No. 19-1069

In the

United States Court of Appeals

For the Fourth Circuit

CHARLES J. ELLEDGE,

Plaintiff-Appellant,

v.

LOWE'S HOME CENTERS, LLC,

Defendant-Appellee,

and

LOWE'S COMPANIES, INC.,

Defendant.

On Appeal from the U.S. District Court for the W.D.N.C.
Honorable Robert J. Conrad, Jr.| Case No. 5:16-cv-00227-RJC-DCK

Brief for *Amici Curiae* Retail Litigation Center, Inc. and Chamber of Commerce of the United States of America in Support of Defendant-Appellee and Affirmance

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4), I certify that the Retail Litigation Center, Inc. and the Chamber of Commerce of the United States of America are 501(c)(6) membership associations that have no parent company. No publicly held company owns a ten percent or greater ownership interest.

Dated: May 20, 2019

/s/ *Matthew A. Fitzgerald*
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STATEMENT OF INTEREST[1]

The RLC is a public policy organization that represents regional and national retailers, including many of the country's largest and most innovative retailers across a breadth of industries. Member retailers employ millions of workers in the United States, including tens or hundreds of thousands in this circuit alone. These member retailers account for tens of billions of dollars in annual sales. The RLC seeks to present courts with the retail-industry perspective on legal issues that impact its members and to provide insight into the potential consequences of particular outcomes in pending cases. Founded in 2010, the Retail Litigation Center has filed amicus briefs in nearly 150 cases and proceedings.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. One of the Chamber's most important responsibilities is to represent the

[1] All parties consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party, no party's counsel, and no person or entity other than the *amici* themselves and their counsel have made a monetary contribution to the preparation or submission of this brief.

interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

As major employers, RLC and U.S. Chamber members are committed to nondiscrimination and to providing equal opportunities in their workplaces for Americans with disabilities. Under Title I of the Americans with Disabilities Act (ADA), members regularly make reasonable accommodations that allow qualified employees with disabilities to perform their jobs.

In some cases, however, employees seek accommodations that would encroach on the rights or properly earned opportunities of other employees. Appellant Charles Elledge and his two amici, the Equal Employment Opportunity Commission (EEOC) and several disability rights groups, argue that the ADA requires employers to provide such accommodations. They urge that the ADA grants disabled employees a preference in job placement over nondisabled, better-qualified employees.

The ADA's text, purpose, and legislative history do not support that view, which would disrupt fair, disability-neutral hiring practices of the RLC's and U.S. Chamber's members and impose burdens on employers and employees that were never envisioned by Congress.

ARGUMENT

Mr. Elledge argues that as a qualified disabled person under the ADA, he was entitled to reassignment to a Merchandising Director job at Lowe's. Rather than award Elledge the job, Lowe's chose more-qualified nondisabled applicants under a nondiscriminatory best-qualified policy. Order, JA2330-31. This Circuit has not directly addressed whether "reassignment to a vacant position" under the ADA is a "reasonable accommodation" when reassignment would require overstepping an established best-candidate policy. Other circuits have divided on the issue. Order, JA2331, n.4.

Elledge, the EEOC, and several disability rights groups argue at length that the ADA required Lowe's to propel Elledge ahead of more qualified candidates *because* of his disability. Elledge Br. 34-48; EEOC Br. 12-30; Disability Rights Br. 5-21.[2] That view of the law is wrong.

The ADA does not require reassignment of the disabled as a "reasonable accommodation" regardless of relative job qualifications. Such a reassignment would not be a "*reasonable* accommodation" when it requires an employer to violate a nondiscriminatory best-candidate hiring policy.

[2] The three briefs on the appellant's side do not appear to disagree with each other on any key aspect of this issue. Thus, for simplicity this brief refers to the core position of all three as that of the EEOC.

