NO. 16-0214

IN THE
SUPREME COURT OF TEXAS

PAUL GREEN,
Plaintiff/Petitioner,
v.
DALLAS COUNTY SCHOOLS
Defendant/Respondent

On Petition for Review from the
Fifth Court of Appeals at Dallas, No. 05-14-00432-CV

On Appeal from the 162nd Judicial District Court,
Dallas County, Texas, Cause No. DC-12-09857

BRIEF ON AMICI CURIAE AARP and AARP FOUNDATION, AMERICAN DIABETES ASSOCIATION, AND DISABILITY RIGHTS TEXAS, IN SUPPORT OF PETITION FOR REVIEW

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INTEREST OF AMICI CURIAE

AARP is a nonprofit, nonpartisan organization with a membership dedicated to addressing the needs and interests of older persons. AARP helps people age 50 and over strengthen their communities and fight for results that matter most to families, including employment, healthcare, income security, retirement planning and protection from financial abuse. AARP strives through legal and legislative advocacy to assist older persons to preserve the means to enforce their rights. To this end AARP frequently appears as an amicus curiae in cases before federal and state appellate courts. *See, e.g., Flynn v. Distinctive Home Care, Inc*., 812 F.3d 422 (5th Cir. 2016); *Little v. Tex. Dept. Crim. Just.*, 143 S.W.3d 374 (Tex. 2004). **The AARP Foundation** is AARP's independent charitable arm. It serves vulnerable older persons, including through the public interest legal advocacy of AARP Foundation Litigation (AFL).

AARP has more than 2.3 million members in the State of Texas, of whom approximately one-third are employed, either full- or part-time, and still others are seeking employment. A disproportionate share of older workers have one or more actual "disabilities" and/or a record thereof and/or are regarded as having one or more disabilities. Such workers, including AARP members, are covered by the Americans with Disabilities Act (ADA) and corresponding provisions of Chapter 21 of the Texas Labor Code. AARP and the AARP Foundation are committed to the

vigorous enforcement of the ADA and state laws such as Chapter 21, which are interpreted in a manner consistent with the ADA; they respectfully submit that in this case, the appeals court misapplied Chapter 21 of the Labor Code and related provisions of the ADA.

The **American Diabetes Association** is a nationwide, nonprofit, voluntary health organization founded in 1940, and has over 485,000 general members, 15,000 health professional members, and 1,000,000 volunteers. The mission of the Association is to prevent and cure diabetes and to improve the lives of all people affected by diabetes. Presently, there are nearly 30 million adults and children with diabetes in the United States. The Association is the largest, most prominent nongovernmental organization that deals with the treatment and impact of diabetes. The Association establishes and maintains the most authoritative and widely followed clinical practice recommendations, guidelines, and standards for the treatment of diabetes. The Association publishes the most authoritative professional journals concerning diabetes research and treatment.

One of the Association's principal concerns is the equitable, fair, and 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. 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. *See, e.g., Kapche v. City of San Antonio,* 176 F.3d 840, 847 (5th Cir. 1999) (noting Association's "cogent support" for its position).

Disability Rights Texas is the agency designated by the Governor of Texas to protect and advocate for the rights of individuals with disabilities in the State of Texas, pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 200, 42 U.S.C. §§ 15041 *et seq*., the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. §§ 10801 *et seq*., and the Protection and Advocacy of Individuals Rights program, 29 U.S.C. § 794e. As the P&A agency for Texas, Disability Rights Texas is interested in the enforcement of civil rights laws that protect the rights of individuals with disabilities to be free of discrimination based on their disabilities. This includes the right to be free from employment discrimination in accordance with state and federal law.

In compliance with Texas Rule of Appellate Procedure 11(c), the undersigned counsel affirms that no fee was charged or paid for the preparation of this brief.

SUMMARY OF ARGUMENT

Petitioner Paul Green argued that he was fired for an incident of incontinence at work. Respondent Dallas County Schools disagreed, arguing that he was fired for inadequate cleanup. The jury sided with Green. The Court of Appeals reversed, on a different ground. It faulted Green for not proving that one particular health condition caused his incontinence, holding that "Green did not offer more than a scintilla of evidence that his congestive heart failure or his Coreg caused his incontinent event." But unlike a personal-injury or workers-compensation claim, the underlying cause of one's disability is irrelevant to a claim of employment discrimination. The opinion by the Court of Appeals is contrary to established law, administrative guidance, legislative history, and logic. It would also allow discrimination against many individuals with serious health conditions for whom the underlying cause is medically complicated, unclear, or unknown.

