No. 18-672

IN THE

Supreme Court of the United States

CITY OF NEWPORT BEACH, a governmental entity; RICHARD HENRY; NATHAN FARRIS,

Petitioners,

vs.

RICHARD VOS, individually and as successor-in-interest to Gerritt Vos; JENELLE BERNACCHI, individually and as successor-in-interest to Gerrit Vos,

Respondents.

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

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The Petition demonstrated that the circuits are sharply divided on whether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody. Respondents' Brief in Opposition ("Opposition") does not argue otherwise. Instead, respondents argue that the circuits are united on a different issue: whether Title II applies to arrests. Respondents then try to paint the circumstances of the "arrest" as issues of fact. This strawperson approach mirrors the one the respondent in *City and County of San Francisco v. Sheehan*, Docket No. 13-1412, pursued. It did not defeat certiorari in *Sheehan*. It cannot defeat certiorari here.

The briefs from the Department of Justice and the United States that respondents cite in their Opposition do not aid respondents. Those briefs confirm the circuit split. They further confirm that "accommodations" are inappropriate when a mentally ill suspect is armed and violent.

The Opposition also fails to rebut the circuit conflict on whether the Fourth Amendment "totality of the circumstances" analysis looks at police conduct that took place before the use of force. Respondents' argument only highlights the conflict on that issue. Respondents' attempt to dismiss the Ninth Circuit's holding on that issue here as dictum fails.

Finally, the Opposition fails to show that review of the third issue would not be intertwined with review of either of the first two.

Respondent's Opposition does not disprove the need for certiorari. It highlights that need.

ARGUMENT

1. Respondents' Attack on the Petition's Statement—and Respondents' Own Argumentative Statement—Should Be Disregarded.

At page 3, footnote 1 of the Opposition, respondents argue the Petition "improperly portrays many facts in the light most favorable to Petitioners and omits facts favorable to Respondents." Respondents do not give any examples. They cannot. Petitioners have therefore provided a concise statement of the material facts that is based on materials readily available to the Court. That is what Rule 14.1.(g) requires.

Petitioners drew their facts from the circuit court's majority and dissenting opinions (Petition Appendix A) along with the video of decedent's attack, available on the Internet. (Pet. 6-7.) The majority opinion sets forth the record "in the light most favorable to the nonmovants . . . so long as their version of the facts is not blatantly contradicted by the video evidence." (App. 5-6.) The dissenting opinion states that "[t]here is no dispute as to what occurred, as much of it is

captured on 7-Eleven's video cameras." (App. 31.) Petitioners' summary of facts from those sources—facts the Court may readily check—is neither biased nor incomplete.

The Opposition's Statement, on the other hand, is flawed. It includes argumentative conclusions of fact that lack citation to any source. (E.g., Opposition, p. 4.) It mischaracterizes facts. For instance, the circuit opinion's statement that "the officers knew that Vos . . . was potentially mentally unstable or under the influence of drugs" (App. 8) becomes respondents' representation that, "The facts also indicate that the Defendants knew that they were dealing with a mentally ill person from the start of this incident." (Opposition, p. 3.)

The Opposition's statement also omits material facts. Respondents write that Vos "walked . . . with an object in his hand, and from the back of the 7-eleven [sic] ran toward the front door." (Opposition, p. 5.) They omit these undisputed facts:

- That Vos charged the officers in the parking lot (App. 14, 23, 31);
- That as Vos charged, he held an object in a hand raised over his head (App. 8);
- That the shooting officers believed the object Vos held to be scissors (App. 9); and
- That after Vos fell, a pronged mental display hook was found near him (App. 9.)

Respondents thus address a petition discussing armed and violent suspects by omitting the facts that Vos was armed and violent.

Both respondents' statement and their attacks on the Petition's statement should be disregarded. The Petition's statement—and the undisputed facts in the circuit opinion and video—should guide the Court in determining whether to grant Certiorari.

