NO. 11-5017 & 11-5018

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JEFFREY KAPCHE
Plaintiff-Appellant/Cross-Appellant

V.

ERIC HOLDER, ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN DIABETES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT/CROSS-APPELLE URGING AFFIRMANCE OF THE JURY VERDICT AND THE DISTRICT COURT'S DENIAL OF DEFENDANT'S RULE 50 MOTION

Michael A. Greene
Rosenthal Greene & Devlin, P.C.
121 Southwest Salmon, Suite 1090
Portland, Oregon 97204
Telephone: (503) 228-3015
Facsimile: (503) 228-3269
Counsel for *Amicus Curiae*
American Diabetes Association

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The American Diabetes Association ("Association") is a non for-profit corporation with no parent corporation and no stockholders.

The counsel of record for the Association certifies that the following listed persons/entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

A. Parties Plaintiff-Appellant:	Jeffrey Kapche
Defendant-Appellee:	Eric Holder
B. Attorneys For Plaintiff-Appellant:	Katherine L. Butler Butler & Harris 1007 Heights Boulevard Houston, Texas 77008
	David Cashdan Cashdan & Kane, PLLC 1150 Connecticut Avenue NW Washington, D.C. 20036-4129
	John W. Griffin, Jr. Marek Griffin & Knaupp 203 N. Liberty Street Victoria, Texas 77901
Attorneys For Defendant-Appellee:	Tony West Assistant Attorney General Ronald C. Machen, Jr. United States Attorney

Marleigh D. Dover
Lindsey Powell
Attorneys, Appellate Staff
Civil Division, Room 7318
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

C. *Amicus Curiae* Party: American Diabetes Association
1701 North Beauregard Street
Alexandria, Virginia 22311

Attorney: Michael A. Greene
Rosenthal Green & Devlin, P.C.
121 Southwest Salmon, Suite 1090
Portland, Oregon 97204

Michael A. Greene
Attorney for *Amicus Curiae*
American Diabetes Association

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*Authorities upon which we chiefly rely are marked with asterisks.

OTHER AUTHORITIES

American Diabetes Association, Standards of Medical Care in Diabetes, *Diabetes Care,* Volume 34, Supplement 1, pp. S11–S61 (2011) 1

American Diabetes Association Position Statement: Diabetes and Employment, *Diabetes Care*, Volume 34, Supplement 1, pp. S82–S86 (January 2011) 2

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Transcript of Direct Examination of Jeffrey Kapche, *Kapche v. Holder*, Nos. 11-5017 & 11-5018, pp. 399-601 ....13, 16

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U.S. Department of Health and Human Services, Centers for Disease Control and Prevention: National Diabetes Fact Sheet: National Estimates and General Information on Diabetes and Prediabetes in the U.S. (2011)..3, 7

APPENDIX

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

The certificate of parties, rulings, and related cases contained in Appellant's Response and Reply Brief is accurate and not repeated in this brief. A Rule 26.1 Corporate Disclosure Statement is included with this brief.

Michael A. Greene

GLOSSARY OF ABBREVIATIONS

App	-	Appendix
Association	-	American Diabetes Association
FBI	-	Federal Bureau of Investigation
Fed. R. App. Pro.	-	Federal Rules of Appellate Procedure

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Cross-Appellant/Appellee.

I. STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The American Diabetes Association ("Association") is a nationwide, nonprofit, voluntary health organization founded in 1940. The mission of the Association is to prevent and cure diabetes and to improve the lives of all people affected by diabetes.

The Association is the largest, most prominent nongovernmental organization that deals with the treatment and impact of diabetes.[2] The Association establishes and maintains the most authoritative and widely followed clinical practice recommendations, guidelines, and standards for the treatment of diabetes.[3] The Association publishes the most authoritative professional journals and books concerning diabetes research and treatment.[4]

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[1] Pursuant to Fed. R. App. Pro. 29(a), both parties consent to the filing of an *amicus curiae* by the American Diabetes Association. See App-001, Consent of Jeffrey Kapche and App-002, Consent of Eric Holder.

