

## Via Electronic Submission

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U.S. Department of Justice  
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Re: DREDF Comments on Proposed DOJ ADAAA Regulations  
RIN 1190-AA59, DOJ-CRT 2010-0112

Dear Ms. Johnson-Betts:

The Disability Rights Education & Defense Fund (DREDF) appreciates the opportunity to comment on the U.S. Department of Justice (DOJ) Notice of Proposed Rulemaking (NPRM) to implement the ADA Amendments Act (ADAAA) of 2008, as it amends Titles II and III of the Americans with Disabilities Act (ADA) of 1990.

Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF is a national law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. For three decades, DREDF has remained board- and staff-led by members of the disability community, pursuing its mission through education, advocacy and law reform efforts.

Nationally recognized for expertise in the interpretation of federal disability civil rights laws, DREDF has been intimately involved in the passage process leading to most of those laws. We participated in most of the U.S. Supreme Court decisions interpreting those laws, including participation as party or *amicus* counsel. During the early 1990s we offered comments on previous regulations promulgated by both DOJ and the U.S. Equal Employment Opportunity Commission (EEOC) to implement the ADA as originally enacted. We also offered comments in 2009 on the EEOC's proposed ADAAA regulations, which were promulgated in final form in 2011.

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Our comments on DOJ's proposed regulations follow. For convenience and to aid review, this submission includes: (1) a table of contents, identifying the page number on which discussion of each identified subject begins; and (2) more extensive discussion of each identified subject.

Thank you for your time and attention.

Respectfully submitted,

Disability Rights Education & Defense Fund (DREDF)

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## **STRUCTURE OF NPRM and DREDF COMMENTS**

The DOJ's Notice of Proposed Rulemaking (NPRM) ("DOJ ADAAA NPRM") was published at 79 Fed. Reg. 4839-4862 (Jan. 30, 2014). The NPRM includes the text of proposed changes in regulatory language relevant to DOJ's Americans with Disabilities Act (ADA)<sup>1</sup> Title II regulations (28 C.F.R. Part 35) and Title III regulations (28 C.F.R. Part 36).

The NPRM also includes introductory sections: I-Executive Summary (at 4840-4841); II-Background (at 4841-4842); III-Summary of ADAAA (at 4842); IV-Relationship to EEOC ADAAA regulations (at 4843). These introductory sections are followed by: V-Section-by-Section Analysis (at 4843-4849), which contains the bulk of the discussion of the substantive regulatory provisions.

Finally, the NPRM also includes a "Regulatory Process" section addressing various issues, some of which are also addressed in prior portions of the NPRM (e.g., costs assessment, and relationship to EEOC regulations).

DREDF's comments have been organized conceptually, addressing each specified topic once, rather than tracking the precise structure of the NPRM. We begin by offering "Overall Comments" of general relevance to the NPRM as a whole. We then provide more specific discussion of various aspects of the NPRM, grouped by general subject matter. Thus, for example, "relationship to EEOC ADAAA regulations" is discussed in one discrete section below, even though it is mentioned in both the introductory and regulatory process portions of the NPRM. Absence of specific or detailed reference to some aspects of the NPRM is generally a result of DREDF agreement with the approach proposed by DOJ in the NPRM. However, as to all aspects of the NPRM, DREDF also urges attention to the insights and recommendations of other commenters with relevant experience and expertise.

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<sup>1</sup> Pub. L. 101-336, 101 Stat. 327 (Jul. 26, 1990), *codified at* 42 U.S.C. §§ 12101 *et seq.*

## **OVERALL COMMENTS**

### **Commendable Emphasis on Broad Statutory Purpose**

DREDF understands the proposed DOJ regulations to be a strong statement of support for, and generally effective implementation of, the clear congressional mandate to restore a broad definition of "disability" under the ADA and other federal disability civil rights laws.

As emphasized by the ADAAA<sup>2</sup> itself, the definition must be construed broadly, to the maximum extent permitted by statutory language. The ADAAA clearly invalidates a series of U.S. Supreme Court and lower court decisions that failed to fulfill Congress's original expectation as to definitional interpretation.<sup>3</sup> It also confirms Congress's intent that ADA analysis should focus primarily on whether covered entities have complied with disability nondiscrimination mandates.<sup>4</sup>

The specific comments offered here use this clear congressional mandate as a touchstone. We commend the many instances in which the proposed rule is faithful to this mandate. We also identify instances where adjustments or clarifications are advised to more fully implement congressional intent.

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<sup>2</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553-3559 (Sept. 25, 2008)(hereafter "ADAAA" or "Amendments").

<sup>3</sup> Specifically, there was an expectation that the 1990 ADA definition of disability would be interpreted to be consistent with expansive Rehabilitation Act authority that pre-dates the passage of the ADA itself. See Pub. L. 110-325, § 2(a)(3).

<sup>4</sup> See Pub. L. 110-325, § 2(b)(5), 42 U.S.C. § 12101 note ("... it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis".)

**Commendable Cost Assessment Emphasis on Both Quantitative and Qualitative Benefits**

DREDF concurs with DOJ's determination that economic changes resulting from implementation of the ADAAA will be below the \$100 million threshold for "economically significant" regulations.<sup>5</sup> Moreover, while it may be difficult to project precise quantitative costs and benefits, it is clear that overall benefits will exceed the costs of ADAAA implementation as it pertains to Title II and III contexts. Such a conclusion is particularly justified given the *restorative* nature of the Amendments, and the fact that they have now been in effect for over five years with no significant adverse impact.<sup>6</sup>

In assessing *quantitative* economic impacts, it is important to recognize the cost *savings* resulting from the ADAAA's clarity as to the broad scope of coverage. The clarity and detail of the ADAAA discourages unnecessary expenditure of resources on threshold definitional issues. It will reduce the volume of complaints and litigation, reduce the costs of

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<sup>5</sup> See 79 Fed. Reg. 4850 ("this proposed rule is not an economically significant regulatory action, as it will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.")