2. The Opposition Fails to Rebut the Petition's Showing That Review of the Title II Issue Is Necessary.

A. The Opposition Does Not Rebut the Circuit Split.

The Petition established that the circuits are split on whether Title II of the ADA requires officers facing an armed, violent, and mentally ill suspect to provide the suspect "reasonable accommodations." (Petition, pp. 13-15.) Respondents make no effort to show otherwise. Instead, they reframe the question as whether Title II applies to *arrests*. They argue there is no circuit split on whether officers "must provide 'reasonable accommodations' to disabled suspects when it is safe to do so." (Opposition, p. 8.) They then characterize the "safe to do so" qualification as an issue of fact. (Opposition, pp. 17-19.)

The respondents in *City and County of San Francisco v. Sheehan*, No. 13-1412, took the same approach. (*Sheehan* Brief in Opposition, dated

October 13, 2014, pp. 9-16.) It did not work then. It should not work now. The circuit split identified in *Sheehan* has not disappeared. *See*, *e.g., Brunette v. City of Burlington, Vermont*, No. 2:15-CV-00061, 2018 WL 4146598, at *33-*35 (D. Vt., Aug. 30, 2018) (noting split and following the *Vos* circuit court opinion).

Indeed, the statements of interest from the United States that respondents cite to support their position (Opposition, p. 9, n. 4) acknowledge the circuit split. *See* Statement of Interest of the United States of America, *Robinson v. Farley*, 15-00803 (D.D.C. 2016), 7-8, https://www.ada.gov/briefs/robinson_soi.pdf (last checked March 14, 2019); Statement of Interest of the United States, *S.R. v. Kenton County*, 15-143 (N.D. Ky. 2015), 32, n. 50, https://www.justice.gov/crt/file/780706/download (last checked March 14, 2019).

The split is on an issue of law, not fact. *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) held that Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents before the officer secures the scene and ensures that there is no threat to human life. The Ninth Circuit has held that Title II *does* apply to such responses. (*See* App.26-27.) That is a split of authority on an issue of law.

Respondents' attempt to switch the focus from use of force against an armed, violent suspect to arrests generally fails because "arrests" is too broad a category of police interactions. "Arrests" include situations that have nothing to do with the use of force at issue here, situations in which Title II's protections are directly relevant. For instance,

respondents argue that *Delano-Pyle v. Victoria City, Tex.*, 302 F.3d 567 (5th Cir. 2002) establishes that the Fifth Circuit agrees with the other circuits on application of Title II. (Opposition, pp. 8, 10-11.) *Delano-Pyle* arose out of an arrest in which officers mistook the suspect's disabilities as evidence of a crime—a form of disability discrimination. *Id.* at 570-571. After the arrest, the officers failed to accommodate the suspect's disabilities during interrogation. *Id.* at 571. *Delano-Pyle* did not involve use of force, deadly or otherwise.

There is little question that Title II protects suspects from arrests based on disabilities rather than criminal activity. There is little question that it requires accommodating disabilities while the suspect is in custody.

But there is a question whether Title II protects an armed, violent individual from use of force. That is not an arrest based on disability. It is a use of force based on the suspect's status as armed and violent. It is not a failure to accommodate after arrest, after the area is secured and there is no threat to life. It is a response to a potential threat to life and safety.

That is the question on which the circuits split. It is a question of law. Respondents fail to show otherwise.

B. The Federal Government Briefs and Resources Respondents Cite *Support* Petitioners' Contention That an Armed, Violent Attacker Cannot Be "Accommodated."

Respondents cite the United States' Statements of Interest in two district court cases, as well as the United States' amicus brief in *Sheehan*, *supra*, Docket No. 13-1412 as supporting their position. (Opposition, p. 9 & n. 4.) True, those papers express a position that Title II applies to all police interactions. But the papers also assert that Title II generally does *not* require reasonable modifications where officers are dealing with armed and violent individuals. That supports petitioners' position.

