No. 24-975

In the Supreme Court of the United States

LATRISHA WINDER, AS NEXT FRIEND OF J. W., A MINOR AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STEPHEN WAYNE WINDER, DECEASED, ET AL., PETITIONERS,

v.

JOSHUA M. GALLARDO, ET AL., RESPONDENTS.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.*, permits liability absent a showing of discriminatory intent.

2. Assuming Title II permits such liability, whether the Fifth Circuit correctly held that petitioners' claim regarding Young County's purported failure to adopt mental-health-crisis policies fails for lack of a causal link between the absence of the policy and Steve Winder's death.

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INTRODUCTION

On a summer night in 2021, Deputy Joshua Gallardo was sent to check on Steve Winder, who was heavily intoxicated, had a gun, and had threatened to kill himself. When Deputy Gallardo arrived at the house, Steve twice ignored commands to "put [the gun] down." Pet.App.18a. Fearing for his life and the life of a bystander, Deputy Gallardo made the split-second decision to fire his own weapon, and Steve was tragically killed. Presented with these factual allegations, the Fifth Circuit held neither

Deputy Gallardo nor the County were liable under Title II of the Americans with Disabilities Act ("ADA") because Steve was not shot "by reason of" any alleged disability—he was shot because of the deadly threat he posed.

Petitioners disavowed any claim that Deputy Gallardo engaged in disability discrimination by responding to Steve's threat—the alleged disability discrimination that took place *during the exigency*—by conceding that Deputy "Gallardo didn't directly shoot Steve 'by reason of' his depression." En Banc Pet. 29, No. 24-10017 (5th Cir. Oct. 15, 2024) Dkt. 105. Instead, petitioners (at 2) argue solely that the County violated the ADA by failing "to have a policy for adequately conducting welfare checks in the first place." The Fifth Circuit, however, did not find the ADA inapplicable to the claim challenging the County's policies; it simply held that the County's policies did not cause Steve's injuries. Petitioners' question presented, which asks whether Title II applies when police officers face "exigent circumstances," is therefore not presented here.

This case also implicates no split. Petitioners identify no court that disagrees with the Fifth Circuit's holding that failure to enact a mental-health policy to govern police conduct does not trigger liability under Title II of the ADA when an intervening threat causes the disabled person's injuries. And petitioners' alleged "3-1" split over whether Title II applies to on-the-ground officers' responses to exigencies is overstated. All circuits agree that Title II applies to arrests and police encounters. The Fifth and Ninth Circuits merely disagree whether Title II applies when police respond to life-threatening exigencies. This Court need not intervene over a shallow difference between courts that is not squarely implicated in this case.

The Fifth Circuit is also right on the merits. The complaint fails to sufficiently allege that the County's policies caused Steve's death. And critically, the petition incorrectly asserts that Title II imposes liability absent evidence of discriminatory intent. The Court should resolve that antecedent question before reaching petitioners' question presented. Likewise, because petitioners claim only damages, they cannot recover because the complaint does not allege discriminatory intent.

But in all events, Title II does not require police staring down the barrel of a gun to tick through a checklist of reasonable accommodations. A disabled person is not being denied access to any service, program, or activity, as the statute requires, when he poses a deadly threat and the police respond accordingly. *See* 42 U.S.C. § 12132. Nor is police response to a life-threatening exigency "discrimination." *Id.* Holding otherwise would not only extend the statute to deadly emergencies in contravention of background principles, it would circumvent century-old immunity doctrines designed to protect police who make judgment calls in the line of duty. That is not the statute Congress wrote, nor should this Court make the ADA a new home for excessive-force claims.

This Court has denied petitions raising variations of the question presented both before and after *Sheehan*.[1] The same result should follow here.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12132 provides:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such

[1] *See City of Newport Beach v. Vos*, 587 U.S. 1014 (2019); *De Boise v. St. Louis County*, 575 U.S. 1025 (2015); *City of New York v. Green*, 562 U.S. 947 (2010); *Hainze v. Richards*, 531 U.S. 959 (2000).

disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12131(2) provides:

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

STATEMENT

A. Statutory Background

Congress enacted the ADA in 1990. The ADA contains three main titles. Title II, at issue here, targets "State [and] local government[s]." 42 U.S.C. § 12131(1). Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id.* § 12132.

A "qualified individual" is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, … or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2). A "disability" includes "a physical or mental impairment that substantially limits one or more major life activities of such individual." *Id.* § 12102(1)(A).

Via a twice-removed reference to Title VI's remedies, Title II plaintiffs may sue public entities for money damages or injunctive relief. *See id.* § 12133; 29 U.S.C. § 794a(a)(2). Title VI itself contains no textual cause of action, but this Court has implied one for violations of Title VI's prohibition on intentional race-, color-, or national origin-based discrimination. *See Alexander v. Sandoval*, 532 U.S. 275, 278-81 (2001).

B. Factual Background

1. Steve Winder lived in Graham, Texas, with his wife, Latrisha, and one of his children. Pet.App.43a-44a. Graham is situated in a rural area of Young County. Pet.App.43a-44a.

