No. 18-672

In the Supreme Court of the United States

CITY OF NEWPORT BEACH, CALIFORNIA, *et al.*,
Petitioners,

v.

RICHARD VOS, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* CALIFORNIA STATE ASSOCIATION OF COUNTIES, THE LEAGUE OF CALIFORNIA CITIES, AND INTERNATIONAL MUNICIPAL LAWYER'S ASSOCIATION IN SUPPORT OF PETITIONERS

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California State Association of Counties (CSAC) is a non-profit corporation. CSAC's membership consists of the 58 California Counties. CSAC sponsors a Litigation Coordination Program. The Program is administered by the County Counsel's Association of California and overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Committee monitors litigation of concern to counties statewide.

The League of California Cities (League) is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of California. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance.

International Municipal Lawyer's Association (IMLA) is a non-profit organization dedicated to advancing the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States

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[1] Amici notified all counsel of record of its intent to file this brief more than 10 days before the due date, and consent to file was given by all. No part of this brief was authored by counsel for any party. No person or entity other than amici made a monetary contribution to this brief's preparation or submission.

Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts. Established in 1935, IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters for its more than 2,500 members across the United States and Canada.

Amici have determined the questions presented in the petition raise significant and important issues impacting law enforcement on a state and national level.

SUMMARY OF ARGUMENT

The questions presented in the petition are vitally important, and very timely. As more mentally ill persons living in communities receive little or no treatment, or do not comply with the treatment they do receive, law enforcement officers have unfortunately become de facto first responders to incidents involving the mentally ill. Andrew C. Hanna, *Municipal Liability and Police Training for Mental Illness: Causes of Action and Feasible Solutions*, 14 Ind. Health L. Rev. 221, 236–37 (2017) (footnotes omitted). "Law enforcement officers come into contact with individuals with mental illness for a variety of reasons. In total, a conservative estimate is that 10% of current police calls involve an individual with mental illness." *Id.* at 228 (citing Amy Watson and Beth Angell, *The Role of Stigma and Uncertainty in Moderating the Effect of Procedural Justice on Cooperation and Resistance in Police Encounters with Persons With Mental Illness*, 19 PSYCHOL. PUB. POL'Y & L. 30 (Feb. 2013)). But make no mistake, law enforcement officers are not trained mental health professionals.

Just like suspects who are not mentally ill, suspects who are mentally ill may and do engage in violent behavior threatening the safety of officers, bystanders and the suspects. Recognizing encounters with the mentally ill may require specialized responses, some public entities have developed and trained officers on new and innovative approaches for responding to situations involving the mentally ill (e.g., critical or psychiatric emergency response teams). But there is no conclusive evidence that these specialized approaches reduce the rate or severity of injuries suffered during police encounters with the mentally ill. In fact, several studies suggest that these specialized approaches have no impact whatsoever on injuries or the use of force.[2] This is not entirely surprising. Law enforcement officers encounter a wide range of mental illnesses under very diverse circumstances, precluding any one-size-fits-all approach. An "accommodation" effective in one situation may very well be totally ineffective in another. As such, neither plaintiffs, judges nor juries should be determining in hindsight

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[2] Michael T. Compton et al., *The Police-Based Crisis Intervention Team (CIT) Model: II. Effects on Level of Force and Resolution, Referral, and Arrest*, 65 Psychiatric Services 523, 527 (2014); Peter H. Silverstone et al., *A Novel Approach to Training Police Officers to Interact with Individuals Who May Have a Psychiatric Disorder*, 41 J. Am. Acad. Psychiatry & L. 344, 345 (2013); Melissa S. Morabito et al., *Crisis Intervention Teams and People with Mental Illness: Exploring the Factors that Influence the Use of Force*, 58 Crime & Delinquency 57, 58, 60, 71 (2012); Amy N. Kerr et al., *Police Encounters, Mental Illness and Injury: An Exploratory Investigation*, 10 J. Police Crisis Negot. 116, 119 120, 129 (2010); Jennifer Wood et al., *Police Interventions with Persons Affected by Mental Illness: A Critical Review of Global Thinking and Practice 22* (2011).