In the *Sheehan* amicus brief, the United States explained at length that "a modification will ordinarily not be reasonable due to safety concerns when officers arrest an individual with a disability who is armed and violent." *Brief for the United States as Amicus Curiae Supporting Vacatur in Part and Reversal in Part* in Docket No. 13-1412, dated Jan. 15, 2015, 18; *see* discussion at 15-21. According to the brief, a public entity's showing that officers were arresting an armed and violent individual should "'by itself ordinarily [be] sufficient' to warrant summary judgment on a failure-to-accommodate claim." *Id.* at 19 (brackets in original), quoting *U.S. Airways v. Barnett*, 535 U.S. 391, 405 (discussing accommodations that will be unreasonable in the run of cases). The United States argued that a plaintiff should be able to defeat summary judgment by showing "special

circumstances" under which officers had time to implement a proposed modification that would not have created significant risks—such as by demonstrating the suspect was no longer violent and armed at the time of the arrest. *Id.* at 20-21.[1]

Similarly, the United States' Statement of Interest in *S.R. v. Kenton County*, *supra*, asserts that "a reasonable modification may not be required in situations where a serious threat of injury and other extreme behavior is involved." *Id.* at 34. The Statement uses as examples cases in which "the individuals were described as violent—one had a dangerous weapon—and therefore the officer had to act swiftly to prevent injury to himself or to others." *Id.* at 34-35. And the United States' Statement of Interest in *Robinson v. Farley*, *supra*, points out that under 28 C.F.R. § 35.139(a), a modification is not required in the law-enforcement context if it would interfere with an entity's ability to address a significant safety threat. *Id.* at 8-9.

Respondents also point to resources from the Department of Justice as providing guidance in accommodating disabled persons—guidance that they contend obviates the need for Supreme Court

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[1] Respondents restate this position as an argument that a dispute of fact on whether a particular accommodation of an armed and violent suspect will defeat summary judgment. (Opposition, at p. 18.) They contend that "this appears consistent with every circuit which has addressed the matter." (*Id.*) Incorrect. It is inconsistent with the Fifth Circuit's holding in *Hainze*, *supra*, 207 F.3d 795, 801 that Title II does not apply at all.

guidance "in the absence of a circuit split." (Opposition, at pp. 15-16 and n. 6.) Yet those resources also support the impracticality of applying Title II to an armed and violent suspect. *See* U.S. DEPARTMENT OF JUSTICE, EXAMPLES AND RESOURCES TO SUPPORT CRIMINAL JUSTICE ENTITIES IN COMPLIANCE WITH TITLE II OF THE AMERICANS WITH DISABILITIES ACT, https://www.ada.gov/cjta.html (last checked March 20, 2019) at Heading I (limitations to Title II includes individuals who pose a "direct threat" to the health or safety of others; officers need not make modifications that would interfere with their response to a safety threat); U.S. DEPARTMENT OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, https://www.justice.gov/crt/file/883296/download (last checked March 20, 2019) at 81, n. 94 ("BPD would not have to make the requested modifications if the person requiring the modification poses a direct threat to the safety of the officer or others").

These positions are consistent with those of the Fourth, Sixth, and Eighth Circuits finding accommodation unreasonable when dealing with such a suspect—either categorically or under the circumstances of the case. (*See* list in Petition, 14-15.) They are inconsistent with the Ninth Circuit's decision in this case, and with *Haberle v. Troxell*, 885 F.3d 170, 180-181 (3rd Cir. 2018), both of which require officers to accommodate armed and violent suspects. And they cannot be reconciled with the Fifth Circuit's position in *Hainze*, *supra*, 207 F.3d 795, 801 that Title II does not apply at all.

These resources confirm the need for this Court to grant review, to determine whether Title II applies when officers deal with an armed and violent suspect; and, if so, what accommodations are "reasonable" (or possible).