On June 27, 2021, Steve was drinking and swimming in his pool with his family while Latrisha was away at National Guard training in Virginia. Pet.App.45a. After accidentally getting his phone wet, Steve plugged in Latrisha's old phone and swapped out the SIM card. Pet.App.45a. Upon powering on the phone, Steve discovered messages between Latrisha and her ex-husband. Pet.App.3a. Latrisha's ex-husband had asked to reconcile with Latrisha. Pet.App.3a.

Although Latrisha had declined her ex-husband's overtures, Steve became upset. Pet.App.46a. He showed the messages to Latrisha's mother, Lou Anne, who lived next door. Pet.App.3a. Lou Anne tried to calm Steve down. That evening, however, Lou Anne started receiving frantic text messages from Latrisha, who could not get in contact with Steve. Pet.App.3a. Steve had a history of depression, excessive drinking, and threatening suicide. Pet.App.3a, 44a. But Steve had achieved stability, working as a successful auto mechanic and taking medication for his depression. Pet.App.43a-44a. After receiving Latrisha's messages, Lou Anne went to check on Steve and,

after speaking with him, returned to her home. Pet.App.3a.

Unfortunately, the situation continued to escalate. Latrisha later called Lou Anne, explaining that Steve had sent her pictures of himself holding a gun to his head along with the message that he "could not bear it anymore." Pet.App.3a. So Lou Anne went back over to Steve's house. Pet.App.3a. She found Steve in his bedroom with his gun tucked between the bed's sideboard and mattress. Pet.App.48a. Meanwhile, Latrisha called the Young County Sheriff's Department, requesting a welfare check. Pet.App.3a. Latrisha told the dispatcher that Steve had sent her photos of himself holding a gun to his head. Pet.App.3a.

Deputies Gallardo and Simon Dwyer were dispatched to the Winders' home. Pet.App.3a. The dispatcher told the deputies that Steve had a gun, that he had sent his wife photos of himself holding that gun, and that he had made statements indicating he was willing to use the weapon. Pet.App.49a. Deputy Gallardo knew that Steve was "suicidal." Pet.App.50a. But the dispatcher did not tell Deputy Gallardo about Steve's history of depression.

The deputies drove in separate cars, and Deputy Gallardo arrived first. Pet.App.3a. Steve's niece accompanied Deputy Gallardo to the front door of the Winders' home and knocked on the door. Pet.App.3a; Pet.App.52a. After hearing the knock on the door, Lou Anne tried to retrieve Steve's gun. Pet.App.3a-4a. But Steve became angry, "yelling 'I don't give a [expletive]. This is my home.'" Pet.App.4a (alteration in original). Steve—who had a blood alcohol content over twice the legal limit—took the gun. Pet.App.4a.

For his part, Deputy Gallardo remained on the porch, opened the front door, and announced: "Hello, Sheriff's

Office." Pet.App.4a. When he heard no response, Deputy Gallardo "called out 'Steve' in a louder voice. Steve responded 'What?' from the bedroom, and Lou Anne emerged saying 'We're right here. Can I help you?'" Pet.App.4a.

At that point, Lou Anne noticed that Steve was holding his gun and walking towards the bedroom door. Pet.App.4a. Lou Anne asked Steve to "put it up" and warned Deputy Gallardo that "he's got a gun." Pet.App.4a. "Deputy Gallardo drew his service weapon, radioed 'he's got a gun, he's got a gun,' and told Steve 'put it down man, put it down.'" Pet.App.4a. Deputy Gallardo then shot Steve in the chest one time. Pet.App.4a. The entire incident played out in less than half a minute. Pet.App.4a.

Deputy Dwyer arrived on the scene shortly thereafter. Pet.App.4a. Although the "[d]eputies rendered aid until emergency medical services arrived a few minutes later, … Steve ultimately died." Pet.App.4a.

2. Petitioners—Latrisha, Steve's estate, and Steve's children—filed their complaint on June 26, 2023. Pet.App.39a. Petitioners brought damages claims against Young County, Deputy Gallardo, and Sheriff Robert T. Babcock under 42 U.S.C. § 1983 and, as relevant here, the ADA.

As to the ADA claims, Petitioners alleged that the County "discriminated against Steve in two respects." Pet.App.91a. "First, Young County, through the Young County Sheriff's Office, discriminated against Steve by treating him like a criminal suspect, rather than like a person with a disability" (here, depression), "as evidenced by Deputy Gallardo's conduct at the scene and by fatally shooting Steve." Pet.App.92a.

"Second, Young County failed to reasonably accommodate Steve's disability" by failing "to adopt a policy protecting the welfare of Steve," and failing "to adopt a policy for responding to threatened suicide calls with well-established crisis intervention techniques, including responding with a mental health professional, therefore resulting in discriminatory treatment by Deputy Gallardo." Pet.App.92a.