what "accommodations" were necessary in any given situation, particularly in situations where law enforcement officers are dealing with a mentally ill suspect that poses a danger to the officers, the public and the suspect. *See Vos v. City of Newport Beach*, 892 F.3d 1024, 1037 (9th Cir. 2018) (faulting law enforcement officers dealing with armed mentally ill suspect for failing to "employ the accommodations identified by the Parents, including de-escalation, communication, or specialized help"). Indeed, as one commentator has explained:

> Individuals with mental illness, whether they are a suspect, witness or victim pose a unique challenge for law enforcement officers who are often unfamiliar with their particular symptoms, behavior, and demeanor. With such a wide variety of mental illnesses and symptoms, it is difficult for law enforcement to detect and effectively interact with varying types of mental illness.

Hanna, *supra*, at 229 (footnotes omitted). Moreover, knowledge of a suspect's mental illness does not give officers any greater insight into whether a mentally ill suspect will act violently. *See Vos,* 892 F.3d at 1043 (9th Cir. 2018) (Bea, J., dissenting) ("The danger to the officer is not lessened with the realization that the person who is trying to kill him is mentally ill. Indeed, it 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.") Even psychiatrists with decades of special education, training, and experience in dealing with the mentally ill cannot predict with any reasonable degree

of certainty whether an armed suspect with a serious mental illness will harm herself or others in an emergency situation. The truth is that no one knows what might help law enforcement officers in their encounters with the mentally ill.

For years, courts of appeals have been divided on the question of whether Title II of the Americans with Disabilities Act (Title II) applies to arrests, and even those courts finding Title II applies to arrests cannot agree on how it applies. None of the courts concluding Title II applies to arrests have provided any workable guidance to public entities and law enforcement officers on what "accommodations" must be made or given when officers are confronted with mentally ill suspects that are (or could be) armed and dangerous. This Court was prepared to resolve these issues in *City & County of San Francisco. v. Sheehan*, but deficiencies in the merits briefing counseled against deciding the issue.[3] 135 S. Ct. 1765, 1769-1173 (2015). As a result, as the petitioner well describes, courts remain divided. Petition for Certiorari, pp. 11-15; *see Haberle v. Troxell*, 885 F.3d 170, 180 (3d Cir. 2018) (observing courts of appeals are divided on Title II's application to arrests).

As a federal anti-discrimination statute, Title II must be applied consistently throughout the country. Whether or not Title II applies to arrests and, if so, how it applies, when it applies, and what it requires from public entities and law enforcement officers cannot continue to be geographically dependent.

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[3] Petitioners are committed to briefing the issue. Petition for Certiorari, p. 16. So are amici.

Whether it applies or not, this Court should speak now to ensure consistent and uniform application of Title II to arrests. This will benefit not only public entities and law enforcement officers by providing clear guidance, but it will also benefit the mentally ill.

Interactions between law enforcement officers and the mentally ill do not just raise questions involving Title II. Significant and unresolved questions exist in 42 U.S.C. section 1983 litigation involving claims of excessive force against the mentally ill. Put simply, the issue raised in the petition is whether a suspect's mental illness is a proper factor to consider in the Fourth Amendment objective reasonableness analysis established in *Graham v. Connor*, 490 U.S. 386, 396 (1989). The Ninth Circuit appears to be the only court of appeals holding that it is a proper factor. In the Ninth Circuit, not only is a suspect's known mental illness a factor in the Fourth Amendment's reasonableness analysis, but also "whether it should have been apparent to the officers that the subject of the force used was mentally disturbed." *Vos*, 892 F.3d at 1033.[4]

Neither *Graham* nor any other decision from this Court holds that a suspect's mental illness is a proper factor to consider in the Fourth Amendment reasonableness analysis. Nonetheless, the Ninth Circuit justifies including mental illness in the analysis because it believes "the *Graham* factors are not exclusive." *Id.; but see County of Los Angeles v.*

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[4] On this issue, *Vos* was not an outlier in the Ninth Circuit. *See, e.g., Bryan v. MacPherson*, 630 F.3d 805, 831 (9th Cir. 2010); *Deorle v. Rutherford*, 272 F.3d 1272, 1282-83 (9th Cir. 2001).

