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CASE NO. 00-10691-E
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
ATLANTA, GEORGIA

CHARLOTTE CHENOWETH,	:	
	:	
Appellant,	:	
	:	
v.	:	
	:	
HILLSBOROUGH COUNTY,	:	
a political subdivision	:	
of the State of Florida,	:	
	:	
Appellee.	:	
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	:	

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Epilepsy Foundation ("Epilepsy Foundation"), by and through undersigned attorneys and pursuant to Federal Rule of Appellate Procedure 29 and this Court's Local Rule 29-1, hereby moves this Court for leave to file the accompanying brief *amicus curiae* in support of Appellant, Charlotte Chenoweth, in urging reversal of the District Court's decision in this case. In support of this motion, the Epilepsy Foundation states as follows:

1. As stated in the accompanying brief, the Epilepsy Foundation is a nonprofit corporation founded in 1968 to advance the interests of 2.3 million Americans with epilepsy and seizure disorders. With its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates up-to-date, accurate information about epilepsy and seizures; promotes public understanding of the disorder; and supports research, professional awareness and advocacy on behalf of people with seizure disorders. Because the term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, especially employment, the Epilepsy

Foundation has, since its inception, worked to dispel the stigma associated with seizures, and has supported the development of laws that protect individuals from discrimination based on these stereotypes and fears.

2. The Epilepsy Foundation is deeply concerned that the District Court's interpretation of the Americans with Disabilities Act ("ADA") in effect leaves people with epilepsy unprotected by the ADA. This result is contrary to the mandate of the ADA, and threatens the great progress our country has made in promoting the full integration of people with seizure disorders into the mainstream of American life.

3. Thus, the accompanying brief addresses issues of importance to all people with epilepsy, seizure disorders and other disabilities.

4. The Epilepsy Foundation has reason to believe that its brief will supplement rather than reiterate the arguments made by Appellant.

5. Neither Appellant nor Appellee has provided written consent to this motion. The Epilepsy Foundation therefore requests leave of this Court. See Fed. R. App. P. 29(a).

WHEREFORE, the Epilepsy Foundation requests that this Court give leave for the Epilepsy Foundation to file the accompanying brief *amicus curiae* in support of Appellant, Charlotte Chenoweth, in urging reversal of the District Court's decision in this case.

Respectfully submitted,

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STATEMENT OF THE ISSUES AND INTEREST OF AMICUS CURIAE

The central issues in this case are whether the District Court erred in holding that Appellant Charlotte Chenoweth's epilepsy is not a disability under the Americans with Disabilities Act ("ADA") and, by extension, whether people with epilepsy are within the class of persons Congress intended to protect when it enacted the ADA. This Court's disposition of these issues will impact all similarly situated persons within this Court's jurisdiction.

The Epilepsy Foundation is a nonprofit corporation founded in 1968 to advance the interests of 2.3 million Americans with epilepsy and seizure disorders. With its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates up-to-date, accurate information about epilepsy and seizures; promotes public understanding of the disorder; and supports research, professional awareness and advocacy on behalf of people with seizure disorders.

The term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, especially employment. Since its inception, the Epilepsy Foundation has worked to dispel the stigma associated with seizures and has supported the development of laws that protect individuals from discrimination based on these stereotypes and fears.

The Epilepsy Foundation is deeply concerned that the District Court's interpretation of the ADA in effect leaves people with epilepsy unprotected by the ADA. This result is contrary to the mandate of the ADA, and threatens the great progress our country has made in promoting the full integration of people with seizure disorders into the mainstream of American life.

SUMMARY OF THE ARGUMENT

The District Court erred in holding that Appellant, Charlotte Chenoweth, was not disabled under the Americans with Disabilities Act ("ADA"). The ADA's definition of disability includes physical impairments that substantially limit one or more major life activities. The Supreme Court has directed lower courts to determine whether the individual's impairment is substantially limiting based on her actual condition, rather than her hypothetical state. In making this determination, courts must consider the positive and negative effects of any mitigating measures that are actually used to treat the condition.