The district court dismissed the complaint. Pet.App.36a. As to petitioners' ADA claims, the district court reasoned that the "ADA does not reach an officer's conduct when they act in the face of exigent circumstances." Pet.App.33a (citing *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000)). The district court found that life-threatening exigent circumstances existed, given Deputy Gallardo's reasonable belief that Steve was armed, aggressive, and advancing towards him, which foreclosed the application of Title II. Pet.App.34a-35a.

3. The Fifth Circuit affirmed. Pet.App.2a. It separately addressed each of petitioners' two discrimination claims—one premised on allegedly discriminatory at-the-scene conduct and the other on the County's failure to enact policies at some undefined point in the past.

First, the Fifth Circuit rejected petitioners' claim that Young County, through Deputy Gallardo, had discriminated against Steve by "fatally shooting" him. Pet.App.92a. The panel noted that ADA claims are barred "where police officers face exigent circumstances." Pet.App.13a (citing *Hainze*, 207 F.3d at 801). And here, "there were indeed exigent circumstances—Steve 'was a suicide risk *and* had the means to act on it.'" Pet.App.14a (quoting *Clark v. Thompson*, 850 F. App'x 203, 211 (5th Cir. 2021)). "These exigent circumstances," the court held, resembled those in *Hainze* and "foreclose[d] ADA relief." Pet.App.14a. "Moreover," the claim also failed for

another reason: causation. Petitioners could not "show that Steve was discriminated against 'by reason of his disability' (here, depression)," since no facts showed that "Deputy Gallardo shot Steve *because* Steve was depressed." Pet.App.14a.

The court separately rejected petitioners' claim that Young County failed to reasonably accommodate Steve's disability by refusing to adopt policies to protect his welfare or to respond to "threatened suicide calls." Pet.App.92a; *see* Pet.App.14a. That theory, the court reasoned, failed to allege causation, because it did not "demonstrate that Deputy Gallardo shot Steve 'by reason of' his depression." Pet.App.14a. Instead, the allegations in the complaint confirmed that "Deputy Gallardo shot Steve 'by reason of' circumstances that would lead an objectively reasonable officer to reasonably believe that Steve was reaching for or had a gun." Pet.App.14a.

4. In their rehearing petition, petitioners conceded that "Gallardo didn't directly shoot Steve 'by reason of' his depression," but contended that the County could still be liable because it allegedly "failed to have policies for reasonably accommodating Steve's mental illness." En Banc Pet. 29. The Fifth Circuit denied rehearing en banc without dissent. Pet.App.37a-38a.

REASONS FOR DENYING THE PETITION

This petition is an unsuitable vehicle for considering petitioners' question presented, because petitioners' claim does not implicate that question at all. The Fifth Circuit held that Steve was shot because he posed a deadly threat, not because of his disability or because of some past failure to enact mental-health policies. That fact-bound causation holding is independent of any determination about Title II's applicability in life-threatening

exigent circumstances. The question presented is thus neither implicated nor outcome-dispositive here.

Petitioners also overstate the disagreement between the circuits. Petitioners identify no circuit split on the Fifth Circuit's case-dispositive holding that Young County's policies did not cause Steve's injuries. Nor is there a circuit split on whether Title II applies to arrests. The Fifth Circuit merely holds that Title II does not apply when police face direct threats to human life, and only the Ninth Circuit has expressly held otherwise.

In any event, the decision below is correct. Petitioners never alleged facts demonstrating that the absence of petitioners' preferred policies caused Steve's death. Nor did petitioners ever allege that Steve was subject to intentional discrimination, as Title II requires and as is required for damages. Moreover, Title II does not apply in cases like this, which do not involve a public entity service, program, or activity; involve an individual who poses a deadly threat; and do not involve any exclusion, denial, or differential treatment. To extend the ADA to such circumstances would threaten public and officer safety, defy traditional exigency exceptions, and circumvent longstanding immunity doctrines. This Court should not entertain petitioners' attempt to remake the law of policing and convert Title II into a surrogate home for excessive-force claims.

I. This Case Is A Poor Vehicle For Resolving The Question Presented

A. This Case Does Not Implicate The Question Presented

Recall that petitioners raised two theories of ADA liability below—one grounded in allegedly discriminatory at-the-scene conduct and the other premised on Young County's failure to change its policies at some point in the

past. *See supra* pp. 7-8. The Fifth Circuit rejected the at-the-scene theory for two reasons: *Hainze* and causation. Pet.App.13a-14a; *supra* pp. 8-9.

The court then addressed petitioners' separate theory "that Young County lacked polices to 'protect [Steve's] welfare' or 'respond[] to threatened suicide calls with well-established crisis intervention techniques,'" which led to the shooting. Pet.App.14a. The Fifth Circuit rejected this theory purely on causation grounds: Petitioners' allegation about Young County's failure to adopt petitioners' preferred policies "doesn't demonstrate that Deputy Gallardo shot Steve 'by reason of' his depression. Deputy Gallardo shot Steve 'by reason of' circumstances that would lead an objectively reasonable officer to reasonably believe that Steve was reaching for or had a gun." Pet.App.14a. As to this theory, the panel did not rely on *Hainze* whatsoever.