<sup>6</sup> The ADAAA was enacted with a statutory effective date of January 1, 2009, and it includes no explicit congressional statement of retroactively. Because the number of ADA cases arising or filed before 2009 continues to diminish, the importance of formal ADAAA retroactivity is similarly diminishing in significance over time. We thus do not include any extended retroactivity discussion in these comments. But as DREDF also asserted in November 2009 comments on the EEOC's proposed ADAAA regulations, the Amendments leave the technical statutory language of the disability definition unchanged, and they are clearly directed at *restoring* what Congress understood to be the original broad scope of that language. Because that original intent is clearly relevant to all ADA cases, the Amendments should thus play a role in the interpretation of any claims that predate 2009, notwithstanding the lack of formal retroactivity.

remaining complaints and litigation, and yield better consistency and predictability in both judicial interpretation and executive enforcement. As the NPRM anticipates, there are also quantitative benefits that come from expanded access to various Title II and III opportunities. These include (but are not limited to) benefits from educational opportunities that can enhance employment prospects, enhance productivity, and boost future earnings and the tax base.<sup>7</sup>

As the NPRM also notes, when contemplating the cost-benefit equation it is equally important to go beyond quantitative measures to recognize the ADAAA's *qualitative* benefits. These include enhanced personal self-worth and dignity for individuals with disabilities, as well as the various societal benefits that come when the United States honors its deeply held values of equity, fairness, and full participation.<sup>8</sup>

### **Commendable Emphasis on Implications for LD/ADD/ADHD in Testing and Post-Secondary Education**

As the NPRM notes, a primary impetus for the ADAAA was congressional concern about the impact of erroneous judicial interpretations in the employment context.<sup>9</sup> Beyond employment, explicit

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<sup>7</sup> See 79 Fed. Reg. 4854 (noting that some individuals covered by ADAAA “could be expected to earn a degree or license that they otherwise would not have earned” and that “extensive research has shown notably higher earnings for those with college degrees over those who do not have one.”)

<sup>8</sup> See 79 Fed. Reg. 4854 (“the ADA Amendments Act is expected to generate psychological benefits for covered individuals, including an increased sense of personal dignity and self-worth”); and 79 Fed. Reg. 4855 (“people value living in a country that affords protections to persons with disabilities, whether or not they themselves are directly or indirectly affected. ... people in society value equity, fairness and human dignity; even if they cannot put a dollar value on how important it is to them.”)

<sup>9</sup> See 79 Fed. Reg. 4850 (“although the ADA Amendments Act was expected to have an impact on a broad range of individuals with disabilities who were seeking reasonably accommodations under title I, its impact on



ADAAA legislative history references concentrated on confirming the clarified coverage for learning disabilities in testing and post-secondary education.<sup>10</sup>

Given this background, DREDF concurs with DOJ's proposal to highlight the clear ADAAA implications for individuals with learning disabilities, Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD) in the context of testing and post-secondary education. The rule properly recognizes — as did Congress — that many such individuals have been inappropriately denied accommodation in testing and other educational activities under previously constrained definitional interpretations. DREDF appreciates the special attention that is given to these issues, given the importance of the ADAAA's clarification as it pertains to these particular disabilities and contexts. In finalizing the rule, we urge DOJ to pay particular attention to commenters with relevant expertise and experience in these issues.

However, as discussed below, we also urge DOJ to clarify that the ADAAA has equally important implications beyond these issues. Detail provided as to LD/ADD/ADHD in testing and post-secondary education should not be taken to suggest that the ADAAA is limited to these particular disabilities and contexts. There are and will be broader Title II and Title III implications, some of which can already be anticipated, and some of which may only become apparent as ADAAA implementation proceeds.

### **Additional Implications Should Be Expressly Anticipated**

While the NPRM appropriately notes and includes detail regarding the ADAAA implications for LD/ADD/ADHD in testing and higher education, DREDF is concerned that an over-emphasis on those issues may inadvertently obscure the potential impact on other disabilities and contexts

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individuals challenging discrimination under titles II or III was expected to be substantially less.”)

<sup>10</sup> See 79 Fed. Reg. 4850, *citing* H.R. Rep. No. 110-730 pt. 1 at 10-11 (2008) (“Congress was concerned about the number of individuals with learning disabilities who were denied testing accommodations (usually extra time) because covered entities claimed that those individuals did not have disabilities covered by the ADA.”)

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that come within DOJ's regulatory ambit. DOJ's enforcement experience may indeed confirm that "the ADA's definition of 'disability' was rarely a central issue in title II and title II cases, except with respect to testing accommodations." See 79 Fed. Reg. 4850. However, the ADA AAA nevertheless includes important coverage clarifications relevant to such contexts.

First, the ADA AAA clarifies coverage for pre-school and K-12 students with a wide range of impairments in both public and private child care and educational settings. Certainly, many of these children have disabilities affecting learning that entitle them to the protections of the Individuals with Disabilities Education Act (IDEA). And new accommodation costs for such students — as well as for their non-IDEA classmates — may well be minimal, given that many pre-school and K-12 institutions can meet such costs with existing personnel, protocols, and technologies.<sup>11</sup>

But as currently drafted, the DOJ rule fails to acknowledge that there will be a distinct subset of students who are not necessarily IDEA-eligible, and who were at risk of being denied nondiscrimination protection (including various policy modifications and accommodations) prior to the ADA AAA. This includes (but is not limited to) students with a wide range of episodic conditions, mitigated conditions, and other medical conditions such as allergies, diabetes and seizure impairments that may require basic health maintenance support such as diet and schedule adjustments or

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<sup>11</sup> The NPRM explicitly addresses the potential pre-secondary education cost implications of the proposed rule at 79 Fed. Reg. 4840 ("[T]he Department does not believe that there are significant additional costs for providing extended time for testing for students in kindergarten through grade 12 as a result of the ADA Amendments Act. The vast majority of these students are already receiving a range of classroom program modifications, including extended time for testing, pursuant to the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1400, *et seq.* To the extent that there are non-IDEA students in kindergarten through grade 12 who will receive additional classroom modifications (e.g., extended time for testing), as a result of the Department's implementing the ADA Amendments Act by amending its title II regulations, the Department believes that schools will not incur significant additional costs because the extra time will be supervised by the student's teachers or other existing school personnel.")

medications. Such students are clearly affected by the ADAAA's invalidation of now-discarded high court decisions that may have excluded them from definitional coverage.

