BEFORE THE KANSAS BOARD OF LAW EXAMINERS

In the Matter of the Application of
Ian Bruce Johnson
For Admission to the Kansas Bar

Application No. 12320

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CAROL G. GREEN
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PETITIONER'S HEARING BRIEF

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[at p. 1:]

Thus, while this brief contains primary arguments based on the Kansas disciplinary case law, the due process and equal protection clauses of the Fourteenth Amendment, the constitutional right to medical privacy, and the Americans with Disabilities Act ("ADA")—and also discusses the conclusive effect of the Board's 1992 proceedings and the Court's 1993 order regarding my 1992 application—the issue underlying all of these arguments is one of fundamental fairness. Is it fair to impose upon me a requirement to prove a "cure," or any other requirement that is in addition to or stricter than would be imposed on a similarly-situated attorney facing the Bar disciplinary process?

I believe the clear answer to this question is "no," and that the Constitution and the ADA both support this answer. The documentary record, as summarized in the fact statement included in this brief, clearly shows that I have been rehabilitated. The testimony at the Board's hearing in this matter will reinforce this showing. This is all that is asked of disciplined attorneys seeking reinstatement, and is all that should be asked of me. I should be permitted to take the Kansas Bar examination.

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[at p. 16:]

ISSUES PRESENTED

1. Whether the Board and the Court are required by the Fourteenth Amendment to apply objective and ascertainable character and fitness qualification standards to the licensure of attorneys?

2. Whether the Court is required by the Fourteenth Amendment to apply its character and fitness qualification standards uniformly to both attorneys involved in disciplinary proceedings and new applicants for admission to the Bar?

3. Whether the burden of proving character and fitness by "clear and convincing evidence" defines a subjective or objective burden of proof, and, if it is subjective, whether it requires an applicant to disprove common social prejudices?

4. Whether the standard of "rehabilitation" that applies to previously rejected applicants for admission pursuant to Kansas Supreme Court Rule 704(k) is the same as the rehabilitation standard applied to attorneys seeking reinstatement pursuant to Kansas Supreme Court Rule 219 following suspension of their licenses?

5. Whether the Board or the Court may, consistent with the Fourteenth Amendment, impose additional, unwritten character and fitness qualification standards upon applicants for original admission pursuant to Rule 704(k) that do not apply to applicants for reinstatement pursuant to Rule 219?

6. Whether misdemeanor sex offenses comparable to Applicant's offenses, if committed by an attorney twenty-one years ago, would presently preclude his reinstatement from suspension pursuant to Rule 219?

7. Whether a suspended attorney presenting to the Court for reinstatement with a psychiatric condition comparable to Applicant's condition, and for which psychiatric treatment was presently ongoing, would be precluded from reinstatement pursuant to Rule 219 by that psychiatric condition, by the fact of ongoing treatment, or both?

8. Whether Applicant's factual showing meets the character and fitness standards for admission to the Bar pursuant to Rules 702(a) and 704(k)?

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13. If the requirement that Applicant must prove his psychiatric condition to be "cured" is binding upon this proceeding, whether that standard is consistent with the constitutional right of medical privacy set forth in *State v. Hughes*, 246 Kan. 607, Syl. 2, 792 P.2d 1023 (1990)?

14. Whether Title II of the ADA is applicable to court proceedings to determine the character and fitness of individual applicants for admission to the Bar?

15. Whether the practice of law is a "class of jobs" for purposes of the ADA?

16. Whether Applicant has a history of a disability or has been regarded by the Court as having a disability for purposes of the ADA?

17. Whether Applicant is a “qualified individual with a disability” for purposes of the ADA?

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[At p. 19:]

I. The General Standard Under Rule 704(k) and its Application

This section of the brief explains the rules that will determine the outcome of this application if the requirement of a “cure” is held not to be controlling, and explains the manner in which the evidence to be presented at the hearing before the Board will satisfy that standard. As an initial matter, however, it should be noted that the Bar is not a lodge or a social club. Admission to the Bar is a right for those who satisfy the requirements for admission; it is not merely a matter of grace and favor. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102 (1963). Thus, the rules quoted and discussed below must have some objective meaning; admission cannot be entirely subjective and discretionary. In other words, the licensing standards must be “objective and ascertainable” and “applied consistently and uniformly;” otherwise the Fourteenth Amendment is implicated. *Hallmark Cards, Inc. v. Kansas Department of Commerce and Housing*, 32 Kan. App.2d 715, Syl. 6-9, 88 P.3d 250 (2004); *Mattox v. Disciplinary Panel of the U.S. District Court for the District of Colorado*, 758 F.2d 1362, 1366 (10th Cir. 1985). The rules cannot simply be a formal way of saying “we’ll let you into our club if we like you.”