The only theory of liability presented in the petition (one of failing to adopt policies), therefore, has nothing to do with the question presented. The Fifth Circuit did not hold that petitioners' failure-to-adopt-a-better-policy theory failed because Title II does not apply in exigent circumstances. So, addressing the question in this case would require this Court to consider the applicability of *Hainze* to petitioners' policy theory without the benefit of any analysis on that question by the court below. And resolving the question presented one way or the other would not disturb the Fifth Circuit's resolution of the only claim pressed by petitioners before this Court.

B. Even Assuming This Case Implicates The Question Presented, This Case Provides A Particularly Unsuitable Vehicle For Resolving It

Even if the Fifth Circuit had rejected petitioners' ADA claims solely on the basis that Title II does not apply

in exigent circumstances, there is no reason to think that such a decision would have been outcome determinative. Petitioners' ADA claim fails for myriad additional reasons.

First, petitioners have never identified with specificity which accommodations they wanted Young County to implement, whether they ever asked the County to implement those accommodations, or why those accommodations would have been reasonable. Petitioners made generic allusions to Young County "failing and refusing to adopt a policy protecting the welfare of Steve" and "failing and refusing to adopt a policy for responding to threatened suicide calls with well-established crisis intervention techniques, including responding with a mental health professional." Pet.App.92a. And now, before this Court, petitioners argue that Young County should have sent a "mental-health professional" to perform a welfare check on Steve who was trained in "crisis-intervention techniques" like "de-escalation, non-confrontation, and patience." Pet. 12.

But petitioners never asked Young County to make these or any other accommodations. And in the Fifth Circuit, an ADA plaintiff bears the burden of showing he requested "an accommodation in 'direct and specific' terms." *Windham v. Harris County*, 875 F.3d 229, 237 (5th Cir. 2017) (citation omitted). Since petitioners failed to do so, their ADA claim can only succeed if Steve's "'disability, resulting limitation, and necessary reasonable accommodation' were 'open, obvious, and apparent' to the entity's relevant agents." *Id.* (citation omitted). But, again, the complaint alleged only that Steve was depressed; it contained no allegations as to the resulting limitations from his disability or a reasonable accommodation that would have been obvious to Young County. Petitioners' failure to request an accommodation means

that Young County "cannot be held liable for failing to provide one." *Id.* at 239 (citation omitted).

Even if petitioners had requested accommodations from Young County, the touchstone of an ADA reasonable-accommodation claim is the requirement that the requested accommodation be reasonable. *See, e.g.*, *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085-86 (11th Cir. 2007). Petitioners have never shown that these accommodations are reasonable, which dooms their claim. *See, e.g.*, *Waller ex rel. Est. of Hunt v. Danville*, 556 F.3d 171, 175-76 (4th Cir. 2009) (finding "unreasonable" accommodations to "summon[] mental health professionals and family members and administer[] medication"); *Roell v. Hamilton County*, 870 F.3d 471, 489 (6th Cir. 2017) (rejecting as unreasonable accommodations involving "de-escalation techniques" or calling "EMS services before engaging"). Certain of petitioners' cited cases even reach a similar outcome. *Seremeth v. Bd. of Cnty. Comm'rs*, 673 F.3d 333, 340-41 (4th Cir. 2012) (cited at Pet. 20-21); *Bircoll*, 480 F.3d at 1085-86 (cited at Pet. 19-20).[2]

Second, as respondents argued before the district court, Steve was not disabled at the time of the incident. To be sure, the complaint included the conclusory allegation that Steve suffered from "major depression" that rendered him disabled. Pet.App.91a. But that point is just a barebones legal conclusion disguised as a factual allegation. To qualify as a disability, Steve's depression had to impair a major life activity. *See* 42 U.S.C. § 12102(1)(A).

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[2] Petitioners' out-of-circuit district-court cases (at 24) are not to the contrary. Though many of the cases settled following the motion-to-dismiss orders cited in the petition, the one case that actually went to trial resulted in a take-nothing verdict in favor of the defendants. *See* Amended Judgment, *Buben v. City of Lone Tree*, No. 1:08-cv-00127 (D. Colo. Feb. 7, 2011), Dkt. 153.

And the complaint's other allegations render that conclusion implausible. Petitioners allege that Steve was gainfully employed as "a successful auto mechanic," lived in a house on nine acres of land, was medicated, and had not had a suicidal episode for over ten years before the incident. Pet.App.43a-44a, 91a. And the complaint alleges that when Deputy Gallardo arrived on the scene, Steve was "not suicidal." Pet.App.40a, 48a, 51a, 53a. Because the complaint failed to plausibly allege that Steve was disabled, the ADA did not apply.