Defendant does not dispute Amici's central point and the reason why Amici support review—that proof of the cause of a disability is not required. Rather, Defendant argues that this case is not worthy of review because there was no evidence that Mr. Green's episode of incontinence in this instance was caused by a disability. That is not accurate.

The evidence in the case included expert testimony that Mr. Green's incontinence was a "medical condition," and that "by definition" it had a cause, even

though the cause was unclear. There was also evidence that Mr. Green's condition substantially limited his urinary or bladder function, especially when viewed under the broad interpretation mandated by the 2009 amendments to Chapter 21 of the Labor Code. Thus, there was evidence of disability.

After a vigorously contested trial, the district court proposed to instruct the jury that Mr. Green had a disability. Defendant made no objection, nor did it seek any clarifying language about the nature of the disability. Because the jury had evidence before it that Green's incontinence was a disability, Defendant's efforts to shift the Court's focus come too late.

The error by the Court of Appeals is an important one that Amici believe must be corrected, and there is no obstacle to this Court's review.

INTRODUCTION

Defendant Dallas County Schools terminated Mr. Green shortly after an incident of urinary incontinence.[1] Incontinence is the "[i]nability to prevent the discharge of any of the excretions, especially of urine …." *Stedman's Medical Dictionary* (26th ed. 1995).[2] There are various forms, but Mr. Green had "urge

[1] The Defendant principally argued that it did not fire Mr. Green because of the admitted incontinence episode but because of what he failed to do afterwards. *See, e.g.,* Reporter's Record Vol. 7, pp. 30, 37, 39, 49–50, and 52; Vol. 5, p. 246. Mr. Green argued that he was fired because of his incontinence incident. *See, e.g., id.*, Vol. 7, p. 13–15; Defendant's Exh. 7, Reporter's Record Vol. 9. That was the central dispute at trial, and the jury believed Mr. Green.

[2] Defendant's experts testified similarly. Reporter's Record Vol. 4, p. 71; *id.*, Vol. 5, pp. 130–31.

incontinence," which is a "sudden involuntary contraction of the muscular wall of the bladder causing urinary urgency, an immediate unstoppable urge to urinate."[3] "Urge incontinence is characterized principally by an urgent desire to void followed by involuntary loss of urine." *Merck Manual of Diagnosis and Therapy*, at 1740 (16th ed. 1992) (emphasis omitted). It comes without warning, *id*. at 1647, and may prevent getting to the restroom in time.[4]

Although the cause may be unknown,[5] the expert testimony in this case confirmed that it is a medical condition,[6] with an underlying cause, in which "something is wrong with the nervous system" and with the mechanism associated with the ability to store urine.[7] The evidence also shows that it is categorized as a "Renal or Urinary Disorder[]."[8] The urology expert also testified that Mr. Green's condition—in which voiding occurs only seconds or a few minutes after the urge—is a "severe" or "profound" example, and different from most people's experience.[9] Of course, the jury was free to rely on the common knowledge that grown men

[3] MEDICINENET, http://www.medicinenet.com/script/main/art.asp?articlekey=18380 (last visited July 29, 2016).
[4] Reporter's Record Vol. 4, p. 41 (testimony of urologist Dr. Feagins).
[5] *See* note 32 below.
[6] *See, e.g.*, Reporter's Record Vol. 4, p. 16.
[7] *See, e.g.*, Reporter's Record Vol. 4, pp. 40–41 (testimony of urologist Dr. Feagins).
[8] Plaintiff's Exh. 45, p. [Bates] DCS 1420.
[9] *See, e.g.*, Reporter's Record Vol. 4, p. 17–18.

generally do not urinate on themselves, a fact that was also confirmed both by Defendant's own witnesses[10] and by Mr. Green's expert.[11]

Mr. Green, a bus monitor, had incontinence both before[12] and after[13] the incident at issue here. On past occasions he would tell the bus drivers when he needed a bathroom stop, and Defendant's employees accommodated his condition by allowing such stops in order to prevent an episode of involuntary voiding.[14] But on August 30, 2011, for reasons that were never explained, the District's bus driver refused to stop,[15] resulting in Green's episode of uncontrollable incontinence.