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[At p. 22:]

C. The Reinstatement Standard Stated under the Rule 219 Case Law

As previously noted, both Rule 219(a) and Rule 704(k) require an applicant to prove that he or she “has been rehabilitated.” This language is exactly the same in both rules. This suggests that the standards set forth in the published case law regarding reinstatement of suspended or disbarred attorneys will also have some application under Rule 704(k). The Kansas Supreme court has set forth the factors to be considered in reinstatement cases as follows:

> Factors to be considered in determining whether a former attorney should be readmitted to the practice of law include: (1) the present moral fitness of the petitioner; (2) the demonstrated consciousness of the wrongful conduct and disrepute which the conduct has brought to the profession; (3) the extent of petitioner's rehabilitation; (4) the seriousness of the original misconduct; (5) conduct subsequent to discipline; (6) the time elapsed since the original discipline; (7) the petitioner's character, maturity and experience at the time of

> the original discipline; and (8) the petitioner's present competence in legal skills.

In re Dunn, 238 Kan. 31, Syl. 1, 707 P.2d 1076 (1985), *citing State v. Russo*, 230 Kan. 5, 630 P.2d 611 (1981).

It will be noted that most of these factors can be applied to original admission cases under Rule 704(k) exactly as they are stated above.

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[At p. 24:]

In a recent case, the Kansas Court of Appeals explained the constitutional requirement that "licensing or certification" programs have "clear and ascertainable standards," which should preferably be promulgated formally and published, and which must be "applied consistently and uniformly." In *Hallmark Cards, Inc. v. Kansas Department of Commerce and Housing*, 32 Kan. App.2d 715, 88 P.3d 250 (2004), a case involving the state Commerce Department's denial of a certification for a tax credit based on its own application of its internal, unpublished eligibility guidelines, the Court of Appeals explained that inconsistent application of such unpublished guidelines may violate both the due process and equal protection clauses:

6. When an agency is charged with implementing or interpreting legislation, especially when an agency is administering a licensing or certification statute, fundamental fairness and due process dictate that any "standard" or "statement of policy" be expressed in a rule or regulation filed and published pursuant to law. Members of the public, and others affected thereby, should not be subjected to agency rules and regulations that are known only by agency personnel.

7. In the absence of formal rules, due process requires an agency to demonstrate that its internal and unwritten standards of eligibility for statutory benefit are objective and ascertainable and that they are applied consistently and uniformly.

8. Where disparity in outcome among applicants for administrative certification or licensing is the result of intentional systematic unequal treatment by an agency, the Equal Protection Clauses of the federal and state Constitutions are implicated.

9. Both due process and equal protection concerns require that an administrative agency charged with administering a statutory certification program must demonstrate that any unwritten standards which have not been made explicit in the statute or regulations are applied consistently and uniformly.

Hallmark Cards, 32 Kan. App.2d 715, Syl.

Applicant recognizes, of course, that admission to the Bar is a judicial act of the Court, not the act of an administrative agency, and that the courts have traditionally held themselves to different standards than they apply to administrative agencies. However, the Federal and state Constitutions apply to both courts exercising their inherent powers and executive branch agencies administering statutes. If denial of a licensure application based on rules and regulations known only to agency personnel raises due process concerns when done by an administrative agency, it equally raises due process concerns when done by a court—as it was during the present Applicant's 1992 application process, in which he was subjected to an unwritten requirement to prove himself "cured." Likewise, if inconsistent application of an unpublished licensure or certification standard, resulting in intentional systematic unequal treatment, violates the Equal Protection clause when done by an administrative agency, it would equally violate the Equal Protection clause when done by a court. Thus, any systematic inconsistency between the treatment of applicants for admission to the Bar and similarly-situated attorneys appearing before disciplinary panels would implicate the Equal Protection clause.

