No. 18-672

IN THE
Supreme Court of the United States

CITY OF NEWPORT BEACH, CALIFORNIA, et al.,

Petitioners,

v.

RICHARD VOS and JENELLE BERNACCHI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

PAUL L. HOFFMAN
Counsel of Record
JOHN WASHINGTON
SCHONBRUN SEPLOW HARRIS & HOFFMAN, LLP
200 Pier Ave Ste. 226
Hermosa Beach, CA 90254
(310) 396-0731
hoffpaul@aol.com
jwashington@sshhlaw.com

ERWIN CHEMERINSKY
UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW
215 Boalt Hall
Berkeley, CA 94720
(510) 642-6483
echemerinsky@berkeley.law.edu

JASON FOWLER
R. REX PARRIS
PARRIS LAW FIRM
43364 10th St. W.
Lancaster, CA 93534
(661) 949-2595
jfowler@parrislawyers.com
rparris@parrislawyers.com

MILTON GRIMES
LAW OFFICES OF MILTON C. GRIMES
3774 W. 54th St.
Los Angeles, CA 90043
(323) 295-3023
miltgrim@aol.com

QUESTIONS PRESENTED

1. Whether the Americans with Disabilities Act, which applies to all public agencies, requires police officers to accommodate a mentally disabled person by communicating with him – where reasonable, effective, and safest for all parties – rather than waiting and killing the disabled person.

2. Whether the "totality" of the circumstances relevant to unreasonable force, which "is not capable of precise definition [and] requires careful attention to the facts and circumstances," can include officers' conduct preceding a shooting, where it is not the basis for their liability. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

3. Whether the "totality" of the circumstances relevant to unreasonable force can include a suspect's mental illness.

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INTRODUCTION

This case turns on the reasonableness of the fatal shooting of Richard Vos, a young mentally disturbed man, by Newport Beach police officers in the context of disputed facts. The court of appeals reversed the summary judgment granted by the district court but granted the two officers qualified immunity, a ruling that respondents do not challenge.

The court of appeals reversed the district court's ruling that the Americans with Disabilities Act and Rehabilitation Act ("Disability Acts") did not apply in these circumstances and remanded these claims to be decided on the merits. The court of appeals also remanded Plaintiffs' section 1983 municipal liability claims for further consideration by the district court and allowed Plaintiffs' state law claims to proceed to trial.

The petition is premature in this procedural context. The court of appeals held that the officers' conduct prior to shooting Mr. Vos raised material disputes of fact concerning whether the officers reasonably accommodated Mr. Vos. Pet. App. A-27. The holding is correct and even to the extent Respondents seek review of it, it would benefit from a complete record, including expert testimony, before consideration in this Court. The facts are also in dispute in this case.

There is no clear circuit split concerning the application of the Americans with Disabilities Act in these circumstances. There is no reason to exempt

law enforcement entirely from this critical requirement and the Justice Department has given and will continue to provide the necessary guidance to police departments on the implementation of the Disability Acts. To the extent there are differences in the case law these differences concern the reasonableness of law enforcement actions in particular circumstances, an issue yet to be determined in this case.

Nor did the court of appeals break new ground on the application of this Court's "totality of circumstances" Fourth Amendment jurisprudence. The facts that Mr. Vos was mentally ill, and that the officers knew this, are part of the totality of these circumstances relevant to the reasonableness of the officers' actions. The court of appeals did not alter the consensus that pre-shooting conduct cannot be the basis for a Fourth Amendment violation.

Most of Plaintiffs' remaining claims arise under California law which does provide for liability for pre-shooting negligence in these circumstances. *See, e.g., Hayes v. County of* San *Diego*, 57 Cal. 4th 622 (2013). The fact that this case is likely to be resolved on state law grounds is an additional reason to deny the petition.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS[1]

On May 29, 2014, Newport Beach police officers were called to respond to a man (Mr. Vos) behaving erratically and appearing obviously mentally ill to the officers and others at the scene in a local 7-Eleven. Pet. App. A-13 & n.6. It is uncontested that Mr. Vos was, in fact, mentally ill at the time and acting in a manner consistent with his disease. Pet. App. A-8, A-20. The facts also indicate that the Defendants knew they were dealing with a mentally ill person from the start of this incident. *Id.*

The officers on the scene also knew that Mr. Vos did not have a firearm. Pet. App. A-14. Mr. Vos had held a pair of scissors when he was inside the store. He had an incident with one of the store clerks before officers arrived. However, the clerks and everyone else had left the store shortly after the officers first arrived at the scene. *Cf.* Pet. App. A-6–7. At that point Mr. Vos was alone in the store.