The jury was instructed that Green was a qualified individual with a disability.[16] Defendant did not object to this instruction,[17] nor did it quibble over what the disability was. Instead, it conceded this issue. The Defendant's position makes sense given that since 2009, Texas law must "be construed in favor of broad coverage of individuals . . . to the maximum extent allowed" by its language. Tex. Lab. Code § 21.0021(a)(1).[18]

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[10] Reporter's Record Vol. 6, p. 155; *id.*, Vol. 5, p. 205 (testimony by putative decisionmaker Johnson that it was unusual and unintentional).
[11] Reporter's Record Vol. 4, p. 14.
[12] Reporter's Record Vol. 4, p. 52.
[13] Reporter's Record Vol. 4, p. 51.
[14] Reporter's Record Vol. 3, pp. 52–53; Vol. 5, pp. 51, 58–59, 66.
[15] Reporter's Record Vol. 3, pp. 57–62.
[16] Clerk's Record p. 1403.
[17] Reporter's Record Vol. 6, p. 203.
[18] Under the current law's broad standard, problems with involuntary urination fall within the definition of disability. An "impairment" is "[a]ny physiological disorder or condition . . . affecting one or more body systems, such as . . . genitourinary . . .," 29 C.F.R. § 1630.2(h)(1), and Texas law defines "major life activity" as including "the operation of a major bodily function,

It is undisputed that Green suffered from urinary incontinence. It substantially limited his bladder and genitourinary functions because he could not control urination or bladder function in the same way the general population can. Of course, had the School District felt it important for the jury to make findings on which precise impairments constituted a disability, it could have objected to the district court's instruction that Green had a disability. Having allowed that instruction, the jury was left to decide whether disability motivated the discharge, or whether, as Respondent argued, it fired Green for legitimate nondiscriminatory reasons. The jury found that Defendant fired Green because of his disability, and the district court entered judgment on the verdict.

The Court of Appeals reversed, faulting Green for not proving that his congestive heart failure caused his incontinence. But the court's analysis was wrong. As shown below, the underlying cause of one's disability is irrelevant to claims of

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including . . . bladder . . . functions." Tex. Lab. Code Ann. § 21.002(11-a). For episodic conditions, substantial limitation is assessed when the condition is "active," Tex. Lab. Code Ann. § 21.0021(a)(2), that is, during an incontinence episode. In addition, substantial limitation is assessed in comparison with most people in the general population. *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 573 (4th Cir. 2015), *citing* 29 C.F.R. § 1630.2(j)(1)(ii). It has been estimated that ten million Americans have incontinence, MERCK MANUAL OF DIAGNOSIS AND THERAPY, at 2544 (16th ed. 1992), representing [at the time] about four percent of the population. So it is decidedly *not* the experience of "most people." *See also Jacobs*, *supra*, 780 F.3d at 574 n.14 (because only 3–13% of the population will have social anxiety disorder, it "limits sufferers 'as compared to most people in the general population.'"). The case law is consistent. *See, e.g., Erjavac v. Holy Fam. Health Plus*, 13 F. Supp. 2d 737, 747 (N.D. Ill. 1998) ("the average adult does not need such frequent access to the bathroom that they soil themselves while waiting to use it . . ."); *E.E.O.C. v. Cast Products, Inc.*, No. 07 C 5457, 2009 WL 595935, at *4 (N.D. Ill. Mar. 9, 2009) ("frequent and urgent need to urinate could substantially limit an individual's performance of the major life activity of waste elimination").

employment discrimination under Chapter 21. Not only is that clearly established law, but a contrary ruling would allow discrimination against a great many individuals with serious health conditions. That is because there is frequently a lack of clear medical causation, either because science does not yet know it, or because it could be the result of a variety of causes. Moreover, causation is legally irrelevant; the important issue for determining disability is the effect of the individual's impairment, not its name or diagnosis.

ARGUMENT:

Proof of the Origin Or Cause of a Disability Is Not Required.

The Court of Appeals erred in holding that Green was required to prove the cause of his urinary incontinence. The holding impermissibly rewrites Texas disability law by adding an element to the cause of action prescribed by the Legislature, and by excluding many individuals from coverage. It also ignores that the Texas Legislature, in 2009, broadened the law to eliminate these kinds of artificial barriers. Under the terms of the Labor Code, it does not matter whether a disability is caused by congestive heart failure, medication, or some other trigger. A person need not prove that one disability is caused by another. It matters only that a disability exists and motivated an employment decision.

There is no language in Chapter 21 (or in the ADA) that even suggests that proof of an impairment's source is required. Moreover, the lack of such a

"causation" requirement is supported by the case law, regulatory guidance, legislative history, and commentators.