The United States Court of Appeals for the Seventh Circuit discussed a similar equal protection concern in the context of an occupational licensure regime in *Miller v. Carter*, 547 F.2d 1314 (1977), *aff'd per curiam sub nom. Carter v. Miller*, 434 U.S. 356 (1978). In *Miller*, the court held that a city ordinance which permanently barred persons convicted of certain felonies from obtaining a public chauffeur's license, but which gave the licensing authority discretion to permit persons who committed the same offenses *after* receiving their licenses to retain their licenses, created an irrational classification within the class of ex-offenders contrary to the Equal Protection clause of the Fourteenth Amendment. The court explained:

> The city's purported justification for this different treatment of persons who commit one of the listed offenses after receiving a license is that they have a "track record" that the commissioner and the mayor can balance against the felony in evaluating fitness. The validity of this distinction is dissipated, however, by the fact that the licensee has an opportunity to obtain a favorable exercise of this discretion regardless of how short a time the license has been held. Thus, one who committed armed robbery within a few days of receiving the license, or one who committed the crime before licensing but was convicted after receiving the license, would, apparently, be eligible to retain the license. Indeed, one who was convicted of armed robbery before applying, but concealed that fact and so obtained a license, would, according to the ordinance, also be eligible to retain the license, for under Ch. 28.1-10 misrepresentation of a material fact in the application, like commission of one of the prohibited offenses while licensed, does not automatically result in revocation.
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> Such distinctions among those members of the class of ex-offenders are irrational, regardless of the importance of the public safety considerations underlying the statute or the relevance of prior convictions to fitness. In fact, allowing existing licensees who commit felonies to continue to be eligible for

> licensing undercuts the reasonableness of the basis for the classification, which is that the felony is *per se* likely to create a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings. An applicant for a license who has committed one of the described felonies and a licensee who has done the same are similarly situated, and no justification exits for automatically disqualifying one and not the other. Accordingly, insofar as Ch. 28.1-3 and 28.1-10 discriminate irrationally among the class of ex-offenders, they violate the equal protection clause of the Fourteenth Amendment.

Miller, 547 F.2d at 1316. More recently, the same court explained that, in *Miller*, "we struck down the ordinance because it irrationally denied licenses to offenders who committed the enumerated offenses *before* obtaining a license while making no similar restriction based on a person's conduct *after* obtaining a license." *United States v. Jester*, 139 F.3d 1168, 1171 (7th Cir. 1998) (emphasis in the original).

Thus, the equal protection clause of the Fourteenth Amendment, as explained in *Hallmark Cards*, *Miller* and *Jester*, requires that the published bar disciplinary case law serve as a limit on the Court's discretion on applications for original admission to the Bar in at least three ways relevant to this case. First, the Court may not treat as an automatic absolute disqualification for original admission a past criminal conviction that would not result in automatic permanent disbarment if committed by an admitted attorney. This conclusion is a direct application of the holding in *Miller*—permitting licensees who commit a particular crime today to retain their licenses (or extending to them the possibility of future discretionary reinstatement) while absolutely denying admission to new applicants who have ever in the past committed the same crimes, introduces an unconstitutionally irrational classification among the class of ex-offenders. Second, the Court may not treat as an automatic absolute disqualification for original admission a psychiatric condition that would not result in permanent disbarment of an admitted attorney under similar circumstances. This is an indirect application of *Miller*, but still well-supported by its reasoning. Making such a distinction based on licensing status will make an irrational distinction among the class of psychiatric patients in much the same way the distinction in *Miller* irrationally distinguished among the members of the class of ex-offenders. Finally, by a direct application of *Hallmark Cards*, the Court may not systematically treat applicants for new licensure differently than similarly-situated attorneys involved in the Bar's disciplinary system.

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[At p. 31:]

F. Applicant's Psychiatric History Would Not Bar Reinstatement under Rule 219(a)

The Board of Law Examiners, in its December 17, 1992 report to the Supreme Court, found that Applicant at that time was "diagnosed as chronic bi-polar with his hypersexuality a symptom of his diagnosis." (Board's report, December 17, 1992, p. 2,

¶4). It based this finding upon Dr. Urdaneta's 1992 report and his testimony before the Board. (See, the Board Minutes attached to its December 17, 1992, report). As will be seen in later sections of this brief, that diagnosis is binding on the Board today, at least as showing the diagnosis upon which the Board's 1992 recommendation and the Court's rejection of Applicant's 1992 application were based. However, in his March 14, 2006, report, Dr. Urdaneta indicates that, based on 14 years more experience with Applicant, he now believes that Applicant's primary diagnosis is, and always has been, Asperger's disorder, a mild form of autism, rather than bipolar disorder. A sleep study done in May, 2006, also diagnosed sleep apnea, although the relationship of this condition to Applicant's psychiatric symptoms is still somewhat unclear.

Whichever diagnosis is Applicant's correct primary diagnosis, the published disciplinary case law of the Kansas Supreme Court does not show that attorneys who develop or start to manifest these disorders are uniformly immediately disbarred. Quite the contrary is the case, in fact. Admitted attorneys who commit misconduct as a result of a mental illness, but who seek treatment, are often treated with some leniency and given an opportunity for their courses of treatment to become effective. Mental illness, if under treatment, is treated as a factor *mitigating* (not aggravating) punishment.

