Law Schools*."[20]

In theory, of course, Standard 503 allows law schools to attempt to establish a valid and reliable alternative test to the LSAT. But in practice this does not appear to have occurred. Since no other test enjoys the LSAT's presumption of compliance, a law school

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[20] Publication of this official guide has ceased, and the most current ABA Law School Data is no longer posted on the LSAC website. Http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/official-guide-to-aba-approved-law-schools.html.

seeking to base admission on a different examination bears the burden of establishing that the alternate test is valid and reliable. And law schools must expend their own funds to come up with an alternative exam. Again, they risk sanctions or loss of accreditation if the alternative exam is used and the ABA does not approve it.

Although programmatic variance is a possibility under Standard 802, it is fraught with barriers for law schools seeking to accommodate students with disabilities such as blindness or visual impairment. Even if the ABA grants a variance, it "may impose conditions, and shall impose time limits it considers appropriate." (Consultant's Memo #1, Am. Compl., Ex. D, at 3.) For example, the schools that were granted a variance as of 2009 were granted only five-year variances and were required to annually report admission numbers, scores for various student populations, student GPAs, and in-depth student reports. (*Id.* at 4–6.) These reporting requirements are not imposed on schools using the LSAT. (*Id.* at 3–6.) Accordingly, a causal connection can exist where, as here, the ABA is a standard-setter, there are significant obstacles to an alternative path, and the ABA's repeal of its former waiver for those physically incapable of taking the LSAT shows that it is really the entity in control.

Redressability has also been met. Binno need not show he would be admitted to one of his chosen law schools. As this Court explained in *Regents of University of California* v. *Bakke*, the constitutional element of standing is a plaintiff's demonstration of any injury *to himself* that is likely to be redressed by favorable decision of his claim. 438 U.S. 265, 280 n.14 (1978)

(citing *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)). Bakke's injury was not in failing to be admitted to the medical school but in not being permitted to compete for all 100 places in that school because of his race and the school's special admissions program. *Id.* Similarly here, Binno alleges he has no effective chance to compete for law school positions, an injury that can be redressed by the ABA's reinstating the waivers it allowed prior to 1997.

The majority below ruled that Binno failed to establish standing because the injury is caused and is "best" redressed by the LSAC (which provides the content for the LSAT), *not* the ABA (which enforces standards essentially requiring law schools to consider the LSAT in the admissions process). Pet. App. 10a–12a. The dissent found this ruling "troubling," in part because it improperly limits liability to "the first link in the chain of causation." *Id.* at 31a, 27a (citing *Lexmark Int'l*, *Inc.* v. *Static Control*, *Inc.*, 134 S. Ct. 1377, 1391 n.6 (2014)).

Binno's ultimate ability to attain his goal of attending law school will, of course, be based on a law school accepting him. But this Court has not required plaintiffs to *conclusively* prove that third-party choices will be made in such a manner as to produce causation and permit redressability of injury, but only to adduce facts establishing a "substantial likelihood" that they will do so. *E.g.*, *Duke Power Co.* v. *Carolina Envtl. Study Group*, *Inc.*, 438 U.S. 59, 77–78 (1978) (holding that causation and redressability tests were met because there was a *substantial likelihood* that *but for* the protections afforded by the Price-Anderson

Act, a reactor would not have been built and the plaintiffs would not have suffered the alleged due-process violation); *Public Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 450–451 (1989) (in a case about the ABA's consulting role on judicial nominees, rejecting the ABA's argument against redressability, holding that the appellants might "gain significant and genuine relief" if they prevail). Binno has met that burden because an order against the ABA will virtually ensure a correction to the LSAT's bias against the blind and visually impaired. And Binno should have the opportunity to develop the record as to whether, but for ABA Standard 503, law schools would either grant waivers to the blind and visually impaired or decide not to utilize the LSAT.

B. The lower courts' interpretations of the ADA's Title III and Title V limit blind individuals' access to a legal education, contrary to the Act's central concern over access to education.

