No. 15-

IN THE

Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, OKLAHOMA, AND ADVANCED CORRECTIONAL HEALTHCARE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Americans with Disabilities Act require a plaintiff to prove that her disability was the "sole cause" of the challenged conduct (as the Tenth Circuit has held repeatedly), or does the Act permit claims when disability discrimination is accompanied by other factors (as every other federal court of appeals has held)?

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PETITION FOR WRIT OF CERTIORARI

John Doe respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 5a) is unreported, but is available at 2015 U.S. App. LEXIS 9298. The jury verdict and associated ruling of the district court (App. 15a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2015. App. 5a. The court of appeals denied Petitioner's motion for rehearing *en banc* on June 29, 2015. App. 3a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, provides in pertinent part:

> [N]o 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 a public entity, or be subjected to discrimination by any such entity.

STATEMENT

This petition presents an expressly recognized split among the courts of appeals regarding the ADA's causation standard. The Tenth Circuit in this case, relying on its own precedent, held that an ADA plaintiff must prove that disability discrimination was the "sole cause" of her injury. Every other federal circuit has rejected a sole-cause standard for ADA claims.

1. Early in the morning of February 23, 2012, local law enforcement officers went to the house of Petitioner John Doe ("Doe") to investigate a hit-and-run accident.[1] The officers visited Doe's house because Doe's car sustained damage consistent with such an accident.

Doe was sleeping when the officers banged on his bedroom window. Startled, Doe grabbed his gun and went to the door. He opened the door and, upon seeing police officers, engaged his gun's safety and then lowered the gun. Nonetheless, the officers arrested Doe for obstruction and assault with a deadly weapon. The charges were later dismissed, and Doe pled guilty to a misdemeanor offense.

The officers transported Doe to the municipal jail. The next day, Doe was transferred to the Payne County Detention Center ("PCDC"). Upon admission, Doe told the PCDC staff that he is HIV-positive. He was assigned to a general population housing unit.

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1. Doe was allowed to proceed pseudonymously, and the court of appeals sealed the portions of the record that referenced his name. The lower court subsequently granted Doe's motion to lift the seal for the limited purpose of facilitating filings with this Court. App. 1a.

Later in the day, however, PCDC supervisor Annette Anderson ordered Doe transferred to the Center's isolation unit. She noted her reasoning on the cell assignment log: "[M]oved due to his HIV statutes [*sic*]." Although this log entry is the only documentation for Doe's move to the isolation unit, Anderson later testified that Doe's HIV status was not the sole reason for the move, but was one of a few factors.

Rights and privileges vary dramatically in the general population unit and the isolation unit at PCDC. People housed with the general population are allowed to participate in group religious services; have unlimited access to television, showers, and telephones; and interact with their peers. Those in the isolation unit, however, are locked down for 23 hours per day, cannot recreate with others, do not have access to television, and may not shower or use telephones without permission. Doe languished in the isolation unit for 47 consecutive days, until he was released from PCDC.

2. Doe filed a lawsuit against the Board of County Commissioners of Payne County, Oklahoma ("Board"). He claimed that the Board violated the ADA by housing him in the isolation unit because of his HIV status.

The district court denied the Board's motion for summary judgment and set the case for jury trial. Leading up to trial, the parties proposed their respective jury instructions. The Board proposed that Doe must prove that his HIV status was the sole cause of his move to the isolation unit, while Doe proposed a determining-factor jury instruction.

The district court ruled that Tenth Circuit precedent required it to issue a sole-cause jury instruction. App. 21a. Again, Doe objected. While the district court overruled Doe's objection in light of binding Tenth Circuit precedent, the court noted that it would not have issued a sole-cause instruction if the case had been brought in any other circuit. App. 23a (observing that the Tenth Circuit has not "join[ed] all the other circuits on the sole cause issue").

At trial, the court instructed the jury that Doe must prove that his HIV status was the sole cause of his move to the isolation unit. The verdict form—to which Doe likewise objected—also included the sole-cause standard.

Following trial, the jury found that Doe satisfied each element of his ADA claim, except he did not prove that his disability was the *sole* cause of his move to the isolation unit. The jury filled out the verdict form as follows:

> (1) Has plaintiff . . . proven by a preponderance of the evidence, essential element number one of his ADA claim that he is a qualified individual with a disability?
> ☑ Yes
> ☐ No
>
> (2) Has plaintiff . . . proven by a preponderance of the evidence, essential element number two of his ADA claim that he was either excluded from participation in or denied the benefits of Payne County Detention Center's services, programs, or activities, or was otherwise discriminated against by the jail's officers or employees?
> ☑ Yes
> ☐ No

> (3) Has plaintiff . . . proven by a preponderance of the evidence, essential element number three of his ADA claim that such exclusion, denial of benefits, or discrimination was solely by reason of plaintiff's disability?
> ☐ Yes
> ☑ No

App. 15a. Because the jury did not find that Doe's exclusion, denial of benefits, or discrimination was *solely* due to his HIV status, judgment issued in favor of the Board.