Third, petitioners provide this Court no reason to believe that their suit for money damages will ever succeed. *See* Pet.App.93a-94a (requesting damages for ADA claims). To obtain damages under the ADA in the Fifth Circuit, plaintiffs must show intentional discrimination. *Miraglia v. Bd. of Supervisors of La. State Museum*, 901 F.3d 565, 574 (5th Cir. 2018). But petitioners' complaint does not show intentional discrimination. The complaint did not allege that Deputy Gallardo shot Steve because Steve was disabled. (Even if it had, the Fifth Circuit squarely rejected that theory, and petitioners disclaimed it in their en banc petition. *Supra* pp. 8-9.) And the complaint also did not allege that Young County's decision not to adopt a mental-health-crisis policy was motivated by disability-based considerations. That pleading deficiency further undercuts petitioners' ADA claim—even if this Court reverses the decision below, petitioners will get no relief.

Fourth, the complaint also failed to allege that Young County was aware of the limitations associated with Steve's disability. A "critical component" of a reasonable-accommodation claim "is proof that 'the disability and its consequential limitations were known by the [entity providing public services].'" *Windham*, 875 F.3d at 236 (citation omitted) (alteration in original). The "ADA does

not require clairvoyance." *Hedberg v. Ind. Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995). True, the complaint alleged that Young County knew of Steve's disability because Latrisha had described Steve as depressed to the dispatcher. *See* Pet.App.91a. But "[m]ere knowledge of the disability is not enough; the service provider must also have understood 'the limitations [the plaintiff] experienced … *as a result of* that disability.'" *Windham*, 875 F.3d at 236 (citation omitted) (alteration in original). Because the complaint alleged neither the limitations that Steve experienced due to his disability nor Young County's knowledge of those limitations, petitioners' ADA claim fails for this reason too. *See id.* at 236-37.

In sum, even if the Court were to grant review and hold that Title II applies when officers face life-threatening exigent circumstances, the outcome of petitioners' suit would be no different.

II. Petitioners Overstate The Circuit Split

1. Petitioners identify no split from the Fifth Circuit's analysis of their claim that Young County lacked appropriate policies. Again, the Fifth Circuit dispatched with this claim on causation grounds, not because Title II does not apply. *See supra* p. 9; Pet.App.14a.

Not only is that conclusion inherently fact-bound, but petitioners fail to identify any court that disagrees with the Fifth Circuit's analysis. To the contrary, there is widespread agreement that cities and localities do not discriminate on the basis of disability when a disabled person's threatening behavior is the intervening cause of his injury.

The Sixth Circuit, for example, rejected an ADA claim that a county sheriff lacked an adequate policy for dealing with disabled people because the cause of the disabled person's injury was his "violent, threating

behavior." *Thompson v. Williamson County*, 219 F.3d 555, 558 & n.5 (6th Cir. 2000). The Fourth Circuit held that a county's failure to train its officers could not form the basis of an ADA claim where an arrestee's "objectively verifiable misconduct" was the cause of his injuries, not his disability. *Bates ex rel. Johns v. Chesterfield County*, 216 F.3d 367, 373 & n.3 (4th Cir. 2000) (Wilkinson, J.). And the Third Circuit held that "[a] municipality's failure to train its police is not actionable unless and until that failure *leads directly to* a denial of a needed accommodation or improper discrimination. It is the denial that gives rise to the claim." *Haberle v. Troxell*, 885 F.3d 170, 178 n.7 (3d Cir. 2018) (emphasis added). This widespread agreement on the causation analysis—the Fifth Circuit's actual reason for rejecting petitioners' only remaining claim—further undermines petitioners' arguments in favor of review.

2. Petitioners' asserted split over the question presented is also overblown. While petitioners claim that the circuits are divided 3-1 over whether Title II of the ADA applies to officers facing exigent circumstances, Pet. 2, 14, the courts of appeals agree about the ADA's application in all but a narrow set of cases.

a. The circuits agree that Title II applies when officers arrest individuals with disabilities. All three circuits that petitioners (at 16) identified as opposite the Fifth Circuit have held or indicated that "Title II applies to arrests." *Sheehan v. City & County of San Francisco* ("*Sheehan I*"), 743 F.3d 1211, 1232 (9th Cir. 2014); *accord Bircoll*, 480 F.3d at 1084; *Seremeth*, 673 F.3d at 339.

The Fifth Circuit agrees. It has long "recognized Title II claims" when "officers … fail reasonably to accommodate the known limitations of disabled persons they detain." *Windham*, 875 F.3d at 235-36. For instance, the Fifth Circuit upheld a jury verdict finding that police

failed to accommodate a deaf arrestee's needs. *Delano-Pyle v. Victoria County*, 302 F.3d 567, 576 (5th Cir. 2002). And the court found a genuine factual dispute when officers allegedly failed to accommodate a handcuffed and detained child's disability. *Wilson v. City of Southlake*, 936 F.3d 326, 331 (5th Cir. 2019). As both the Third and First Circuits have recognized, "*no* court of appeals has held that the ADA does not apply at all" "during a law enforcement encounter." *Haberle*, 885 F.3d at 181 (emphasis added); *accord Gray v. Cummings*, 917 F.3d 1, 16-17 (1st Cir. 2019).