[2] The Association has over 485,000 general members, 15,000 health professional members, and 1,000,000 volunteers.

[3] American Diabetes Association, Standards of Medical Care in Diabetes, *Diabetes Care,* Volume 34, Supplement 1, pp. S11-S61 (2011). The Association's position statements are peer-reviewed documents that represent the consensus of the diabetes scientific and medical community. They are included as an appendix to this brief. *See* App.-001–078.

[4] The Association publishes many authoritative books and four professional journals with widespread circulation: (1) *Diabetes* (original scientific research about diabetes); *Diabetes Care* (original human studies about diabetes treatment); (3) *Clinical Diabetes* (information about state-of-the-art care for people with diabetes); and (4) *Diabetes Spectrum* (review and original articles on clinical diabetes management).

One of the Association's principal concerns is the legal treatment of persons with diabetes in employment situations. The Association knows through long experience that employers frequently restrict employment opportunities for people with diabetes based on prejudices, stereotypes, unfounded fears, and misinformation concerning diabetes and insulin in the workplace. The Association believes that each person with diabetes should be individually considered for employment based on the requirements of the specific job, the particular qualifications of the individual, and the capacity of that individual to fully and safely perform that job.[5] Consistent with this policy, the Association appears as *amicus curiae* in cases throughout the United States involving prohibitions or restrictions on the employment of persons with diabetes.[6]

The Association has a specific interest in this case because of the question of whether Jeffrey Kapche has a disability based on his efforts to monitor and control

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[5] American Diabetes Association Position Statement: Diabetes and Employment, *Diabetes Care*, Volume 34, Supplement 1, pp. S82-S86 (January 2011).

[6] The Association has participated as *amicus curiae* in the U.S. Supreme Court and several Circuit Courts of Appeal cases on the issue of whether diabetes is a covered disability under the ADA. See *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Branham v. Snow*, 392 F.3d 896 (7th Cir. 2004); *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003); *Nawrot v. CPC Int'l*, 277 F.3d 896 (7th Cir. 2002); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916 (7th Cir. 2001). The Fifth Circuit cited approvingly the Association's contributions as *amicus curiae* in *Kapche v. City of San Antonio,* 176 F.3d 840, 847 (5th Cir. 1999) (noting that Association provided "cogent support" for its position through evidence of improvements in diabetes management).

his diabetes. The premise of the FBI's argument would lead to the absurd result that only unsuccessful control of diabetes creates a disability under the Rehabilitation Act.[7] In other words, Kapche's incredible efforts to monitor and control his diabetes disqualify him from legal protection. This means that only a person who fails to control his diabetes can be considered to have a disability even though that person would not qualify to do the job. The Association files this amicus brief precisely because of this Catch-22 situation and a desire to ensure that Kapche is afforded the protection of the law despite his well-managed diabetes.

II. BACKGROUND INFORMATION ON DIABETES[8]

Diabetes is a chronic and incurable disease of the endocrine system which affects 25.8 million Americans, 26% of whom take insulin to help treat their diabetes.[9] It is characterized by high blood glucose (sugar) levels and results from either the failure of the pancreas to produce enough insulin or the failure of the body to effectively use whatever insulin is produced. Insulin is a hormone that transports glucose from the bloodstream into the body cells where it is metabolized.

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[7] *See* Brief for Cross-Appellant/Appellee at 10, 15, 17-19.

[8] *See generally* Kaufman, *Medical Management of Type I Diabetes* (5th Ed.), American Diabetes Association (2008).

[9] U.S. Department of Health and Human Services, Centers for Disease Control and Prevention: National Diabetes Fact Sheet: National Estimates and General Information on Diabetes and Prediabetes in the U.S. (2011).