3. Doe appealed the judgment against him. His principal argument on appeal was that the district court erred in issuing a sole-cause jury instruction on his ADA claim.

A three-judge panel of the Tenth Circuit affirmed. App. 5a. The court held that it was bound by its precedent that requires an ADA plaintiff to prove that her disability was the sole cause of the challenged conduct. App. 14a. In *Fitzgerald v. Corrections Corporation of America*, 403 F.3d 1134, 1144 (10th Cir. 2005), the Tenth Circuit held that an ADA plaintiff "is obligated to show that he was otherwise qualified for the benefits he sought and that he was denied those *solely* by reason of disability." App. 12a (emphasis added by court of appeals).

The panel that heard Doe's appeal recognized that intervening case law from this Court, *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), caused "several" other circuits to apply a but-for causation standard—not a sole-cause standard—to ADA claims. App. 13a n.3 (citing cases). However, the Tenth Circuit was unwilling to reassess its precedent.

Doe objected to a sole-cause standard throughout this case. *See, e.g.*, App. 11a-12a, 19a-20a. He noted that the sole-cause standard applied by the Tenth Circuit has been rejected everywhere outside of that Circuit. Doe sought rehearing *en banc* in order to bring the Tenth Circuit in line with all other courts of appeals. However, the court denied further review. App. 3a.

REASONS FOR GRANTING THE PETITION

This petition presents an opportunity for this Court to resolve a well-entrenched conflict regarding the proper interpretation of an important federal statute. In the decision below, the Tenth Circuit affirmed its prior holdings that the ADA's causation element—"by reason of" disability—requires a plaintiff to prove that a disability was the "sole cause" of the challenged conduct. This decision conflicts with opinions from every other federal court of appeals. The First, Second, Third, Fourth, Fifth, Sixth, Seven, Eighth, Ninth, Eleventh, and District of Columbia Circuits all have refused to adopt a sole-cause standard for ADA claims. Grafting "sole" onto the ADA's causation element contravenes the plain language of the statute, Congress's explicit statements when passing the ADA, and the statute's purpose. It also conflicts with the reasoning of this Court in *Gross v. FBL Financial Services, Inc.*

Resolving this conflict among the circuits is vitally important to our nation's disabled population. Large majorities of both Houses of Congress passed the ADA to provide a comprehensive and meaningful mandate for the elimination of discrimination against disabled individuals. Enacting this law, Congress explicitly declined to include a

sole-cause standard because it would not provide sufficient protection. The Tenth Circuit's sole-cause standard thus both defies explicit legislative intent and threatens to foreclose relief for ADA plaintiffs whom Congress intended to protect. Disabled individuals and veterans groups, in particular, are understandably alarmed.

I. THE DECISION BELOW CONFLICTS WITH OPINIONS FROM EVERY OTHER FEDERAL COURT OF APPEALS.

Every circuit in the country—except for the Tenth Circuit—has rejected the sole-cause standard for ADA claims. They have done so without a single dissent. The Tenth Circuit's continued adherence to a sole-cause standard for ADA claims presents a clear and longstanding, albeit lopsided, split among the circuits. Granting this petition or summarily reversing the Tenth Circuit is needed for national uniformity.

To state a claim under Title II of the ADA, plaintiffs must establish that: (1) they are qualified individuals with a disability; (2) who were excluded from participation in or denied the benefits of a public entity's services, programs, or activities; and (3) such exclusion, denial of benefits, or discrimination was "by reason of" a disability. 42 U.S.C. § 12132. This petition concerns whether the third element—"by reason of" a disability—requires a plaintiff to prove that her disability was the "sole cause" of the challenged conduct. The jury in this case found that Doe satisfied the first two elements but did not prove that he was subjected to solitary confinement *solely* because of his disability. App. 15a-16a.

As maintained by Doe throughout this case, the sole-cause standard applied to ADA claims by the Tenth Circuit has been rejected by every other circuit.[2] *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996); *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 89 (2d Cir. 2004); *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 300 n.4 (3d Cir. 2007); *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468-70 (4th Cir. 1999); *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005); *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 314-21 (6th Cir. 2012) (*en banc*); *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 849 (7th Cir. 1999); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995); *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1099 (9th Cir. 2013); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1074 (11th Cir. 1996); *Adeyemi v. Dist. of Columbia*, 525 F.3d 1222, 1226 (D.C. Cir. 2008).[3]

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2. Because of its limited jurisdiction, the Federal Circuit has not addressed this issue.