Mendez, 137 S. Ct. 1539, 1546 (2017) (*Graham* "sets forth a settled and exclusive framework for analyzing whether the force used in making a seizure complies with the Fourth Amendment."). If the *Graham* factors are not exclusive, it should be this Court that decides that question.

The Ninth Circuit's conclusion that the *Graham* factors are not exclusive has also lead the Ninth Circuit to hold that law enforcement officers' discretionary decisions and conduct made and done prior to the use of force (pre-force tactics) in the tense, uncertain and dangerous situations officers encounter on a daily basis are properly considered in the Fourth Amendment reasonableness analysis. *See Vos*, 892 F.3d at 1034 ("[E]vents leading up to the shooting, including the officer's tactics, are encompassed in the facts and circumstances for the reasonableness analysis.")[5] The Ninth Circuit's expansive Fourth Amendment jurisprudence conflicts with other courts of appeals, as the petition well demonstrates at pages 20-23, but also runs afoul of this Court's admonition that the focus of the Fourth Amendment reasonableness analysis must be on what was occurring "at the moment when the [force was used]." *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014).

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[5] Again, *Vos* is not an outlier. Other Ninth Circuit decisions also hold that pre-force tactics are considered in the Fourth Amendment reasonableness analysis. *See, e.g, Hung Lam v. City of San Jose*, 869 F.3d 1077, 1087 (9th Cir. 2017).

ARGUMENT

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." 42 U.S.C. § 12132; *see* 28 C.F.R. §35.130(a).[6] The Department of Justice's implementing regulations for Title II provide that "a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. §35.130(b)(7); *see id.* at §35.139 (direct threat exception).

[6] When referring to Title II, amici is also referring to the Rehabilitation Act as the two provide nearly identical "remedies, procedures and rights." *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000).

A. This Court Should Decide The Important Question Of Whether Title II Requires Law Enforcement Officers To Provide Accommodations To Mentally Ill Suspects, And If So, When And What Accommodations Are Required In The Differing And Often Dangerous Circumstances Law Enforcement Officers Confront When Responding To Situations Involving The Mentally Ill[7]

1. Courts Of Appeals Are Divided

As the Third Circuit stated this year when holding Title II applies to arrests if law enforcement officers are deliberately indifferent to a suspect's disability, *Haberle*, 885 F.3d at 180-81, "courts across the country are divided on whether police fieldwork and arrests can rightly be called 'services, programs, or activities of a public entity....' [Citation]." *Id.* at 180; *see id.* at 180 n.10 (noting this Court declined to answer the question in *Sheehan* and observing "[t]he issue thus continues to divide some federal courts. *See generally* Robyn Levin, Note, *Responsiveness to Difference: ADA Accommodations in the Course of an Arrest*, 69 Stan. L.

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[7] "In the context of arrests, courts have recognized two types of Title II claims: (1) wrongful arrest, where police arrest a suspect based on his disability, not for any criminal activity; and (2) reasonable accommodation, where police properly arrest a suspect but fail to reasonably accommodate his disability during the investigation or arrest, causing him to suffer greater injury or indignity than other arrestees." *Waller ex rel. Estate of Hunt v. City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009); *see Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999) (same). The issues in this case involves the latter.

Rev. 269 (2017) (compiling cases)."); Hanna, *supra*, at 242-45 (noting conflict).

The principal dispute amongst the courts of appeals is whether Title II and its reasonable accommodation mandate apply to law enforcement officers' on-the-street interactions with mentally ill suspects and how the existence of "exigent circumstances" impacts application of Title II.

The Fifth Circuit holds that Title II does not apply to arrests. *Hainze,* 207 F.3d at 801 ("Title II does not apply to an officer's on-the street responses to reported disturbances or other similar incidents, whether or not those calls involved subjects with mental disabilities prior to the officer's securing the scene and ensuring that there is no threat to human life."). As the court perceptively observed:

> Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents. While the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public. Our decision today does not deprive disabled individuals, who suffer discriminatory treatment

> at the hands of law enforcement personnel, of all avenues of redress because Title II does not preempt other remedies available under the law. We simply hold that such a claim is not available under Title II under circumstances such as presented herein.