For those without diabetes, the pancreas regulates the amount of glucose in the bloodstream by producing a matching supply of insulin, keeping the blood glucose levels in a narrow range. Blood carries this glucose to cells throughout the body where, with the help of insulin, it enters the cells and is changed into energy that is essential for all of the activities of life. In people without diabetes, blood glucose levels go up and down throughout the day in response to food and the needs of the body. This is a finely tuned system that automatically keeps blood glucose levels within the normal, healthy range. But in people with diabetes, that delicate balance is disrupted and is not automatically corrected.

Jeffrey Kapche has type 1 diabetes. In type 1 diabetes, the pancreas stops making insulin or makes only an insufficient amount. A person with type 1 diabetes must receive insulin from an outside source in order to survive. Lack of insulin will lead to death within days or weeks. Even if the person gets enough insulin to stay alive, but not a sufficient amount to bring blood glucose into a normal range, the high blood glucose levels caused by insulin deficiency will over time cause severe complications.

It is the use and impact of insulin to treat diabetes that is the key factor in evaluating whether Jeffrey Kapche has a disability. Insulin is necessary for Kapche's survival, but is **not** a cure. Taking insulin creates its own challenges, because getting insulin from an external source does not come close to matching

the body's ability to automatically and precisely regulate the glucose supply. Too much insulin causes too much sugar to leave the blood and cross into the body cells, resulting in abnormally low blood glucose levels (hypoglycemia). Too little insulin allows glucose to remain in the blood, resulting in abnormally high blood glucose levels (hyperglycemia).[10] As a direct consequence of taking insulin a person like Jeffrey Kapche must steer a perilous course between the Scylla (the rock) of high blood glucose and the Charybdis (the whirlpool) of low blood glucose.

Symptoms of mild to moderately low blood glucose include tremors, sweating, lightheadedness, irritability, confusion, and drowsiness. Severe low blood glucose may lead to unconsciousness, convulsions, and can be life threatening if not promptly and properly treated. Many persons with type 1 diabetes like Jeffrey Kapche are able to avoid such episodes by regularly monitoring their blood glucose level.[11] Kapche recognizes the early warning signs of low blood glucose and takes immediate corrective action to raise blood glucose (*e.g.*, consume quickly-absorbed forms of sugar such as fruit juice or regular soft drinks). Such self-monitoring is *the* early warning trip wire to avoid or minimize

[10] Generally, eating raises blood glucose while taking insulin or exercise lowers blood glucose.
[11] Blood glucose monitoring is done by a finger stick to draw a drop of blood to place in a glucometer to test. Kaufman, *supra* note 8, pp. 86–92.

low or high blood glucose. The more often individuals with diabetes know their blood glucose level, the earlier one can take the necessary corrective actions to keep blood glucose in a safe range. Once the blood glucose level is known, adjustments are made for insulin dosage, carbohydrate intake, and other factors, such as exercise.[12]

Successful management of type 1 diabetes requires a treatment regimen that is custom designed for each individual. Just as diabetes is a condition that affects people differently, there is no single, successful treatment regimen that fits everyone with diabetes – one size does not fit all. Given the acute dangers of low blood glucose, it might seem to make sense to allow blood glucose levels to stay higher than normal. In the long run, however, the chronic effect of elevated blood glucose causes severe complications, including heart disease, kidney disease, nerve disease, lower limb amputation, and blindness.

Diabetes is the seventh leading cause of death in the United States. The risk of death among people with diabetes is about twice that of people of similar age but without diabetes. The risk for stroke is two to four times higher among people with diabetes. Diabetes is the leading cause of kidney failure and new cases of

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[12] In addition, illness, infection and stress all affect blood glucose and add a particularly difficult challenge for a person with diabetes, who must re-evaluate and re-calculate insulin and carbohydrate needs. *See* Kaufman, *supra* note 8, pp. 77–79, 192.

adult blindness.[13] To delay or avoid both short-term and long-term complications, persons with diabetes must keep blood glucose levels as close as possible to their target range.