The Fifth Circuit deviates only in cases involving life-threating emergencies. In *Hainze*, the court held that "Title II does not apply to an officer's on-the-street responses to reported disturbances" when the officer is still "securing the scene and ensuring that there is no threat to human life." 207 F.3d at 801. But *Hainze* was a narrow holding on its own terms. There, officers encountered a man "under the influence of alcohol and anti-depressants" and wielding a knife. *Id.* at 797. The man cursed at the officers and approached with his knife, twice refusing commands to back down. *Id.* Only when the man was "within four to six feet" of an officer did police shoot him in the chest. *Id.* The court emphasized that it was not foreclosing other legal claims. *Id.* at 801. It "simply h[e]ld that" a Title II claim "is not available … *under circumstances such as presented herein*"—that is, a situation where an individual directly threatens the lives of officers or bystanders. *Id.* (emphasis added).

Petitioners (at 21) insist that the Fifth Circuit bars Title II claims any time officers face "exigent circumstances." But by its own terms, *Hainze* shielded police from liability only in "circumstances" where officers must "identify, assess, and react to [a] potentially life-threatening situation[]." *Id.* at 801. If there was any ambiguity in

Hainze, the Fifth Circuit later clarified that "the *Hainze* exception does not apply" in a police encounter where "[t]here was no potentially life-threatening situation or threat to human life." *Wilson*, 936 F.3d at 331. Judge Ho even concurred to reinforce that *Hainze* does not control "where … there is no threat of *deadly* harm to either the police officer or others." *Id.* at 333 (Ho, J., concurring in judgment) (emphasis in original).

Wilson undermines petitioners' attempt (at 16-19) to establish a split, as the Fifth Circuit no longer parts ways with the Fourth and Eleventh Circuits. In petitioners' lone Fourth Circuit case (at 20-21), police responded to a domestic-disturbance tip where there was no allegation of a weapon or lethal force. *Seremeth*, 673 F.3d at 335. And in the Eleventh Circuit's *Bircoll* decision, police arrested a disabled individual for a DUI and there was no suggestion he posed a threat to the officers. 480 F.3d at 1075. In the Fifth Circuit, Title II would apply to these encounters because "[t]here was no … threat to human life." *Wilson*, 936 F.3d at 331. Indeed, the Fifth Circuit applied the ADA in a case similar to *Bircoll*—the court affirmed a jury verdict that officers violated the ADA in their treatment of a deaf man arrested for driving while intoxicated. *Delano-Pyle*, 302 F.3d at 575-76.

Petitioners cited only Ninth Circuit cases involving life-threatening exigencies. *See Sheehan I*, 743 F.3d at 1215 ("grabb[ing] a knife" and "threaten[ing] to kill the officers"); *Vos v. City of Newport Beach*, 892 F.3d 1024, 1028-30 (9th Cir. 2018) ("brandishing … scissors"); *Hyer v. City of Honolulu*, 118 F.4th 1044, 1054 (9th Cir. 2024) ("load[ing]" bow and arrow). The broad agreement among the circuits—save for the Fifth and Ninth Circuit's narrow divergence in extreme cases—counsels in favor of further percolation.

b. In this respect, the circuit split has narrowed considerably since this Court last considered the subject. A decade ago, this Court granted certiorari to decide whether the ADA "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect *in the course of bringing the suspect into custody*"—in other words, "whether the ADA applies to arrests." *City & County of San Francisco v. Sheehan* ("*Sheehan II*"), 575 U.S. 600, 610 (2015) (emphasis added). At the time, however, the only circuit decision suggesting that the ADA did not apply to arrests was *Hainze*. And the Fifth Circuit has since clarified that *Hainze* does *not* foreclose ADA liability in all arrests, only in cases involving direct threats to human life. *See Wilson*, 936 F.3d at 331. Whatever split may have existed in 2015 is no more.

This Court ultimately dismissed the question of whether the ADA applies to arrests as improvidently granted, but petitioners (at 15) still try to piggyback on *Sheehan II* and suggest this Court should pick up what it previously put down. But that obfuscates the differences between *Sheehan II* and this case and ignores the developments of the last decade. For one thing, the Court granted certiorari in *Sheehan II* to consider the ADA's applicability to arrests and a substantial question about qualified immunity. *See* 575 U.S. at 601-11. Petitioners now ask this Court to answer only the ADA question.

More importantly, although the *Sheehan II* petition included in the question presented the fact that the police faced an "armed, violent, and mentally ill suspect," the thrust of the legal question was not the extenuating circumstances but whether the ADA applied *at all* to the police's attempts to "bring[] [a] suspect into custody," *i.e.*, whether a "police officer may be required to provide accommodations to a disabled suspect in the course of arresting her." Pet. i, 1, *City & County of San Francisco*

v. Sheehan (No. 13-1412). That language tracked the underlying Ninth Circuit opinion, which posited that courts disagreed about "whether the ADA applies to arrests." *Sheehan I*, 743 F.3d at 1232. In dismissing the question as improvidently granted, this Court four times referenced the "important question" about whether the ADA "applies to arrests." *Sheehan II*, 575 U.S. at 610; *id.* ("[o]ur decision not to decide whether the ADA applies to arrests"); *id.* ("[t]his part of the statute would apply to an arrest"); *id.* ("whether a public entity can be liable for damages under Title II for an arrest made by its police officers"). Now, however, "no circuit" holds that the ADA is "wholly inapplicable" to arrests. *Gray*, 917 F.3d at 16-17. At least two circuits have recognized as much since 2015. *Id.*; *Haberle*, 885 F.3d at 181.