3. The above-cited cases from the First, Sixth, Eighth, Eleventh, and District of Columbia Circuits involved Title I, not Title II, of the ADA. The distinction is immaterial for present purposes for four reasons. First, the causation language of Title I ("because of" disability) and Title II ("by reason of" disability) are practically indistinguishable. *Gross*, 557 U.S. at 176 ("The words 'because of' mean 'by reason of . . . .'"); *cf. McNely*, 99 F.3d at 1074-75 (observing that the causation standards of Titles I and II are "substantially identical"); *see also, e.g.*, *Lewis*, 681 F.3d at 315 (noting that no Title of the ADA includes the word "solely"); *Washington*, 181 F.3d at 848 ("[T]he ADA's legislative history indicates that the methods of proving discrimination under Titles I and III of the ADA also apply to Title II."). Second, as Respondent acknowledged below, for the past twenty years the Tenth Circuit has mandated a sole-cause standard for Title I claims, as well. *White v. York Int'l Corp.*, 45 F.3d 357, 361 n.6, 363 (10th Cir. 1995)

The district court recognized the clear circuit split. Specifically, it noted that it must overrule Doe's objections to the sole-cause jury instruction and verdict form because the Tenth Circuit has not "join[ed] all the other circuits on the sole cause issue." App. 23a.

The Tenth Circuit's adherence to the sole-cause standard for ADA claims began with its opinion in *Fitzgerald*. In *Fitzgerald*, the court adopted the sole-cause standard by erroneously conflating the causation requirement of the ADA with that of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* 403 F.3d at 1144 (applying an opinion concerning the Rehabilitation Act to an ADA claim). Whereas the plain language of the Rehabilitation Act prohibits discrimination "*solely* by reason of" disability, 29 U.S.C. § 794(a) (emphasis added), the ADA simply prohibits discrimination "by reason of" disability, 42 U.S.C. § 12132.

Every other circuit in the country has avoided the Tenth Circuit's error. Writing for an *en banc* majority of the Sixth Circuit in *Lewis*, Judge Sutton explicitly rejected importing the Rehabilitation Act's sole-cause standard into the ADA. Judge Sutton observed the important textual differences between the ADA and the Rehabilitation Act, noting that Titles I, II, III, and V of the ADA, unlike the Rehabilitation Act, do not use the word "solely" in their causation requirements:

(referring to element of Title I claim that plaintiff was terminated "based solely on his disability"). Third, some circuits rejected a sole-cause standard in Title I cases based on the legislative history concerning Title II specifically. *See, e.g.*, *McNely*, 99 F.3d at 1074-75. Fourth, regardless, the Tenth Circuit's sole-cause standard is at odds with Title II-specific cases in at least the six remaining circuits.

> At no point . . . has the ADA used the "solely" because of formulation found in the Rehabilitation Act. That leaves us with two laws with two distinct causation standards. One bars differential treatment "solely by reason of" an individual's disability; the other bars differential treatment "because of" the individual's disability. No matter the common history and shared goals of the two laws, they do not share the same text. Different words usually convey different meanings, and that is just the case here.

Lewis, 681 F.3d at 315. While some Sixth Circuit judges dissented in part because they disagreed with the causation standard that the majority ultimately adopted in *Lewis*, all 16 judges of the Sixth Circuit agreed that a sole-cause standard does not apply to ADA claims. *Id.* at 322 (Clay, J.), 325 (Stranch, J.), 331 (Donald, J.).

Numerous other circuits have relied on the differing statutory language in the ADA and the Rehabilitation Act to reach the same conclusion as the Sixth Circuit in *Lewis*. *See, e.g.*, *K.M.*, 725 F.3d at 1099; *New Directions*, 490 F.3d at 300 n.4; *Bennett-Nelson*, 431 F.3d at 454; *Baird*, 192 F.3d at 469 ("Despite the overall similarity of § 12132 of Title II of the ADA and § 504 of the Rehabilitation Act, the language of these two statutory provisions regarding the causative link between discrimination and adverse action is significantly dissimilar."); *McNely*, 99 F.3d at 1073-74.

Other courts also have noted that applying a sole-cause standard to an ADA claim would disregard the clear legislative history of Title II of the ADA. The

Eleventh Circuit, for instance, recognized that Congress purposefully—even explicitly—refused to codify a sole-cause standard when enacting Title II of the ADA. *McNely*, 99 F.3d at 1074-75. After observing that the causation standards in the various titles of the ADA are "substantially identical," the Eleventh Circuit quoted the legislative history of Title II that expressly discussed why Congress declined to insert sole-cause language into the ADA:

> The Committee recognizes that the phrasing of [Title II of the ADA] differs from [the Rehabilitation Act] by virtue of the fact that the phrase "solely by reason of his or her handicap" has been deleted. . . .
>
> A literal reliance on the phrase "solely by reason of his or her handicap" leads to absurd results. For example, assume that an employee is black and has a disability and that he needs a reasonable accommodation that, if provided, will enable him to perform the job for which he is applying. He is a qualified applicant. Nevertheless, the employer rejects the applicant because he is black and because he has a disability.
>
> In this case, the employer did not refuse to hire the individual solely on the basis of his disability—the employer refused to hire him because of his disability and because he was black. Although the applicant might have a claim of race discrimination under title VII of the Civil Rights Act, it could be argued that he

> would not have a claim under section 504 [of the Rehabilitation Act] because the failure to hire was not based solely on his disability and as a result he would not be entitled to a reasonable accommodation. The Committee . . . rejects the result described above.