There were at least eight officers and three police vehicles at the scene in a defensive position when Mr. Vos was in the store alone. Pet. App. A-14–17 & n.7. The officers set up two police SUVs in

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[1] The petition for certiorari improperly portrays many facts in the light most favorable to Petitioners and omits facts favorable to Respondents. In this procedural context the facts must be viewed in the light most favorable to Respondents. *E.g. Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014) (citations omitted). Respondents do so in this section.

a "v" formation outside the doors of the 7-Eleven, opening the doors of the vehicles for cover, and propping open the doors of the 7-Eleven for a direct line of sight on Mr. Vos if he attempted to leave the store. Pet. App. A-7–8, *id.* at A-17. These officers were armed with lethal and various non-lethal weapons; including rifles loaded with rubber, non-lethal bullets, tasers, and a canine unit. Pet. App. A-16–17. The officers had agreed that only non-lethal force would be necessary if Mr. Vos came out of the store with scissors. Pet. App. A-8–9. Indeed, there is no reason to believe that non-lethal force would not have succeeded in controlling Mr. Vos.

For the approximately twenty minutes that officers were present outside the 7-Eleven while Mr. Vos was inside alone, the officers did not communicate or attempt to communicate with him.[2] Pet. App. A-13; Excerpts of Record [hereafter "ER"] 153 at 96:12-15; ER 156 at 132:6-11; ER 104 at 31:7-10; ER 107 at 43:22-24. Petitioners concede that the

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[2] To the extent Petitioners suggest officers were "preparing to communicate" with Mr. Vos as an accommodation at the point they killed him, Pet. 13, that is belied by the evidence. As the video shows and the officers testified repeatedly there was no communication or attempt to communicate with Mr. Vos prior to officers yelling to disarm before quickly firing on him. Excerpts of Record [hereafter "ER"] 153 at 96:12-15; ER 156 at 132:6-11; ER 104 at 31:7-10; ER 107 at 43:22-24; 2 Supplementary Excerpts of record [hereafter "SER"] 412. In any event a purported intention or attempt to communicate with Mr. Vos as an accommodation is at minimum a disputed matter for a trier of fact to resolve.

failure to communicate with Mr. Vos to de-escalate the situation violated their training. ER 268; *see also* ER 92 at 125:22-126:7, ER 124 at 100:22-24; ER 103 at 27:4-9, ER 140 at 186:23-25. This training was designed and mandated to ensure reasonable accommodations to mentally ill suspects in order to avoid precisely the kind of unnecessary use of lethal force that happened here. Cal. Penal Code § 13515.25–29; ER 234–35, 229–32.

The officers had decided, with ample time to plan, that if Mr. Vos ran toward the officers, even with scissors, they would use the 40-millimeter non-lethal weapon, which deploys rubber bullets to neutralize targets, to subdue Mr. Vos. Pet. App. A-8; *see also* Supplementary Excerpts of Record [hereafter "SER"] 409. After twenty minutes Mr. Vos walked around the front counter with an object in his hand, and from the back of the 7-eleven ran toward the front door. In addition to the rifle with the rubber bullets, each officer had a taser and there was a canine unit deployed at the scene, all of which were capable of subduing Mr. Vos without killing him. Pet. App. A-17. Officer Preasmeyer yelled for the officer with the rifle with rubber bullets to shoot Mr. Vos. Pet. App. A-8–9. The intention was only for the officer with the non-lethal weapon to fire. *Id.*

Instead, when Officer Preasmeyer yelled "shoot," Officers Henry and Farris fired lethal assault rifles at Mr. Vos at the same time Officer Shen used the non-lethal weapon the officers planned to use, killing Mr. Vos. ER 90 at 80:20-21;

Pet. App. A-9. No other officer on the scene used lethal force in response to Mr. Vos coming toward the officers. Pet. App. A-9.

II. PROCEDURAL HISTORY

The district court held that Respondents' claims under the Disability Acts required a showing of "provocation," and that because a reasonable jury could not find that the Defendants "provoked" Vos' actions summary judgment must be granted. Pet. App. A-66–67. Thus, the district court did not address the reasonableness of Defendants' conduct under the Disabilities Acts. *Id.*

The district court granted summary judgment against the Plaintiffs on their Fourth Amendment claims, finding that the Defendants acted "reasonably" as a matter of law on the basis that a reasonable officer could have believed himself in immediate danger. Pet. App. A-64. The court did not reach the issue of qualified immunity. *Id.* at A-64–65. The district court dismissed Plaintiffs' *Monell*[3] and state law claims based on its ruling that Defendants had acted reasonably as a matter of law.

The court of appeals affirmed the district court's summary judgment on Plaintiffs' Fourth Amendment claim for the individual officers. The Court held that the officers were entitled to qualified immunity but reversed the district court's holding that the Defendants' actions were "reasonable" as a

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[3] *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978).

matter of law. Pet. App. A-21–24, *id.* at A-21. The court of appeals also remanded for the district court to consider Plaintiffs' *Monell* claim. Pet. App. A-25. The court of appeals reversed summary judgment on Plaintiffs' state law claims, including negligence. Pet. App. A-28-29.