Id. at 801. The Sixth Circuit's approach is consistent with the Fifth Circuit's, holding exigent circumstances counsel against Title II's application to arrests. As held in *Roell v. Hamilton County*:

> We need not decide whether Title II applies in the context of arrests because, even if Nancy Roell's failure-to-accommodate claim is cognizable, Hamilton County is entitled to summary judgment based on the facts of this case. ... Deputies ...unquestionably faced exigent circumstances while attempting to restrain and arrest Roell. ... [¶] Nancy Roell's proposed accommodations—that the deputies use verbal de-escalation techniques, gather information from the witnesses, and call EMS services before engaging with Roell—were therefore 'unreasonable ... in light of the overriding public safety concerns.'

870 F.3d 471, 489 (6th Cir. 2017) (citation omitted); *see also De Boise v. Taser Int'l, Inc.*, 760 F.3d 892, 899 (8th Cir. 2014) ("Moreover, the 'use of force' on De Boise was 'not by reason of [De Boise's] disability, but because of [his] objectively verifiable misconduct.' [Citation]. Accordingly, the facts before us do not contemplate any violation of the ADA.").

The Ninth, Fourth and Eleventh Circuits hold that Title II applies to arrests despite the existence of exigent circumstances, but the exigent circumstances are considered in the analysis of whether reasonable accommodations were provided. *Vos*, 892 F.3d at 1037; *see Sheehan v. City & County of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014) ("[W]e agree with the Eleventh and Fourth Circuits that exigent circumstances inform the reasonableness analysis under the ADA, just as they inform the distinct reasonableness analysis under the Fourth Amendment."), *rev'd in part, cert. dismissed in part sub nom. Sheehan*, 135 S. Ct. 1765 (2015); *Waller,* 556 F.3d at 175; *Bircoll v. Miami–Dade County*, 480 F.3d 1072, 1085 (11th Cir. 2007).

Although not deciding the issue, the First Circuit has expressed reservations about Title II applying to arrests. *See Buchanan v. Maine*, 469 F.3d 158, 176 n. 13 (1st Cir. 2006) ("It is questionable whether the ADA was intended to impose any requirements on police entering a residence to take someone into protective or other custody beyond the reasonableness requirement of the Fourth Amendment, described earlier."). And the Tenth Circuit has not answered the question of whether Title II applies to arrests. *Clark v. Colbert*, 895 F.3d 1258, 1265 (10th Cir. 2018) ("We have never squarely held the ADA applies to arrests."). Neither has the Seventh Circuit. *See Estate of Robey by Robey v. City of Chicago*, No. 17-CV-2378, 2018 WL 688316, at *5 n. 1 (N.D. Ill. Feb. 2, 2018) ("The Seventh Circuit has not yet resolved whether the ADA applies to on-the-street arrests.").

Amici believe it is important to point out that courts addressing Title II and its application to arrests have seemingly not considered what amici believe is an important issue in the analysis. Title II imposes obligations on public entities; it does not apply to individual law enforcement officers. 42 U.S.C. § 12132; 28 C.F.R. §35.130(b)(7); *see Kiman v. New Hampshire Dep't of Corr.*, 451 F.3d 274, 290 (1st Cir. 2006) ("Several courts have held that Title II does not provide for suits against state officials in their individual capacities. *See, e.g.*, *Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002); *Garcia v. State Univ. of N.Y. Health Scis. Ctr.*, 280 F.3d 98, 107 (2d Cir. 2001); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n. 8 (8th Cir. 1999)."). For example, the Ninth Circuit in *Vos* reversed summary judgment for individual law enforcement officers on a Title II claim without recognition that individuals cannot be liable under Title II. 892 F.3d at 1030, 1036-37. Surely the absence of individual liability under Title II impacts the analysis of whether Title II applies to arrests and, if so, how it applies.