Id. at 1075 (quoting H.R. Rep. No. 485(II), at 85 (1990)).

No court of appeals—except for the Tenth Circuit—has ignored Congress's clear intent by applying the sole-cause standard that Congress explicitly rejected for ADA claims. Yet the Tenth Circuit has applied the sole-cause standard on at least three different occasions over the past decade, without even a single vote to consider the matter *en banc*.[4] Because the Tenth Circuit has steadfastly refused to reconsider its erroneous sole-cause standard over the past ten years, summary reversal or a grant of this petition is needed to ensure a uniform application of the proper ADA causation standard among the circuits.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S REASONING IN *GROSS* AND PRESENTS AN IMPORTANT ISSUE.

The court below committed the same statutory interpretation sin that this Court warned against in *Gross*. Moreover, the Tenth Circuit's ADA causation standard substantially undermines this crucial federal statute in contravention of Congress's express goals.

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4. App. 5a; *Breedlove v. Costner*, 405 F. App'x 338, 341 (10th Cir. 2010) (affirming dismissal of ADA claim for failing to "allege discrimination solely based on his asserted disability"); *Fitzgerald*, 403 F.3d at 1144.

1. In *Gross*, this Court considered applying Title VII's motivating-factor standard to claims brought under the Age Discrimination in Employment Act (ADEA). 557 U.S. at 173. Holding that the ADEA's "because of" standard warranted but-for causation, not Title VII's "motivating factor" standard, this Court cautioned against "apply[ing] rules applicable under one statute to a different statute . . . ." *Id.* at 174 (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)). This is true even when two statutes, such as Title VII and the ADEA, address similar issues and share common goals. *Id.* at 174-75.

The Tenth Circuit violated the main lesson of *Gross*. It uncritically (and erroneously) conflated the ADA's and Rehabilitation Act's causation standards in its earlier *Fitzgerald* opinion, and it has refused to correct its error since.

2. Congress intended the ADA to be a vital federal statute to remedy disability discrimination. In enacting the ADA, Congress explicitly declined to adopt a sole-cause standard because a sole-cause standard would permit discrimination that was in fact based on disability. The Tenth Circuit's continued insistence on a sole-cause standard for ADA claims is not only devastating for disabled individuals seeking to redress discriminatory conduct, but is contrary to Congress's express intent.

Congress designed the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The statute was necessary to "address the pervasive problems of discrimination that

people with disabilities are facing." *Tennessee v. Lane*, 541 U.S. 509, 526 (2004) (quoting S. Rep. No. 101-116, at 18 (1989)). To confront disability discrimination adequately through the ADA, Congress intentionally declined to adopt a sole-cause standard, noting that such a standard would lead to "absurd results." H.R. Rep. No. 485(II), at 85 (1990), *quoted in McNely*, 99 F.3d at 1075.

Congress was aware that a sole-cause standard would effectively authorize a broad swath of disability discrimination by allowing the presence of other putative factors to disqualify an otherwise valid ADA claim. Rarely is disability the only cause of discriminatory conduct. Disability discrimination is often combined with other factors, even when disability is the determining, but-for concern. Bringing ADA claims in the Tenth Circuit is almost always now a fool's errand.

Rejecting a sole-cause standard for ADA claims, the Eleventh Circuit summarized the consequences of such a standard—consequences that unfortunately have materialized in the Tenth Circuit:

> [I]mporting the restrictive term "solely" from the Rehabilitation Act into the ADA cannot be reconciled with the stated purpose of the ADA—"the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1). . . . A liability standard that tolerates decisions that would not have been made in the absence of discrimination, but were nonetheless influenced by at least one other factor, does little to "eliminate" discrimination; instead, it indulges it.

McNely, 99 F.3d at 1074.

Congress purposefully declined to codify a sole-cause standard in the ADA because that causation requirement would severely undercut this iconic law. The disabled community is alarmed that the Tenth Circuit, on multiple occasions over the past decade, has ignored Congress's clear admonition.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may also wish to consider summary reversal.

Respectfully submitted,

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September 25, 2015

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED AUGUST 18, 2015

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-6187

JOHN DOE,

Plaintiff-Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, OKLAHOMA,

Defendant-Appellee,

and

ADVANCED CORRECTIONAL HEALTHCARE, INC.,

Defendant.

ORDER

Before **BRISCOE**, Chief Judge, **LUCERO**, and **MATHESON**, Circuit Judges.