There is no published case law in Kansas regarding attorneys with Asperger's Disorder or any other form of autism. Thus, it cannot be said that attorneys diagnosed with autism after receiving their licenses are usually, or always, disbarred.

However, at least two cases have been published in which bipolar disorder was an issue. In *Re Metz*, 266 Kan 118, 965 P.2d 821 (1998), an attorney who had previously been suspended for failure to meet his continuing education requirements was found to have committed several acts of non-criminal professional misconduct, and was given a one year suspension. Bipolar disorder and alcoholism, both under active treatment at the time of the disciplinary hearing, were explicitly considered as *mitigating* factors. Similarly, in *Re Herman*, 254 Kan. 908, 869 P.2d 721 (1994), an attorney was found guilty of multiple instances of professional misconduct, including neglecting client matters, intentional damage to his clients, misrepresentations to courts and to his clients and billing for work not done. However, his behavior was found to have been influenced by bipolar disorder, which was under treatment at the time of the disciplinary hearing. Moreover, the Court indicated that "Respondent (Herman) recognizes that his medical condition is permanent, and will require treatment indefinitely." *Herman*, 254 Kan. at 913. The Court's response to Mr. Herman's admission that his condition was "permanent" (hence, incurable) was not to instantly disbar him, but to allow him to continue his practice under supervised probation, with faithful continuation of his psychiatric treatment a condition of that probation. Mr. Herman was discharged from probation five years later, presumably while still receiving treatment for his incurable bipolar disorder. *See, In re Herman*, 266 Kan. 497 (1999).

Furthermore, in at least one case, sleep apnea has been considered a factor *mitigating* discipline, where expert testimony showed it was causally related to a psychiatric condition (severe depression) that influenced the misconduct charged. *In re Meyer*, 251

Kan. 838, 841, 840 P.2d 522 (1992). One year of probation was imposed on attorney Meyer. As noted in *Meyer*, once diagnosed, sleep apnea is easily treated through the use of a mechanical breathing aid called a nasal CPAP at night. Applicant will show at the hearing in this matter that he now has and uses a nasal CPAP.

Finally, its should be noted that in *Ketter*, which was previously discussed as an example of a case in which an attorney committed misdemeanor sex crimes comparable to those of which Applicant was convicted, treatable mental illnesses—namely, exhibitionism and obsessive compulsive disorder—were explicitly discussed as *mitigating* factors in the decision to allow the attorney to continue practicing law on supervised probation.

Thus, in the disciplinary case law, treatable mental illnesses are regarded as *mitigating* factors, and attorneys are often permitted to continue practicing while under treatment. There is no uniform pattern of disbarring attorneys who commit disciplinary offenses under the influence of a mental illness (even one that is incurable), or of suspending them until they can prove they are "cured."

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[At p. 44:]

III. The "Cured" Standard Violates the Constitutional Right of Medical Privacy

A. The Issue Raised by This Section

The issue raised by this section of the brief is actually quite simple: Whether the Kansas Supreme Court may penalize with automatic denial of admission to the Bar the mere act of seeking ordinary, lawful psychiatric treatment from an appropriately-licensed psychiatrist consistent with its own holding stated in Syllabus 2 of *State v. Hughes*, 246 Kan. 607, 792 P.2d 1023 (1990) (*Hughes*). It should be noted that the Applicant is *not* here arguing that the constitutional right of privacy requires the Board, or the Court, to disregard any part of Dr. Urdaneta's testimony regarding Applicant's diagnosis, present or past treatment, or prognosis, or prescribes the weight that must be given to that testimony. Applicant is arguing only that the right to privacy prohibits the Court form penalizing him for the simple decision to continue to receive psychiatric treatment. The test must be what the doctor says about his treatment, not simply whether he is still receiving treatment.

B. The "Cured" Standard is Contrary to the Holding of *State v. Hughes*

The requirement that, in order to be admitted to the Bar, this Applicant must prove his psychiatric condition to be totally and permanently "cured," as orally announced to Applicant during the 1992 application process, included, as a part of its definition of a "cure," a requirement that the applicant must prove that he has not seen a mental health professional for purposes of treatment for at least two to three years. Thus, it imposed a penalty—automatic denial of licensure—upon the decision to seek, or to continue to

receive, treatment from a psychiatrist. As such, it plainly violates the right to privacy in therapy for physical or psychological disorders set forth in *Hughes:*

> The liberty interest protected by the 14th Amendment to the United StatesConstitution encompasses the right of personal privacy in therapy for physical or psychological disorders.