All that is left is of the *Sheehan*-era split is the Fifth Circuit's holding that Title II of the ADA does not apply in extreme cases where a law-enforcement officer must act swiftly to protect his own life or the lives of bystanders. *See Hainze*, 207 F.3d at 801.

III. The Decision Below Is Correct

A. The Fifth Circuit Correctly Held That The County and Deputy Gallardo Did Not Take Action "By Reason Of … Disability"

The Fifth Circuit correctly held that petitioners' claim for damages stemming from Young County's lack of "a policy for adequately conducting welfare checks," Pet. 2, fails because Deputy Gallardo did not "sho[o]t Steve 'by reason of' his depression. Pet.App.14a. "Deputy Gallardo shot Steve 'by reason of' circumstances that would lead an objectively reasonable officer to reasonably believe that Steve was reaching for or had a gun." Pet.App.14a. This creates two insurmountable problems for petitioners' claims.

1. First, the Fifth Circuit rightly held that causation is lacking: Petitioners failed to allege facts indicating a plausible connection between the lack of a modification to the County's policies and the shooting, particularly given Steve's intervening unlawful and dangerous conduct and the fact that an "objectively reasonable officer" would have responded to the life-threatening situation in the same way. Pet.App.14a. Though petitioners (at 32) argue that their preferred policy may have led to a different outcome for Steve, this amounts to nothing more than an attempt to relitigate the fact-bound causation question in this Court. But petitioners never explain why the intervening unlawfulness of Steve's conduct does not break the causal chain from the alleged unlawful act (the County's failure to modify its policies) to the injury (Steve's death).

2. Second, as the Fifth Circuit emphasized, Title II imposes liability only if the defendant "discriminated against" the injured party "by reason of his disability." Pet.App.14a. Petitioners (at 28) are wrong to assert that that requirement is met whenever an entity fails to "accommodate persons with disabilities," regardless of whether that failure was the product of *intentional* discrimination. Petitioners' incorrect assumption pervades the petition and creates a threshold issue to the consideration of the merits of petitioners' question presented. After all, petitioners never allege that the County's lack of disability-specific policies is the product of intentional discrimination.

Title II imposes liability only for intentional discrimination. The phrase "by reason of" is classic motive-based language. *See Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176 (2009). Title II also both incorporates the rights and remedies of Title VI and uses materially identical language as

Title VI—and Title VI prohibits only intentional discrimination. *See Sandoval*, 532 U.S. at 278-81. It follows that Title II also requires intentional discrimination.

Moreover, unlike Title II, Titles I and III of the ADA expressly provide for intent-free theories of liability (including intent-free reasonable-accommodation liability) underscoring that Title II is limited to intentional discrimination. *See, e.g.*, 42 U.S.C. §§ 12112(b)(5)(A), 12112(b)(3)(A), 12112(b)(6), 12182(b)(2)(A)(ii)-(iv); 12182(b)(1)(D)(i), 12182(b)(2)(A)(i). Congress' decision not to subject state and local governments under Title II to the sort of intent-free discrimination liability that Titles I and III impose on coffee shops and tech companies was compelled by foundational vertical separation-of-powers principles.

Petitioners (at 28) support their intent-free interpretation of Title II by relying on dicta from *Tennessee v. Lane*, 541 U.S. 509 (2004). *Lane*'s dicta does not help petitioners because the parties in *Lane* all assumed that Title II requires reasonable accommodations, the Court did not analyze the statutory text, and the holding was limited to the narrow context of right-to-court-access claims. *See id.* at 530-31, 532 n.20; Pet. Br. 31-33, *Lane*, 541 U.S. 509 (No. 02-1667); *Lane* U.S. Br. 45; *Lane* Resp. Br. 39. Moreover, this Court has held that outside the access-to-courts context, petitioners' vision for reasonable-accommodation liability "far exceeds" Fourteenth Amendment limits. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 372 (2001).

Petitioners (at 28) also cite the Department of Justice's Title II regulations, but they afford no better support for petitioners' position. The regulations do not even purport to plausibly interpret the statutory text, providing little claim to validity. *See* Pet. 28 (citing 28 C.F.R. § 35.130(b)(7)(i)).

Given the Fifth Circuit's emphasis on petitioners' failure to demonstrate that Steve was discriminated against by reason of disability, the question of whether Title II requires intentional discrimination is squarely presented here and fairly encompassed within petitioners' question presented as an antecedent question. Petitioners appear to recognize as much, going out of their way to argue that Title II imposes intent-free, affirmative-action obligations in their petition. *See* Pet. i, 8, 28-29. The need to address this threshold issue further undermines the case for reviewing this petition.