The text, purpose, and legislative history of the ADA all confirm this. The ADA aims to level the playing field—to stop discrimination *because of* a person's disability. When equality requires special treatment for the disabled, those "reasonable accommodations" still aim only to erase barriers created by the disability. Such accommodations include making facilities "accessible," "modified work schedules," and the "provision of readers or interpreters." 42 U.S.C. § 12111(9). Among the statutory list of seven such accommodations that "may" be "reasonable," the fourth is "reassignment to a vacant position."

But in the EEOC's view, "reassignment to a vacant position" is a unique and dramatic demand. Unlike all the other reasonable accommodations listed in the statute, the EEOC says reassignment forces employers to propel a disabled employee *ahead* of others more qualified for a job. Under this view, an employee's disability grants him the right to a job that he would not otherwise get. If the ADA required that, it would be a major feature of the law, venturing well beyond the purposes stated in the ADA and its legislative history. The EEOC cannot cram such an elephant into this statutory mousehole. And under *Skidmore*, this Court need not accept the EEOC's view or its unpersuasive explanation.

This Court should follow its own lead in *EEOC v. Sara Lee*, 237 F.3d 349 (4th Cir. 2001). It should join the Eighth and Eleventh Circuits in recognizing

that the ADA does not require employers to reassign minimally qualified disabled employees over better qualified applicants. As the Eleventh Circuit recently held: "the ADA does not automatically mandate reassignment without competition." *EEOC v. St. Joseph's Hosp.,* Inc., 842 F.3d 1333, 1347 (11th Cir. 2016). "[T]he ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate." *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007).

I. The ADA does not force employers to reassign disabled employees as a "reasonable accommodation" over better-qualified applicants.

1. The ADA's text, purpose, and legislative history show that it aims to *equalize* opportunity for the disabled.

When it passed the ADA in 1990, Congress announced its "findings and purpose" in the statute's text. Congress noted that "historically, society has tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12101(a)(2). It observed that disabled Americans had often "been precluded from [fully participating in society] because of discrimination," and called it "discrimination on the basis of disability." § 12101(a)(1),(4). Congress declared that the Nation should instead provide "equality of opportunity," and stated that "discrimination

and prejudice denies people with disabilities the opportunity to compete on an equal basis." § 12101(a)(7),(8). The primary stated purpose of the ADA was "to provide a clear and comprehensive national mandate for *the elimination of discrimination* against individuals with disabilities." § 12101(b)(1) (emphasis added).

This text reflects that Congress wanted the ADA to equalize opportunity. Equalizing opportunity by rooting out "unfair and unnecessary discrimination," § 12101(a)(8), however, differs from granting affirmative action, or a competitive advantage to disabled individuals. The statute's "express findings certainly teach, if they do not conclusively prove, that Congress passed the ADA to eliminate barriers to equal opportunity facing disabled Americans, not to grant disabled employees a competitive edge." *United States v. Woody*, 220 F. Supp. 3d 682, 688 (E.D. Va. 2016).

The ADA's legislative history reflects the same point. Congress understood that lawful hiring decisions under the ADA would focus on qualifications for the job, not disabilities. For instance, the House committee report stated: "this legislation does not undermine an employer's ability to choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose or effect of subjecting a qualified individual

with a disability to discrimination on the basis of his or her disability." H.R. Rep. No. 101-485, *reprinted at* 1990 U.S.C.C.A.N. 303, 337. The Report then gave an example: an employer could lawfully hire a nondisabled typist who could type 75 words per minute over a disabled one that could type only 50. On the other hand, the employer could not refuse to hire the disabled typist if the only difference were her need for a special headset. The Committee could scarcely have been clearer. "The employer's obligation is to consider applicants and make decisions without regard to an individual's disability, or the individual's need for a reasonable accommodation." H.R. Rep. No. 101-485 (1990), *reprinted at* 1990 U.S.C.C.A.N. at 338.

Both the House and Senate reports confirm that "the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability." H.R. Rep. No. 101-485, 1990 U.S.C.C.A.N. at 338; *see also* S. Rep. No. 101-116, at 26 (1989) (stating that an employer would have "no obligation to prefer applicants with disabilities over other applicants").

