

No. 15-387

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**

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF OF THE IRAQ AND
AFGHANISTAN VETERANS OF AMERICA AS
AMICUS CURIAE IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

Julia M. Carpenter
Counsel of Record
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
202-639-6029
jcarpenter@jenner.com
Counsel for Amicus Curiae

October 30, 2015

MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE OF THE IRAQ AND AFGHANISTAN
VETERANS OF AMERICA IN SUPPORT OF THE
PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Iraq and Afghanistan Veterans of America (IAVA) respectfully requests leave to file the attached brief amicus curiae in support of Petitioner, John Doe. Petitioner has consented to the filing of the brief. Counsel for Respondent has not consented to the filing of the brief.

IAVA is the voice of the 2.8 million American veterans of Iraq and Afghanistan, raising awareness in the media, on Capitol Hill, in the Courts, and among the general public. It provides valuable resources and empowers veterans to connect with one another, fostering a strong and lasting community. Through education, advocacy and community building, IAVA seeks to build employment opportunities for returning veterans, combat veteran suicide, strengthen government services, and provide new opportunities through employment and education benefits. It does all this to accomplish its vision of an empowered generation of veterans who provide sustainable leadership for our country and their communities.

In this case, the Tenth Circuit's Americans With Disabilities Act jurisprudence has imposed a unique and improper burden on disabled persons who live in Colorado, Kansas, New Mexico, Oklahoma, and Utah – a burden not imposed on disabled persons living in the other forty-five states. Because veterans are disproportionately disabled as a population, IAVA has an outsize interest in the proper interpretation and

application of statutes like the Americans with Disabilities Act. On behalf of its members, IAVA also has an interest in seeing that the protections of the ADA are applied fairly nationwide. Finally, IAVA has important information for the Court about the real and significant employment-related problems disabled veterans face as they seek to re-integrate back into their communities.

For these reasons, amicus IAVA can bring an important perspective and context for the Court as it considers the issues raised by the petition, and respectfully requests that leave be granted to file the attached brief amicus curiae in support of the petition for certiorari.

Respectfully submitted,

Julia M. Carpenter
Counsel of Record
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
202-639-6029
jcarpenter@jenner.com
Counsel for Amicus Curiae

October 30, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS*..... 1

ARGUMENT..... 2

 A. Because Veterans Are
 Disproportionately Affected by
 Disability, They Have a Particular
 Interest in the Proper Application
 of the Americans With Disabilities
 Act, Which Was Designed to
 Remove or Reduce the Barriers
 Disabled Veterans Face. 3

 B. Disabled Persons In the Tenth
 Circuit Should Not Be Subject To a
 Legally Incorrect and Extremely
 Burdensome Causation
 Requirement That Does Not Apply
 in Any Other Circuit. 10

CONCLUSION 11

TABLE OF AUTHORITIES

STATUTES

42 U.S.C. § 12101(a)(7)	9
42 U.S.C. § 12101(b)(1)	10

OTHER AUTHORITIES

Economic News Release, United States Department of Labor, Bureau of Labor Statistics, <i>Employment Situation of Veterans Summary 2014</i> (Mar. 18, 2015), http://www.bls.gov/news.release/vet.nr0.ht m	4, 7
William Erickson, Camille Lee, Sarah von Schrader, Cornell University Employment and Disability Institute (EDI), <i>2013 Disability Status Report: United States (2014)</i> , http://www.disabilitystatistics.org/ StatusReports/2013-PDF/2013- StatusReport_US.pdf	3
Profile of Post-9/11 Veterans: 2013, at 29, National Center for Veterans Analysis and Statistics (Aug. 2015), http://www.va.gov/ vetdata/docs/SpecialReports/Post_911_Vet erans_Profile_2013.pdf	4

- Returning Home from Iraq and Afghanistan: Assessment of Read-adjustment Needs of Veterans, Service Members, and Their Families.*, Committee on the Assessment of Readjustment Needs of Military Personnel, Veterans, and Their Families; Board on the Health of Select Populations, Washington (DC): Institute of Medicine of the National Academies, The National Academies Press; 2013 6
- Hannah Rudstam, Wendy Strobel Gower and LaWanda Cook, *Beyond Yellow Ribbons: Are employers prepared to hire, accommodate and retain returning veterans with disabilities?* 36 J. Vocational Rehabilitation 87 (2012) 8
- Morin Taylor, et al., Pew Research Center, For Many Injured Veterans, A Lifetime of Consequences (Nov. 8, 2011), <http://www.pewsocialtrends.org/files/2011/11/Wounded-Warriors.pdf> 4, 5, 7, 8
- Trends in Veterans with a Service-Connected Disability FY1986 to FY2014*, National Center for Veterans Analysis and Statistics, http://www1.va.gov/vetdata/docs/QuickFacts/SCD_quickfacts_FY2014.pdf..... 5