Insulin therapy helps Kapche walk a life-sustaining tightrope between the pillars of low and high blood glucose. In order to stay balanced on that tightrope, people with type 1 diabetes like Jeffrey Kapche must constantly, rigorously, and perpetually implement and follow a comprehensive diabetes treatment plan, 24 hours a day, seven days a week. This restrictive plan, which is aimed at keeping Kapche from falling off his life-sustaining tightrope, substantially limits a number of his major life activities compared to "the average person in the general population."

III. THE DIABETES OF JEFFREY KAPCHE[14]

The jury found that Jeffrey Kapche's diabetes substantially limits his major life activities because:

1. Kapche **must take insulin** to live.
2. Kapche **takes multiple shots of insulin each day** including injections before each meal or snack and, after checking his blood glucose, each time

[13] U.S. Department of Health and Human Services, *supra* note 9.
[14] The impact of Kapche's diabetes is well explained in Appellant's Response and Reply Brief. Response and Reply Brief of Appellant, Statement of Facts Relevant to Kapche's Disability, pp. 5–12.

his blood glucose is too high. Conversely, each time Kapche's blood glucose is too low, he must ingest a food or drink with sufficient carbohydrates to raise the level.

3. Because he must take insulin, Kapche is **always at risk of low blood glucose** (hypoglycemia), which can have traumatic, significant, and acute health consequences.
4. Kapche **monitors his blood glucose** with multiple daily finger stick blood glucose tests, three to five times a day, or 90 to 150 times per month.
5. Kapche **counts the carbohydrates and measures the quality and quantity of everything he eats** in order to adjust his insulin dosage.
6. Kapche **calculates each insulin dose** to coincide with what and when he eats and what his blood glucose is before eating.
7. Kapche **coordinates exercise with food intake and insulin administration**.
8. Kapche must **recalculate his blood glucose targets** whenever he is sick.
9. Kapche follows a medically created and tailored treatment plan that requires **regular visits to his physician** to monitor the effectiveness of his treatment, assess his progress, and modify for problems.
10. Kapche follows a **continual and permanent treatment plan** that does not allow a vacation or any time off as reward for compliance. In order to live

well with his diabetes, Kapche follows a state-of-the-art and limiting treatment plan.

IV. SUMMARY OF ARGUMENT

The clinical impact of Jeffrey Kapche's efforts to monitor and control his diabetes, combined with facts in the record, show why the district court correctly decided that the question of whether Kapche had a disability was a question for the jury. The jury correctly determined that Kapche has a disability when it looked at his diabetes and the burdens it places on him, and assessed whether those burdens substantially limit Kapche's major life activities of eating and caring for himself.

V. ARGUMENT

THE INSULIN-TREATED DIABETES OF JEFFREY KAPCHE SUBSTANTIALLY LIMITS HIS MAJOR LIFE ACTIVTIES

There is a substantial body of case law on how to show a person with type 1 diabetes has a substantial limitation on one or more major life activity. Under the analysis used in *Branham*, *Fraser*, *Nawrot*, and *Lawson*,[15] Kapche's type 1 diabetes substantially limits his major life activities of eating and caring for himself. The Association appeared as amicus in each of these four cases on the question of whether the plaintiff-worker had a disability given the impact of

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[15] *Branham v. Snow*, 392 F.3d 896 (7th Cir. 2004); *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003); *Nawrot v. CPC Int'l*, 227 F.3d 896 (7th Cir. 2002); and *Lawson v. CSX Transp., Inc.*, 245 F.3d 916 (7th Cir. 2001).

diabetes and his or her efforts to monitor and control his/her diabetes. Additionally, the District of Columbia district court has held that eating is a major life activity that can substantially limit a person with diabetes.[16]

A. *Jeffrey Kapche meets the substantial limitation requirement that his type 1 diabetes is a disability.*

Eating is a major life activity.[17] A major life activity need only be substantially limiting, not completely limiting. "The [law] addresses substantial limitation on major life activities, not utter inabilities."[18]

Comparing Kapche's limitations to the "average person in the general population"[19] highlights the many ways in which Kapche's major life activities are substantially limited by his diabetes. The appropriate comparison is to the "average person" not others with diabetes as argued by the FBI. Kapche must do a lot more to monitor and control his diabetes than any "average person".