Appendix A

This matter is before the court on appellant's *Unopposed Motion to Permit Non-Sealed Filing in U.S. Supreme Court of Previously Sealed Documents*. In the motion, the appellant seeks permission to file certain materials sealed in this court in a "public, non-sealed manner" in the United States Supreme Court as part of a petition for writ of certiorari. Upon consideration, the motion is granted.

Entered for the Court

/s/
ELISABETH A. SHUMAKER,
Clerk

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED JUNE 29, 2015

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-6187

JOHN DOE,

Plaintiff-Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, OKLAHOMA,

Defendant-Appellee,

and

ADVANCED CORRECTIONAL HEALTHCARE, INC.,

Defendant.

ORDER

Before **BRISCOE**, Chief Judge, **LUCERO**, and **MATHESON**, Circuit Judges.

Appendix B

Appellant's petition for rehearing is denied.

The petition for rehearing *en banc* was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/_____
ELISABETH A. SHUMAKER, Clerk

APPENDIX C — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED JUNE 4, 2015

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-6187
(D.C. No. 5:13-CV-00108-F)
(W.D. Okla.)

JOHN DOE,

Plaintiff-Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF PAYNE COUNTY, OKLAHOMA,

Defendant-Appellee,

and

ADVANCED CORRECTIONAL HEALTHCARE, INC.,

Defendant.

Appendix C

ORDER AND JUDGMENT*

Before **BRISCOE**, Chief Judge, **LUCERO** and **MATHESON**, Circuit Judges.

John Doe appeals from the judgment entered on a jury verdict in favor of the Board of County Commissioners of Payne County, Oklahoma (the Board) on his claim for discrimination under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-33 (ADA). Doe argues the district court erred in (1) excluding his proposed expert witness testimony, and (2) instructing the jury that the decision to move him from general to segregated housing had to be motivated *solely* by the fact that he is HIV positive.[1] Doe argues that either error standing alone entitles him to a new trial. We have jurisdiction under 28 U.S.C. § 1291. Finding no error, we affirm.

---

* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1. We granted the stipulated motion to dismiss Doe's appeal against Advanced Correctional Healthcare, Inc. with prejudice.

Appendix C

BACKGROUND

On February 23, 2012, Doe was arrested on charges of obstruction and assault with a deadly weapon on a police officer. He was transported to the local municipal lockup. The next day, February 24, Doe was sent to the Payne County Detention Center (the Detention Center). During the routine booking process the facility learned that Doe was HIV positive. Initially, Doe was assigned to a general housing unit where inmates are permitted to freely socialize during the day and also have unrestricted access to showers, telephones and television. General-housing detainees are also permitted to attend group religious services.

Later that same day, Annette Anderson, a Detention Center sergeant, decided Doe should be moved to a segregation pod, where he remained for several weeks until his release on April 11. In this pod, Doe did not enjoy all of the benefits, programs or activities afforded to general-housing detainees. For example, Doe was limited to one hour a day outside of his cell to shower and use the telephone. As a result, he could not move freely within the pod to mingle with other inmates. Nor could he attend group religious services.

In a contemporaneous record made at the time of the transfer, Anderson wrote that the reason Doe was transferred was "due to his HIV statutes [sic]." Aplt. App., Vol. 3 at 689. She explained later that she did not elaborate because of her mistaken belief that there was not "enough room in our [computer] field of [sic] putting

all the reasons in the cell movement log." *Id*., Vol. 14 at 3284. Anderson testified that absent this mistaken belief, she would have expanded the entry to say she knew Doe "personally" and "due to the nature of his charges" she worried about him getting into a fight and exposing other inmates to "bodily fluids or blood." *Id*. at 3285.

Prior to trial the Board moved to exclude the testimony of Doe's proposed corrections expert, Emmitt Sparkman. Following a *Daubert* hearing, the district court ruled that Mr. Sparkman would not be allowed to testify in Doe's case-in-chief. The court noted that the central issue for the jury was whether Doe "was or was not segregated solely because of his HIV status." *Id*., Vol. 13 at 2947. Because Mr. Sparkman's opinions concerned what the court characterized as "best practices," it concluded the "proposed expert testimony has, at best, . . . only a slim toe hold on relevance, or as the Supreme Court calls it 'fit,'. . . [and] if [Mr. Sparkman] is a candidate to give expert testimony at all, [it] would be . . . to do so only as a rebuttal witness depending on what we hear from the defendant." *Id*. at 2960-61.