Texas law is intended to execute the policies of the ADA as amended, Tex. Lab. Code § 21.001(3), so this Court generally relies on federal law in interpreting it. *See, e.g., Little v. Tex. Dep't of Crim. Just.*, 148 S.W.3d 374, 382 (Tex. 2004). This is doubly true after the Legislature's 2009 amendments to Chapter 21 to expand the definition of a covered disability, Acts 2009, 81st Leg., ch. 337, § 2, eff. Sept. 1, 2009, which was intended to make Chapter 21 conform to the ADA Amendments Act of 2008. *See* H.B. 978 Bill Analysis (Background and Purpose) ("The ADA Amendments Act of 2008 was signed into law by President George W. Bush to expand the scope and coverage of the original ADA. Current law in Texas fails to provide sufficient protection for disabled individuals. This bill fulfills Governor Perry's disability initiative to expand opportunities for disabled Texans. C.S.H.B. 978 brings together the state's plan for improving the lives of disabled Texans and the revised national mandate by the U.S. Congress for eliminating discrimination against individuals with disabilities.").[19]

Even before the amendment of Chapter 21 to expand disability coverage, federal courts considering the issue[20] have held that the cause of the impairment is

[19] Available online at http://www.capitol.state.tx.us/tlodocs/81R/analysis/pdf/HB00978H.pdf.
[20] Federal ADA case law guides this Court's interpretation of the TCHRA. *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001).

irrelevant in discrimination cases. *See e.g., Navarro v. Pfizer Corp.*, 261 F.3d 90, 97 (1st Cir. 2001) ("Because the source of an impairment is irrelevant to a determination of whether that impairment constitutes a disability, it makes no difference that the appellant's daughter's high blood pressure was induced by her gravidity.") (citation omitted);[21] *Cook v. State of R.I., Dep't of Mental Health Servs.*, 10 F. 3d 17, 24 (1st Cir. 1993) (recognizing that under the Rehabilitation Act, the ADA's precursor,[22] there was "no language suggesting that its protection is linked to how an individual became impaired"); *McDaniel v. Milligan*, No. 4:12–cv–00751 KGB, 2014 WL 3700573, at *4 (E.D. Ark. July 25, 2014) (the important thing for determining disability are the effects of plaintiff's impairment, not its name or diagnosis); *E.E.O.C. v. Resources for Human Dev., Inc.*, 827 F. Supp. 2d 688, 694 (E.D. La. 2011) ("[N]either the EEOC nor the Fifth Circuit have ever required a disabled party to prove the underlying basis of their impairment."); *Hutchinson v. Ecolab, Inc.*, No. 3:09CV1848(JBA), 2011 WL 4542957, at *9 n.10 (D. Conn. Sept. 28, 2011) (rejecting argument that syncope [fainting spells] could not be a disability because the plaintiff did not know the cause; the law "does not require a plaintiff to have a formal 'diagnosis' in order to be 'disabled'—an impairment that substantially

[21] Although *Navarro* was an FMLA case, the provision at issue required proof of an ADA disability.

[22] The Rehabilitation Act "is considered generally as a predecessor to the ADA." *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 854 n.2 (5th Cir. 1999).

limits a major life activity is all that is required."); *Puckett v. Park Place Entm't, Corp.*, No. 3:03-CV-0327-ECRVPC, 2006 WL 696180, at *3 (D. Nev. Mar. 15, 2006) ("While the 2003 doctor's notes indicate that Plaintiff is restricted in her ability to carry, they specify that such restriction is probably not related to her MS, but rather to an industrial injury. Nevertheless, the fact that Plaintiff is unable to carry or lift certain amounts or in a certain manner is an impairment, regardless of whether the cause is MS or an industrial injury.").

In *Bordonaro v. Johnston County Board of Education*, a teaching assistant, who was also required to be a bus driver, began experiencing vision loss and was terminated from her position. 938 F. Supp. 2d 573, 576–77 (E.D.N.C 2013). Her doctor thought the vision loss was from a pituitary tumor, but later believed the cause of the vision loss to be glaucoma. *Id.* at 576. The court found that whether her vision loss was "caused by a pituitary tumor or glaucoma is of no import as the ADAAA does not require a plaintiff to have a formal diagnosis in order to be disabled." *Id.* at 579 (internal quotations omitted). Just as the court in *Bordonaro* found that it did not matter what caused the plaintiff's vision loss, it does not matter what caused Green's urinary incontinence.