The Sixth Circuit ruled that the ABA does not "offer" the LSAT for purposes of Title III, and therefore cannot incur liability for its discriminatory impact on individuals such as Binno. Pet. App. 14a–17a. The Court also ruled that Binno could not sustain his interference claim without first establishing a violation of another section of the ADA—here, that the ABA interfered with the "offering" of the LSAT, Pet. App. 17a–18a. Neither ruling interprets the ADA's language based on the Act's goals.

1. An entity that selects a test "offers" the test under Title III.

Title III of the ADA, 42 U.S.C. § 12189, provides that "[a]ny person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education . . . shall offer such examinations or courses in a place and manner accessible to persons with disabilities . . . ." "[C]ontext indicates that an entity that offers examinations under this provision must be able to provide an accessible place and manner for administration of the tests . . . ." Pet. App. 14a. But an interpretation of the plain language that allows an entity (here, the ABA) to contract away liability merely by getting another entity (here, the LSAC) to administer the test it selects (here, because it is the only test that is presumptively valid and reliable) makes no sense.

Significantly, the associated regulations mention not just administration of the test but also test selection: "The examination is *selected* and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure . . . ." 28 C.F.R. § 36.309(b)(1)(i)(2015) (emphasis added). The ABA "selects" the LSAT test: it requires law schools to consider an entrance examination and then gives only the LSAT presumptive reliability and validity. And the logic games cannot accurately reflect a blind or visually impaired individual's aptitude.

Courts generally have not had to examine what to do about test accessibility under Title III when an examination itself is written and formatted in a way that prohibits accessibility to the disabled. Dworkin, *Testing for Total Inaccessibility*, 2014 U. Ill. L.R. at 1980. Even when the Department of Fair Employment and Housing sued the LSAC over the LSAT, all of its causes of action involved the exam's technical administration, not its content. *Id*. (discussing *Dep't of Fair Emp't & Housing* v. *LSAC*, 896 F. Supp. 2d 849 (N.D. Cal. 2012)).

But it is content that matters here, because the blind and visually impaired are not on an equal playing field with the sighted when they are exposed to the content of the logic-games portion of the test. The stated goal of the logic games is to attempt to mimic " 'the kinds of complex analyses that a law student performs in the course of legal problem solving.' " Dworkin, *Testing for Total Inaccessibility*, 2014 U. Ill. L.R. at 1984. The games deal with the relationship among various entities, with their placement in groups, or with matching of their qualities with each other. And the rules are in a randomized order to confuse examinees, with some rules dependent on whether or not a given fact exists, which changes the way the entities relate to each other. Dworkin, *Testing for Total Inaccessibility*, 2014 U. Ill. L.R. at 1983. Although the entities are described linguistically, examinees have to imagine them existing in a physical space. They have to step back and look at the bigger picture, which is why sketching is so important—it gives the examinee a bird's eye view of how the entities exist in space and what happens when a condition changes. *Id*. No physical accommodation—not more

testing time, not software, not breaks—will give the blind person spatial reasoning equal to their sighted counterparts.

There are practical benefits to this Court's guidance on what constitutes "offer[ing]" an exam, such as minimizing the incentive for entities such as the ABA to insulate themselves by contracting a discriminatory exam out to a third party, contrary to the goals of the ADA. But broader interests are at stake here. This Court's guidance would impact the membership and integrity of our profession.

2. This Court's guidance is needed to interpret Title V.

As the petition explains, Pet. App. 32–33, this Court's guidance is needed to resolve the circuit split over the scope of Title V and the appropriate standard for examining such a claim.

Courts are split on whether to apply a distinct standard for Title V claims or to use the modified *McDonnell-Douglas* burden-shifting analysis that is fairly uniformly applied to determine whether a plaintiff has established a prima facie case of retaliation under the ADA. See *McDonnell Douglas Corp*. v. *Green*, 411 U.S. 792, 802 (1973); 42 U.S.C. § 2000e, et seq. As is true with the interpretation of "offer" under Title III, courts seldom have occasion to examine stand-alone Title V claims because most interference claims are brought along with a retaliation claim under § 12203(a), and so, proceed under *McDonnell-Douglas*. Pet. 24–26. This Court's guidance is needed to articulate a national standard.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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