The lower court misapplied this test and instead evaluated Ms. Chenoweth's condition in her hypothetical state. Although Ms. Chenoweth was on medication at the time the request for reasonable accommodations were made, the medicine was ineffective in controlling her seizures. The lower court, therefore, should have based its analysis on her uncontrolled state rather than her controlled state. Epilepsy is a chronic brain disorder. Seizures are only one symptom of the condition. While the seizures themselves may last only a few seconds or minutes, the impact of the condition is more profound and long-lasting. People with epilepsy must contend with stigma and the resulting discrimination, must tailor their daily schedules to fit rigorous medication schedules, take daily precautions to avoid additional seizures and live with the constant threat of another seizure occurring at any time. Others, including Ms. Chenoweth, are unable to drive for extended periods of time, and, as a result, are significantly limited from engaging in the major life activities of

caring for oneself, social interactions, working, and driving. Epilepsy and anti-epileptic medications also affect the major life activity of reproduction. Women with epilepsy have an increased risk of birth defects, a higher infant mortality rate and are more likely to have a child with epilepsy than a woman without epilepsy. In short, epilepsy is a physical impairment that substantially limits many major life activities.

The District Court's decision in effect denies people with epilepsy the rights and protections afforded by the ADA. This result is contrary to the intent of Congress in enacting the ADA. The Epilepsy Foundation urges this Court to reverse the lower court's decision and hold that Ms. Chenoweth is disabled under the ADA as a matter of law.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT
MS. CHENOWETH'S EPILEPSY IS NOT A
DISABILITY UNDER THE AMERICANS WITH
DISABILITIES ACT .

The Americans with Disabilities Act ("ADA") defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(a) (1999).¹ While the statute itself does not define the term "substantially limiting," the implementing regulations issued by the Equal Employment Opportunity Commission provide that an impairment is substantially limiting if it prevents the individual from participating in a particular major life activity, or alternatively, "if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population" 29 C.F.R. § 1630.2(j)(1) (1999) (defining "substantially limits"); see also Bragdon v. Abbott, 524 U.S. 624, 641 (1998) (holding that an impairment is substantially limiting even if the difficulties resulting from the impairment are not "insurmountable").

The regulation further directs that, in determining if an impairment is substantially limiting, the following factors should be considered: (1) the nature and severity of the **impairment**, (2) the duration or expected duration of the **impairment**, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from the **impairment**. 29 C.F.R. § 1630.2(j)(2) (1999)

¹ The statutory definition of "disability" also includes two other prongs: "(b) a record of such an impairment; or (c) being regarded as having such an impairment." 42 U.S.C. § 12102(2)(b-c) (1999). In the interest of economy, this brief does not address these prongs.

(emphasis added). Notably, neither the regulation nor the Interpretative Guidance suggests that any one factor should be weighed more heavily than another. When all of these factors are considered together, it is evident that Ms. Chenoweth's epilepsy substantially limits at least one major life activity.

A. Sutton v. United Airlines, Inc., requires that the court determine whether an individual is substantially limited in one or more major life activities based on her actual condition, and not her hypothetical state .

In Sutton v. United Airlines, 119 S. Ct. 2139 (1999), the Supreme Court held that in determining whether an individual has a disability under section 12102(2)(a) of the ADA, measures -- both positive and negative -- taken to mitigate or correct the effects of the impairment must be considered. In reaching this conclusion, the Court reasoned that a person must be evaluated in her actual, "present" state, rather than her hypothetical state. See id. at 2146-47.

The District Court ignored this mandate when it determined that Ms. Chenoweth was not disabled. In rendering its decision, the lower court considered the effects and severity of Ms. Chenoweth's epilepsy upon her major life activities once it was successfully controlled with medication. However, at the time that Ms. Chenoweth made the requests for a reasonable accommodation, the medication was not effective in controlling her seizures. Thus, her condition when controlled by medication has no bearing on whether she is disabled; it is only a hypothetical state. Her actual, present state was as a person with uncontrolled epileptic seizures whose major life activities, as discussed in the following sections, were substantially limited by her physical impairment.