Second, the ADAAA clarifies coverage for the same range of episodic, mitigated or medical conditions (as well as other impairments) outside the educational context. While formal definitional challenges and anticipated costs may be more prevalent in specific circumstances, Titles II and III of the ADA address an enormous breadth of covered entities and contexts. Just by itself, the explicit change in "mitigating measures" analysis can be expected to have implications across that entire spectrum. Add to that all of the other interpretive changes mandated by the ADAAA, and it is clear that definitional and implementation revisions are highly relevant to all of Titles II and III — not just testing and education.

## **RELATIONSHIP TO EEOC ADAAA REGULATIONS**

As the DOJ NPRM notes, Congress gave the U.S. Equal Employment Opportunity Commission (EEOC) regulatory responsibility for implementing the ADAAA as it pertains to the ADA's Title I employment provisions.<sup>12</sup> The EEOC has already completed its ADAAA regulatory promulgation process, which included an NPRM issued in September 2009, consideration of public comments, and a final rule in March 2011.<sup>13</sup>

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<sup>12</sup> See 79 Fed. Reg. 4843. Statutory authority is conferred on the EEOC by Pub. L. No. 110-325, § 6(a)(2), *codified at* 42 U.S.C. § 12205a. As the DOJ NPRM notes, that same statutory provision gives DOJ authority to issue ADAAA regulations applicable to the ADA's Title II (state and local government) and Title III (public accommodations) provisions. See 79 Fed. Reg. 4840.

<sup>13</sup> The EEOC's ADAAA regulatory history is recounted at 79 Fed. Reg. 4843. The EEOC NPRM was published at 74 Fed. Reg. 48431 (Sept. 23, 2009). As noted in the DOJ NPRM, "The EEOC received and reviewed over 600 public comments in response to its NPRM." See 79 Fed. Reg. 4843. During the EEOC's promulgation process, EEOC and DOJ also "held four joint 'Town Hall Listening Sessions' throughout the United States and heard testimony from more than 60 individuals and representatives of the business/employer industry and the disability advocacy community." *Id.* DREDF submitted both written comments and testimony during this

Given the breadth of the final EEOC ADAAA regulations, and their general fidelity to statutory mandates and congressional intent, DREDF commends DOJ's intention to generally track with the existing EEOC regulations.<sup>14</sup> However, there are some instances where DREDF urges the Department to include emphasis and analysis not necessarily present in the EEOC rule. For example, we urge inclusion of additional "major life activity" examples of relevance given the wide breadth of covered entities and contexts that come within the sweep of ADA Titles II and III.

## **PURPOSE AND BROAD COVERAGE**

### ***Express Broad Construction References***

DREDF commends the NPRM for its repeated emphasis on the ADAAA's intended breadth of construction, and endorses DOJ's proposal to add express broad construction references to regulatory language. See proposed 28 C.F.R. § 35.101(b) and 28 C.F.R. § 36.101(b). Similarly explicit references should be retained in the Section-by-Section Analysis and other explanatory portions of the final regulations.<sup>15</sup>

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process. The EEOC's final rule was published at 76 Fed. Reg. 16978 (Mar. 25, 2011).

<sup>14</sup> See 79 Fed. Reg. 4843 and 4850 (noting that DOJ "has made every effort" to ensure consistent albeit not always identical provisions, and proposing adoption of the same regulatory language "wherever possible."). As the NPRM notes, such harmony is required by Executive Order 13563, and is important for consistent implementation and enforcement of the ADAAA, and greater certainty for all those affected by the law. *Id.*

<sup>15</sup> See, e.g., 79 Fed. Reg. 4840 ("proposed revisions state that the definition of 'disability shall be interpreted broadly."); 79 Fed. Reg. 4841 ("the definition of 'disability' ... is to be construed broadly"); *Id.* (ADAAA "provides rules of construction necessary to ensure that the definition is construed broadly"); 79 Fed. Reg. 4842 (ADAAA "restores the broad application of the ADA"); 79 Fed. Reg. 4842, *citing* 2008 Senate Statement of the Managers ("like other civil rights statutes, the ADA must be construed broadly to effectuate its remedial purpose."); 79 Fed. Reg. 4842, *citing* 42 U.S.C. § 12102(4)(a)(congressional intent that ADAAA definition

**Primary Focus on Discrimination, not “Disability” Definition**

DREDF commends the NPRM for its repeated emphasis on the ADAAA’s mandate of primary focus on covered entity compliance, rather than definitional assessment. We endorse DOJ’s proposal to add such references to regulatory language. See proposed 28 C.F.R. §§ 35.101(b) and 35.108(d)(1)(iii); and 28 C.F.R. §§ 36.101 and 36.105(d)(1)(iii). Similarly explicit references should be retained in the Section-by-Section Analysis and other explanatory portions of the final regulations.<sup>16</sup>

**Illustrative, Not Exhaustive, Examples**

Consistent with the ADAAA’s purpose and broad coverage, the congressional language itself carefully specifies that various statutory

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“shall be construed in favor of broad coverage”); and 79 Fed. Reg. 4843 (noting regulatory revisions consistent with “purposes of reinstating a broad scope of protection under the ADA,” and aim that disability definition “shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.”)