Later in the trial, the district court overruled Doe's objection to the jury instruction and verdict form that required him to prove that his HIV status was the *sole* motivating factor in transferring him from general to segregated housing. In so ruling, the court relied on *Fitzgerald v. Corrections Corporation of America*, 403 F.3d 1134, 1144 (10th Cir. 2005), which holds that "[u]nder . . . the ADA . . . [the plaintiff] is obligated to show that he was otherwise qualified for the benefits he sought and

that he was denied those solely by reason of disability" (internal quotation marks omitted). *See* Aplt. App., Vol. 14 at 3319. The jury answered "No" when asked whether the "exclusion, denial of benefits, or discrimination was solely by reason of [Doe's] disability." *Id.*, Vol. 13 at 2912.

ANALYSIS

Expert Witness

On appeal, "we review *de novo* the question of whether the district court applied the proper standard and actually performed its gatekeeper role in the first instance. We then review the trial court's actual application of the standard in deciding whether to admit or exclude expert testimony for abuse of discretion." *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003). As such, "we will not disturb the district court's ruling unless it is arbitrary, capricious, whimsical or manifestly unreasonable, or when we are convinced that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* (internal quotation marks omitted).

Rule 702(a) of the Federal Rules of Evidence imposes a duty on the district court to ensure that the proposed expert testimony is not only reliable, but *relevant*. "A witness who is qualified as an expert . . . may testify in the form of an opinion or otherwise if: [] the expert's scientific, technical, or other specialized knowledge *will help the trier of fact to understand the evidence or to determine a fact in issue*. . . ." (emphasis added). *See*

also Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993).

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *See* Fed. R. Evid. 401. Whether an expert's testimony is relevant has been described as a question of "fit." *Daubert*, 509 U.S. at 591. This means that "[e]ven if an expert's proffered evidence is scientifically valid and follows appropriately reliable methodologies, it might not have sufficient bearing on the issue at hand to warrant a determination that it has relevant 'fit.'" *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1234 (10th Cir. 2004).

Our review of the record convinces us that the district court did not abuse its discretion in excluding Mr. Sparkman's testimony. Despite Doe's arguments to the contrary, not a single one of Mr. Sparkman's sixteen opinions pertained to the question of whether Doe was placed in a segregated housing unit solely because of his HIV status; instead Mr. Sparkman opined on the inadequacies of the Detention Center's policies on classifying prisoners with HIV and its failure to follow so-called "best practices." *See* Aplt. App., Vol. 3 at 813-15.

There is no question the district court performed its gatekeeper function in the first instance. As to its relevancy determination, the court explained that Mr. Sparkman's proposed testimony was not a "fit," because it had nothing to do with "whether [Doe] was or was not

segregated solely because of his HIV status." *Id*., Vol. 13 at 2961. The court's decision to exclude Mr. Sparkman's testimony was not an abuse of discretion.

Jury Instruction and Verdict Form

We review the sole-motivating-factor instruction "*de novo* to determine whether it accurately states the governing law." *EEOC v. Beverage Distribs. Co.*, 780 F.3d 1018, 1020 (10th Cir. 2015) (footnote omitted). Title II of the ADA provides 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 a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.[2]

As such, "[t]o state a claim under Title II, the plaintiff must [prove] that (1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability." *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1193 (10th Cir. 2007). We are concerned here with the third element of a cause of action under Title II and Doe's argument that the jury should have been instructed that he had carried his burden if he could

2. "This provision extends to discrimination against inmates detained in a county jail." *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1193 (10th Cir. 2007).

show that his HIV status was *a motivating factor* in the decision to move him to segregated housing. We conclude there was no error in the jury instruction and concomitant verdict form.

In *Fitzgerald*, we held that a plaintiff claiming a violation of Title II of the ADA "is obligated to show that he was otherwise qualified for the benefits he sought and that he was denied those *solely* by reason of disability." 403 F.3d at 1144 (internal quotation marks omitted) (emphasis added). Nonetheless, Doe urges us to ignore our holding in *Fitzgerald*, arguing that it purports to overrule the "determining factor" ADA causation standard established by our earlier decision in *Bones v. Honeywell International, Inc.*, 366 F.3d 869 (10th Cir. 2004). He also argues that *Fitzgerald* is contrary to the Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar*, --- U.S. ---, 133 S. Ct. 2517 (2013), which according to Doe, "strongly suggests that motivating factor is the proper standard for status-based discrimination under the ADA because the ADA specifically includes" some of the same remedies included in Title VII. Aplt. Reply Br. at 3.