Rehabilitation Research and Training Center
on Disability Statistics and Demographics,
Institute on Disability University of New
Hampshire, Table 6.1: Service-Connected
Disability Rating—Civilian Veterans Ages
18 Years and Over Living in the
Community, by Disability Status: 2013,
<http://www.disabilitycompendium.org/compendium-statistics/veterans/6-1-service-connected-disability-rating---civilian-veterans-ages-18-years-and-over-living-in-the-community-by-disability-status>..... 11

INTEREST OF AMICUS¹

Iraq and Afghanistan Veterans of America (IAVA) is the voice of the 2.8 million American veterans of Iraq and Afghanistan, raising awareness in the media, on Capitol Hill, in the Courts, and among the general public. It works to empower veterans to connect with one another and to provide sustainable leadership for our country and their communities.

Because veterans are disproportionately disabled as a population, IAVA has an outsize interest in the proper interpretation and application of statutes like the Americans with Disabilities Act. On behalf of its members, IAVA also has an interest in seeing that the protections of the American With Disabilities Act are fairly applied nationwide. Both of those interests are implicated in the case before the Court, where the Tenth Circuit's Americans With Disabilities Act jurisprudence has imposed a unique and improper burden only on disabled persons who live in Colorado, Kansas, New Mexico, Oklahoma, and Utah. Because of these interests, and because it can bring information to the Court about the real and significant employment-related problems disabled veterans face as they seek to

¹ Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2(a), counsel of record received timely notice of the intent to file the brief *amicus curiae*. Petitioner consented to the filing of the brief; Respondent did not consent.

re-integrate back into their communities, IAVA offers an important perspective and context for the Court as it considers the issues raised by the petition.

ARGUMENT

The Petition for Certiorari presents this Court with a clear split of authority among the circuit courts on whether a disabled person must prove that his or her disability was the sole cause of discrimination under the Americans with Disabilities Act. Petitioner has ably informed the Court as to the nature of the split, in which the Tenth Circuit repeatedly has ruled contrary to every other circuit. *Amicus* does not write to reiterate those arguments.

Instead, *amicus* writes to briefly highlight how veterans are particularly affected by the Americans With Disabilities Act, and why this single-circuit split matters so much. To frame that discussion, it is worth noting that 1.2 million veterans currently live within the Tenth Circuit's confines, and at least 250,000 of those veterans currently have a disability. Moreover, because veterans are disproportionately disabled as a population, they have an outsize interest in the proper interpretation and application of statutes like the ADA, which is aimed at leveling the playing field for disabled persons. Indeed, the ADA created protections that are vital for disabled veterans who are re-integrating after military service: access to public accommodations, commercial facilities and public transportation, access to programs and services offered by public entities, non-discrimination and reasonable accommodation in

employment, and housing, and other protections. The Tenth Circuit's ADA jurisprudence threatens the ability of disabled veterans within the Tenth Circuit to step on to that level playing field and jeopardizes the important work of re-integration which the ADA was designed to assist.

Amicus urges the Court to confirm, by summary affirmance or by grant of certiorari and decision, that the Tenth Circuit's "sole cause" test is incorrect.

- A. Because Veterans Are Disproportionately Affected by Disability, They Have a Particular Interest in the Proper Application of the Americans With Disabilities Act, Which Was Designed to Remove or Reduce the Barriers Disabled Veterans Face.

It may be intuitive to expect that veterans, especially combat veterans, likely suffer disability in greater proportions than their non-veteran counterparts. But the numbers are surprising despite that intuition. While about 12.6% of the general U.S. population is disabled,² 21.4% of the nation's veterans report a service-related disability as of 2013.³ And nearly 30% of our post-9/11 veterans – those who

² William Erickson, Camille Lee, Sarah von Schrader, Cornell University Employment and Disability Institute (EDI), *2013 Disability Status Report: United States*, at 5, 6 (2014), http://www.disabilitystatistics.org/StatusReports/2013-PDF/2013-StatusReport_US.pdf.