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[16] *DuBerry v. District of Columbia*, 582 F. Supp. 2d 27 (D.D.C. 2008).
[17] *Branham*, 392 F.3d 896 (eating); *Fraser*, 342 F.3d 1032 (eating); *Nawrot*, 277 F.3d 896 (caring for oneself); *Lawson*, 245 F.3d 916 (eating). See also 29 C.F.R. § 1630.2(i) (caring for oneself).
[18] *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998).
[19] 29 C.F.R. § 1630.2(j).

No.	**Limitation**	**Kapche**[20]	**Average Person**
1.	Constant blood sugar vigilance	Yes	No
2.	Multiple insulin shots each day	Yes	No
3.	Side effects from insulin	Yes	No
4.	Multiple blood tests each day	Yes	No
5.	Limits on quantities and quality of food	Yes	No
6.	Adjust food for insulin and exercise	Yes	No
7.	Adjust exercise for insulin and diet	Yes	No
8.	Adjust insulin for exercise and diet	Yes	No
9.	Multiple doctor visits	Yes	No
10.	Adjust mathematical conversions for insulin during illness & exercise	Yes	No

Jeffrey Kapche's diabetes management regimen is both burdensome and necessary for maintaining life. Without keeping his blood glucose in a safe range and injecting insulin daily, he would die. The burdens Kapche's diabetes places on his life are critical. The consequence of ignoring those burdens is life threatening. It is this never-ending burden that creates a substantial limitation on his major life activities. As the court in *Fraser* noted, "[s]imply having the means to control an illness does not make controlling the illness easy."[21]

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[20] *See* Appellant/Cross-Appellee's Response and Reply Brief, Statement of Facts Relevant to Kapche's Disability, pp. 5–12.
[21] *Fraser*, 342 F.3d 1032, 1042.

B. *Jeffrey Kapche's major life activity of eating is substantially limited by his type 1 diabetes.*[22]

The most prominent cases regarding diabetes and the major life activity of eating are *Branham v. Snow*, *Fraser v. Goodale*, and *Lawson v. CSX Transp., Inc*.[23] In both *Lawson* and *Fraser*, the courts concluded that "when taking insulin, [the plaintiff's] ability to regulate h[is] blood sugar and metabolize food is difficult, erratic, and substantially limited."[24] The control and regulation of Kapche's food intake has little in common with an ordinary diet that someone without diabetes might try to follow. Many people attempt to maintain a diet; some do so diligently, and others intermittently, if at all. When such a person cheats or violates the diet – by eating forbidden foods, eating too many calories or eating at the wrong times – there is no acute medical consequence. Such diets are voluntary, and healthy

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[22] The eating-related demands and limitations of a diabetes treatment like Kapche's are outlined in considerable detail in the Association's position statements. *See, e.g.,* American Diabetes Association Position Statement: Nutrition Principles and Recommendations in Diabetes, *Diabetes Care*, Volume 27, Supplement 1, pp. S36–46 (January 2004); American Diabetes Association Position Statement: Physical Activity/Exercise, *Diabetes Care*, Volume 27, Supplement 1, pp. S58–S62 (January 2004); American Diabetes Association Position Statement: Insulin Administration, *Diabetes Care,* Volume 27, Supplement 1, pp. S106–109 (January 2004).