B. Epilepsy significantly restricts participation in many major life activities .

It is easiest to observe the impact of epilepsy while a seizure is occurring. Some people lose consciousness during a seizure. Others may not be able to walk, talk, or otherwise interact with other people while a seizure is occurring. However, the effects of epilepsy last longer than the duration of a seizure and affect more than the individual's physical condition.

1. Epilepsy is a chronic brain disorder manifested by seizures.

Epilepsy does not last simply for ten to fifteen seconds. It is a chronic brain disorder. While proper diagnosis and medication can mitigate the effects of the condition, for most people with epilepsy there is currently no cure. Thus, a diagnosis of epilepsy is a life-long diagnosis.

Epilepsy is characterized by seizures. Physiologically, seizures are sudden, unexpected, uncontrolled episodes of excessive electrical discharges of brain cells, accompanied by sensory, motor and/or behavioral changes. See H. Gastaut, Dictionary of Epilepsy, Part 1: Definitions (1973) (defining "epilepsy"). There are many different types of seizures and many different causes. For this reason, epilepsy is more accurately referred to as "the epilepsies." There are two general categories of seizures: (1) "partial seizures," which are seizures whose onset is limited to a part of one cerebral hemisphere, and (2) "generalized seizures," which are seizures that, from onset, are diffused throughout the brain.

Partial seizures, the most common type, are also the most difficult to recognize. Some people who are unfamiliar with this type

of seizure may mistakenly believe that the individual is daydreaming, intoxicated, or high on drugs.

There are two types of partial seizures: (1) "simple partial seizures" and (2) "complex partial seizures." During simple partial seizures, consciousness is maintained but the individual loses sensory and motor control. Generally, during such a seizure, the individual can still interact with the environment, but the seizure will limit specific functions, such as speech or movement. Generally, though, the individual does not lose muscle control or fall.

During complex partial seizures, in addition to losing sensory and motor control, the person loses consciousness or her consciousness is impaired. As a result, individuals with complex partial seizures generally cannot recall the details of the seizure episode, have impaired responsiveness, cannot interact normally with their environment and are amnesic for the event. Frequently, these seizures are manifested by "automatisms," repetitive complex motor activity that is purposeless, undirected, and inappropriate. Complex partial seizures, as well as simple partial seizures, may evolve into generalized seizures (secondarily generalized seizures) as the excessive electrical discharge spreads through the brain.

Generalized seizures may be convulsive or nonconvulsive, but all are characterized by lapses in consciousness. Some people experience an "aura" before a seizure. An aura is the unusual sensation that, if it occurs, warns the person that a seizure may develop. Generalized seizures include "tonic clonic seizures" and "absence seizures." Tonic clonic seizures, commonly known as "grand mal seizures," are manifested by a complete loss of muscle tone and massive muscle

contractions, usually lasting between one and two minutes. Absence seizures, also known as "petit mal seizures," produce short periods of blank staring or momentary changes from a normal to a blank facial expression. They characteristically last from ten to twenty seconds, and there is no loss of muscle tone. During the seizure, the person becomes completely unaware of the people and things around him, but quickly returns to full consciousness and has no memory of the seizure. Indeed, these seizures happen so quickly that the person and sometimes even other people may not notice that anything has happened. An individual may suffer multiple absence seizures in a one-day period.

The majority of people with epilepsy have their seizures controlled through medication. See Epilepsy Foundation, Epilepsy: A Report to the Nation 5 (1999) [hereinafter Report to the Nation]. "Controlled," however, is not synonymous with being cured or living symptom-free. There may be a period of weeks, months, or even years during which there are no seizures, and then suddenly and unexpectedly, seizures reoccur. Indeed, in a recent study, fifty percent of respondents reported that their epilepsy was under "good control" when using medications, thirty percent had "partial control," and the rest have seizures that cannot be controlled through any current treatment. See id.