³ *Id.*

fought in Iraq and Afghanistan – live with a service-related disability.⁴ Nor is the number of veterans static: the Department of Veterans Affairs expects the post-9/11 veteran population to grow by half again between 2013 and 2018.⁵

The higher percentage of disabled veterans in the post-9/11 veteran cohort is, in part, because combat is less lethal now than it used to be. Improvements in medical care and in access to the battlefield have improved survival odds: “Proportionately more soldiers now survive shattering injuries that would have killed their predecessors.”⁶ But those shattering injuries leave their marks: an amputated limb, lost vision or hearing, PTSD, Traumatic Brain Injury, and

⁴ Economic News Release, United States Department of Labor, Bureau of Labor Statistics, *Employment Situation of Veterans Summary 2014* (Mar. 18, 2015), <http://www.bls.gov/news.release/vet.nr0.htm>. More generally, as of 2014, about 3.4 million veterans of all conflicts reported living with a service-related disability, 1.2 million of whom have a disability rated at 60% or higher. *Id.* at Table 7.

⁵ *Profile of Post-9/11 Veterans: 2013*, at 29, National Center for Veterans Analysis and Statistics (Aug. 2015), http://www.va.gov/vetdata/docs/SpecialReports/Post_911_Veterans_Profile_2013.pdf.

⁶ Based on Defense Department casualty reports, post-9/11 soldiers have survived 88% of all combat injuries. In contrast, the survival rate in Vietnam was 72%, in World War II it was 63%, and in the Civil War, only 44% of soldiers survived those injuries. Morin Taylor, et al., Pew Research Center, *For Many Injured Veterans, A Lifetime of Consequences*, at 12 (Nov. 8, 2011), <http://www.pewsocialtrends.org/files/2011/11/Wounded-Warriors.pdf> (referred to hereafter as “Pew Report”).

severe disfigurement, to name but a few. As the Pew Wounded Warrior Report concluded:

An inevitable consequence of these successful efforts to save the lives of wounded service members has been to swell the ranks of disabled veterans. Today, about three-in-ten post-9/11 veterans have been determined by the Department of Defense or the Department of Veterans Affairs to have some level of disability from service-related injuries, illnesses or psychological conditions such as PTS. Among these disabled veterans, nearly six-in-ten are at least 30% disabled and four-in-ten have lost at least half of their normal ability to function.⁷

Finally, the number of veterans living with very serious injuries has risen sharply. Between 2000 and 2014, the number of veterans with 70% to 100% disability rose from about 275,000 to about 1,200,000.⁸

These statistics confirm that veterans, and especially post-9/11 veterans are more likely to be disabled than the civilian counterparts. Veterans

⁷ *Id.* at 13.

⁸ See *Trends in Veterans with a Service-Connected Disability FY1986 to FY2014*, National Center for Veterans Analysis and Statistics, http://www1.va.gov/vetdata/docs/QuickFacts/SCD_quickfacts_FY2014.pdf (showing steep rise from 2000 to 2014).

groups, therefore, have a special interest in making sure that the measures designed to ease post-deployment integration by removing or reducing barriers to disabled persons are working as Congress intended. In short, the Americans with Disabilities Act plays a critical role in ensuring that when disabled veterans return home, their re-integration difficulties are not compounded by discrimination based on their disabilities.

As a group, veterans face significant challenges when they return home and re-integrate into their families and communities. Close to half (44%) of post-9/11 veterans reported a range of difficulties adjusting to their post-deployment status.⁹ Not surprisingly, disabled veterans face even more significant obstacles in that adjustment as their disabilities may affect their ability to access public physical spaces, employment, transportation, housing, and educational opportunities, as well as impair their ability to re-integrate with family life.

As one example, recently-returned disabled veterans are less employed than their non-disabled veteran counterparts. Of the post-9/11 veterans who live with a service-related disability, only 75.1% were

⁹ *Returning Home from Iraq and Afghanistan: Assessment of Read-adjustment Needs of Veterans, Service Members, and Their Families*, at 13, Committee on the Assessment of Readjustment Needs of Military Personnel, Veterans, and Their Families; Board on the Health of Select Populations, Washington (DC): Institute of Medicine of the National Academies, The National Academies Press; 2013.

employed in August of 2014, while 85.6% of their counterparts without a disability were employed.¹⁰ And the more serious the disability, the more challenging finding a job can be. The Veterans Administration rates veterans' disabilities by determining the extent of the disability, and then quantifying the average detriment to earning capacity resulting from that disability. Veterans with a service-connected disability rating of 60% or higher were much less likely to be in the work force than those with ratings of less than 30 percent.¹¹ And even these numbers "may paint an overly positive picture of the employment situation for disabled veterans."¹² "About 14% of all disabled veterans are classified as too disabled to work and are therefore not included in government calculations of the unemployment rate."¹³ Another 29% of these disabled veterans are classified as full-time retirees and not included in the unemployment calculation. But those veterans may still want to work and contribute:

In fact, many of these veterans may be reluctant retirees. In answer to another CPS question, nearly a third (32%) of disabled veterans who are retired say their service-connected disability

¹⁰ Economic News Release, *supra* n.7.