2. Courts Of Appeals Have Provided Little Guidance On How Title II Applies To Arrests And What Title II Requires From Public Entities And Law Enforcement Officers

Assuming Title II applies to arrests, public entities and law enforcement officers desperately need guidance on when and how to offer reasonable accommodations, and what constitutes a reasonable accommodation. Guidance is also needed on whether the obligation lies with the public entity to create

policies and procedures, or do the accommodation obligations rest on the shoulders of the individual law enforcement officer. These issues, and other important and complex questions remain unresolved by the courts of appeals. The following is in no way a complete list of questions left open by the courts, but illustrates the dilemma law enforcement face:

* Are accommodations required simply because a law enforcement officer has been told or otherwise suspects a mental illness but does not know for sure?

* Are different accommodations required for different mental illnesses and how is a law enforcement officer supposed to determine (i.e., diagnose) what accommodation is appropriate?

* Are accommodations required based on an individual's drug use?[8]

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[8] During oral argument in *Sheehan,* an exchange between Justice Scalia, Chief Justice Roberts, and the attorney arguing for Ms. Sheehan underscored the difficulty police officers would be placed in under Ms. Sheehan's theory of the case:

> Justice Scalia: Is – is being high on drugs a mental disability?
> Mr. Feldman: I think it would depend on why somebody is high on drugs. They – they may –
> Justice Scalia: He's high on drugs because he took drugs.
> Mr. Feldman: Well, if it was a choice to take drugs –
> Justice Scalia: Yes.
> Mr. Feldman: -- and it was unrelated to a mental disability –
> Justice Scalia: Right.
> Mr. Feldman: -- then – then I think it would not be a mental disability.
> Justice Scalia: Why?

* How are Title II claims involving uses of force analyzed, and what are the legal questions for the court and what are the factual questions for the jury? Are Title II claims involving arrests and use of force analyzed under the same objective reasonableness test employed in excessive force claims brought under 42 U.S.C. section 1983?

* Is qualified immunity available to law enforcement officers, or is it essentially strict liability if the officer provides what she believes are reasonable accommodations based on the limited guidance currently available, and a court (or jury) in hindsight disagrees?

* Is it sufficient for public entities to implement system wide accommodations (e.g., a psychiatric emergency or critical response team)?

* What are the obligations of public entities regarding training on reasonable accommodations during arrests?

…
Chief Justice Roberts: And presumably, there's no way to tell if there's somebody you come upon on the street who's exhibiting signs of being on – on drugs, whether that is because of prescription medication or illicit drugs.
Mr. Feldman: I – I think that's right.
Chief Justice Roberts: And – but they – but they have to be treated differently.
Mr. Feldman: They do.

Tr. 44-45.

B. This Court Should Decide Whether The Fourth Amendment Objective Reasonableness Analysis Established In *Graham* Allows For Consideration Of Suspect's Mental Illness And A Law Enforcement Officer's Pre-Force Tactics

In *Mendez*, this Court observed that *Graham* "sets forth a settled and *exclusive framework* for analyzing whether the force used in making a seizure complies with the Fourth Amendment." *Id.* at 1546 (emphasis added). Under *Graham*, determining whether a particular use of force was objectively reasonable requires a balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the "countervailing government interests at stake." 490 U.S. at 396-97; *Mendez*, 137 S. Ct. at 1546; *Scott v. Harris*, 550 U.S. 372, 383 (2007). Properly applying *Graham* "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396. When it comes to deadly force, as was employed in this case, this Court has made it clear that the Fourth Amendment is not violated if the law enforcement officer reasonably believes a suspect poses a threat of injury or death, *Brousseau v. Haugen*, 543 U.S. 194, 197-98 (2004), "at the moment when the shots were fired." *Plumhoff*, 572 U.S. at 777.

Perhaps the most important aspect of *Graham* is the recognition that deference is given to the law enforcement officers on-the-scene decisions and a hindsight evaluation of what the officers failed to consider or do is absolutely prohibited. 490 U.S. at 396. Although many courts have explained *Graham's* proscription of hindsight analysis, the Seventh Circuit did so extremely well in *Horton v. Pobjecky*, 883 F.3d 941, 950 (7th Cir. 2018):

> [W]e must refuse to view the events through hindsight's distorting lens. [Citation]. We must consider the totality of the circumstances, including the pressures of time and duress, and the need to make split-second decisions under intense, dangerous, uncertain, and rapidly changing circumstances. [Citation]. We must recognize that in such circumstances, officers often lack a judge's luxury of calm, deliberate reflection.... [¶.] Judges view facts from afar, long after the gunsmoke cleared, and might take months or longer to decide cases that forced police officers to make split-second decisions in life-or-death situations with limited information. We as judges have minutes, hours, days, weeks, even months to analyze, scrutinize and ponder whether an officer's actions were 'reasonable,' whereas an officer in the line of duty all too frequently has only that split-second to make the crucial decision. The events here unfolded in heart-pounding real time, with lives on the line. [The officer] lacked our luxury of pausing, rewinding, and playing the videos over and over.