In addition to the fact that our prior ruling in *Bones* concerned a Title I claim, whether or not the plaintiff's disability was the sole motivation for terminating her employment was not at issue; instead, we stated, in the context of summary judgment, that a plaintiff "must provide some evidence that her disability was a determining factor in [the employer's] decision to terminate her." 366 F.3d at 878. Moreover, we have had

occasion to interpret and apply the Supreme Court's *Nassar* decision, and we concluded it stands for the proposition that the standard of causation for a Title VII retaliation claim is "but for" causation. *See, e.g.*, *Ward v. Jewell*, 772 F.3d 1199, 1203 (10th Cir. 2014) ("The Supreme Court [in *Nassar*] has likened [the burden for a retaliation claim] to a showing of 'but-for causation.'"). If *Nassar* suggests anything regarding the instruction issue presented, it suggests that a mixed-motive standard does not apply to any claims other than Title VII discrimination claims.[3]

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3. We acknowledge that several of our sister circuits have relied on the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), to apply a "but for" causation standard to ADA claims. To be sure, *Gross* concerned a claim under the Age Discrimination in Employment Act of 1967 (ADEA) – not the ADA. However, the Supreme Court cautioned against incorporating the statutory language of Title VII, which specifically "provide[s] that a plaintiff may establish discrimination by showing that age was simply a motivating factor," to anti-discrimination statutes that do not contain such language. *Id*. at 174. *See also Palmquist v. Shinseki*, 689 F.3d 66, 74 (1st Cir. 2012) (applying the "but for" causation standard announced in *Gross* to claims under the Rehabilitation Act), *cert. denied*, 134 S. Ct. 52 (2013); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 319 (6th Cir. 2012) (applying *Gross's* "but for" standard to claims under the ADA); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 (7th Cir. 2010) (same).

In any event, we do not consider whether "but for" causation is the proper standard because Doe failed to request such an instruction and does not argue plain error. *See EEOC v. Beverage Distribs. Co.*, 780 F.3d 1018, 1023 n.4 (10th Cir.

In summary, at present *Fitzgerald* is the controlling law in this circuit and "[a]bsent *en banc* consideration, we generally cannot overturn the decision of another panel of this court." *United States v. Brooks*, 751 F.3d 1204, 1209 (10th Cir. 2014) (internal quotation marks omitted). At the same time, "when the Supreme Court issues an intervening decision that is contrary to or invalidates our previous analysis," we can treat our prior ruling as overruled. *Id.* (internal quotation marks omitted). A case that merely "suggests" a result contrary to our existent precedent falls short of a decision that is contrary to, or invalidates, a prior decision of this court.

The judgment of the district court is affirmed. We grant Doe's request to file Volumes 12, 13 and 14 of the Appendix under seal.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

2015) (citation omitted) ("Though we can consider forfeited arguments under the plain-error standard, [when a party] has not argued plain error . . . we will not consider the possibility of plain error on a forfeited theory").

APPENDIX D — VERDICT FORM OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, FILED AUGUST 14, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-13-108-F

KEVIN DUANE OGLE,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS OF
PAYNE COUNTY, OKLAHOMA,

Defendant.

VERDICT FORM

We, the jury, empaneled and sworn in the above-entitled cause, do, upon our oaths, find as follows:

PLEASE ANSWER ALL QUESTIONS IN PART A.

PART A

(1) Has plaintiff, Kevin Duane Ogle, proven by a preponderance of the evidence, essential element number one of his ADA claim that he is a qualified individual with a disability?

☒ Yes
☐ No

(2) Has plaintiff, Kevin Duane Ogle, proven by a preponderance of the evidence, essential element number two of his ADA claim that he was either excluded from participation in or denied the benefits of Payne County Detention Center's services, programs, or activities, or was otherwise discriminated against by the jail's officers or employees?

☒ Yes
☐ No

(3) Has plaintiff, Kevin Duane Ogle, proven by a preponderance of the evidence, essential element number three of his ADA claim that such exclusion, denial of benefits, or discrimination was solely by reason of plaintiff's disability?

☐ Yes
☒ No

IF YOU HAVE ANSWERED "YES" TO EACH OF THE QUESTIONS IN PART A, PLEASE ANSWER THE QUESTION IN PART B AND THE QUESTION IN PART C. THE QUESTION IN PART B AND THE QUESTION IN PART C SHOULD BE ANSWERED ONLY IF YOU HAVE ANSWERED "YES" TO ALL THREE QUESTIONS IN PART A.

Appendix D

IF YOU HAVE ANSWERED "NO" TO ANY OF THE QUESTIONS IN PART A, PLEASE HAVE YOUR FOREPERSON DATE AND SIGN THE VERDICT FORM AS YOUR DELIBERATIONS ARE COMPLETE.

* * * *

8-14-14	/s/_____
Date	FOREPERSON

APPENDIX E — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, DATED AUGUST 14, 2014

[345]**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

Case No. CIV-13-108-F

JOHN DOE,

Plaintiff,

vs.

PAYNE COUNTY BOARD OF COUNTY COMMISSIONERS,

Defendant.

*** SEALED ***

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TRANSCRIPT OF JURY TRIAL PROCEEDINGS

BEFORE THE HONORABLE STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

AUGUST 14, 2014 8:30 A.M.

VOLUME III

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Appendix E

*** SEALED ***

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[347](PROCEEDINGS HAD AUGUST 14, 2014, WITH ALL PARTIES PRESENT, BUT WITHOUT THE PRESENCE OF THE JURY.)