<sup>16</sup> See, e.g., 79 Fed. Reg. 4840 (proposed regulatory revisions “make it clear that the primary object of attention” should be entity compliance, and that definitional assessment “should not demand extensive analysis”); 79 Fed. Reg. 4840 (proposed regulatory rule of construction explicit as to “primary issue” of entity compliance); 79 Fed. Reg. 4842, *citing* Pub. L. 110-325, § 2(b)(5), 42 U.S.C. § 12101 note (“Congress sought to convey that ‘the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and to convey that the question of whether an individual’s impairment under the ADA should not demand extensive analysis.”); 79 Fed. Reg. 4843 (added regulatory provisions “explain that ‘[t]he primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection’ and “primary object of attention” should be entity compliance.”); and 79 Fed. Reg. 4845 (discussing “Primary focus of ADA cases”).

examples are intended to be illustrative, not exhaustive.<sup>17</sup> The NPRM is generally faithful to this mandate, expressly incorporating various statutory examples and drawing from EEOC examples, as well as proposing to include new DOJ examples.<sup>18</sup>

DREDF generally endorses DOJ's proposal to include examples already present in statute and EEOC regulations, as well as to add new examples relevant to impairments or contexts that have been the subject of past confusion or legal challenges (e.g., LD/ADD/ADHD in testing and higher education). However, the final rule should continue to emphasize that any example used to illustrate non-exclusive statutory mandates should not be interpreted to be exhaustive. Additionally, in crafting final examples, we urge DOJ to pay particular attention to commenters with expertise and experience of relevance to any potential illustrations.

### **No Negative Implications From Omissions**

Consistent with the "illustrative, not exhaustive" tenor of the ADAAA, the final DOJ rule should emphasize that the absence of particular examples is not dispositive as to whether they may appropriately come

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<sup>17</sup> See, e.g., 42 U.S.C. § 12102(1)(2)(A)(major life activities "include, but are not limited to ..."); 42 U.S.C. § 12102(1)(2)(B)(Major bodily function "including but not limited to ..."); 42 U.S.C. § 12102(4)(E)(i) ("mitigating measures such as ..."); and 42 U.S.C. § 12103(1)("The term 'auxiliary aids and services' includes [various examples]" as well as "other similar services and actions.")

<sup>18</sup> See, e.g., 79 Fed. Reg. 4842 (ADAAA provides "an non-exhaustive list of major life activities ..."); 79 Fed. Reg. 4842 (noting that the ADAAA prohibits consideration of "mitigating measures such as ..."); 79 Fed. Reg. 4844, *citing* 42 U.S.C. § 12102(2)(A) and 29 C.F.R. § 1630.2(i)(1)(i) (as to major life activities, DOJ intent to "incorporate the statutory examples as well as to provide additional examples included in the EEOC regulation—reaching, sitting, and interacting with others); and 79 Fed. Reg. 4844, *citing* 42 U.S.C. § 12102(2)(B) and 29 C.F.R. § 1630.2(i)(1)(i)(as to major bodily functions, including "non-exclusive list" consistent with statutory language, plus six additional major functions illustrations in the EEOC regulation—special sense organs and skin, genitourinary, cardiovascular, hemic, lymphatic, and muscular skeletal).

within the ambit of statutory protection. DREDF commends the NPRM for explicitly recognizing that “the absence of a particular life activity or bodily function from the list [of identified examples] should not create a negative implication as to whether such activity or function constitutes a major life activity under the statute or the implementing regulations.” See 79 Fed. Reg. 4844. We urge DOJ to consider including such explicit “no negative implication” language in other parts of the final rule addressing non-exclusive statutory definitions.

## **DEFINITION OF “DISABILITY”**

### **Generally**

DREDF appreciates the proposed regulatory restructuring of the definition given the expanded definitional length and detail mandated by the ADAAA. See 79 Fed. Reg. 4843. The definition appropriately retains “the three-part basic definition of the term ‘disability,’” but as the NPRM notes, emphasizes that this definition must be construed consistently with the broad language and intent of the ADAAA.

### **Rules of Construction**

The proposed DOJ rules of construction are generally faithful to the ADAAA’s statutory mandate. We commend the NPRM for noting that individuals asserting a disability may establish coverage under any one or more definitional prong, as they choose. See 79 Fed. Reg. 4843. One prong is sufficient for coverage, but no prong affords lesser or greater rights, with the sole exception that those asserting third-prong “regarded as” coverage are not entitled to reasonable modifications of policies, practices or procedures. *Id.*, citing 42 U.S.C. §12201(h). While the proposed regulations note the congressional expectation that consideration of first- and second-prong coverage will generally not be needed unless reasonable modifications are at issue, DOJ correctly emphasizes that individuals are entitled to proceed under any definitional prong of their choosing. See 79 Fed. Reg. 4843-4844.

## **PHYSICAL OR MENTAL IMPAIRMENT**

The NPRM proposes to generally retain the definition of “physical or mental impairment.” See 79 Fed. Reg. 4844. However, DOJ proposes to add examples of two new body systems (“immune” and “circulatory”) that are also now included in the EEOC regulations. *Id.*; see also 29 C.F.R. § 1630.2(h)(1). The NPRM also contemplates the addition of “dyslexia” as an example of a specified learning disability, with a targeted request for comment on this proposal. See 79 Fed. Reg. 4844.

DREDF commends the addition of “immune” and “circulatory” systems, which are consistent with both the statute and the EEOC regulations. Consistent with our more global comments, we urge DOJ to emphasize that any newly included or expanded examples remain illustrative only, not exhaustive. No negative implications should be drawn from omissions.

As to the addition of “dyslexia,” DREDF appreciates that special attention to this impairment may be appropriate, given the confusion and disputes that arose as to dyslexia prior to the enactment of the ADAAA. However, any such special attention heightens the prospect that negative implications might be drawn from the omission of other diagnoses or impairments that might also come within the statutory ambit of covered intellectual, learning, cognitive or other mental disabilities. To minimize this risk, it may be appropriate to include additional learning-related impairments, in addition to a general “no negative implication from omission” disclaimer. If the final rule includes an explicit “dyslexia” example, it should be coupled with a contextual explanation and explicit acknowledge that it is merely one more illustration in a larger non-exhaustive list. In finalizing the rule as to a possible “dyslexia” illustration, we urge DOJ to pay particular attention to commenters with relevant expertise and experience.