Several members of Congress addressed the same point during floor debates. Congressman Steny Hoyer (D-Md) said that "the bill does not guarantee a job—or anything else. It guarantees a level playing field." 136 Cong. Rec. 10,856 (1990). Congressman Don Edwards (D-Cal.) added that the "ADA does not require

employers to hire unqualified persons, nor does it require employers to give preferences to persons with disabilities. The ADA simply states that a person's disability should not be an adverse factor in the employment process." 136 Cong. Rec. 10,868 (1990).

2. The ADA's "reasonable accommodation" provisions, including reassignment, do not go beyond ensuring *equal* opportunity.

Part of leveling the playing field for individuals with disabilities in the workplace is the "reasonable accommodation" requirement. The ADA generally requires employers to provide "reasonable accommodations" to qualified employees with disabilities. 42 U.S.C. § 12112(b)(5)(A). The statute does not specify exactly *what* qualifies as "reasonable." Instead, it lists examples of accommodations that "may" be reasonable. § 12111(9) (definition section) ("reasonable accommodations may include—"). Nor does the statute direct employers to choose any one of these potential modifications for a particular circumstance.

One example of a possibly-reasonable accommodation is "making existing facilities used by employees readily accessible" to individuals with disabilities. § 12111(9)(A). Congress also listed "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations,

training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations." § 12111(9)(B).

First, the EEOC says that this provision means that an employer *must* reassign a qualified disabled employee to a vacant position regardless of relative qualifications or best-candidate hiring policies. EEOC Br. 13. In other words, according to the EEOC, Congress has deemed reassignment a "reasonable accommodation" and thus presumptively it must be done.

But as a pure matter of text, reassignment is not always reasonable. Instead, reassignment "may" be reasonable. "The ADA does not say or imply that reassignment is always reasonable. To the contrary, the use of the word 'may' implies just the opposite: that reassignment will be reasonable in some circumstances but not in others." *St. Joseph's Hosp., Inc.*, 842 F.3d at 1345; *id.* at n.5 (observing that "had Congress understood the ADA to mandate reassignment, it could easily have used mandatory language").

Recognizing this, the Supreme Court has explained that the employee carries the burden to show a proposed accommodation's reasonableness under the particular circumstances. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 402 (2002) (citing the "plaintiff's need to show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases"). *Barnett*'s holding drives the point

home. The Court ruled that in the run of cases, "reassignment to a vacant position" would *not* be a "reasonable accommodation" when it would require violating an employer's nondiscriminatory seniority system for filling jobs. 535 U.S. at 405.

Second, the EEOC urges that "reasonable accommodations" are already *preferences*, so it makes sense that reassignment requires a competitive hiring edge for the disabled. EEOC Br. 22. But requiring some individualized accommodations, or "preferences," for the disabled differs from requiring employers to grant disabled employees a *competitive edge* in hiring.

Reading the law as requiring a competitive edge elevates "reassignment" to something far more severe than the surrounding examples of possible "reasonable accommodation." The other examples include modifying existing facilities to make them "readily accessible" to the disabled, "modified work schedules," or new equipment, different training materials, or interpreters. Certainly these examples in some sense require special treatment for the disabled. *See Barnett*, 535 U.S. at 397 ("[P]references will sometimes prove necessary to achieve the Act's basic equal opportunity goal.").

Even so, the general theme of these examples listed in § 12111(9) is that employers must do what it takes to *level the playing field*—to make adjustments

necessary to give disabled employees a full opportunity to do their job or compete for other jobs. Reasonable accommodations "clear away obstacles" and "requir[e] the employer to rectify a situation (such as lack of wheelchair access) that is of [the employer's] own doing." *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000).[3] The Supreme Court said it well: "The Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy." *Barnett*, 535 U.S. at 397 (emphasis in original).

"Reassignment" as a potential accommodation should be read in light of the accommodations surrounding it: a series of preferences that work to level the playing field for disabled employees, not to leap disabled employees ahead of nondisabled workers around them. *See Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 634–35 (2012) (observing that a statutory term "is given more precise content by the neighboring words with which it is associated").