The court of appeals found that "provocation" was not a required element of Disability Act claims and that summary judgment for the City was precluded by material disputes as to whether "reasonable accommodations" might have been provided in these circumstances, an issue the district court had not addressed. Pet. App. A-27. The case was remanded for a determination on the merits of plaintiffs' remaining claims. *Id.* at A-28.

REASONS FOR DENYING CERTIORARI

I. REVIEW OF PETITIONER'S ADA QUESTION IS NOT MERITED IN THIS CASE.

A. Every Circuit to Address the Issue Has Held that Officers Must Accommodate Arrestees where it is Safe and Reasonable to Do So.

There is no clear circuit split over the applicability of the Americans with Disabilities Act ("ADA") in the interactions between law enforcement and suspects. Any differences in the circuit decisions concern fact-based inquiries into whether accommodation was unreasonable in the circumstances of particular cases, an inquiry which

could benefit here from a complete record, including expert testimony.

Every circuit to consider the issue has held that law enforcement officers must provide "reasonable accommodations" to disabled suspects where it is safe and effective to do so. *See, e.g.*, *Haberle v. Troxell*, 885 F.3d 170, 178 (3d Cir. 2018) (ADA generally applies to arrests); *id.* at 183–88 (Greenway, J., concurring); *Folkerts v. City of Waverly, Iowa,* 707 F.3d 975, 983 (8th Cir. 2013) ("Title II of the ADA applies to an arrestee's post-*Miranda* interview."); *Seremeth v. Bd. of Cty. Comm'rs Frederick Cty.,* 673 F.3d 333, 337 (4th Cir. 2012) (Title II applies to police investigations); *Bircoll v. Miami-Dade Cty.,* 480 F.3d 1072, 1085-86 (11th Cir. 2007) (rejecting argument that Title II would not apply to DUI arrests); *Delano-Pyle v. Victoria Cty., Tex.,* 302 F.3d 567, 576 (5th Cir. 2002) (ADA applies to arrest); *Thompson v. Davis,* 295 F.3d 890, 894, 897 (9th Cir. 2002) (rejecting argument that the ADA does not apply to parole decisions); *Gohier v. Enright,* 186 F.3d 1216, 1221 (10th Cir. 1999) ("[A] broad rule categorically excluding arrests from the scope of Title II … is not the law."); *Gorman v. Bartch,* 152 F.3d 907, 913 (8th Cir. 1998) (Title II applies to transportation of arrestees). These decisions are also consistent with this Court's holding that activities within state prisons fall within the ADA. *See Pa. Dep't of Corr. v. Yeskey,* 524 U.S. 206, 209–11 (1998). Thus, the overwhelming consensus among the circuits is that

the ADA applies in the circumstances presented by this case. These decisions do not include the "provocation" element imposed by the district court. There is no circuit split on this "provocation" issue.

The Justice Department, the entity Congress assigned to implement the ADA, has issued guidance since at least 2006 that under the ADA officers must provide "reasonable accommodations" in the context of arrests. *See generally Haberle*, 885 F.3d at 185 (Greenway, J., concurring) (collecting citations). The United States also filed an *amicus* brief in *Sheehan* before this Court, supporting the *Sheehan* plaintiffs in relevant part and underscoring that under the ADA officers must provide "reasonable accommodations" to arrestees in the context of law enforcement operations. Brief for the United States as *Amicus Curiae* Supporting Vacatur in Part and Reversal in Part at 1–22, *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765 (2015) (No. 13–1412).[4]

The uniform conclusions of the United States are also correct. They are consistent with the plain text of the ADA. *See, e.g.*, 42 U.S.C.A. §§ 12132,

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[4] The United States has also repeatedly filed similar statements of interests in other cases. *E.g.* Statement of Interest of the United States 5–9, *Robinson v. Farley*, No. 15-cv-00803 (D.D.C. 2016), available at: https://www.ada.gov/briefs/robinson_soi.pdf; Statement of Interest of the United States, *S.R. and L.G. v. Kenton Cty. et al.*, No. 2:15-cv-01143 (E.D. Ky. 2015), available at: https://www.justice.gov/crt/file/780706/download.

12131(1)(b) (ADA applies to activities of a public entity or agency thereof); 28 C.F.R. Pt. 35, App. B ("[T]itle II applies to anything a public entity does . . . ."); *Pa. Dep't of Corr. v. Yeskey,* 524 U.S. 206, 209-11 (1998) (applying ADA to prison context); *see also Haberle v. Troxell*, 885 F.3d 170, 184-86 (3d Cir. 2018) (Greenway, J., concurring). The ADA's requirement that all public entities reasonably accommodate disabled persons is particularly important in the context of police interactions and arrests. In such situations the failure to provide reasonable accommodations may mean the difference between life and death.