## **MAJOR LIFE ACTIVITIES**

As the NPRM recognizes, the ADAAA includes a non-exhaustive statutory list of “major life activities.” This list was memorialized in statutory language due to the congressional concern that courts had been construed “major” more narrowly than intended. See 79 Fed. Reg. 4844, *citing* 42



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U.S.C. §§ 12102(A) and 12101(b)(4).<sup>19</sup> DOJ proposes to incorporate this non-exhaustive statutory list into its regulatory definitions, as well as including additional examples (“reaching,” “sitting, and “interacting with others”) from the EEOC regulations. See 79 Fed. Reg. 4844, *citing* 29 C.F.R. § 1630.2(i)(1)(i).

DREDF commends all of these additions, which are consistent with both the statute and the EEOC regulations. However, there are other activities that may also be appropriately added. In particular, DREDF recommends that the DOJ add test-taking, writing, typing or keyboarding, traveling, driving and swimming. While potentially relevant to the workplace as well, these activities are often especially relevant to the additional contexts subject to DOJ regulation.

The final rule should also recognize the importance of additional life activities relevant to communities with characteristics that distinguish them from other parts of America. For example, in farming and ranching communities, tending livestock and operating farm equipment can be a major life activity. Operating water craft may be integral to life in isolated river or lake communities, or on small islands. Gardening, composting, hunting and maintaining independent septic, well or water systems may be crucial to rural life. Moreover, some of the activities relevant to life in such communities (e.g., saddling and riding a horse) may require unique combinations of reaching and bending, manual dexterity, balance and endurance. Such life activities, and the potentially substantially limiting impact of impairments on them, must be subject to ADAAA analysis in order to ensure the intended breadth of coverage.

In preparing the final illustrative list, we urge DOJ to pay particular attention to commenters offering relevant expertise or experience.

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<sup>19</sup> In particular, the ADAAA rejected “the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002)[“*Williams*”], that the terms ‘substantially’ and ‘major’ in the definition of disability under the ADA ‘need to be interpreted strictly to create a demanding standard for qualifying as disabled,’ and that to be substantially limited in performing a major life activity under the ADA ‘an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.’” See 42 U.S.C. § 12101(b)(4).

Consistent with our more global comments, we urge DOJ to emphasize that any newly included or expanded examples remain illustrative only, not exhaustive. No negative implications should be drawn from omissions. Regardless of what is included in the final regulatory list, DOJ should also explicitly anticipate that courts have and will continue to recognize other examples of covered major life activities.

## **SUBSTANTIALLY LIMITS**

### **Generally**

DREDF appreciates the proposed regulatory structure and language of the “substantially limited” explanations and provisions, which are generally faithful to the ADAAA’s statutory mandates. In particular, we commend the NPRM’s emphasis on and consistency with the ADAAA’s enunciated broad purposes and coverage. We further commend the explicit recognition that Congress has rejected the narrowing standards of the *Williams* case, especially its now abandoned requirements of “prevents or severely restricts,” and “central importance to most people’s daily lives.”<sup>20</sup>

### **Rules of Construction**

The proposed DOJ rules of construction are generally faithful to the ADAAA’s statutory mandates. DREDF appreciates that proposed rules of construction have been structured into 9 categories, which facilitate ease of review, and which will be helpful in enabling individuals with disabilities, covered entities, and the courts in finding analysis of relevance to specific types of issues and cases.

To facilitate review of these comments, we summarize here the basic 9 categories as we understand them:

1. Broad construction
2. Comparison to “most people”
3. Primary focus on discrimination

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<sup>20</sup> See 79 Fed. Reg. 4844-4845, *citing Williams*, 534 U.S. 184 (2002), and further discussion above at n.19.

4. Individualized assessment less onerous than previous
5. Role of scientific, medical or statistical evidence
6. Mitigating measures
7. Episodic conditions and remissions
8. One “major life activity” sufficient
9. Transitory and minor exception

We address here only the categories as to which we have specific concerns or recommendations of direct relevance to the category.

### **Comparison to “Most People”**

There are two distinct aspects to our concerns and recommendations as to the “Comparison to ‘Most People’” category.

First, we urge DOJ to ensure that final inclusion of any learning disability illustration(s) are in line with DREDF’s more global comments. Specifically, while it may be appropriate to include such illustration(s), they should be crafted with attention to commenters with relevant expertise and experience. Additionally, DOJ should emphasize that any newly included or expanded examples remain illustrative only, not exhaustive. No negative implications should be drawn from omissions.

Second, DREDF is concerned that DOJ’s proposed language and analysis in this category risks confusion as to when and how the comparison to “most people in the general population” should be made. We particularly address: (1) the circumstance of discrepancy between aptitude and achievement due to impairment, and (2) the proposal to include reference to potential targeted subpopulation comparisons. In crafting the final rule, we urge DOJ to be attentive to the ADAAA’s anticipation that identified limitation(s) may indeed be “important” within the congressional intent, even if they do not meet the strictures of discarded case law.<sup>21</sup>

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<sup>21</sup> See 79 Fed. Reg. 4845, citing H.R. Rep. 110-730, pt. 1, at 9-10 (2008), as to the proposition that a requirement of “important” limitation remains, notwithstanding the legislative override of the *Williams* case (“While the limitation imposed by an impairment must be important, it need not rise to the level of severely restricting or significantly restricting the ability to perform a major life activity in order to qualify as a disability.”)