Given this Court has never held that a suspect's mental illness or a law enforcement officer's pre-force tactics are properly considered in the Fourth Amendment reasonableness analysis, and courts of appeals are divided, this Court should grant review.

1. Courts Of Appeals Are Divided On Whether Mental Illness Is A Factor In The Fourth Amendment Reasonableness Analysis

The Ninth Circuit justifies including a suspect's mental illness in the Fourth Amendment reasonableness analysis because, according to the Ninth Circuit, "the *Graham* factors are *not exclusive*. Other relevant factors include . . . whether it should have been apparent to the officers that the subject of the force used was mentally disturbed." *Vos,* 892 F.3d at 1033-34 (emphasis added) (citing *Bryan*, 630 F.3d at 831; *Deorle*, 272 F.3d at 1282-83 (9th Cir. 2001)).

The Ninth Circuit's conclusion that the *Graham* factors are not exclusive conflicts with what this Court said in *Mendez* about *Graham* providing the settled and exclusive framework to evaluate use of force under the Fourth Amendment. *Mendez*, 137 S. Ct. at 1546. Certainly this Court has never held that a suspect's mental illness is an appropriate factor to consider in the Fourth Amendment reasonableness analysis. No doubt this is because a suspect's mental illness has no bearing on "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. As Judge Bea aptly observed in his dissent in *Vos*, utilizing a suspect's mental illness in the reasonableness analysis

improperly establishes one track for an excessive force analysis for those with mental illness and another track for those without. 892 F.3d at 1043. Judge Bea also pointed out the logical flaw with using mental illness as a factor:

> In logic: whether the person who charges the officer does so out of a base desire to kill, or does so because, in the midst of a psychotic episode, he thinks the officer is a monster or a ghost, the danger to the officer is the same. The officer's interest in protecting his own life and the lives of his fellows is therefore the same as well.

Id. Moreover, including a suspect's mental illness in the Fourth Amendment reasonableness analysis most often, if not always, requires the hindsight *Graham* forbids. *See Vos*, 892 F.3d at 1030 ("Vos's medical history *later revealed* that he had been diagnosed as schizophrenic.") (emphasis added).

The Ninth Circuit's conclusion that a suspect's mental illness is a factor in the Fourth Amendment reasonableness analysis conflicts with the Fourth and Eighth Circuits, which have held that "[k]nowledge of a person's [mental illness] simply cannot foreclose officers from protecting themselves, the disabled person and the general public when faced with threatening conduct by the individual." *Bates v. Chesterfield County*, 216 F.3d 367, 372 (4th Cir. 2000); *id.* ("[I]n the midst of a rapidly escalating situation, the officers cannot be faulted for failing to diagnose Bates' autism. Indeed, the volatile nature of a situation may make a pause for psychiatric diagnosis impractical and even dangerous."); *see Sanders v. Minneapolis,* 474 F.3d 523, 527 (8th Cir. 2007) (Relying on *Bates* to conclude "[t]he

fact that Alfred may have been experiencing a bipolar episode does not change the fact that he posed a deadly threat against the police officers."); *Hayek v. City of St. Paul*, 488 F.3d 1049, 1055 (8th Cir. 2007) (citing *Sanders* for proposition that "[e]ven if William were mentally ill, and the officers knew it, William's mental state does not change the fact he posed a deadly threat to the officers."); *see also Rucinski v. County of Oakland*, 655 F. App'x 338, 342 (6th Cir. 2016) ("Rucinski identifies no case law restricting an officer's ability to use deadly force when she has probable cause to believe that a mentally ill person poses an imminent threat of serious physical harm to her person; indeed, out of circuit case law weighs against this argument.") (citing *Sanders*, 474 F.3d at 527 (quoting *Bates*, 216 F.3d at 372)).