Hainze v. Richards, 207 F.3d 795 (5th Cir. 2000) does not hold otherwise. *See* Pet. 13–14. *Hainze* concerned a man who held a knife next to civilians and walked quickly towards officers with it within 20 seconds of the officer's arrival on the scene. *Id.* at 801. The *Hainze* court did not hold that the ADA was inapplicable in arrest situations. Indeed, *Hainze* found that the ADA did apply to arrests, *id.* at 802, but simply held that a claim was not available "under circumstances such as presented herein." *Id.* at 801; *id.* at 802. The *Hainze* court, in accordance with the national consensus, also emphasized that an accommodation would be required under the ADA where it could be safely provided. *Id.* at 802. Indeed, shortly after *Hainze* the Fifth Circuit affirmed that the ADA required officers to accommodate arrestees where exigencies did not make it unsafe to do so. *Delano-Pyle v.*

Victoria Cty., Tex., 302 F.3d 567, 576 (5th Cir. 2002). The decision below is not in conflict with *Hainze*.

Nor does *Roell v. Hamilton Cty., Ohio/Hamilton Cty. Bd. of Cty. Commissioners*, 870 F.3d 471 (6th Cir. 2017), reflect the split that Petitioners claim. As Petitioners acknowledge, Pet. 14–15, *Roell* did not hold that officers have no duty to provide arrestees reasonable accommodations; it found only that the accommodations the *Roell* plaintiffs identified were unreasonable given the threat presented by the suspect when officers used tasers on him. Petitioners' remaining citations, *Waller v. City of Danville*, 556 F.3d 171, 176-177 (4th Cir. 2009), and *Roberts v. City of Omaha*, 723 F.3d 966, 973 (8th Cir. 2013), both acknowledged that law enforcement officers are required to accommodate a suspect's disabilities where it is reasonable to do so. There is no split in the circuits about the fact that the ADA applies in these circumstances and no other case imposes a "provocation" requirement. Each case has been decided instead on the fact-based evaluation of whether accommodations were reasonable in the circumstances. *See, e.g. Roell*, 870 F.3d at 489 (noting that the determination is "highly fact-specific, requiring case-by-case inquiry.")

Petitioners ask this Court to determine as a general matter and in the absence of a decision on this issue below, how violent and armed persons must be accommodated under Title II of the ADA. Pet. i, 11–18. In particular, Petitioners apparently

seek review on the ground that the court of appeals required accommodations at the point when Mr. Vos exited the store and the officers allegedly feared imminent injury. Pet. 18–20 (arguing the decision is wrongly decided because the ADA does not require officers to accommodate "when police use force against a violent individual who attacks them with a weapon.").

The court of appeals' decision did not address that situation. The court of appeals focused instead on whether reasonable accommodations could have been provided at *any* point in this encounter to avoid the lethal result, specifically in the events leading up to the ultimate use of force. Pet. App. A-27 (identifying reasonable accommodations that could have been previously employed, all of which concerned conduct before Mr. Vos exited the store). Thus, it is not clear that the matter Petitioners ask this court to resolve is at issue in this case. If this issue is addressed in the district court initially the record would be clear.

Here officers waited for twenty minutes behind well-planned defensive formations and with the store surrounded by at least eight officers without defusing the situation, waiting instead for Mr. Vos to emerge. No efforts were made to de-escalate the situation or communicate with the mental health experts available to the officers at that time for such purposes. ER 153 at 96:12-15; ER 156 at 132:6-11; ER 104 at 31:7-10; ER 107 at 43:22-24. When Mr. Vos emerged, the Defendant officers

killed him rather than using non-lethal means as the officers had planned.

The court of appeals found on this record that prior to emerging from the 7-Eleven Mr. Vos had done nothing justifying the need to use lethal force as a matter of law. Pet. App. 13 & n.6; Pet. App. 17–18. Prior to coming toward the officers Mr. Vos had not shown that he was a serious danger to himself or others. Pet. App. 17–20. Indeed, the officers believed Mr. Vos only to have a pair of scissors, and did not believe him to have a firearm. Pet. App. 14. They knew him to be secluded and alone in the back of a 7-Eleven. They had a direct line of sight into the store with eight officers surrounding the area in defensive positions. Pet. App. A-7, A-17; *id.* at A-8. The record indicates disputed material issues about whether the officers could have safely taken reasonable and effective actions to accommodate Mr. Vos' disability without killing him. Indeed, Petitioners conceded below that officers were trained to do so. ER 268; *see also* ER 92 at 125:22-126:7, ER 124 at 100:22-24; ER 103 at 27:4-9, ER 140 at 186:23-25.

