

JOSÉ A. CABRANES, *Circuit Judge*, concurring in part and dissenting in part:

I concur in the majority’s thorough and well-reasoned opinion insofar as it (1) concludes that the District Court applied the wrong legal standard for purposes of determining whether Bartlett is disabled with respect to the major life activity of reading and (2) vacates the judgment and remands to the District Court on that basis. However, I cannot concur in the majority’s decision to vacate and remand for further proceedings on whether Bartlett is disabled with respect to the major life activity of working. In my view, the evidence in the record supports only one conclusion on that issue—namely, that Bartlett is not disabled with respect to the purported major life activity of working—and the majority reaches a contrary conclusion only by equating the act of test-taking with the fundamentally different act of working. I would reverse the judgment of the District Court insofar as that Court concluded that Bartlett is disabled with respect to the major life activity of working, and I therefore respectfully dissent in part.

## I.

The Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101 *et seq.*, defines individuals with disabilities to include any individual with “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” *Id.* § 12102(2)(A). I agree with the majority that Bartlett’s dyslexia constitutes a mental impairment. For purposes of this opinion, I also agree that working is a major life activity under the ADA. *But cf. Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999) (noting “that there may be some conceptual difficulty in defining major life activities to include work, for it seems to argue in a circle” (internal quotation

marks omitted)). However, I cannot agree with the majority insofar as it holds that Bartlett is *substantially limited with respect to working* so long as her dyslexia *substantially limits her ability to pass the bar examination*.

To state the majority's holding in this respect is to reveal the fundamental flaw in its reasoning: Taking the bar examination is not working. The regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") with respect to Title I of the ADA state that a person is substantially limited with respect to working if he or she is "significantly restricted in *the ability to perform . . . a class of jobs.*" 29 C.F.R. § 1630.2(j)(3)(i) (1999) (emphasis added).<sup>1</sup>

Whether or not Bartlett is excluded from practicing as a lawyer by virtue of her inability to pass the bar examination (a predicament shared by many non-dyslexic bar candidates)—that is, whether or not Bartlett is *eligible* to perform such legal work—the only evidence in the record with respect to her ability to *perform* as a lawyer suggests that she is not limited in that major life activity. *See Bartlett v. New York State Bd. of Law Exmr's*, 970 F. Supp. 1094, 1101-02 (S.D.N.Y. 1997) ("*Bartlett I*") (discussing Bartlett's employment history). Moreover, to reason, as the District Court did and the majority does, that Bartlett would be entitled to accommodations on the bar examination if she is unable to "compet[e] on a level playing field with other bar examination applicants," *id.* at 1121, assumes the conclusion of the ultimate inquiry—namely, that Bartlett is disabled and thus requires accommodations on the bar examination to compete on a level playing field.

To be sure, Bartlett can (and does) argue that she is substantially limited with respect to

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<sup>1</sup> For purposes of this opinion, I assume that the EEOC regulations on the meaning of "substantially limited" with respect to the major life activity of working are both valid and applicable to cases under Title II or III of the ADA. *But cf. Gonzales v. National Bd. of Med. Exam'rs*, — F.3d —, No. 99-1931, 2000 WL 1179798, at \*8-10 (6th Cir. Aug. 22, 2000) (holding that the EEOC regulations do not apply to cases under Title III of the ADA). Insofar as the majority decides these issues, I express no views on its analysis or conclusions.

test-taking.<sup>2</sup> However, even assuming for the argument that test-taking is a “major life activity” within the meaning of the ADA, to prove that she is substantially limited in that respect the applicable regulations require Bartlett to demonstrate that she is “significantly restricted,” 29 C.F.R. § 1630.2(j)(1)(ii), in her test-taking when compared to “most people,” 28 C.F.R. Pt. 35, App. A, § 35.104, or to “the average person in the general population,” 29 C.F.R. § 1630.2(j)(1). In contrast, by treating test-taking as working, the majority permits Bartlett to prove that she is disabled with respect to test-taking merely by showing that she is substantially limited when compared to “the average person *having comparable training, skills and abilities.*” 29 C.F.R. § 1630.2(j)(3)(i) (emphasis added). In so doing, the majority makes it significantly easier for Bartlett—and similarly situated candidates for any number of tests like the bar examination, including the Law School Aptitude Test, the Medical College Aptitude Test, and the United States Medical Licensing Examination—to prove that she is disabled under the ADA.

In defining who is entitled to accommodations under the ADA, Congress struck a delicate balance. As one court explained, “The ADA is not designed to allow individuals to advance to professional positions through a back door. Rather, it is aimed at rebuilding the threshold of a profession’s front door so that capable people with unrelated disabilities are not barred by that threshold alone from entering the front door.” *Price v. National Bd. of Med. Exam’rs*, 966 F. Supp. 419, 421-22 (S.D. W. Va. 1997) (internal quotation marks and citation omitted). I believe that, by treating test-taking as working, the majority today upsets this delicate balance, and that its decision will permit some “to advance to professional positions through the proverbial back door.” *Id.* at

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<sup>2</sup> Although Bartlett focuses in this appeal almost exclusively on the major life activities of reading and working, she argued before the District Court that her dyslexia also limits her with respect to the major life activity of test-taking. The District Court concluded, correctly in my view, that asking whether Bartlett is disabled with respect to test-taking is essentially the same as asking whether she is disabled with respect to reading. *See Bartlett I*, 970 F. Supp. at 1117 (“For purposes of this case, plaintiff’s claimed disability collapses into an inability to read like the average person on tests like the bar examination, for that is the skill that plaintiff claims constricts her ability to engage in all the other relevant major life activities.”).

**II.**

In sum, I respectfully dissent from the majority's opinion insofar as it vacates and remands for further proceedings on whether Bartlett is disabled with respect to the major life activity of working. I would reverse the judgment of the District Court on that point and remand for further proceedings only with respect to whether Bartlett's dyslexia substantially limits her in the major life activity of reading.