[23] *Branham*, 392 F.3d 896, 903–04 (7th Cir. 2004); *Fraser*, 342 F.3d 1032, 1039–40 (9th Cir. 2003). In *Fraser*, the Ninth Circuit followed the Seventh Circuit's analysis in *Lawson*.

[24] *Lawson*, 245 F.3d at 924; *Fraser*, 342 F.3d at 1041 (quoting *Lawson).*

people can—and do—ignore or compromise them at will. Jeff Kapche has no such option. As the court states in *Fraser*:

> Unlike a person with ordinary dietary restrictions, she does not enjoy a forgiving margin of error. While the typical person on a heart-healthy diet will not find himself in the emergency room if he eats too much in a meal or forgets his medication for a few hours, Fraser does not enjoy this luxury.[25]

The court in *Branham* confirmed the limitation on eating posed by type 1 diabetes when it stated:

> Depending on the level of his blood sugar, Mr. Branham may have to eat immediately, may have to wait to eat, or may have to eat certain types of food. Even after the mitigating measures of his treatment regimen, he is never free to eat whatever he pleases because he risks both mild and severe bodily reactions if he disregards his blood sugar readings. He must adjust his diet to compensate for any greater exertion, stress, or illness that he experiences.[26]

Jeffrey Kapche is not trying to lose weight, to meet a cholesterol target, or to improve his body image through the eating choices he makes. Rather, he is performing the balancing act necessary to survive. His eating limitations are mandatory, unforgiving, and constant.[27] These are the limitations he endures every day.

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[25] *Fraser*, 342 F.3d at 1041.
[26] *Branham*, 392 F.3d 896, 903–04.
[27] Kapche's diabetes regimen is detailed in his trial testimony. *See generally*, Transcript of Direct Examination of Jeffrey Kapche, *Kapche v. Holder*, Nos. 11-5017 & 11-5018 at pp. 399–601.

Jeffrey Kapche counts the amount of carbohydrates in everything he eats and drinks. If he does not know how many carbohydrates are in a particular food item, he looks it up in a 15–20 page list containing the carbohydrate content for just about every food item. He must also calculate the amount of insulin necessary to balance those carbohydrates.

Prior to eating or drinking, Jeffrey Kapche must take a blood glucose test to determine his blood glucose level. This is necessary in order for him to do a second calculation of how much insulin is necessary to bring his actual blood glucose into his target range prior to eating or drinking. During this time, he also assesses any future exercise and insulin needs. This calculation is done every time and before anything is consumed.

Then, Jeffrey Kapche either writes down or stores electronically the above calculations and data so that he can recreate the facts and data upon which certain food, drink or insulin dosage decisions are made. This recorded history keeps track of the accuracy and effectiveness of the above calculations and allows for periodic medical review and revision.

It is this arduous and constant process, and its grave consequences, that result in Kapche being substantially limited in the major life activity of eating.

C. *Jeffrey Kapche's ability to care for himself is substantially limited by his type 1 diabetes.*[28]

The major life activity of caring for oneself is analyzed in *Nawrot*.[29] Federal regulations specifically list caring for oneself as a major life activity under the Americans with Disabilities Act.[30]

To determine if there is a substantial limitation of Jeffrey Kapche's ability to care for himself, this court should look at the overall impact of his type 1 diabetes. His ability to care for himself is substantially limited because of: (1) the constant monitoring, measurement, and testing of his blood glucose level; (2) the recalculation of multiple daily injections of insulin; and (3) the coordination of his insulin therapy, nutritional therapy, and activity level. In addition to making determinations about his food intake, checking his blood glucose, injecting insulin, engaging in exercise, and addressing other factors such as illness, infection or stress, Kapche must constantly think about his diabetes to make sure he is not

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[28] The limitations on caring for himself posed by Kapche's diabetes are outlined in considerable detail in the Association's position statements. *See, e.g.,* American Diabetes Association Position Statement: Nutrition Principles and Recommendations in Diabetes, *Diabetes Care*, Volume 27, Supplement 1, pp. S36–46 (January 2004); American Diabetes Association Position Statement: Physical Activity/Exercise, *Diabetes Care*, Volume 27, Supplement 1, pp. S58–S62 (January 2004); American Diabetes Association Position Statement: Insulin Administration, *Diabetes Care,* Volume 27, Supplement 1, pp. S106–109 (January 2004).