The facts in this case are far different from the facts in *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765 (2015). In *Sheehan* the officers might have reasonably feared the plaintiff was going to harm them or escape; they feared that the situation "required immediate attention." *Id.* at 1770–71. That was not the case here when the facts are taken in the light most favorable to Plaintiffs. In

Sheehan, the plaintiff had threatened to kill the officers and three others with a knife and intended to use it. *Id.* at 1771, 1775. The officers thought that Sheehan might escape or harm another, believed the situation required immediate attention, and "knew that delay could make the situation more dangerous . . . ." *Id.* Accordingly they entered the room in which Ms. Sheehan was located as a safety measure, and it was this action that Ms. Sheehan claimed failed to accommodate her. *Id.* In contrast there was no credible safety concern to weigh against an accommodation during the twenty minutes officers waited outside before Vos emerged. Thus, this case is a poor vehicle for resolving the issues presented previously in *Sheehan*.

Moreover even if there were a split concerning whether reasonable accommodations should be provided to arrestees, this case would be a poor vehicle for resolving it. The district court never reached this issue, or for that matter, what accommodation would require. The district court's decision was that an ADA claim requires a "provocation." The district court believed ADA liability could only extend to situations where officers provoke and "initiate the confrontation . . . ." Pet. App. A-67–68. It solely considered such acts as might have independently provoked the decedent's actions, believing them the only ones relevant to an ADA claim.[5] *Id.* The court of appeals addressed this

[5] Neither the ADA's text nor any other law suggests that the "reasonable accommodations" in arrests have any limitations

decision and reversed it, clarifying that the district court had "improperly read a provocation theory into accommodation." Pet. App. A-27. There is no split in the circuits on that issue and the court of appeals' decision is in line with the decisions of other circuits.

Petitioner argues that a need for guidance requires review now. No circuit has disputed that officers should provide reasonable accommodations in arrest situations. Every federal or state agency in the United States deals with the duty to provide reasonable accommodations, and every police force deals with the duty this Court has described as to use "reasonable" force. The Justice Department is fully capable of providing any additional guidance defendants require in fulfilling the statutory mandates in the Disability Acts, and designated by Congress to do so. 42 U.S.C. § 12206.

The Justice Department has presented its official guidance,[6] and its expertise is most relevant

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to behavior that provokes. Nor has any circuit found such a limitation and have held otherwise. *E.g. Gorman v. Bartch,* 152 F.3d 907, 913 (8th Cir. 1998) (Title II applies to failing to accommodate wheelchair bound arrestee for failing to transport the arrestee in vehicle equipped with wheelchair restraints, without "provocation.").

[6] *E.g.* U.S. DEPARTMENT OF JUSTICE, EXAMPLES AND RESOURCES TO SUPPORT CRIMINAL JUSTICE ENTITIES IN COMPLIANCE WITH TITLE II OF THE AMERICANS WITH DISABILITIES ACT (2017), available at: *https://www.ada.gov/cjta.html*; *see also id.* § II.A (noting the need for officers facing disabled persons to use "alternative techniques to increase safety and avoid using force

in these circumstances in the absence of a circuit split. The Justice Department is available to provide any additional guidance police departments require.[7] Respondents' purported need for guidance on what specific accommodations are reasonable therefore does not justify review by this Court even it did grant review to define reasonableness in

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unnecessarily"); *id.* § III.A (providing examples, including communicating with Crisis Intervention Teams); U.S. DEPARTMENT OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 80–85 (2017), available at: https://www.justice.gov/crt/file/883296/download; *id.* at 81 (noting that reasonable modifications under the ADA requires law enforcement to "employ[] appropriate de-escalation techniques or involv[e] mental health professionals or specially trained crisis intervention officers.").

[7] Petitioners' *amicus* suggests that in broad terms some "innovative approaches for responding to the mentally ill" may not be effective. Those at issue here – e.g. communicating with a mentally ill person rather than waiting to kill him – are effective and necessary. *E.g.* POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 5, 54-55, 57–60 (2016) (conclusions of Police Executives nationwide after 18 months of study that communication and de-escalation are necessary to accommodate mentally ill suspects and increase officer and public safety), available at: https://www.policeforum.org/assets/30%20guiding%20principles.pdf. The Justice Department has underscored the same. *See* footnote 5, *supra.* As to other accommodations for the mentally ill, if they are dubious or not effective then it would not be reasonable to require officers provide them. In any case if such matters were to be addressed in this case remand would be necessary for a factual record.

individual circumstances, which it ordinarily does not.

B. The Decision Below Was Correctly Decided Because It Was Safe and Reasonable to Accommodate Mr. Vos.

All of the circuit cases, the United States' interpretative guidance and regulations concerning the ADA, and the United States' amicus brief in *Sheehan* reflect a straightforward proposition: law enforcement, like every other agency, has the duty to provide "reasonable accommodations" to disabled suspects. The decision below reflects these basic principles.