Hughes, 246 Kan. 607, Syl. 2.

Hughes was an appeal by the state of the dismissal of a charge of promoting obscenity brought against an adult bookstore owner who had sold a vibrator dildo kit and an inflatable doll with an artificial vagina to an undercover police officer. The district court, after hearing testimony from a licensed Ph.D. psychologist who specialized in sex therapy to the effect that vibrator dildos are often used in the treatment of anorgasmia and urinary stress incontinence in women, found the obscene devices statute to be unconstitutionally overbroad and dismissed the charges against the bookstore owner. In affirming the district court, the Supreme Court first held that the bookstore owner had standing to assert the rights of his customers, then explained its case law basis for its conclusion that the constitutional right of privacy encompasses therapy for medical and psychological disorders:

> The trial court's decision was made on privacy and medical treatment grounds. The United States Supreme Court has found that a constitutionally protected zone of privacy exists under the First, Third, Fourth, Fifth, and Ninth Amendments to the United States Constitution. *Griswold v. Connecticut*, 381 U.S. 479, 484-86, 85 S.Ct. 1678, 1681-83, 14 L.Ed.2d 510 (1965). The Court has stressed that individuals have a fundamental "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969). This liberty interest in privacy was held protected by the Fourteenth Amendment's restriction on state action against personal liberty in *Roe v. Wade*, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147, *reh. denied* 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973). We agree with the opinion in *[People v.]Seven Thirty-Five [East Colfax, Inc.*, 697 P.2d 348 (Colo. 1995)] that a statute is impermissibly overbroad when it impinges without justification on the sphere of constitutionally protected privacy which encompasses therapy for medical and psychological disorders.

Hughes, 246 Kan. at 617.

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[At p. 46:]

The *Hughes* opinion then discusses the relationship between the individual patient's right to privacy in medical and psychiatric treatment and the physician's freedom in exercising his or her medical judgment:

> The statute thus impermissibly infringes on the constitutional right to privacy in one's home and in one's doctor's or therapist's office. See *City of Junction City v. White,* 2 Kan.App.2d 403, 404, 580 P.2d 891 (1978) (citing *Paris Adult Theatre I v. Slaton,* 413 U.S. at 66 n. 13, 93 S.Ct. at 2640 n. 13). We note the statute also restricts a doctor's freedom to exercise his or her medical judgment in providing medical services. See *State ex rel. Stephan v. Harder,* 230 Kan. 573, 588, 641 P.2d 366 (1982) (quoting *Minnesota Medical Ass'n v. State,* 274 N.W.2d 84 [Minn.1978]).

Hughes, 246 Kan. at 619. Appellant notes that the "cured" standard requires him, as a minimum condition of admission, to either obtain a release from Dr. Urdaneta's care or to terminate treatment against medical advice and to be remain symptom-free for at least two years thereafter without treatment. The only alternative is to continue treatment as recommended and abjure licensure as an attorney. This choice, if made in favor of taking another gamble on applying for the Bar, quite obviously limits Dr. Urdaneta's medical judgment.

Finally, the *Hughes* opinion notes that "when a state chooses to regulate matters involving sensitive rights of its citizens, it is obligated to do so in a manner that bears a real and substantial relationship to the objective sought and is narrowly drawn to express only those objectives." *Hughes*, 246 Kan. at 619, *citing Nebbia v. New York*, 291 U.S. 502, 525 (1934) and *Carey v. Population Services International*, 431 U.S. 678, 686 (1977). Applicant notes that the admission requirement that he must refrain from receiving treatment from his psychiatrist for a period of years bears no positive relationship whatever to the objective sought—i.e., assuring the Court and the public of his mental and psychological fitness to practice law. Indeed, by requiring him to avoid a part of his support system, it would appear to be directly counterproductive. Moreover, even assuming *arguendo* that there is some relationship between the requirement and its objective, the requirement is not "narrowly drawn to express only those objectives," as a requirement that Applicant continue his treatment as long as recommended would appear to better express the objectives.

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[At p. 48:]

C. *Hughes* is Consistent with Subsequent Fourteenth Amendment and Privacy Case Law

Moreover, the existence of a right to choose to receive lawful treatment from a licensed medical provider is consistent with the privacy and Fourteenth Amendment liberty case law developed by the United States Supreme Court since *Hughes* was decided. The "right

of personal privacy in therapy for physical or psychological disorders" set forth in *Hughes* is merely the positive aspect of the negative right to refuse medical treatment recognized by the Court in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) (*Cruzan*) and *Washington v. Glucksberg*, 521 U.S. 702 (1997) (*Glucksberg*).