THE COURT: Good morning. We're resuming without the jury for the purpose of affording counsel an opportunity to make their concise Rule 51 record with respect to the Court's intended instructions.

I have spent a fair amount of time in chambers with counsel working on these instructions and, as is usually the case, neither side is entirely satisfied with the instructions. Counsel have had an opportunity to fully articulate their positions and their arguments, so there's no need at this juncture, as we make the Rule 51 record, for extended argument. All I need and all the Court of Appeals needs is for counsel to concisely lodge their objections on the record with respect to the instructions and the verdict form.

With that in mind, I'll invite plaintiff to state any objections that the plaintiff has to the Court's intended instructions.

MR. BRYAN: Thank you, Judge. Very briefly, plaintiff objects to any instructions articulating the sole motivation causation standard. Plaintiff contends that the panel decision in *Bones v. Honeywell* controls and that the sole motivation standard is inconsistent with the spirit of the

ADA in its textual history. Secondly, the -- for -- plaintiff would object to any instruction that includes the sole [348]motivation standard.

Secondly, plaintiff would object to the construction of the delivered indifference language articulated in Jury Instruction Number 15.

THE COURT: What page is that, if you have that handy?

MR. BRYAN: Judge, I have it as Instruction Number 15. It's page 18.

THE COURT: Okay. Thank you.

MR. BRYAN: And, lastly, plaintiff would make a record objection not to the fact of giving the preexisting mental health condition, Instruction Number 17, but to omitting the susceptibility standard or language which plaintiff contends is the essence of the eggshell instruction.

With that, plaintiff has no other objections to the jury instructions.

THE COURT: And what about the verdict form?

MR. BRYAN: Plaintiff has no objections to the verdict form, other than the memorialization of the sole motivation standard.

THE COURT: Okay. Very well. Thank you. I'm going to overrule all of those objections. I certainly do

understand plaintiff's point with respect to all three of those. The -- probably the overriding objection, if you will, or the most consequential issue is the sole motivation issue.

[349]I have carefully reviewed *Fitzgerald v. Corrections Corporation of America*, 403 F.3d 1134, particularly the discussion that is on page 1144.

And in that case, Judge Holloway wrote as follows: "Under either the ADA or the Rehabilitation Act, Fitzgerald is obligated to show that he was otherwise qualified for the benefits he sought and that he was denied those solely by reason of disability." And I've left out internal quotes in reading that.

In that case, the plaintiff was a state prisoner. He asserted an ADA Title II claim for disability discrimination. I think that is a pronouncement by the Court of Appeals that is binding precedent.

I certainly don't -- am not the least bit critical of plaintiff for plaintiff's advancing of the arguments that have been advanced as reasons for which I should not consider this to be binding precedent, but I do consider this to be binding precedent, as did my very respected colleague, Judge Claire Eagan, in *Doe v. County Commissioners of Craig County*, a decision she entered on July 16 of 2012, which can be found at 2012 Westlaw 2904518.

And for that reason, the objection on the sole motivation issue is overruled.

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APPENDIX F — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, DATED AUGUST 12, 2014

[1]**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

Case No. CIV-13-108-F

JOHN DOE,

Plaintiff,

vs.

PAYNE COUNTY BOARD OF COUNTY COMMISSIONERS,

Defendant.

*** SEALED ***

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TRANSCRIPT OF JURY TRIAL PROCEEDINGS

BEFORE THE HONORABLE STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

AUGUST 12, 2014 9:30 A.M.

VOLUME I

* * * * * * * * * *

Appendix F

*** SEALED ***

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[156]On the third hand, of course, the defendant may want this in the case as a backstop as an affirmative defense, in case the Tenth Circuit decides to join all the other circuits on the sole cause issue.

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APPENDIX G — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, DATED AUGUST 11, 2014

[1]**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

Case No. CIV-13-108-F

JOHN DOE,

Plaintiff,

vs.

PAYNE COUNTY BOARD OF COUNTY COMMISSIONERS,

Defendant.

*** SEALED ***

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TRANSCRIPT OF DAUBERT MOTION

BEFORE THE HONORABLE STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

AUGUST 11, 2014 9:00 A.M.

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*** SEALED ***

Appendix G

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[5] So the jury is going to have to decide whether the plaintiff was or was not segregated solely because of his HIV status. Of course, the word that is, to put it mildly, irritating to the plaintiff or at least his counsel is the word "solely." We covered that last week. It's my reading of the Tenth Circuit case law, including the Fitzgerald case, I believe it is, that the law of the Tenth Circuit is that his handicap must have been the sole reason for the decision that was made in order to be actionable.

And I think as a practical matter, because the case law says what it says, it would take an *en banc* decision by the Tenth Circuit or a Supreme Court decision to change that law. So that's where we are. So the jury will have to decide whether the plaintiff was or was not segregated solely because of his HIV status.

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