Third, the EEOC's view—that the ADA demands reassignment regardless of any neutral employer policy or relative qualifications for the job—is the

[3] The Seventh Circuit later reconsidered and overruled *Humiston-Keeling*. *See E.E.O.C. v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012) (opining that although it was a "close call," *Barnett* undermined the ultimate holding in *Humiston-Keeling*). Respectfully, the Seventh Circuit got it right the first time.

quintessential example of the Supreme Court's elephant in a mousehole. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).

An affirmative action hiring regime for the forty million or so individuals with a disability is surely a statutory "elephant." 42 U.S.C. § 12101(a)(1) (estimating in 1990 that 43 million Americans were disabled). Under this view of the law, the disability itself trumps all relative job qualifications, propelling disabled employees to the head of the hiring line.

Courts have noted the extreme nature of this view. "That is affirmative action with a vengeance. That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group." *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 484 (8th Cir. 2007). As other courts have observed, on this view, a "29-year-old white male with severe tennis elbow" would be entitled to a job over a better-qualified "62-year-old black woman." *Humiston-Keeling, Inc.*, 227 F.3d at 1027. *See also Woody*, 220 F. Supp. 3d at 689 (making the same observation). That is, "on the Commission's view there is a hierarchy of protections for groups deemed entitled to protection against discrimination, with

the disabled being placed ahead of [all other groups]." *Humiston-Keeling, Inc.*, 227 F.3d at 1027.

Affirmative action for the disabled in hiring is also an elephant because it runs so far beyond the expressed purpose of the ADA. *See, e.g.*, 42 U.S.C. § 12101(a), (b) (referring to "equality of opportunity," "the opportunity to compete on an equal basis," and "the elimination of discrimination against individuals with disabilities."); H.R. Rep. No. 101-485, 1990 U.S.C.C.A.N. at 338 ("the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability"). If affirmative action is truly what the ADA requires, members of Congress certainly would have mentioned it. But they did not. On the contrary, members of Congress explicitly *disavowed* any such result.

At the same time, "reassignment to a vacant position" is a statutory mousehole. It sits in the definition section of the ADA, and it is the fourth of seven fairly ordinary examples of actions that could qualify as a "reasonable accommodation." Even the word "accommodation" suggests the idea of moderate change, adjustment, and adaptation, not a major or fundamental change. *E.g.*, *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) ("'modify,' in our view, connotes moderate change").

In other words, EEOC argues that Congress enacted a significant affirmative-action-in-hiring regime for disabled individuals, and achieved that "by including in the 'definitions' section of the ADA that 'reasonable accommodations *may* include,' among other things, 'reassignment.'" *Woody*, 220 F. Supp. 3d at 688-89 (concluding that it "strains plausibility and the norms of statutory interpretation beyond recognition" to find that Congress did "such a far-reaching" thing in this way).

3. *U.S. Airways v. Barnett* does not favor the EEOC's view.

Against all of this, the EEOC contends that a defeat its view suffered at the Supreme Court in 2002 actually now *favors* its position. That is not correct.

In *Barnett*, a U.S. Airways employee with an injured back claimed a right to "reassignment" to a mailroom position. 535 U.S. at 394. U.S. Airways, however, used a seniority system that allowed its employees to bid for jobs. Barnett did not have the seniority to get the position. He sued, claiming discrimination because the employer had not granted him the "reassignment." *Id.* at 395. At the Supreme Court, the issue was whether the employee had an ADA right to the mailroom job as a "reasonable accommodation," regardless of the employer's disability-neutral seniority-based hiring system. Seven justices agreed that the answer was no.

Only two justices—Justices Souter and Ginsburg—bought what the EEOC is selling now. In their view, "reassignment" would be reasonable, and thus generally required, regardless of any contrary seniority system. 535 U.S. at 424.