There is, however, no common definition of "control." Among those with "good control," nearly forty percent (37%) had at least one seizure within the last three months and more than twenty percent had at least one seizure within the last month. See R.S. Fisher et al., A Large Community-Based Survey of Quality of Life and Concerns of People

with Epilepsy: Part 1, 39(6) *Epilepsia* (1998). In the case presently before this Court, the plaintiff's epilepsy was also not cured even though she was taking medication to control her seizures. Ms. Chenoweth continued to have seizures well beyond the date of her last request for an accommodation.

2. Epilepsy is a substantial limitation on the major life activity of caring for oneself and interacting with others .

Seizures are, by their nature, unpredictable, both in frequency and severity. Consequently, whether an individual's epilepsy is well-controlled or not, she must always anticipate the possibility of a seizure.² For a person like Ms. Chenoweth, whose seizures were not controlled, the possibility of another seizure represented a realistic threat. In fact, fifty percent of people with epilepsy reported that the single worst thing about epilepsy was living with the fear of another seizure. See Report to the Nation at 11. In addition to living with a constant fear, a person with epilepsy must alter her daily behavior and schedule to minimize the risk of another seizure.

The changes to one's daily schedule and behavior can take various forms. A common method is taking medicine to try to prevent the

² Breakthrough seizures can occur for any number of reasons, but most commonly, illness, lack of sleep, hormonal or metabolic changes, and changes in medications can cause seizures to recur unexpectedly. See N. Santilli, Selection and Discontinuation of Antiepileptic Drugs, in Managing Seizure Disorders: A Handbook for Health Care Professionals (N. Santilli ed. 1996) (identifying illness as a cause of breakthrough seizures); S. Schachter, Treatment of Seizures, in The Comprehensive Evaluation and Treatment of Epilepsy: A Practical Guide (S. Schachter & D. Schomer eds. 1997) (identifying lack of sleep and changes in medication as causes of breakthrough seizures); A.G. Herzog et al., Three Patterns of Catamenial Epilepsy, 38 *Epilepsia* 1082-88 (1997).

occurrence of a seizure. This accommodation alone has a significant impact on an individual's daily life. Usually there is a trial period where the doctor may change the dosage or medicine in an effort successfully to control the patient's seizures. For Ms. Chenoweth, this period lasted several months and, as a result, she needed to make repeated visits to the physician, was restricted from driving, and continued to experience seizures. It was, in other words, a significant intrusion on her daily schedule and life activities.

While medicine may control the seizures, it imposes other significant limitations on the person's daily life. Once on medication, many people with epilepsy, like Ms. Chenoweth, experience side effects including an inability to concentrate and diminished mental functioning. See Schachter, supra note 2. People with epilepsy controlled by medication are also plagued by concerns about loss of concentration, memory, and mental functioning, caused either by the medications or the underlying condition itself. See O. Devinsky, Antiepileptic Drug Therapy, in Guide to Understanding and Living with Epilepsy (1994). Taking medication also affects the person's daily schedule and may require that she arrange her daily schedule to fit her medication schedule.

Other adjustments include making sure to get enough sleep. When a seizure does occur, the individual may lose the privilege of driving, and may need to take time off from work because she is unable to get to work or perform the functions of the job, or in order to regain seizure control. In short, a person with epilepsy, particularly someone such as Ms. Chenoweth, whose epilepsy is not well controlled, must tailor her daily schedule to reduce the risk of seizures and to

accommodate the effects of seizures. Unlike most people, they cannot be flexible; instead, they must strictly adhere to these schedules. It is difficult to imagine a more substantial limitation than having to plan and live one's daily life around the demands of an unpredictable physical condition.

While seizures are the most common symptom associated with epilepsy, the condition affects people in other ways. As was true for Ms. Chenoweth, the diagnosis of epilepsy often means the loss of the right to drive for a specified period of time. Florida law requires that people with epilepsy be seizure-free for six months, be under regular medical supervision, and submit a current neurological evaluation in order to get a drivers license. See §§ 322.16, 322.221, Fla. Stat. (1999). In some situations, the required seizure-free period may be longer. See id. This restriction on driving significantly impairs the ability of Ms. Chenoweth and others with epilepsy to engage in such routine daily activities such as going to the grocery store, going to the doctor's office, and driving to work.