B. Title II Does Not Apply To Petitioners' Claims In Any Event

Even setting aside the Fifth Circuit's holding as to causation, petitioners are wrong on their question presented: Title II does not apply in cases like this, where officers face life-threatening exigent circumstances, for at least five reasons.

1. First, Title II prohibits only "exclu[sion] from participation in or be[ing] denied the benefits of the services, programs, or activities of a public entity, or be[ing] subjected to discrimination by any such entity." 42 U.S.C. § 12132. But an on-the-spot response to a deadly threat is not a qualifying Title II "service[], program[], or activit[y]" that is being provided to the person causing the exigency police are responding to, so Title II does not apply.

Petitioners (at 27) claim that "services, programs, or activities" broadly encompass "all of the operations of a public entity" because that is what the statutory definition of a different phrase ("program or activity") contained in a different statute (the Rehabilitation Act) says. But it makes little sense to judicially insert the Rehabilitation

Act's specific definition of a different phrase into Title II when Congress chose not to.

2. Second, on-the-spot responses to deadly threats do not constitute "exclus[ion]," "deni[al]," or "discrimination." 42 U.S.C. § 12132. Individuals like Steve are not "excluded from participation in" or "denied the benefits" of any police activities. If anything, petitioners' argument is that the County *should have* excluded Steve from the normal policies that apply to threatening persons. As for discrimination, that requires "differential treatment" based on the protected trait. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005). But responses to deadly threats are based on the threat, not disability. The overriding imperative in these situations is for police to treat all threatening individuals equally—*i.e.*, as threats.

3. Third, Title II of the ADA extends only to "qualified individual[s] with … disabilit[ies]," which excludes those threatening the lives of others. *See* 42 U.S.C. §§ 12131(2), 12132. Those who threaten death in exigent circumstances do not "meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *See id.* § 12131(2); 28 C.F.R. § 35.139(a). As this Court has long recognized, Congress does not through disability law require "exposing others to significant health and safety risks"—instead, those who necessarily pose such a risk are not "qualified." *See Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 287-88 (1987) (analyzing Section 504 of the Rehabilitation Act).

4. Fourth, Congress enacted the ADA against the background principle that broad legal prohibitions do not normally apply when it comes to actions taken to avoid public harm during exigencies. Thus, categorically worded statutes (such as traffic ordinances) have long been "construed as not applicable to … officers" "engaged

in duties, in the performance of which speed is necessary." *See, e.g.*, *Lilly v. West Virginia*, 29 F.2d 61, 64 (4th Cir. 1928). Similarly, the Fourth Amendment's warrant requirement gives way during exigencies: "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (citation omitted). And so too here, petitioners' claimed Title II accommodation requirements do not apply when police are responding to deadly threats.

5. Finally, under petitioners' reading, Title II would require police to put safety-concerns second to reasonable-accommodation calculations. As petitioners (at 28) recognize, their reasonableness standard would force police in life-or-death situations to engage in a "fact-intensive" calculus before acting. And petitioners' standard would force States and localities to hamstring officers' discretion in the field via before-the-fact policies that prioritize jurors' hindsight view of what is reasonable rather than officers' on-the-ground, in-the-moment judgments.

Petitioners' position also ascribes to Congress an improbable intent to enact through the ADA an end-run around longstanding excessive-force and qualified-immunity doctrines by directing courts to nit-pick (and impose liability for) local police officers' on-the-spot emergency decisions. Under petitioners' theory, disabled plaintiffs in cases like this who cannot make out any unreasonable use-of-force claim or who run into qualified immunity can simply turn to Title II. Petitioners in essence seek to "create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals." *Vos*, 892 F.3d at 1043 (Bea, J., dissenting in part) (citation omitted).

That poses serious risks, given that excessive-force and qualified-immunity doctrines are carefully calibrated

to ensure the safety of officers and the public. "The danger to the officer is not lessened with the realization that the person who is trying to kill him is mentally ill." *Id.* (Bea, J., dissenting in part). And indeed, the danger to the officer in such situations "may be increased, as in some circumstances a mentally ill individual in the midst of a psychotic break will not respond to reason, or to anything other than force." *Id.* (Bea, J., dissenting in part). Moreover, qualified immunity's protection from suit would become a dead letter in cases involving a disabled plaintiff because, as petitioners (at 23, 25) explain, on their read, cases like this one should "proceed[] to discovery and then to a trial" given the amorphous nature of their reasonableness standard.

In any event, Congress lacks the power to legislate regarding these quintessentially local safety-based choices. *See United States v. Lopez*, 514 U.S. 549, 564 (1995). Title II contains no Commerce Clause hook at all and applies to non-economic local activities. And this Court has held that (at least when a fundamental right, like access to courts, is not implicated) Congress lacks authority under its Fourteenth Amendment powers to impose the sort of affirmative action obligations for which petitioners advocate. *See Garrett*, 531 U.S. at 367, 372-74 (explaining that the Equal Protection Clause does "not require[]" the government to "make special accommodations for the disabled"). That conclusion applies with particular force when it comes to police officers' on-the-spot, existential choices in the line of duty.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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MAY 30, 2025