On the other hand, Justices Scalia and Thomas believed broadly that it was not "reasonable" to force an employer to violate *any* nondiscriminatory hiring policies to reassign a disabled employee. 535 U.S. at 416 (Scalia, J., dissenting). They opined that "'reassignment to a vacant position' does *not* envision the elimination of obstacles … that have nothing to do with his disability—for example, another employee's claim to that position under a seniority system, *or another employee's superior qualifications*." *Id.* (emphasis added). These two justices undeniably would agree with the district court's decision here. Order, JA2331 ("Plaintiff was not entitled to special treatment in violation of Lowe's longstanding nondiscrimination job application and hiring policy.").

The controlling majority—the five justices in the middle—took a somewhat narrower path. The Court made two rulings relevant here. First, the Court set out the governing test. It made clear that courts must analyze any proposed reassignment to determine whether that reassignment is "reasonable in the run of cases." 535 U.S. at 401-02. Second, the Court applied that test to established seniority systems, and ruled that "in our view, the seniority system will prevail in

the run of cases." 535 U.S. at 394. That is, a reassignment that would violate an established seniority system is generally unreasonable, and not required by the ADA.

Barnett thus largely rejected the EEOC's theory of a broad reassignment mandate.[4] Elledge and his amici ignore the first holding in *Barnett*—that a disabled employee claiming a right to reassignment must show that his request would be "reasonable in the run of cases" given the employer's contrary policy. Instead, they say *Barnett* created a "narrow" seniority-system exception to the otherwise broad reassignment mandate they prefer. Elledge Br. 38, 40; Disab. Rights Br. 15; EEOC Br. 24. But the better reading is that the *one* time the Supreme Court has ever addressed whether "reasonable accommodation" requires preferential hiring in violation of a specific nondiscriminatory employer policy, the Court ruled it did not.

Moreover, some of *Barnett*'s reasoning about seniority systems applies to Lowe's "best-qualified" policy. The Court upheld seniority systems because they

[4] The EEOC did not participate as a party in *Barnett* at the Supreme Court. Yet it did participate at the Ninth Circuit on the employee's side—and won—favoring reassignment regardless of the seniority system. *See Barnett v. U.S. Airways*, No. 96-16669 (9th Cir.) (docket showing briefs filed by the EEOC and participation at oral argument *en banc*). The Supreme Court then rejected that view by a 7-2 margin.

"provide important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." 535 U.S. at 404. Several times, the Court mentioned the "fairness" of seniority systems to *all* employees. *Id.* (fearing that a reassignment mandate "might well undermine the employees' expectations of consistent, uniform treatment"). The *Barnett* Court refused to say that "reasonable accommodations" trump seniority systems because it worried about fairness to all employees.

A policy of choosing the best-qualified candidate, like the Lowe's policy here, is similar. Order, JA2330 (describing the Lowe's policy). It too carries an element of fairness to the workforce. Such a policy—like a seniority system—treats disabled and nondisabled employees alike, just as the ADA generally seeks. It often favors the longer-tenured employee. And it makes good business sense. *See* Order, JA2333 ("the record demonstrates that [Elledge] simply was not the best man—or even an appropriate man—for the job").

Hiring, particularly for management roles like the Merchandising Director positions here, is an exceptionally important decision for any business to make. Hiring a minimally-qualified disabled person over better-qualified applicants is a recipe for trouble. "Passing over the best-qualified job applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance."

St. Joseph's Hosp., Inc., 842 F.3d at 1346 (noting that in the context of some businesses, like hospitals, "the well-being and even the lives of patients can depend on having the best-qualified personnel").

There is one other reason *Barnett* does not favor the EEOC here. In reversing the Ninth Circuit, *Barnett* agreed with this Circuit's existing precedent. *See* 535 U.S. at 396 (citing *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001); *contra* Disab. Rights Br. 20 (asserting that *Sara Lee* "did not survive *Barnett*"). In *Sara Lee,* the Fourth Circuit refused to require an employer to violate its seniority policy to accommodate a disabled person. 237 F.3d at 353-56. This Court held that it would not be reasonable to "disrupt the legitimate expectations of Sara Lee's longtime employees." *Id.* at 355; *id.* (adding that "the ADA does not require employers to penalize employees free from disability in order to vindicate the rights of disabled workers"). After *Barnett*, *Sara Lee* remains binding precedent, and this Court would decide it the same way today. *See* Disability Rights Br. 19 (conceding this). Nothing in *Barnett* requires the dramatic shift Elledge and the EEOC seek.