Similarly, in *Pacourek v. Inland Steel Company***,** 916 F. Supp. 797 (N.D. Ill. 1996), the court held that "it does not matter whether the infertility is explained or not. The ADA and regulations under it are simply devoid of any requirement that a

physiological disorder or condition have a scientific name or known etiology. Therefore, infertility, whether explained or not, is an impairment under the ADA." *Id.* Likewise, Mr. Green's incontinence is an impairment regardless of whether it has a known cause.

State courts also recognize the irrelevance of an impairment's cause. *See, e.g.*, *Biggs v. Wyatt*, 2015 Ill. App. (5th) 140141-U, 2015 WL 5830890, at *7 (Oct. 6, 2015) (unpublished), *appeal denied*, 48 N.E.3d 671 (Ill. 2016) (unlike personal injury claims, cause of disability is not relevant in ADA or Social Security claims); *Owens v. Am. Cable Servs., LLC*, No. B246566, 2014 WL 940450, at *4 (Cal. Ct. App. Mar. 11, 2014) (unpublished; decided under state law) (Plaintiff testified "that he suffered from various ailments including headaches, fatigue, stomach aches, and physical weakness. His failure to prove that he suffered from lead poisoning itself was not dispositive. The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (internal quotes omitted); *Hunt v. El Camino Cmty. Coll.*, No. B235293, 2013 WL 1153253, at *3–4 (Cal. Ct. App. Mar. 21, 2013) (unpublished, affirming motion in limine) ("The cause of Hunt's disability is not relevant to her disability discrimination cause of action.").

Furthermore, guidance from the U.S Equal Employment Opportunity Commission ("EEOC") underscores the irrelevance of causation to the determination of a disability.[23] Even before the expanded interpretation of disability in the ADA Amendments Act, the EEOC's Compliance Manual stated that "[t]he cause of a condition has no effect on whether that condition is an impairment." *EEOC Compliance Manual*, § 902.2(e), 2009 WL 4782107, citing both the legislative history and the case law under the predecessor Rehabilitation Act. *See also Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483, *quoting* 29 C.F.R. Part 1630 App., § 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual"). The EEOC's post-amendments guidance reaffirms that position. *See, e.g., Enforcement Guidance: Pregnancy Discrimination and Related Issues*, § II.A and n.144 (EEOC June 25, 2015) ("impairment's cause is not relevant in determining whether the impairment is a disability.") (*citing* EEOC guidance and ADA's legislative history).[24]

[23] This Court follows EEOC guidance. *See, e.g., City of Houston v. Proler*, 437 S.W.3d 529, 533 and n.17 (Tex. 2014); *Little v. Texas Dep't of Criminal Justice*, 148 S.W.3d 374, 383 (Tex. 2004).

[24] Available online at https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last visited July 27, 2016).

The ADA's legislative history explicitly states that the "cause of a disability is always irrelevant to the determination of disability." H.R. REP. NO. 101-485 (III), pt. 3, at 29 (1990).

Commentators have also recognized as much. *See, e.g.*, Jane Byeff Korn, *Fat*, 77 B.U.L. Rev. 25, 49 (1997) ("Congress did not require any determination of the cause of a disability."); John E. Rumel, *Federal Disability Discrimination Law and the Toxic Workplace*, 51 Santa Clara L. Rev. 515, 523 (2011).

Thus, the holding by the Court of Appeals would impose burdens not found in the statute, and would add an extra-statutory defense not found in the plain language of either Chapter 21 or the ADA. That is the role of the Legislature, not the courts. Its approach is inconsistent with the case law, legislative history, EEOC guidance, and legal scholars.

Failure to Correct the Analysis Below Will Prevent Meaningful Enforcement of Texas Law for Thousands of Texans Who the Law Is Intended to Cover.

Not only is it clearly established law that a disability's cause is irrelevant, a contrary ruling would allow discrimination against a great many individuals with serious health conditions. Many serious conditions lack clear medical causation, either because science does not yet know it, or because it could be the result of one

or more of a variety of causes. Incontinence is one of those conditions,[25] but there are a great many others.