2. The Ninth Circuit's Inclusion Of A Law Enforcement Officer's Pre-Force Tactics As A Factor In The Fourth Amendment Reasonableness Analysis Runs Counter To This Court's Jurisprudence And Conflicts With Many Other Courts Of Appeals

In *Mendez*, this Court invalidated the Ninth Circuit's "provocation doctrine," a rule allowing a Fourth Amendment violation to be found where the use of force was objectively reasonable but a law enforcement officer's pre-force conduct was unconstitutional, and that conduct "provoked" a response from a suspect necessitating the use of force. 137 S. Ct. at 1546-48. In the briefing before this Court, the respondent did not defend the provocation doctrine arguing instead that *Graham*'s "totality of the circumstances" analysis allows consideration of an

officer's unreasonable pre-force tactics. Because certiorari was not granted on that issue, this Court declined to address it. *Id.* at 1547 n. *.

According to the Ninth Circuit, "[w]hile a Fourth Amendment violation cannot be established 'based merely on bad tactics that result in a deadly confrontation that could have been avoided,' [citations], the events leading up to the shooting, including the officers tactics, are [still] encompassed in the facts and circumstances for the reasonableness analysis, [citations]." *Vos*, 892 F.3d at 1034; *see Hung Lam*, 869 F.3d at 1087 ("The events leading up to the shooting, such as the officer's tactics, are encompassed in those facts and circumstances.").

This Court has never held that pre-force tactics are properly considered in the Fourth Amendment reasonableness analysis. Indeed, doing so violates *Graham's* prohibition of utilizing hindsight in the reasonableness analysis as it requires second guessing the officer's decisions. 490 U.S. at 396. Moreover, this Court's jurisprudence counsels against using pre-force tactics in the reasonableness analysis. In *Plumhoff*, this Court made clear that an evaluation of whether force used was reasonable focuses on what was taking place "at the moment" force was used. 572 U.S. at 777. And this Court held in *Sheehan* that the Fourth Amendment is not violated by "bad tactics that result in a deadly confrontation that could have been avoided." 135 S. Ct. at 1777.

The Ninth Circuit's position that events leading up to a use of force, including pre-force tactics, directly conflicts with the majority of other courts of appeals, which have long held that neither are included in the

Fourth Amendment reasonableness analysis. *See, e.g.*, *Rockwell v. Brown*, 664 F.3d 985, 988 (5th Cir. 2011) ("'The excessive force inquiry is confined to whether the [officer or another person] was in danger at the moment of the threat that resulted in the [officer's use of deadly force].' *Bazan v. Hidalgo County*, 246 F.3d 481, 493 (5th Cir. 2001) (citing *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992) ('[R]egardless of what had transpired up until the shooting itself, [the suspect's] movements gave the officer reason to believe, at that moment, that there was a threat of physical harm.')"); *Dickerson v. McClellan*, 101 F.3d 1151, 1162 (6th Cir. 1996) ("[W]e limit the scope of our inquiry to the moments preceding the shooting."); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) ("[A]ctions leading up to the shooting are irrelevant to the objective reasonableness."); *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994) ("We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct."); *Bella v. Chamberlain*, 24 F.3d 1251, 1256 (10th Cir. 1994) ("'[W]e scrutinize only the seizure itself, not the events leading to the seizure.'") (quoting *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993)); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) ("[The] events which occurred before Officer Ruffin opened the car door and identified herself to the passengers . . . are not relevant and are inadmissible.").

CONCLUSION

"One of this Court's primary functions is to resolve 'important matter[s]' on which the courts of appeals are 'in conflict.' Sup. Ct. Rule 10(a); *e.g., Thompson v. Keohane*, 516 U.S. 99, 106, 116 S. Ct. 457, 133 L. Ed. 2d

383 (1995)." *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408 (2018) (Mem.) (Thomas, J., dissenting from the denial of certiorari). Amici accordingly respectively request that this Court grant the petition for certiorari.

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