People with epilepsy must also contend with the crippling effects of the stigma attached to the disease. In enacting the ADA, Congress recognized that the irrational fears and misperceptions about disabilities, including epilepsy, can be as debilitating as the impairments themselves. See 136 Cong. Rec. S7422, S7442 (1990) (statement of Sen. Harkin) ("[T]he fear of epilepsy was once so great that people with this disease were believed to be possessed by the devil and were shut out of schools and the workforce.").³ The Supreme

³ Historically, seizures were viewed as a frightening and horrible disease that afflicted both body and soul. People thought that those with seizures were possessed by demons or were mentally ill. See, e.g., L. Eisenberg, Sociocultural

Court itself has also recognized that epilepsy is a stigmatizing condition. See School Bd. v. Arline, 480 U.S. 273, 284 (1987).

Today, despite advances in medical knowledge and laws such as the ADA, this stigma persists.⁴ Indeed, for many people with epilepsy, the stigma associated with the condition and the social isolation that accompanies it is a major concern of living with epilepsy. See Report to the Nation at 11.

Modifying one's daily schedule to minimize the risk of another seizure and coping with the social isolation, fear, stigma and the practical limitations created by not being able to drive is hardly a minimal intrusion on an individual's life. Rather they represent formidable obstacles that the individual must contend with on a day-to-day basis. It is for this reason that this Court should hold that Ms. Chenoweth's epilepsy was a substantial limitation on the major life activities of caring for oneself and interacting with others.

3. Epilepsy is a substantial limitation on the major life activity of working .

Under the implementing regulations, to show that a disability is a substantial limitation on the major life activity of work, the plaintiff must show that she is precluded from a broad class of jobs.

Perspectives, in Epilepsy: A Comprehensive Textbook 41 (1997). As a result of these beliefs, people with epilepsy were subjected to horrific treatment, ranging from physical violence to extreme physical isolation, such as incarceration in institutions. See id. In fact, people who suffer from epilepsy were institutionalized until the latter half of this century. See id.

⁴ The prevalence and persistence of irrational fears led the U.S. Centers for Disease Control Conference on Public Health and Epilepsy to conclude that the stigma associated with epilepsy and the factors which contribute to it should be addressed as a top priority. See Eisenberg, supra note 3, at 12.

See 29 C.F.R. § 1630.2(I) (defining "major life activities"); see also Sutton, 119 S. Ct. at 2151. Ms. Chenoweth's epilepsy precludes her from a broad class of jobs; therefore, she is substantially limited in the major life activity of working.

First, she is precluded from the class of jobs that require employees to work at a designated location during fixed hours. Ms. Chenoweth was unable to drive as a direct result of her physical condition, and it was for this reason that she was unable to arrive at work at a set time each day. Using an alternative to driving -- relying on rides from friends and family, or public transportation -- would not enable her to arrive at a fixed time each day. Indeed, the basis for Ms. Chenoweth's request for a reasonable accommodation was that her friends and family could not give her a ride to work at the same time each day. Unfortunately, in today's society, public transportation is not a substitute for the ability to drive because it is not available twenty-four hours a day, may not service the intended destination, may not be accessible, and is often not punctual. Thus, Ms. Chenoweth would not be able to maintain any job that required her to work on site and required her to arrive at the same time each day. In other words, she was not just precluded from just one job; rather, she was precluded from "a broad class of jobs."

Second, epilepsy strongly influences the types of jobs that people will be able to get and maintain. People with epilepsy are typically employed in low-skilled, low-paying menial jobs. It is estimated that at least twenty-five percent of working-age people with epilepsy are unemployed. See Report to the Nation at 11. Among those whose seizures are poorly controlled, the unemployment rate is even higher.