4. The district court did not read "reassignment" out of the ADA.

The EEOC argues that the district court's view reduces "reassignment" to a nullity. In its view, many employers have "best-qualified" policies, and if such a policy suffices, soon there will never be any ADA reassignments, and the provision

will carry no meaning. EEOC Br. 25-26, 28-29; Disability Rights Br. 4, 8. That is wrong for three reasons.

First, "reassignment" carries meaning because it precludes an employer from banning all reassignments. That is, the ADA recognizes that "reasonable accommodation may include— … reassignment." 42 U.S.C. § 12111(9). A categorical "no-transfer" policy would conflict with the statute. Such a policy would close a door that the law says needs to remain open. The EEOC Guidance admits this specific impact: "if an employer has a policy prohibiting transfers, it would have to modify that policy…" EEOC Guidance, 2002 WL 31994335, at *22. *See also* H.R. Rep. No. 101-485, 1990 U.S.C.C.A.N. at 340 ("covered entities are required to make employment decisions based on facts applicable to individual applicants or employees").

Second, "reasonable accommodation may include—… reassignment" makes clear that an employer *can* lawfully choose to reassign an employee as an accommodation. It is easy to imagine an employer facing a difficult or complex alternative accommodation choosing instead to reassign the disabled employee. The statute protects that employer decision by listing reassignment as a potential "reasonable accommodation." *See* H.R. Rep. 101-485, 1990 U.S.C.C.A.N. at 345 (noting that "efforts should be made … to accommodate an employee in the

position he or she was hired to fill before reassignment is considered," but adding that "a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and [the] employer from losing a valuable worker.").

Third, the reference to reassignment also means that an employer must *consider* reassignment as a possible accommodation. Elledge and his amici respond that *consideration* for a transfer means nothing, because anyone can apply for a job, and the ADA already bars refusing their application because of disability. Elledge Br. 37.

This is wrong: consideration itself does have meaning. Without the "reassignment" term in § 12111(9), such an obligation would not exist. In other words, here Lowe's *did* consider reassigning Elledge, but ultimately selected better-qualified candidates under disability-neutral criteria. Order, Ja2333-34.

That the statute requires considering disabled employees for reassignment is itself a form of accommodation. An employee unable to perform his current job normally would not receive meaningful consideration for an equivalent lateral position in the company. *See Barnett*, 535 U.S. at 414 (Scalia, J., dissenting) ("If an employee is hired to fill a position but fails miserably, he will typically be fired. Few employers will search their organization charts for vacancies to which the low-

performing employee might be suited."). The "reassignment" provision resets expectations, erases past struggles, and seeks fair, disability-free consideration for a lateral transfer to a job the disabled employee can perform. This is itself "of considerable value." *Id.*

II. EEOC guidance should not receive deference.

Elledge does not ask this Court to defer to the EEOC. For its part, the EEOC appears to seek only *Skidmore* deference—asking this Court to find its views persuasive. EEOC Br. 19-20.

1. *Skidmore* deference, if any, applies here.

As a threshold matter, the EEOC's interpretive and enforcement guidelines do not receive *Chevron* deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference"). No party here asks this Court to grant *Chevron* deference, and it should not be given.

The EEOC does assert that its Guidance "reflect[s] a body of experience and informed judgment" and as such it "warrant[s] a measure of respect and deference." EEOC Br. 20.

Thus, the EEOC properly seeks only *Skidmore* deference. *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) ("In our view the [EEOC's] policy statements, embodied in its compliance manual and internal directives . . . are entitled to a 'measure of respect' under the less deferential *Skidmore* standard."); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 15-16 (2011) (citing *Skidmore* in addressing the content of the EEOC compliance manual).