### ***Aptitude-Achievement Discrepancies***

As the NPRM correctly anticipates, discrepancy between intelligence and aptitude (on one side of the equation) and performance or achievement (on the other side of the equation), arises most frequently in consideration of learning disabilities and testing or academic accomplishment. The NPRM also correctly recognizes that imbalance in this equation is “one accepted method” of arriving at a learning disability diagnosis. See 79 Fed. Reg. 4845. However, the NPRM fails to fully acknowledge that this essentially individualized imbalance may also be sufficient to satisfy remaining definitional requirements beyond diagnosis. This possibility is somewhat anticipated in the NPRM’s nuanced discussion of “condition, manner and duration.” But there may be instances where the discrepancy between aptitude and achievement is sufficient, in-and-of itself, to satisfy all relevant comparative requirements. The final rule should also clarify that where the discrepancy between an individual’s intellectual ability and processing speed on exams is greater than the range of discrepancies found in the general population due to an impairment in reading or processing speed, that should be sufficient to meet the definition of disability. Such clarifications are consistent with the statutory mandate that definitional analysis should not “demand extensive analysis,”<sup>22</sup> and the regulatory recognition that it “usually will not require scientific, medical, or statistical evidence.”<sup>23</sup>

### ***Targeted Sub-Population Comparisons***

The NPRM asserts that while the “most people” comparison will generally involve comparison to the general population, “there are a few circumstances where it is only appropriate to make this comparison in reference to a particular population.” See 79 Fed. Reg. 4848. The sole

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<sup>22</sup> See Pub. L. 110-325, § 2(b)(5), 42 U.S.C. § 12101 note, and discussion above at nn.4 and 16.

<sup>23</sup> See 29 C.F.R. § 1630.2(j)(1)(v)(discussion of such evidence in EEOC ADAAA regulations) and 79 Fed. Reg. 4840 and 4845; proposed 28 C.F.R. § 35.108(d)(1)(v); and proposed 36 C.F.R. § 36.105(d)(1)(v) (discussion of such evidence in DOJ ADAAA NPRM).

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example given focuses on diagnosis of learning disability, noting that related clinical assessments “are always performed in the context of similarly-aged children or a given academic year” rather than via comparison to the general population. *Id.*

DREDF is concerned that this explanatory language and example as to the potential use of targeted sub-population comparisons could mistakenly be used to *restrict* definitional scope, thus undermining the ADAAA’s goal of *expanded* coverage (both within and beyond the learning disability assessment context). For example, given the correlation between disability and aging, it would not be appropriate for older individuals to be compared only to those of similar advanced age. In that instance, a sub-population comparison risks *narrowing* rather than *broadening* definitional coverage, because older individuals clearly “substantially limited” relative to the general population are not necessarily “substantially limited” relative to their age peers. Similarly, individuals living in institutional settings may be “substantially limited” in various ways relative to the general population, but not when compared to others living in institutions. Consistent with ADAAA purpose and intent, this explanatory language and example should be omitted, to eliminate the risk that sub-population comparisons could be used to constrict coverage.

***Transitory and Minor Exception***

It is appropriate for DOJ to memorialize and explain that the ADAAA includes a narrow “transitory and minor” exception that is applicable *only* to the “regarded as” third-prong definition. See Pub. L. 110-325, § 4, *codified at* 42 U.S.C. § 12102(3)(B). But this exception is correctly presented only *after* the broader context of the ADAAA’s clarifying *expansion* of the third-prong definition has been established. Thus, the language of the relevant explanatory language should begin by emphasizing the general ADAAA context of enhanced third-prong coverage. The current NPRM language, in contrast, leads off by asserting that the ADAAA “limits the application of the ‘regarded as’ prong to impairments that are not ‘transitory and minor’”. See 79 Fed. Reg. 4843. This formulation can easily be misinterpreted as suggesting that the overall thrust of the ADAAA is to limit third-prong coverage, when in fact the opposite is true.

Once the general context of expansive third-prong covered has been appropriately recognized, statement and analysis relevant to the “transitory

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and minor” exception can follow. As in the NPRM, the final rule should expressly emphasize two crucial aspects of the exception. First, the “transitory and minor” exception requires that *both* characteristics (“transitory” and “minor”) must be present. See 79 Fed. Reg. 4846. Second, the “transitory and minor” exception is clearly a *defense* that must be raised and demonstrated by a covered entity. See 79 Fed. Reg. 4843.

While illustrative examples may be helpful for other provisions of the rule, it is DREDF’s position that they are not particularly helpful as to “transitory and minor,” given the fact-dependent nature of this very narrow statutory exception applicable only to the “regarded as” prong. The NPRM’s illustration of an “uncomplicated sprained ankle,” for example, risks inferences that sprains resulting in extended recovery time or non-minor consequences are also excluded. Similarly, there is a risk that any illustratively excluded impairments will be mistakenly imported into first- and second-prong analysis (where the “transitory and minor” exception has no applicability at all).

**Predictable Assessments**

In contrast to the narrow third-prong “transitory and minor” exception (where illustrations using specific impairments risks inappropriate carry-over to other parts of the ADAAA), robust use of illustrations in the “predictable assessments” portion of the rule will help to further the ADAAA’s broad purpose and intent. “Predictable Assessments” illustrations help underscore the wide range of covered impairments, and the degree to which the baseline individualized assessment “should be particularly simple and straightforward.” See 79 Fed. Reg. 4846 and proposed 28 C.F.R. § 35.108(d)(2) and § 36.105(d)(2). The illustrations currently listed in the “predictable assessments” provisions should be expanded to include, at a minimum, “specific learning disabilities.” In crafting final examples, we also urge DOJ to pay particular attention to commenters with expertise and experience of relevance to any potential additional illustrations.

**Condition, Manner \*or\* Duration**

As the NPRM notes, “condition,” “manner” or “duration” can offer entrée into the many rich and varied ways in which “substantial limitation” may be assessed. See 79 Fed. Reg. 4846-4848, and proposed 28 C.F.R.

§ 35.108(d)(3) and 28 C.F.R. § 36.105(d)(3). “Condition” or “manner” analysis may encompass *how* performance is undertaken, the *impact* of performance, and the *extent* to which performance can be maintained. Various *timing* considerations may also appropriately factor into duration analysis. Thus, such references should be retained in the final rule. However, they should be memorialized with careful attention to the inferences that may be gleaned from related structural and language choices.

In particular, we urge DOJ to emphasize that condition, manner or duration analysis is often unnecessary to assessing coverage, in keeping with the ADAAA’s mandate that definitional assessment “should not demand extensive analysis.” This is particularly — but not exclusively — true for impairments that come within in the “predicable assessments” provisions. The final rule should clearly emphasize that evidence as to condition, manner or duration (as with scientific, medical or statistical evidence) is permitted, but usually not required.