[29] *Nawrot v. CPC Int'l*, 277 F.3d 896, 903-905 (7th Cir. 2002).

[30] 29 C.F.R. § 1630.2 (i).

running into the dangers of too-low or too-high blood glucose based on all these variables.

Jeffrey Kapche's diabetes management is not "routine" even if some of the technical tasks, such as pricking a finger to test blood glucose, or drawing up insulin in a syringe, are. Even if some tasks take mere minutes, "the minute that you don't do that is when you can have problems or complications"[31] that take hours or days to correct. As Dr. James Gavin (former Association President) testified on cross examination:

> If you think about this . . . as a burden only in the sense that, oh it's just an activity that takes a minute. But looking at this through the eyes of a person who has worked with and interacted with people with diabetes, it's not just a test. It really is an assessment of where you stand with respect to your basic, you know, metabolic condition right there. . . Because it's not just the generation of a number, it's a number upon which you may need to take some action.[32]

The things Jeffrey Kapche's must do to care for himself places significantly greater demands on him than for any "average person in the general population."

> The unrelenting demands, inconveniences, frustrations of treatment, and possibilities of disability or death put tremendous emotional and financial strain on patients with diabetes. Patients must struggle continuously to achieve a

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[31] Transcript of Direct Examination of Jeffrey Kapche at 540.
[32] Transcript of Cross Examination of James Gavin, MD, *Kapche v. Holder*, Nos. 11-5017 & 11-5018 at 490-91.

> balance between the demands of their everyday lives and those of their diabetes regimen.[33]

Jeffrey Kapche's type 1 diabetes makes caring for himself a never-ending burden that changes multiple times each day, and whenever medical/scientific developments produce better therapies, devices, and more advanced thinking regarding the management of diabetes. This constant adjustment in the face of these changes is something he must do that the "average person" need not worry about.

VI. CONCLUSION

Kapche's type 1 diabetes imposes two unrelenting life-long burdens: (1) handling the disease of diabetes; and (2) avoiding the side effects of insulin. Each of these burdens is significant and totally different from any burdens affecting an "average person in the general population." Type 1 diabetes not only makes Jeffrey Kapche different from that average person, but substantially limits major life activities performed automatically by "the average person."

In this case, the jury heard testimony about how Jeffrey Kapche's major life activities of eating and caring for himself are substantially limited by his diabetes. Testimony of Dr. Gavin confirmed the burdens of diabetes management specifically with regard for Kapche. The record in this case and the science of

[33] Kaufman, *supra* note 8, at 177.

modern diabetes management explicitly confirm what the jury found: that Kapche's insulin-treated diabetes substantially limits his major life activities of eating and caring for himself.

This court should affirm the court's denial of defendant's Rule 50 Motion and the jury verdict on the question of disability.

Date: October 13, 2011

Respectfully submitted,

MICHAEL A. GREENE
Rosenthal Greene & Devlin, P.C.
121 Southwest Salmon, Suite 1090
Portland, Oregon 97204
(503) 228-3015
Attorney for *Amicus Curiae*
American Diabetes Association

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,088 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word software in Times New Roman 14-point font in text and footnotes.

Michael A. Greene

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to D.C. Circuit Court Rule 29(c)(5), neither party's counsel authored this brief in whole or in part; neither party or his counsel contributed money intended to fund preparing or submitting this brief; and no person other than the amicus curiae, its members or its counsel contributed money intended to fund preparing or submitting this brief.

Michael A. Greene