Sixty-four percent of individuals with epilepsy indicated in a survey that they were unemployed as a direct result of their seizures. See id. By way of comparison, during the same time period, the unemployment rate for the general population was only five percent. See id. The primary causes of this high unemployment rate among persons with epilepsy are the frequency of seizures and attitudes of employers. See id.; see also, R.A. Hicks & M.J. Hicks, Attitudes of Major Employers Toward the Employment of People with Epilepsy: A 30-Year Study, 32(1) *Epilepsia* 86-88 (1991). For those who are able to obtain jobs, the probability of continued employment is also significantly lower (26% among men and 21% among women) for people with controlled seizures than among those who do not have seizures at all. See Report to the Nation at 11. Also, the rate of underemployment (employment in positions below one's level of skill) is also significantly higher among persons with epilepsy than among the general population.⁵ When unemployment, lowered earnings and other indirect costs are added together, they represent more than seventy percent (71%) of the cost of the condition for adult women with epilepsy. See Begley, supra note 5, at 342-51, 347. In short, a diagnosis of epilepsy significantly limits an individual's employment opportunities and ability to retain a job.

It is difficult to imagine a more substantial limit on the major life activity of working than a condition which sharply reduces the

⁵ A 1999 study of the cost of epilepsy found that an average woman would experience a twenty-five percent decline in productivity over her lifetime as a result of her epilepsy. See C.E. Begley et al., The Cost of Epilepsy in the United States: An Estimate from Population-Based Clinical and Survey Data, 41(3) *Epilepsia* 342-51, 347 (2000).

likelihood of obtaining a job in two classes of jobs. For that reason, Ms. Chenoweth's impairment should be recognized as a disability under the ADA.

4. Epilepsy is a substantial limitation on the major life activity of driving .

The District Court also erred in refusing to recognize that driving is a major life activity. In Bragdon v. Abbott, 524 U.S. 624 (1998), the Supreme Court set forth the test for determining what is a major life activity. In concluding that reproduction was a major life activity, it reasoned that "the touchstone for determining an activity's inclusion under the statutory rubric [of major life activity] is its significance." Id. at 638 (quoting Abbot v. Bragdon, 107 F.3d 934, 940 (1st Cir. 1997)).

In American society, there are few activities that are as important as driving. The United States Department of Transportation reports that, as of 1990, eighty-eight percent of workers commuted to work by private vehicle. See U.S. Department of Transportation, Journey-to-Work Trends in the United States and Its Major Metropolitan Areas, 1960-1990; Final Report, available at <<http://www.bts.gov/NTL/DOCS/473.html>> (visited 1999). As of 1995, each individual driver spent, on average, 56.20 minutes each day driving a private vehicle. See U.S. Department of Transportation, Frequently Asked Statistical Questions <<http://www.bts.gov/btsprod/stat~faq.html>> (visited 1999). In 1996, more than 128,000,000 vehicles were privately owned. See id. These statistics make clear that driving one's own vehicle has become the primary means of transport for an overwhelming majority of Americans,

and driving has become a significant part of their daily activities. To deny that it is a major life activity today is to ignore reality. Yet this is exactly what the lower court did when it failed to apply the Supreme Court's test and examine the importance of driving in today's society, and instead chose to simply cite non-controlling case law in support of its conclusory statement that driving is not a major life activity. The Epilepsy Foundation urges this Court to reverse the lower court's decision and to recognize that Ms. Chenoweth was disabled by virtue of the fact that she was prevented from participating in the major life activity of driving solely by her physical impairment.

5. Epilepsy is a Substantial Limitation on the Major Life Activity of Reproduction .

In reviewing the evidence before it concerning the risk of transmitting HIV to an unborn child and the economic and legal costs of the condition, the Supreme Court in Bragdon v. Abbot opined, "[i]n the end, the disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." 524 U.S. at 641. Regardless of whether a woman chooses to conceive or not, epilepsy imposes significant limitations on her ability to engage in the major life activity of reproduction.