Additionally, in both explanatory and regulatory language, the final rule should emphasize that “condition,” “manner,” and “duration” are three distinct and independent bases that may (where appropriate) factor into assessment of limitation. Consequently, the headings related to this analysis should be changed to specify attention to “condition, manner **or** duration,” not “condition, manner and duration” (which risks the inference that analysis as to all three is required in those circumstances where such analysis is useful).

### **Mitigating Measures**

The NPRM is general faithful to Congress’s express mandate that assessment of limitation must be made without regard to ameliorative measures, and related express rejection of previous judicial interpretation to the contrary.<sup>24</sup> The proposed DOJ regulations include an expanded,

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<sup>24</sup> See Pub. L. No. 110-325, § 2(a)(4), 122 Stat. at 3553 (“the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect”); Pub. L. No. 110-325, § 2(b)(2), 122 Stat. at 3554 (identifying express Congressional

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illustrative, but not exhaustive list of such measures, consistent with both the statutory mandate and the EEOC ADAAA regulations. See 29 C.F.R. § 1630.2(j)(5).

We also commend the NPRM's express recognition that the non-ameliorative effects of mitigating measures may be considered. See 79 Fed. Reg. 4847. While definitional consideration of *non-ameliorative* effects is in contrast to definitional disregard of *ameliorative* effects, both approaches ultimately serve the statutory purpose of ensuring broad definitional coverage. Again, the variable treatment of ameliorative and non-ameliorative effects is also consistent with EEOC regulations.

As to potential revisions, we urge DOJ to consider including a general reference to "surgical interventions," if not in regulatory language, then at least in explanatory commentary, or by explicit cross-reference to prior EEOC promulgations.<sup>25</sup> This will help to ensure that the DOJ rule is not misunderstood to offer less protection than the EEOC rule, a misinterpretation that may be possible, given that the regulatory history behind the EEOC rule now differs from that of DOJ on this issue.

In its 2009 NPRM, the EEOC proposed to include "surgical interventions, except for those that permanently eliminate an impairment." See 74 Fed. Reg. at 48447. Ultimately, the proposed regulatory language reference was eliminated "given the confusion evidenced in the comments about how this example would apply. See 76 Fed. Reg. at 16983. But the EEOC rule nevertheless included an explicit explanatory reference to the

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purpose "to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures"); and Pub. L. No. 110-325, § 4(a), 122 Stat. at 3556 (amending the ADA statutory definitions set out at 42 U.S.C. § 12102 to add a new Section 12102(4)(E), which mandates assessment of limitation without regard to ameliorative measures).

<sup>25</sup> There is a DOJ NPRM reference to "surgery," but it appears in the discussion of *non-ameliorative* effects. See 79 Fed. Reg. 4847 ("Such 'non-ameliorative effects' could include ... complications that arise from surgery").



possible relevance of surgical interventions as a form of “mitigating measure.” Specifically, the EEOC rule concluded that “[d]eterminations about whether surgical interventions should be taken into consideration when assessing whether an individual has a disability are better assessed on a case-by-case basis.” *Id.*

In contrast, the DOJ NPRM contains no *general* references to “surgical interventions.” There is thus a risk that the *specific* surgical interventions identified in the NPRM (i.e., “cochlear implant(s) or other implantable hearing devices”) could be presumed to suggest that other types of surgical interventions cannot possibly be “mitigating measures.” See proposed 35 C.F.R. § 35.108(d)(4)(i) and 36 C.F.R. § 36.105(d)(4)(i). The final DOJ rule should clarify that other forms of “surgical intervention” may also constitute “mitigating measures.”

Finally, given the importance of ADA Title II and III coverage as to testing and educational settings, and the prior confusion and debate around learning disabilities, we commend the NPRM for including “mitigating measures” discussion specific to such disabilities, including reference to various “self-mitigating measures,” “undocumented modifications,” and individualized “strategies.” See 79 Fed. Reg. 4848. In crafting the final rule as to “mitigating measures,” we urge DOJ to pay particular attention to commenters with expertise and experience relevant to those disabilities.

## **RECORD OF IMPAIRMENT**

The NPRM is generally faithful to the ADAAA’s purpose and broad coverage, and the EEOC’s generally expansive regulations implementing the second-prong “record of impairment” definition. See 29 C.F.R. § 1630.2(k), and related discussion at 76 Fed. Reg. 16984-16985 and 17014-17015.

The NPRM appropriately notes that the second-prong definition covers instances of “misclassification.” See 79 Fed. Reg. 4848, and proposed 28 C.F.R. § 35.108(e)(1) and 28 C.F.R. § 36.105(e)(1). The NPRM also correctly confirms that individuals asserting second-prong coverage may be entitled to “reasonable modifications.” See 79 Fed. Reg. 4848, and proposed 28 C.F.R. § 35.108(e)(3) and 28 C.F.R. § 36.105(e)(3). The explanatory illustration of schedule change to permit follow up health visits is helpful. See 79 Fed. Reg. 4848. However, DOJ

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should consider adding the additional illustration of modifications relevant to the maintenance of sobriety (e.g., attending AA meetings). Such examples are valuable given the nuances of the narrow ADA definitional exclusion for individuals “currently engaging in the illegal use of drugs.” See 42 U.S.C. §§ 12110 and 12114. Persons with alcoholism, or persons with substance use addictions not currently illegally using drugs, may choose to assert coverage under the first-prong “actual” disability definition. However, such persons may also choose to assert coverage under the second-prong “record of” definition. They are entitled to “reasonable modifications” under either prong.

Finally, we urge DOJ to consider adding additional explanatory language similar to that offered in the EEOC final rule as to the varied evidentiary bases that may support a “record of” impairment. Given that the statutory term “record” may be misunderstood to require documentary evidence, the final rule should confirm that it is clear in existing law, as well as ADAAA regulations that “past history of an impairment need not be reflected in a specific document.” See 76 Fed. Reg. 16984. However, because documentary evidence may be permitted, the rule should also confirm that “[t]here are many types of records that could potentially contain this information, including but not limited to, education, medical or employment records.” See 76 Fed. Reg. 17014.