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[At p. 49:]

If patients have a constitutional liberty or privacy interest in the right to choose to refuse treatment, it logically follows that patients must also have a protected right to make the opposite choice, i.e., to receive recommended treatment. This is what *Hughes* decided, although in the somewhat unusual context of the use of a medically recommended and FDA-recognized (but illegal) obscene device.

The *Hughes* Court's conclusion that there is a "right of personal privacy in therapy for physical or psychological disorders" is also supported by the historical method of analysis set forth in *Glucksberg*:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking that direct and restrain our exposition of the Due Process Clause.

Glucksberg, 520 U.S. at 720-21. The right asserted—the right to see a licensed medical provider without being penalized for doing so—is certainly very easy to describe. It does not even require any qualification to make it sufficiently precise to pass the "careful description" requirement of *Glucksberg*. Moreover, the apparent absence of any published cases in which a court has been directly presented the issue whether a person may be penalized for seeking ordinary, lawful treatment from a properly-licensed medical provider is a strong argument that our nation's history and legal traditions—as well as the reasonable expectations of nearly everyone—simply assume that everyone has the right to seek treatment from a doctor.

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[At p. 51:]

Some more recent opinions have also argued that the list of non-textual rights must be sharply limited to those already explicitly recognized by the U.S. Supreme Court (a list

which presently includes only the right to *refuse* treatment, not the right to *receive* it), because once the courts recognize a right, it can no longer be conveniently limited. However, even courts that take a very limited view of the scope of the non-textual "privacy" rights protected by the constitution have been forced to admit that the United States Supreme Court has explicitly recognized a considerable list of such rights, and that nearly every one of these rights is subject to qualifications and to some degree of legislative restriction. Indeed, the High Court has explicitly recognized the following 18 non-textual rights, each of which is properly characterized as a right of personal autonomy or privacy: 1) the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); 2) the right to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); 3) the right to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); 4) the right to purchase and use contraceptives, *Griswold* and *Eisenstadt v. Baird*, 405 U.S. 438 (1972); 5) the personal right of a woman to choose whether to bear or abort a child, *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639 (1974), and *Roe v. Wade*, 410 U.S. 113 (1973); 6) the right to control the education and upbringing of one's children, *Troxel v. Granville*, 530 U.S. 57, 66 (2000), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923); 7) the right to freedom of thought, i.e., the right not to be subject to penalty merely for the content of one's thoughts, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-34, 641-42 (1943) (*Barnette*), *Stanley v. Georgia*, 394 U.S. 557, 565-566 (1969) and *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 178-79 (1971) (*Wadmond*); 8) the right to refrain from speaking things which one does not believe, without fear of official penalty, *Barnette* and *Wadmond*; 9) the right to possess obscene matter privately in one's home, *Stanley*; 10) the right to receive officially-disfavored "propaganda" without creating a government record that labels the recipient as one who wishes to receive it, *Lamont v. Postmaster General*, 381 U.S. 301 (1965); 11) the right to speak, and to have one's children taught to speak, a foreign language, *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Farrington v. Tokushige*, 273 U.S. 284 (1927); 12) the right to custody of one's children, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); 13) the right to keep a family together, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); 14) the right to bodily integrity, *Skinner* and *Rochin v. California*, 342 U.S. 165 (1952); 15) the right to travel within the United States, *Saenz v Roe*, 526 U.S. 489 (1999), *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849); 16) the right to control dissemination of private information, *Whalen v. Roe*, 429 U.S. 589 (1977); 17) the right of adults to engage in private, consensual, non-commercial sexual activity, *Lawrence v. Texas*, 539 U.S. 558 (2003); and 18) the right of competent adults to refuse unwanted medical treatment, *Cruzan v. Missouri Department of Health*, 497 U.S. 261, 279 (1990).

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[At p. 54:]

IV. Application of the Americans With Disabilities Act

This section of the brief will show that Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et. seq.* ("ADA"), applies to proceedings to determine moral character

and fitness for admission to the Bar, that ADA also applies to Applicant in this case, and that ADA requires the Board and the Court, if they rely upon Applicant's present or past medical diagnosis in reaching their decision, to rely upon objective medical evidence regarding the degree of danger actually presently posed by Applicant rather than on prejudices, fears or stereotypes regarding Applicant's diagnosis.

