No. 15-387

IN THE
Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS
OF PAYNE COUNTY, OKLAHOMA,

Respondent.

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

REPLY BRIEF

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The Americans with Disabilities Act ("ADA") is an iconic federal statute that deserves a uniform interpretation. Both the Petition and Respondent's brief in opposition demonstrate that a serious and deep circuit split exists as to the proper causation standard applicable to ADA claims. In fact, Respondent's brief acknowledges a multi-faceted split, with the circuits adopting four very different ADA causation standards.

Unable to disclaim the circuit split, Respondent's opposition instead argues that Petitioner has waived the question presented. The record clearly and quickly rebuts that contention: Petitioner has argued against the Tenth Circuit's sole-cause standard at every stage in this case. Moreover, he advocated for a different causation standard in both the court of appeals and district court. No issue was forfeited; application of the proper ADA causation standard has been the central issue litigated throughout this matter.

Thus, this case presents an ideal opportunity for the Court to bring order to the chaos that has emerged in the courts of appeals by pronouncing a single causation standard for ADA claims.

I. PETITIONER CONTINUOUSLY PRESERVED THE ISSUE PRESENTED AND ADVOCATED A STANDARD DIFFERENT FROM "SOLE CAUSE."

Respondent is simply incorrect when it claims that Petitioner somehow forfeited review of the question presented. Instead, Petitioner consistently objected to the sole-cause standard, and he urged the application of a different standard in both the court of appeals and

district court. This case is perfectly positioned to address the clear circuit split presented in the Petition.

Respondent acknowledges that Petitioner has objected to the sole-cause standard throughout this case. Br. in Opp. 5. Petitioner objected in the district court to a sole-cause standard for both the jury instruction and verdict form. *Id.*; *see also* Pet. App. 19a-21a. Moreover, this was Petitioner's primary argument on appeal. Pet. App. 12a. The question presented to this Court was vetted fully below. Petitioner undoubtedly preserved this issue.

Sidestepping this fact, Respondent wrongly claims that Petitioner cannot urge a standard other than "sole cause" because he never articulated a standard to replace the sole-cause standard. This is simply untrue. Before the district court and the court of appeals, Petitioner urged the courts to apply a determining-factor test. Pet. App. 12a (Tenth Circuit's noting that Petitioner advocated a determining-factor standard); 19a (objecting at the district court's jury instruction hearing to the sole-cause test and advancing the standard applied in *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 878 (10th Cir. 2004), which asked whether "disability was a determining factor"). The Court can adopt the determining-factor standard, the but-for standard, or any other standard it believes is appropriate to displace the Tenth Circuit's erroneous sole-cause standard.

This Court plainly has the ability to review the issue presented, which was argued in both the district and appellate courts and ruled upon by both courts. In claiming otherwise, Respondent not only misconstrues the record, but cites to inapposite case law. Respondent

relies upon this Court's cases that refuse to rule upon issues that the lower courts had not decided. Br. in Opp. 10 (citing, *inter alia*, *Brumfield v. Cain*, 135 S. Ct. 2269, 2282 (2015); *Meyer v. Holley*, 537 U.S. 280, 291-92 (2003)). Here, of course, the court of appeals and the district court explicitly decided that the sole-cause standard must apply in this case. They also rejected Petitioner's preferred causation standard. The issue is clearly appropriate for review.

The Court can—and should—review the Tenth Circuit's repeated insistence that a sole-cause standard applies to ADA claims. This issue has been the central contention in this case, has been the main dispute between the parties, and has been ruled upon by the courts below. This case is an ideal vehicle to review the clear circuit split presented in the Petition.

II. RESPONDENT ADMITS A WIDE-RANGING CIRCUIT SPLIT CONCERNING THE ADA'S CAUSATION STANDARD.

The Petition highlighted the clear and well-entrenched circuit split concerning the ADA's causation standard. Respondent's brief in opposition does not dispute the disagreement among the circuits. Br. in Opp. 14 (admitting there is "very little agreement among the circuits regarding the proper causation standard"). In fact, Respondent demonstrates that the circuit courts' application of differing causation standards is even more multi-faceted than the Petition acknowledged.

According to the Respondent, the various circuits apply four different causation standards to claims brought under Title II of the ADA:

- Substantial factor (Second Circuit)
- But-for causation (Third and Seventh Circuits)
- Motivating factor (Fourth, Fifth, and Ninth Circuits)
- Sole cause (Sixth and Tenth Circuits)

Br. in Opp. 14-15 (citing cases).

Moreover, the remaining circuits (the First, Eighth, Eleventh, and District of Columbia Circuits) have adopted the motivating-factor and but-for tests—not the sole-cause standard—for ADA claims. *Id.* at 14-15; *see also* Pet. 8-9 & n.3 (citing cases). (This discussion omits the Federal Circuit, which does not adjudicate ADA claims due to its limited jurisdiction.) While the cases in those circuits involved claims under Title I of the ADA, the Petition addressed why there is no reason that the causation standards should differ under Titles I and II of the ADA. Pet. 8 n.3. Indeed, Respondent has not offered any explanation as to why a different standard should apply to claims asserted under either of these Titles.

The only disagreement among the parties is whether the Sixth Circuit has rejected the sole-cause standard for ADA Title II claims. Respondent incorrectly asserts that the Sixth Circuit's former sole-cause standard survives for Title II claims after *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012) (*en banc*). *See* Br. in Opp. 12-13. Judge Sutton's opinion for the Sixth Circuit *en banc* majority repudiated that court's "ADA jurisprudence"—not cabined to Title I claims—to the

extent that the court of appeals previously imposed a sole-cause standard. *Lewis*, 681 F.3d at 314.[*] Regardless, Respondent acknowledges that at least all federal courts of appeals except for the Sixth and Tenth Circuits have adopted a patchwork of varying causation standards other than "sole cause."

The parties thus agree that there is a significant and multi-faceted split among the circuits concerning the ADA's causation standard. This case presents a perfect vehicle to address the split and create uniformity throughout the country for this important federal law.

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* In rejecting a sole-cause standard, the Sixth Circuit relied in part upon the text of Title II. *Id.* at 315. Ultimately, all sixteen Sixth Circuit judges rejected the sole-cause standard, and the majority adopted a but-for causation standard. *Id.* at 321; *see also Jones v. Lacey*, Case No. 14-cv-10384, 2015 U.S. Dist. LEXIS 72901, *37 (E.D. Mich. June 5, 2015) (suggesting that *Lewis* requires application of a but-for causation standard in Title II cases).

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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