**REGARDED AS HAVING IMPAIRMENT**

The NPRM is generally faithful to the ADAAA’s purpose and broad coverage, and the EEOC’s generally expansive regulations implementing the third-prong “regarded as of impairment” definition. See 29 C.F.R. § 1630.2(l), and related discussion at 76 Fed. Reg. 17004, and 17014-17015.

The NPRM also appropriately includes reference to the statutorily established “transitory and minor” defense. However, this is clearly an *affirmative defense*, and it is correctly presented only *after* the broader context of the ADAAA’s clarifying *expansion* of the third-prong definition has been established. See further discussion above at 21-22.

## **MODIFICATIONS IN POLICIES, PRACTICES OR PROCEDURES**

The NPRM is generally faithful to the ADAAA as to entitlement to “reasonable modifications in policies, practices, or procedures.” The NPRM correctly notes that the ADAAA includes a limited exception specifying that individuals covered solely under the third-prong “regarded as” definition are not entitled to such “reasonable modifications.” See 79 Fed. Reg. 4849, and proposed 28 C.F.R. § 35.108(e)(3) and 28 C.F.R. § 36.105(e)(3). However, consistent with the statute’s purpose and broad construction mandates (and as with the “transitory and minor” defense to the third-prong definition), the final rule should emphasize that this is a very limited exception within the otherwise generally broadening ADAAA landscape.

The NPRM also correctly notes that the statute includes a reference to “academic requirements in postsecondary education” that was included “solely to provide assurances that the [ADAAA] does not alter current law with regard to the obligations of academic institutions under the ADA.” See 79 Fed. Reg. 4849, *citing* 42 U.S.C. § 12201(f) and 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008)(Statement of the Managers). Given that the congressional intent is for no change in law, DREDF agrees that no changes are needed to regulatory language.

However, because there is confusion in case law, we urge DOJ to clarify that the “academic deference” that may factor into “reasonable modification” analysis is limited to a subset of covered entities, as well as limited in scope.<sup>26</sup> Specifically, the final rule should confirm that “academic deference” is potentially applicable *only* to educational institutions, *not* to the bulk of testing and licensure entities subject to Section 309 of the ADA, 42 U.S.C. § 12189. Additionally, the rule should confirm that — even as to educational institutions — “academic deference” is limited to academic freedom-related decisions that implicate U.S. Constitutional First Amendment concerns. Moreover, even where appropriately applied, such deference may not be used to mask discriminatory conduct. See *Wong v. Regents of Univ. of Calif.*, 192 F.3d 807, 817 (9<sup>th</sup> Cir. 1999).

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<sup>26</sup> See, e.g., *Rawdin v. American Bd. of Pediatrics*, --- F. Supp. 2d ---, 2013 WL 5948074 (E.D. Pa. Nov. 6, 2013), *appeal docketed*, No. 13-4544 (3<sup>rd</sup> Cir. Nov. 26, 2013)(district court erroneously applied academic deference standard to testing entity covered by 42 U.S.C. § 12189).

**BROAD STANDING TO CHALLENGE UNCORRECTED VISION STANDARDS**

The NPRM includes no reference to ADAAA requirements relevant to “qualification standards and tests related to uncorrected vision.” See Pub. L. 110-325, § 5(b) and (c), *codified at* 42 U.S.C. § 12113. We urge DOJ to include such a reference in the final rule, even if only in explanatory language or by cross-reference to the relevant EEOC ADAAA regulation. See 29 C.F.R. § 1630.10 and related discussion at 76 Fed. Reg. 16986 and 17016.

Section 12113 is situated in Title I of the ADA, and perhaps has primary relevance to the Title I employment provisions. However, by its statutory language it is not exclusive to Title I.<sup>27</sup> Moreover, it anticipates applicability not just to a “job,” but also to a “benefit,” the latter of which (such as insurance, or access to educational programs or recreational facilities) can regularly involve programs, services or activities offered by entities covered under ADA Titles II or III. Given the statutory scope of Section 12113 and the significant real-world implications, the final DOJ rule should anticipate the potential for Section 12113 claims involving entities covered by Titles II or III. Consistent with the EEOC rule, the final DOJ regulation should also confirm that the ADAAA confers broad standing to challenge potential Section 12113 violations.<sup>28</sup>

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<sup>27</sup> See text of 42 U.S.C. § 12113(a) (“It may be a defense to a charge of discrimination under this chapter [i.e., the ADA as a whole, Chapter 126] that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter [i.e., Title I, the employment-specific provisions of the ADA].”)

<sup>28</sup> See 76 Fed. Reg. 17016 (“This provision allows challenges to qualification standards based on uncorrected vision, even where the person excluded by a standard has fully corrected vision with ordinary eyeglasses or contact lenses. An individual challenging a covered entity's application of a qualification standard, test, or other criterion based on uncorrected vision need not be a person with a disability. In order to have

## **Conclusion**

We commend DOJ for acting on the ADAAA's clear congressional mandate for a broad definition of disability, no need for extensive analysis, and primary focus on the critical question of whether discrimination has occurred. Consistent with Congress's instructions and intent, the DOJ regulations will help ensure full and vigorous implementation and enforcement of federal disability civil rights laws. Thank you for providing DREDF and other interested commenters the opportunity to offer reactions, insights and suggestions on this important rule.

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standing to challenge such a standard, test, or criterion, however, a person must be adversely affected by such standard, test or criterion. The Commission also believes that such individuals will usually be covered under the "regarded as" prong of the definition of disability. Someone who wears eyeglasses or contact lenses to correct vision will still have an impairment, and a qualification standard that screens the individual out because of the impairment by requiring a certain level of uncorrected vision to perform a job will amount to an action prohibited by the ADA based on an impairment. (See § 1630.2(l); Appendix to § 1630.2(l)).