Exigencies of course may inform whether accommodations are reasonable, but that is a factual question tied to the circumstances of each case. *See, e.g. Seremeth v. Bd. of Cty. Comm'rs Frederick Cty.*, 673 F.3d 333, 339 (4th Cir. 2012) ("[N]othing in the text of the ADA suggests that a separate exigent-circumstances inquiry is appropriate."). There is no exigency exception that would permit failures to accommodate when accommodation would be reasonable and safe. *Id.*

As the United States' brief in *Sheehan* stated, law enforcement officers must provide accommodations in arrests where they could alter their procedures employed without endangering themselves or others, particularly where the accommodation proposed was "*more* consistent with the entity's procedures." Brief for the United States as *Amicus Curiae* Supporting Vacatur in Part and

Reversal in Part at 20–21, *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765 (2015) (No. 13–1412). As the United States also noted, even *if* a suspect were considered violent, though as the court of appeals found that was not the case at all relevant times here, a law enforcement entity would not be entitled to summary judgment if there are material disputes of fact as to whether "an accommodation was reasonable on the particular facts despite the presence of a weapon and violent behavior during an arrest . . . ." *Id.* at 21. This appears consistent with every circuit which has addressed the matter.

There are material disputes of fact in this record as to whether officers were faced with exigent circumstances precluding reasonable accommodations including de-escalation, communication, or specialized help during the twenty minutes Mr. Vos was in the 7-Eleven alone. At least one of the eight officers had time to communicate with Mr. Vos, or the available Psychiatric Evaluation Teams (PETs), while Mr. Vos was in the 7-eleven. As Defendants themselves conceded in the district court, the officers were required to attempt to communicate with Mr. Vos in exactly this situation. ER 268; *see also* ER 92 at 125:22-126:7, ER 124 at 100:22-24; ER 103 at 27:4-9, ER 140 at 186:23-25. The officers apparently made no such attempts before Mr. Vos left the backroom, at which point they killed him. ER 153 at 96:12-15; ER 156 at 132:6-11; ER 104 at 31:7-10; ER

107 at 43:22-24. They were also required to reach out to the PETs, ER 148 at 62:25-63:13, and no officer attempted to do so. ER 141 at 189:4-9.

The court of appeals focused on the district court's "provocation" theory, and not on reasonableness of accommodation. However there are also, at a minimum, material disputes of fact on this record as to whether officers faced circumstances that precluded reasonable accommodations of Mr. Vos' acknowledged disability. This precludes the summary judgment for Defendants that Respondents seek here. *Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014). Supreme Court review is also traditionally reserved for pure questions of law, rather than sifting through unresolved facts and making factual conclusions, a process better addressed in the district court. Review on this issue should await the development of a record and an initial decision in the district court.

II. REVIEW OF THIS CASE IS NEITHER NEEDED NOR APPROPRIATE TO ADDRESS WHETHER THE "TOTALITY OF CIRCUMSTANCES" RELEVANT TO EXCESIVE FORCE MAY INCLUDE PRE-SHOOTING CONDUCT.

Petitioner also seeks certiorari to resolve what was included in an unnumbered footnote in *County of Los Angeles, Calif. v. Mendez*, 137 S.Ct. 1539 (2017). Namely, in *Mendez* it was established that the act of shooting the respondent was

reasonable under the Fourth Amendment, but respondents had argued that nonetheless the officers were liable because "police conduct prior to the use of force . . . reasonably created the need to use it." *Id.* at 1547 n.*[8]

This case does not raise that issue. The court of appeals expressly stated the same, emphasizing "a Fourth Amendment violation cannot be established 'based merely on bad tactics that result in a deadly confrontation that could have been avoided . . . .'" Pet. App. A-19. The court of appeals understood the Fourth Amendment not to include such liability and further distinguished it from California negligence law, which allows liability based on pre-shooting negligence. Pet. App. A-28–29; *see also Hayes v. Cty. of San Diego*, 57 Cal. 4th 622, 629 (2013) (noting that even where shooting may be justified if examined in isolation, pre-shooting conduct would create liability under negligence law) (citing *Grudt v. City of Los Angeles*, 2 Cal.3d 575, 585–88 (1970)). The court of appeals merely noted that events before a shooting, including the officers' tactics may be considered as part of the "totality of circumstances" which inform the Fourth Amendment. *Id.*

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[8] In *Mendez* the court of appeals had found that the act of shooting was itself reasonable under the Fourth Amendment and *Graham v. Connor*, 490 U.S. 386 (1989), but allowed the case to proceed under an independent provocation theory, which this Court rejected.

The "totality of the circumstances" means precisely that under this Court's cases – an analysis of every factor that may render a use of force reasonable or unreasonable, including events that may have occurred prior to a shooting. As this Court and others interpreting its decisions have repeatedly held:

> Because this test requires us to determine the reasonableness of an officer's actions, it is "not capable of precise definition or mechanical application," *Bell v. Wolfish,* 441 U.S. 520, 559 (1979), but rather "requires careful attention to the facts and circumstances of each particular case." *Graham,* 490 U.S. at 396, 109 S.Ct. 1865. . . . We must determine "whether the totality of the circumstances justifie[s]" the use of deadly force given all the circumstances of the case before us." *Tennessee v. Garner,* 471 U.S. 1, 8–9 (1985), *quoted with approval* in *Graham,* 490 U.S. at 396, 109 S.Ct. 1865. . . . '

Clem v. Corbeau, 284 F.3d 543, 550 (4th Cir. 2002). Similarly, the Fourth Amendment:

> forbade all "unreasonable searches and seizures." . . . In asking what triggers this test, in asking whether the government has acted *reasonably,* we must usually examine with care "the totality of the circumstances" or "the whole picture" of the case before us. . . . Rarely do we expect the Fourth Amendment's reasonablen ess standard to yield "readily, or even usefully, ... a neat set of legal rules," . . . , or "bright-line tests [or] mechanistic inquiries," . . . . .