The government has long conceded this in other cases. *E.g., Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 449 n.9 (2003) (noting that counsel for the government agreed at oral argument, Tr. 19, that EEOC guidance would get "*Skidmore* deference, that's correct."); *Woody*, 220 F. Supp. 3d at 690 n.7 ("the Court holds, and the United States agrees, that this interpretation of the ADA is entitled only to *Skidmore* deference").

2. The EEOC's guidance is conflicting and unpersuasive.

The question thus becomes whether the EEOC's expressed views are persuasive. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (referring to "all of those factors which give [an interpretation] power to persuade, if lacking power to control"). "Under *Skidmore* the agency ultimately must depend upon the *persuasive power* of its argument. The simple fact that the agency *has* a position, in and of

itself, is of only marginal significance." *Mayburg v. Sec'y of HHS*, 740 F.2d 100, 106 (1st Cir. 1984) (Breyer, J.).

The primary assertions the EEOC says "warrant a measure of respect and deference" come from its Enforcement Guidance. That Enforcement Guidance appears to have been first issued in March 1999, and then re-issued in 2002, shortly after *Barnett*. *See* EEOC, Enforcement Guidance, 2002 WL 31994335, at *1 ("Enforcement Guidance") (describing changes made after *Barnett*). The Enforcement Guidance rejects competition for a vacant position, stating that "reassignment means that the employee gets the vacant position if s/he is qualified for it," and adds that "the employee does not need to be the best qualified individual for the position." *Id.* at *20, 23.

These positions recite EEOC policy preferences, not persuasive interpretations of the ADA or *Barnett*. *See supra,* at 5-7 (discussing the text, purpose, and legislative history of the ADA).

Even the EEOC itself originally took a contrary view. In the 1991 appendix to its regulations, the EEOC stated the ADA aimed only to level the playing field, not award jobs to less-qualified disabled workers. The EEOC wrote that "the ADA seeks to ensure access to equal employment opportunities based on merit. It does not . . . require preferences favoring individuals with disabilities over those

without disabilities." 29 C.F.R. § Pt. 1630, App. Bkgrd. (1991), 56 Fed. Reg. 35725, 35739 (July 26, 1991). *See also* 29 C.F.R. Pt. App. § 1630.1(a), 56 Fed. Reg. at 35740 (stating that the ADA is an "antidiscrimination statute that requires that individuals with disabilities be given the *same consideration for employment* that individuals without disabilities are given.") (emphasis added). Other EEOC statements point the same direction. The EEOC has opined that "[t]he reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed." 29 C.F.R. § Pt. 1630, App. § 1630.9 (1991), 56 Fed. Reg. at 35747.

The EEOC's original interpretation contradicts its modern Enforcement Guidance. That inconsistency also undermines the EEOC's position here. *E.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("The consistency of an agency's position is a factor in assessing the weight that position is due.").

This case is like others in which the EEOC has not obtained deference under *Skidmore*. *See, e.g., Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 150 (2008) (declining to give any deference under *Skidmore* to an EEOC interpretation it found "lack[ed] the necessary power to persuade"); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (refusing any deference "because the [EEOC] is clearly wrong" under the "text, structure, purpose, and history" of the law);

E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991) (ruling that an "EEOC[] interpretation does not fare well under these [*Skidmore*] standards.").

CONCLUSION

For these reasons, the district court correctly ruled that the ADA does not grant Elledge a special preference in hiring because of his disability. It would not have been a "reasonable accommodation" for Lowe's to violate its nondiscriminatory best-qualified policy and give Elledge the job that he was "not the best man" for. Order, JA2333.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limitation of Fed. R. App. P. 29(a)(5) because it contains 5,203 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally-spaced typeface using Microsoft Word, in 14-point size.

Dated: May 20, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2019, the foregoing was filed with the Clerk of this Court through the CM/ECF system, which will serve all counsel of record.

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