¹¹ *Id.*

¹² PEW Report, *supra* n. 6 at 19.

¹³ *Id.*

currently keeps them from ‘getting or holding a job.’¹⁴

The view that a disability affect employability appears to be well-founded, according to surveys of employers. While most employers in one study reported they believed that employing veterans with disabilities would be good for their organizations, they also reported confusion about applicable laws. For example, 58% of respondents to the survey incorrectly believed that job applicants must tell employers about a disability during the hiring process.¹⁵ Moreover, only 6% of respondents reported that their organization had accommodated a worker with PTSD in the previous 12 months, and only 2% reported any accommodations for Traumatic Brain Injury.¹⁶ These and other responses led the study authors to conclude that the survey showed “a discrepancy between employers’ publicly held beliefs and their real on-the-ground decision-making.”¹⁷

The Americans With Disabilities Act reaches farther than just employment, of course, and disabled veterans are equally protected by the Act’s requirements of public and commercial space accessibility. Under the ADA, disabled persons have a

¹⁴ *Id.*

¹⁵ Hannah Rudstam, Wendy Strobel Gower and LaWanda Cook, *Beyond Yellow Ribbons: Are employers prepared to hire, accommodate and retain returning veterans with disabilities?* 36 J. Vocational Rehabilitation 87, 90 (2012).

¹⁶ *Id.* at 92.

¹⁷ *Id.*

right to nondiscriminatory access to the public spaces and programs that are woven into the fabric of American life, such as restaurants, hotels, grocery stores, gas stations, and football stadiums. In addition, the ADA ensures disabled persons access to public transportation, courts, hospitals, museums, and polling places. It also mandates that disabled persons have access to emergency 9-1-1 services, to state and local government websites, to other community resources available to persons without a disability, and to reasonable accommodations in all these sites, if necessary to insure that access.

As returning disabled veterans re-integrate into the communities and families they sought to protect with their service, the ADA offers the promise that a disability will not impede that re-integration. Congress' goal was bold and clear: the ADA's purpose was to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for persons living with disabilities. 42 U.S.C. § 12101(a)(7). For disabled veterans, it is vital that the promise be implemented fairly and uniformly.

B. Disabled Persons In the Tenth Circuit Should Not Be Subject To a Legally Incorrect and Extremely Burdensome Causation Requirement That Does Not Apply in Any Other Circuit.

The “sole cause” standard required only in the Tenth Circuit imposes an extraordinary burden on disabled veterans, and on all disabled persons who live there – a much higher burden than applies in any other circuit. Indeed, it is the highest burden of proof possible, with the obvious and certain consequence that fewer instances of actual discrimination will be remedied in the Tenth Circuit. The Americans With Disabilities Act was designed to level the playing field for disabled persons nationwide. 42 U.S.C. § 12101(b)(1) (Act designed “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”). It is inconsistent with that national mandate that disabled persons in one circuit must meet a significantly higher causation burden of proof than all other disabled citizens across the country.

The sole-cause standard required by the Tenth Circuit wrongly and significantly constricts the protections of the ADA for disabled veterans, as indeed it does for all disabled persons living within the states it encompasses. That this incorrect ruling applies only in the Tenth Circuit should not prevent this Court from addressing this important issue. On behalf of the 1.2 million veterans living in that circuit, including the 250,000 of them who live with a service-related

disability, *amicus* asks this Court to review the Tenth Circuit decision, and to ensure that the ADA promise of a level playing field is equally available to everyone.¹⁸

CONCLUSION

For these reasons, *amicus* urges the Court to summarily reverse or grant certiorari to correct the Tenth Circuit's error and ensure that disabled veterans and other disabled citizens nationwide can adequately realize the important protections conferred in the ADA.

Respectfully submitted,

Julia M. Carpenter
Counsel of Record
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
202-639-6029
jcarpenter@jenner.com
Counsel for Amici Curiae

October 30, 2015

¹⁸ Rehabilitation Research and Training Center on Disability Statistics and Demographics, Institute on Disability University of New Hampshire, *Table 6.1: Service-Connected Disability Rating—Civilian Veterans Ages 18 Years and Over Living in the Community, by Disability Status: 2013*. <http://www.disabilitycompendium.org/compendium-statistics/veterans/6-1-service-connected-disability-rating---civilian-veterans-ages-18-years-and-over-living-in-the-community-by-disability-status>. Nearly 151,000 of those 250,000 are 10-60% disabled.