United States v. Nicholson, 721 F.3d 1236, 1248 (10th Cir. 2013) (Gorsuch, J., dissenting) (citations omitted). There is simply no bar on considering all of the circumstances where liability is not imposed for pre-shooting conduct.

There is no circuit split on this issue. Every case Petitioners cite as illustrating a split from the court of appeals' opinion *agrees* with what it held, that "a Fourth Amendment violation cannot be established 'based merely on bad tactics that result in a deadly confrontation that could have been avoided . . . ." Pet. App. A-19. *See Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) (rejecting argument that officer was "liable for using excessive force because he created a situation in which the use of deadly force became necessary."); *Dickerson v. McClellan*, 101 F.3d 1151, 1160 (6th Cir. 1996)

(rejecting plaintiffs' contention that "officers should be held accountable for creating the need to use excessive force by their unreasonable unannounced entry."); *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995) (rejecting argument that Appellant could introduce evidence to prove the officers acts "preceding the seizure caused the circumstances which ultimately led to the need to use deadly force."); *Drewitt v. Pratt*, 999 F.2d 774, 779 (4th Cir. 1993) (rejecting idea that officer was liable under Fourth Amendment for creating a dangerous situation by running toward a vehicle with his weapon drawn and without his badge where the ultimate use of force thereafter was justified); *Fraire v. City of Arlington,* 957 F.2d 1268, 1275 (5th Cir. 1992) (rejecting liability premised on the argument that the officer "manufactured the circumstances that gave rise to the fatal shooting."); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (rejecting argument that "the Fourth Amendment prohibits creating unreasonably dangerous circumstances . . . ."); *Terebesi v. Torreso*, 764 F.3d 217, 235 n.16 (2d Cir. 2014) (collecting cases consistent with argument that it is not a Fourth Amendment violation to have "created the situation in which the use of deadly force became necessary . . . ."). As *Terebesi* emphasized, "[t]he common thread in these cases is the plaintiffs' attempt to argue that a use of force that might appear reasonable if considered in isolation was in fact unreasonable because the officers' prior conduct created the

danger of escalation." *Id.* The Appellate Court expressly rejected such an argument, which is consistent with these cases. Furthermore, even if there were some split from this overwhelming majority of circuits they would not support review of the position *favorable* to Petitioners which they do not contest.

Nor do these circuits split from the court of appeals' statement that the events preceding a shooting are encompassed in the "totality" of the circumstances relevant to the reasonableness of a use force. Pet. A-19–20; *see, e.g. Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (noting that separating a use of force from all consideration of the officer's preceding conduct "seems to us to miss the forest for the trees. The better way to assess the objective reasonableness of force is to view it in full context, with an eye toward the proportionality of the force in light of all the circumstances."); *Deering v. Reich*, 183 F.3d 645, 650 (7th Cir. 1999) ("In *Carter* . . . we indicated that the proper inquiry is whether the force used was reasonable in the totality of the circumstances, not 'whether it was reasonable for the police to create the circumstances.'")[9] (citing *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992)); *id.* at 651 (noting

[9] Petitioners claim that *Carter* represents a split from the court of appeals' reasoning that events prior to the shooting might be relevant to the Fourth Amendment. Pet. 21. It does not, as expressly noted in *Deering* and as addressed in the preceding paragraph.

officers' pre-shooting conduct, including "both the time and manner of the execution of the warrant are part of the totality of the circumstances."); *id.* at 652 ("[O]f course, *all* of the events that occurred around the time of the shooting are relevant.") (emphasis added); *Latits v. Phillips*, 878 F.3d 541, 548 (6th Cir. 2017) ("To determine whether Latits presented an imminent danger to officers or the public at the time Officer Phillips shot him requires analysis of both the moments before the shots were fired and the prior interactions between Latits and Phillips."). Although some cases may have ambiguous language concerning the relevance of pre-shooting conduct, such language refers to rejecting liability for pre-shooting acts as necessitating the shooting – and not rejecting that events occurring before a shooting could be relevant to it under the "totality of the circumstances," which is all that the court of appeals held.