For example, kidney disease is now covered by the law, even though such impairments can be caused by diabetes,[26] hypertension,[27] or other things, or may have unknown causes.[28] But a patient on dialysis should not lose protection if he or she cannot prove the cause of the kidney failure. Similarly, the cause of diabetes itself is not well understood, and appears to be the result of a complex interplay between genetics and environment.[29] The exact cause of asthma is not known.[30] Lung scarring causes breathing problems, but it can have many causes, known or unknown.[31] Syncope, a sudden brief loss of consciousness, may have cardiovascular

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[25] Many cases of urge incontinence are "idiopathic," MERCK MANUAL OF DIAGNOSIS AND THERAPY, at 1740 (16th ed. 1992), meaning without a known cause. Other common causes include bladder dysfunction, multiple sclerosis, uropathy, and cystitis. *Id*. Mr. Green's expert likewise testified that incontinence has a variety of causes, including prostrate and neurologic conditions, Reporter's Record Vol. 4, p. 14–15, but is most commonly labelled idiopathic. *Id*. at 15–16.

[26] *See* American Diabetes Association, *Kidney Disease (Nephropathy)*, available online at http://www.diabetes.org/living-with-diabetes/complications/kidney-disease-nephropathy.html.

[27] National Institute of Diabetes and Digestive and Kidney Diseases, *High Blood Pressure and Kidney Disease*, available online at https://www.niddk.nih.gov/health-information/health-topics/kidney-disease/high-blood-pressure-and-kidney-disease/Pages/facts.aspx#how.

[28] National Institute of Diabetes and Digestive and Kidney Diseases, *Glomerular Diseases*, available online at https://www.niddk.nih.gov/health-information/health-topics/kidney-disease/glomerular-diseases/Pages/facts.aspx#cause.

[29] Erika Gebel, Ph.D, *Why Me? Understanding the Causes of Diabetes* (American Diabetes Association Oct. 2010), available online at http://www.diabetesforecast.org/2010/oct/why-me-understanding-the-causes-of-diabetes.html.

[30] National Heart, Lung, and Blood Institute, *What Causes Asthma*, available online at https://www.nhlbi.nih.gov/.

[31] National Heart, Lung, and Blood Institute, *What Causes Idiopathic Pulmonary Fibrosis?*, available online at https://www.nhlbi.nih.gov/health/health-topics/topics/ipf/causes.

or noncardiovascular causes.[32] High blood pressure can have genetic or environmental causes, and may be a function of kidney functioning, hormones, medications, nervous system activity, or blood vessel structure and functioning.[33]

Although there can be good faith arguments about what causes urinary incontinence, that is a "tempest in a teapot" here, and has no place in the analysis if the employer terminates an individual with a disability (as the jury found here). Here, there was some uncertainty as to the trigger for Green's condition. The Court of Appeals concluded that Green had not met his burden of proving what the trigger was. But that was not Green's burden.

A causation requirement would, in many cases, make proving disability much more difficult, or impossible. Yet Texas law was amended in 2009 to *broaden* coverage "to the maximum extent allowed" by its language, not to add elements to the cause of action. Tex. Lab. Code § 21.0021(a)(1). Adding this new causation requirement is fundamentally at odds with the statute. These amendments were also designed to conform to the ADA Amendments Act, which uses identical language. 42 U.S.C. § 12102(4)(A). In contrast, the analysis by the court below would improperly *narrow* coverage, and would shift the focus of the case away from discrimination and back onto the coverage question, contrary to current law.

[32] MERCK MANUAL OF DIAGNOSIS AND THERAPY, at 431–33 (16th ed. 1992).
[33] National Heart, Lung, and Blood Institute, *Causes of High Blood Pressure*, available online at http://www.nhlbi.nih.gov/health/health-topics/topics/hbp/causes.

Compare Pub. L. 110-325, § 2(b)(5), 122 Stat. 3553 (Sept. 25, 2008) ("it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis …."). The law should no longer be interpreted to create a "demanding standard," Pub. L. 110-325, § 2(b)(4), 122 Stat. 3553 (Sept. 25, 2008).

CONCLUSION

In this case it was undisputed that Green had urinary incontinence, and the jury was instructed without objection that Green had a disability. The source or etiology of his condition was simply irrelevant. This Court should reverse the Court of Appeals, and render judgment for Green in accordance with the jury verdict.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(D) because it contains 4474 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

BRIAN EAST

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2016, a true and correct copy of the foregoing document was electronically filed, and that a true and correct copy of the foregoing document was served by electronic mail on the same date to Matthew R. Scott (matt.scott@scottperezlaw.com) and Bruce Thomas (bthomaslaw@sbcglobal.net), Attorneys for Petitioner Paul Green, and on P. Michael Jung (michael.jung@strasburger.com) and Christine D. Roseveare (christy.roseveare@strasburger.com), Attorneys for Respondent Dallas County Schools.

Brian East