Women with epilepsy who want to conceive face greater risks than those women who do not have epilepsy. Like children of mothers infected with HIV, children whose mothers have epilepsy have an increased risk of being born with the condition: While children in the general population have a one percent risk of developing epilepsy,

children of mothers with epilepsy have a three percent risk of having the condition themselves. See Epilepsy Foundation, Epilepsy & Pregnancy 21-22 (1998) [hereinafter Epilepsy & Pregnancy]. Also, a woman with epilepsy is twice as likely as a woman without epilepsy to have a child with a major birth defect; this risk is four to six percent compared to two to three percent among the general population. See id. Contrary to what the lower court suggested, this risk is not the same risk that anyone taking medication faces. Scientific studies have attributed the increased risk of birth defects to both genetics and to the side effects of medication(s) used to treat women with epilepsy. See id. at 13. Women with epilepsy also face a three times higher risk (1.7% risk) of stillbirths and miscarriages than women in the general population. See id. Also, if a mother has epilepsy, her child faces an increased risk of mortality during the first year of life. See id. at 15. It can hardly be said that passing a life-altering physical condition on to your child, birth defects, and possibly even premature death are minor considerations in the reproduction decision. Even though the risks may be surmountable in some situations, they are, in no mistakable terms, significant limits on the decision to reproduce and to carry a pregnancy to term. Even for a woman who is not contemplating having a child but who is physiologically still capable of becoming pregnant, epilepsy and the effects of mitigating measures used to treat it will significantly impact her life. Some medications reduce the effectiveness of hormonal-based contraceptives, such as birth control pills. As a result, women with epilepsy who are being treated with medications have a higher risk of becoming pregnant when using these forms of

birth control than women in the general population who are using the same contraceptives. See id. at 2. While alternatives are available, they are either generally less effective means of birth control such as sponges, which themselves carry a higher risk of pregnancy than other forms of contraceptives, or more intrusive means of birth control, such as sterilization which will permanently end her ability to reproduce and prevent her from bearing a child in the future if she so decides. See id. at 2-4. Some women may choose not to engage in sexual relations at all in order to avoid the increased risks of birth defects and pregnancy. See id. at 3. What could be more restrictive on the major life activity of reproduction than a physical impairment whose mitigating measures limits the effectiveness of contraceptives, forces the woman to use less effective means of contraception, or denies her the opportunity to reproduce at all?

**II. PEOPLE WITH EPILEPSY ARE WITHIN THE CLASS
OF PERSONS CONGRESS INTENDED TO PROTECT
WHEN IT ENACTED THE ADA .**

The legislative history of the ADA makes clear that Congress intended that persons with epilepsy would, at least in some circumstances, satisfy the definition of disability under the Act. In fact, epilepsy is repeatedly cited throughout the legislative history as an example as a covered disability. See, e.g., S. Rep. No. 101-116, at 22, 31, 39, 62 (1989); H.R. Rep. No. 101-485(II), at 51-52, 62, 72, 79-80, 104 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 303; H.R. Rep. No. 101-485(III), at 28-29, 33, 42, 50 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 445. Notably, Congress was aware that many people with epilepsy use medication to control its effects. See, e.g., H.R. Rep. No. 101-485(II), at 52; H.R. Rep. No. 101-485(III), at

28, 29; see also 135 Cong. Rec. E1575 (1989) (statement of Rep. Coehlo) (testifying that an overwhelming majority of people with epilepsy use medication to control the disease). There is also evidence that it was the difficulties that people with epilepsy encounter in maintaining employment motivated Congress, at least in part, to enact the "reasonable accommodations" provisions of the ADA. Key committee reports observed, "Some people with disabilities are denied employment opportunities because they cannot work a standard schedule. For example,...[a] person with epilepsy may require constant shifts rather than rotation from day to night shifts." H.R. Rep. No. 101- 485(II), at 62-63; see also S. Rep. No. 101-116, at 31. In short, even though Congress was aware that the effects of epilepsy could be mitigated either by medication or a reasonable accommodation, it still recognized that the underlying impairment itself is a disability under the ADA. Not to acknowledge that Ms. Chenoweth is disabled would undermine Congress' intent in enacting the ADA to protect people with epilepsy and other disabilities from discrimination.

CONCLUSION

The judgment of the District Court holding that Ms. Chenoweth is not disabled should be reversed as a matter of law.

Respectfully submitted,

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