Finally, this case is further a poor vehicle for the question Petitioners present because any pre-shooting conduct was in fact unnecessary to the decision below and references to such conduct were dicta. The court of appeals found material disputes of fact as to whether the officers used lethal force against Mr. Vos while he did not pose an immediate threat. Pet. App. A-18. This determination alone would warrant denying summary judgment as the court of appeals did, *see Tennessee v. Garner*, 471 U.S. 1, 11 (1985), rendering review as to the Court

of Appeal's discussion of prior conduct an advisory opinion.

III. REVIEW IS INAPPROPRIATE TO DETERMINE WHETHER A SUSPECT'S MENTAL ILLNESS MAY BE CONSIDERED PART OF THE "TOTALITY" OF CIRCUMSTANCES.

Whether a suspect's mental illness may be considered as part of the Fourth Amendment "totality of the circumstances" analysis is not certworthy, as Petitioner concedes. Pet. 24. This Court's Fourth Amendment jurisprudence has long required consideration of the "totality of the circumstances," the "whole picture," requires "careful attention to the facts and circumstances of each particular case," and is not reducible to individual factors. *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Clem v. Corbeau*, 284 F.3d 543, 550 (4th Cir. 2002) (citations omitted); *United States v. Nicholson*, 721 F.3d 1236, 1248 (10th Cir. 2013) (Gorsuch, J, dissenting). Any factor (including mental illness), may indicate a shooting was more or less reasonable depending on the circumstances. *E.g. Sallenger v. Oakes*, 473 F.3d 731, 739 (7th Cir. 2007) (citing *Abdullahi v. City of Madison*, 423 F.3d 763, 772 (7th Cir. 2005)); *Graham v. Connor*, 490 U.S. 386, 396 (1989). This cuts both ways – a suspect's mental illness may make a particular use of force less or perhaps more reasonable. "Mental illness, of course, . . . does not dictate the same police response in all situations." *Estate of Armstrong ex*

rel. Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 900 (4th Cir. 2016). But there is no reasonable dispute that mental illness may be a circumstance in the totality of them, nor is there an evident circuit split. *E.g.*, *id.*; *Martin v. City of Broadview Heights*, 712 F.3d 951, 962 (6th Cir. 2013); *Abdullahi v. City of Madison*, 423 F.3d 763, 772 (7th Cir. 2005); *Cruz v. City of Laramie, Wyo.*, 239 F.3d 1183, 1188 (10th Cir. 2001)*; Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016).

There is no reason for this Court to grant review to explain a view on the general relevance of mental illness in the *Graham* analysis. Mental illness is a circumstance like any other, and the significance depends, as every Fourth Amendment analysis does, on a fact-laden assessment of the circumstances of the particular case. *Graham*, 490 U.S. at 396 (citations omitted) ("Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application . . . its proper application requires careful attention to the facts and circumstances of each particular case.")

The court of appeals held no more than this. Pet. App. A-20–21 & n. 9. The court of appeals simply did not hold in *Vos*, nor has it ever held as Petitioner contends is the holding for review, that "defendant officers' interest in protecting themselves from an immediate threat of death or serious bodily harm is diminished because the person attacking the police is mentally ill." Pet. 24.

First, *Vos* could not have so held, because the Court expressly held that there were material disputes of fact as to whether officers faced an immediate threat in these circumstances. Pet. A-18. Given the facts demonstrating that the officers had decided to use only non-lethal force and the deliberate steps the officers took to implement this decision, it will be up to a trier of fact to determine whether it was reasonable for the officers who used deadly force to have done so.

Second, it is well-established in the Ninth Circuit that officers' interest in their own lives (or those of others) is not subject to a different rule for mentally ill persons. As the Ninth Circuit held in *Deorle v. Rutherford*:

> We do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed.

272 F.3d 1272, 1282–83 (9th Cir. 2001). The rule reflects the common-sense conclusion that whether a suspect is mentally ill is part of the "totality" of the

circumstances. *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010); Pet. App. A-20 n. 9. *Vos* did not alter these principles.

Furthermore, although Petitioners agree the issue is not worthy of certiorari, they argue it must nonetheless be reviewed and resolved if either of the other questions for review are granted, because this issue is "inextricably" related to such questions. This is untrue. As to the first question presented, there is little reason to grant review and determination of factors for the Fourth Amendment in a review concerning the ADA, particularly where the issue is not worthy of certiorari. In fact, such review would run headlong into the doctrine of constitutional avoidance. *E.g. Rescue Army v. Mun. Court of City of Los Angeles*, 331 U.S. 549, 568–69 (1947). The same is true as to the second question Petitioners present, whether the Fourth Amendment reaches any conduct before a shooting. It is unclear why this issue requires review of accommodating mentally ill persons afterwards, at the time of a shooting, the issue Petitioners present as their third.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,
PAUL L. HOFFMAN
Counsel of Record
SCHONBRUN SEPLOW
HARRIS & HOFFMAN
200 Pier Ave. Ste 226
Hermosa Beach, CA 90254
(310) 396-0731
hoffpaul@aol.com
Counsel for Respondents

Dated: March 11, 2019.