A. Applicability of ADA to Bar Admission Proceedings

By its own terms, Title II of the ADA is applicable to Bar admission proceedings. 42 U.S.C. §§ 12131(1)(A), 12131(1)(B) and 12132 explicitly provide that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities" of any "State" or any "agency… or other instrumentality of a state" nor "be subjected to discrimination by" any state or agency of a state. The Court has a clear duty to enforce Federal statutes applicable to the controversy before it, and may not ignore Federal law on state law grounds. *Howlett v. Rose,* 496 U.S. 356, 369-370, 370 n. 17 (1990). Moreover, the Attorney General has adopted regulations implementing Title II of ADA pursuant to the power delegated by 42 U.S.C. § 12134, which explicitly include licensing and certification programs within the range of public "programs" covered by Title II and which further prohibit eligibility criteria which tend to screen out individuals with disabilities unless those criteria are shown to be necessary for the provision of the program: *** 28 C.F.R. § 35.130(b)(6), (7) and (8)

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Moreover, every court which has directly decided the issue since 1991 has held that admission to the Bar is a "licensing program" regulated by ADA. *See, e.g., Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69 (2nd Cir. 2000); *Re Petition and Questionnaire for Admission to the Rhode Island Bar*, 683 A.2d 1333 (RI 1996)

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[At p. 57:]

B. The Practice of Law is a "Class of Jobs" for Purposes of Determining Whether an Individual is Disabled

The plaintiff in *Bartlett v. New York State Board of Bar Examiners,* 226 F.3d 69 (2nd Cir. 2000) alleged the New York Board failed to reasonably accommodate her individual reading disability in its testing procedures in administering the Bar examination. Ms. Bartlett had already failed the examination and was seeking an opportunity to re-take it, with some additional accommodations. Bartlett contended, *inter alia*, that she had a "disability" for purposes of the ADA because her reading limitations caused her to be regarded as disabled by the New York Board, thereby causing a substantial limitation in her ability to work because she was prohibited from performing a "class of jobs"—i.e., all jobs as a lawyer—which the average person with her training (J.D.) and abilities

would be able to perform. The New York Board responded that Bartlett's ability to work was not substantially impaired because she was excluded from only one job, not a broad range of jobs, and because her ability to work had to be compared to that of the average person, not the average holder of a law degree. The district court granted summary judgment for Bartlett, and the court of appeals initial opinion affirming this judgment in part was vacated and remanded by the United States Supreme Court for consideration in the light of three newly-decided cases. On remand from the Supreme Court, the Second Circuit held that Bartlett had no actual disability, but that, in excluding her from all jobs as a licensed attorney, the New York Board had regarded her as disabled and excluded her from a large "class of jobs" otherwise available to persons possessing a law degree

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[At p. 60:]

Like the plaintiffs in *Bartlett* and *Williams,* Applicant is foreclosed from the vast majority of jobs which utilize his training—a law degree—by the Court's 1993 order excluding him from the practice of law. Applicant is presently working as a paralegal, but that employment as a paralegal does not require a law degree and, in fact, as a practical matter, most legal employers will not consider an applicant with a law degree for a paralegal position (a law degree renders the applicant "overqualified" and also raises the "red flag" question why the applicant is not admitted to the Bar). The whole class of jobs as an attorney is foreclosed by law.

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[At p. 61:]

Applicant does not have a current, actual disability for purposes of 42 U.S.C. § 12102(2)(A). However, Applicant was hospitalized for almost 5 months in a psychiatric hospital in 1985, and was found by the Board in 1992 to have been suffering from "bi-polar disorder" of which "hypersexuality" was a "symptom." Bipolar disorders can be a "disability" for ADA purposes. *Doebele v. Sprint/United Management Co.*, 342 F.3d 117, 1129 n. 3 (10th Cir. 2003) (*Doebele*); *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1081 (10th Cir. 1997). The Board explicitly based its recommendation of denial of licensure in large part on the psychiatric diagnosis, continued treatment record *and* hospitalization record (Board's 1992 report, pp. 1-2, numbered findings 1, 3 and 4). The court agreed. (Court's 1993 order). The Board and Court thus found as of the date of the Court's 1993 order that Applicant's diagnosis and hospitalization record rendered applicant unfit to practice law from 1985 (the date of the hospitalization and the last incident) until at least three years after the Board's hearing, since Supreme Court Rule 704(k) prohibited Applicant from applying again for three years. Thus, as will be shown below, the Court explicitly relied upon the "record of a disability" in denying Applicant's 1992 application and explicitly regarded applicant as disabled by his diagnosis at that time. Applicant's case thus lies on the somewhat indistinct boundary between

discrimination based on the "record of an impairment" and discrimination based on "being regarded as having an impairment."