C. This Case Is Ripe for Review

Respondents argue that this case should not be reviewed until after it is tried. They contend that material disputes of fact exist on whether the officers were faced with exigent circumstances precluding reasonable accommodations. (Opposition, pp. 17-19.) Incorrect.

The facts key to review are undisputed. Vos "cut someone with scissors . . . and ultimately charged at officers with something in his upraised hand." (App. 23.) A pronged metal display hook was found near the place he collapsed. (App. 9.) He was therefore armed and violent. The circuits split on whether Title II requires law enforcement officers to provide accommodations to such a person in the course of bringing him into custody. (Petition, pp. 13-15.) That is an issue of law.

Respondents argue there are issues of fact on whether the officers should have done more to accommodate Vos before he charged the officers. (Opposition, pp. 18-19.) Their focus is misplaced. Nothing the officers did or did not do before Vos's charge injured Vos. Vos's death resulted from what occurred in the few seconds between the beginning of his charge and the police use of force. What

happened in those seconds is not disputed. It was captured on video.

Further, the undisputed facts establish that before Vos charged the officers, the officers did not take action toward Vos, or even enter the store. Instead, they waited outside. (App. 6-8.)

Respondents complain that the officers should have communicated with Vos before he charged them. (Opposition, pp. 18-19.) But they were preparing to communicate with him: One of the officers "set up a public address system, getting ready to communicate with Vos" when Vos charged. (App. 8.)

Respondents therefore appear to argue a question of fact exists on whether the officers should have communicated with Vos *sooner*. That question is material only if Title II required the officers to accommodate an armed, violent, and apparently mentally ill individual such as Vos.

The circuits are split on that issue. And it is an issue of law. Viewing the facts in the light most favorable to respondents—as the circuit court did (App. 5-6.)—will not eliminate the issue. The case is therefore ripe for review.

3. Respondents Fail to Rebut the Need for Review of Whether "Totality of the Circumstances" includes Police Conduct before the Use of Force.

Respondents assert two arguments against reviewing this issue. Neither succeeds.

First, they argue that there is no split of authority on this issue. They contend it is settled that the totality of circumstances includes every factor, regardless of whether it occurred before the event giving rise to the use of force. (Opposition, pp. 19-25.) Yet they fail to address the split of authority described at p. 21 of the Petition, between circuits that deem circumstances leading up to the use of force irrelevant and those deeming the circumstances relevant

Second, they argue that the Ninth Circuit's discussion of police conduct before Vos charges the police to be dicta. (Opposition, pp. 25-26.) Respondents appear to contend that because the circuit court found questions on whether Vos posed an immediate threat at the time the force was used, the court's analysis of police conduct before Vos charged was unnecessary. (*Id.*) Incorrect. "It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion." *Richmond Screw Anchor Co. v. U.S.*, 275 U.S. 331, 340 (1928). The panel majority based its decision not only on the "eight seconds" of Vos's charge, but also on the "upwards of 15 minutes" beforehand. (App. 19; *see* discussion at App. 13-21.) Neither reason for its conclusion is dictum.

4. Respondents Fail to Show That The Court Should Not Review the Third Issue if it Reviews Either of the First Two.

Respondents contend "there is little reason" to review the Ninth Circuit's conclusion that an armed, violent suspect's mental illness affects an officer's need to use deadly force to protect against the suspect's attack. (Opposition, p. 29.) Incorrect. Whether Title II requires an officer to accommodate such an attacker invariably raises the question whether such an attacker must also be "accommodated" somehow under the Fourth Amendment. And an analysis of the totality of the circumstances when dealing with such a suspect will also touch upon the suspect's mental illness as one of those circumstances. Respondents fail to show otherwise.

CONCLUSION

For the reasons set forth in the petition and this reply, the petition should be granted.

Dated: March 25, 2019.

Respectfully Submitted,

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