Under the current case law, Applicant's situation seems to fit most naturally within the "regarded as having an impairment" category, 42 U.S.C. § 12102(2)(C). As has already been noted, in *Bartlett*, even though the plaintiff did not have an actual disability under the applicable case-law definition, she was held to have been "regarded as disabled" by her reading impairment from performing the entire "class of jobs" as an attorney when the New York Board of Bar Examiners refused to further accommodate her impairment in its testing process. *Bartlett*, 266 F.3d at 83-84. Similarly, in *Doebele*, while the Tenth Circuit rejected Ms. Doebele's actual disability and record of a disability claims, it agreed with the district court that she had presented fact issue sufficient to resist summary judgment on her "regarded as disabled" claim by showing that "her supervisors regarded her as substantially limited from a broad class of jobs by her mental impairments" (specifically, bipolar disorder and attention deficit disorder). *Doebele*, 342 F.3d at 1133.

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[At p. 64:]

Thus, the DOJ regulations defining the "regarded as" test under Title II are compatible with the EEOC regulations under Title I discussed in *Doebele*. Moreover, and most relevantly to this case, the DOJ regulations declare that a person will qualify for coverage under the "regarded as" test whenever that person is "denied admittance" to a public program "on the basis of an actual or perceived… mental condition," unless the public entity involved can articulate a "legitimate reason" for the refusal. As was shown in an earlier section of this brief, neither Applicant's stale misdemeanor conviction record nor his mental condition would presently be considered a "legitimate reason" to totally exclude him from the Bar if it had arisen in a disciplinary context. *Compare, e.g.*, *In re Ketter*, 268 Kan. 146, 992 P.2d 205 (1999) *discharged from probation* 276 Kan. 2 (2003) and *In re Herman*, 254 Kan. 908, 869 P.2d 721 (1994), *discharged from probation*, 246 Kan. 497 (1999). Therefore, action to deny him admittance to the Bar on the basis of his mental condition falls clearly within the "regarded as" test as applied under Title II of ADA.

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[At p. 70:]

While the determination is made on a case by case basis, there can be no reasonable argument that an alleged "eligibility requirement" which excludes Applicant under conditions in which an attorney already licensed would be permitted to continue practicing law is truly an "essential" requirement. Thus, if an attorney who has been diagnosed with bipolar disorder, but whose condition has been in remission for more than 15 years would be allowed to continue practicing law, any stricter requirement applied to Applicant would plainly not be an "essential" requirement. Applicant demonstrated in an

earlier section of this brief that much less than 15 years in remission is required in many disciplinary cases. *See, e.g., In re Herman*, 254 Kan. 908, 869 P.2d 721 (1994), *discharged from probation*, 246 Kan. 497 (1999).

The Justice Department's Appendix to 29 C.F.R. § 35.130(b)(8) further clarifies that a public entity may not apply criteria which screen out, or tend to screen out, individuals with disabilities, unless those criteria can be shown to be necessary for the safe operation of the program, and this showing can be made without relying upon speculation, stereotypes or generalizations in finding danger to exist: ***

In addition, paragraph (b)(8) prohibits the imposition of criteria that "tend to" screen out an individual with a disability. This concept, which is derived from current regulations

> under section 504 (*see, e.g.*, 45 C.F.R. 84.13), makes it discriminatory to impose policies or criteria which, while not creating a direct bar to individuals with disabilities, indirectly prevent or limit their ability to participate… A public entity may, however, impose *neutral* rules and criteria that screen out, or tend to screen out, individuals with disabilities *if the criteria are necessary for the safe operation* of the program in question… *Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities*.

29 C.F.R. § 35.130, Appendix "A" to § 35.130(b)(8) (emphasis added).

Finally, the Appendix to the definition of a "qualified individual with a disability" in 29 C.F.R. § 35.104 explains that whether an eligibility requirement that excludes an individual with a disability is an "essential" requirement depends upon whether the disabled individual's participation in the program would pose a "direct threat" to others, when judged with "reasonable judgment" based on "current medical evidence or the best available objective evidence:" ***

> *The determination that a person poses a direct threat to the health or safety of others may not be based on stereotypes about the effects of a particular disability.* It must be based on an *individualized assessment*, based on *reasonable judgment* that relies on *current medical evidence* or the *best available objective evidence*, to determine: the *nature, duration, and severity of the risk*; the *probability* that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures will mitigate the risk.

29 C.F.R. § 35.104, Appendix "A" to 'qualified individual with a disability" (emphasis added).