# Supreme Court of the United States

CITY OF NEW YORK and PAUL GIBLIN,

*Petitioners*,

v.

SUSAN ROSS GREEN,
Executrix of the Estate of Walter Green, deceased,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Several Circuit Courts have held that under exigent circumstances, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.* (the "ADA") either does not apply, or does not demand the same level of disability accommodation as would be required under normal circumstances. Here, the U.S. Court of Appeals declined to recognize any exceptions to the ADA. Should the ADA apply to emergency medical responders who, under exigent circumstances, make a medically reasonable decision to transport a disabled person to the hospital without evaluating the person's refusal of medical assistance?

2. The Court of Appeals expressed concern that emergency medical responders may have ignored a patient's refusal of medical assistance based upon paternalistic attitudes regarding the mental capacity of physically disabled people. Would an exigent circumstances exception to the ADA, applicable in non-hospital emergency medical settings, expose disabled patients to a significant risk of unwanted and paternalistic medical intervention?

## LIST OF PARTIES

Petitioners seek review of two U.S. Court of Appeals judgments. The parties to the first Court of Appeals proceeding were plaintiffs-appellants Walter Green, Susan Ross Green, and Alixandra Green; and defendants-appellees the City of New York, Paul Giblin, and St. Luke's-Roosevelt Hospital Center. The caption contains all of the parties to the second Court of Appeals proceeding.

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## OPINIONS BELOW

This petition seeks review of two Court of Appeals' judgments, the first entered under docket number 04-1006-cv, in proceedings referred to here as "*Green I*," and the second entered under docket number 07-4027-cv, in proceedings referred to here as "*Green II*."

As to *Green I*, the Court of Appeals' opinion (App. 46a-91a) is reported at 465 F.3d 65 (2d Cir. 2006), and the District Court's decision (App. 92a-98a) is unofficially reported at 2004 U.S. Dist. LEXIS 1414 (S.D.N.Y. Feb. 4, 2004).

The Court of Appeals' opinion in *Green II* (App. 1a-9a) is unofficially reported at 2009 U.S. App. LEXIS 28590 (2d Cir. Dec. 30, 2009). The District Court's decision in *Green II* (App. 10a-45a) is unofficially reported at 2007 U.S. Dist. LEXIS 65842 (S.D.N.Y. Sept. 6, 2007).

## BASIS FOR JURISDICTION

The Court of Appeals' second judgment was entered on December 30, 2009. A timely petition for rehearing was denied on February 23, 2010 (App. 99a-100a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2000).

## STATUTORY PROVISIONS INVOLVED

**42 U.S.C. § 12131 (1990)**

As used in this title:

(1) Public entity. The term "public entity" means–

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and . . . .

(2) Qualified individual with a disability. 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.

**42 U.S.C. § 12132 (1990)**

Subject to the provisions of this title, 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.

## STATEMENT OF THE CASE

### A. Background.

The following summary is based upon evidence presented at trial.

On March 19, 2000, 61-year-old Walter Green ("Green") suffered from late-term Amyotrophic Lateral Sclerosis ("ALS"), also known as Lou Gehrig's Disease, and pneumonia (CA404[863]; CA406[871-72]).[1] Because of ALS, Green depended upon a respirator (or "ventilator"), attached to his tracheal tube, to breathe, and could not use his vocal chords to speak (CA142[50-51]).

Green instead communicated by blinking his eyes and, having retained some mobility in his fingers, using a mouse to select letters and words on his computer screen. The computer could emit selected words though its speaker (CA205[245]; CA207[253]). William Hill, Green's respiratory therapist, admitted at trial that Green's communication methods "could be laborious. It could take a long time for him to type out" words on his computer (CA142[51]).

Early in the afternoon of March 19, a ventilator malfunction left Green unable to breathe. Green became light-headed. His "lungs started to burn from lack of

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1. Unless otherwise specified, numbers in parentheses preceded by the letters "CA" refer to pages in the Joint Appendix submitted to the Court of Appeals in *Green II*.

oxygen." Green blacked out and, he later admitted, could have died (CA284[478-79]; CA375[748]; CA377[755]).

Arriving home approximately ten minutes later, Green's 14-year-old daughter Alixandra ("Ali") found him unconscious, with a green complexion, cold hands, and eyes "rolled back in his head" (CA201-02[232-33]; CA216[291]; CA217[293]). Ali called 911. After explaining to the Emergency Medical Services ("EMS") 911 operator that Green's ventilator had broken, Ali exclaimed, "we need help!," and "he's dying, he's dying, his eyes are roll [*sic*] . . . ." (CA 202[236]; CA712-15).

Green's wife came home and found him unconscious and pale, with his fingers turning purple (CA364[704]). After locating Green's back-up "ambu-bag," Mrs. Green, Ali, and an aide used it to force air into Green's lungs manually, through his trachea (CA138-39[35-39]; CA203[237-38]). Allegedly, the color returned to Green's face and he became alert (CA203[238-40]; CA292[510]).

Between 2:45 and 3:00 p.m., New York City ("City") police officers, paramedics from St. Luke's-Roosevelt Hospital ("St. Luke's"), and New York City Fire Department ("FDNY") firefighters and emergency medical technicians arrived (CA383). The paramedics found Green in respiratory arrest, and unresponsive to painful stimuli (CA689). At 2:57 p.m., and again at 3:02 p.m., Green scored a three on the Glasgow Coma Scale ("GCS"), meaning total unconsciousness (A350[648-49]; CA687; CA689).

Emergency medical responders helped ambu-bag Green (CA204[242-43]). To supply Green with 100%

oxygen, St. Luke's paramedic C.K. Collins attached supplemental oxygen to the ambu-bag (CA391-92[813-14]). Mucus suctioned from Green's airway indicated to Collins that Green had an infection (CA392[814-16]).

Mrs. Green thanked the emergency responders and told them, "we don't need you anymore" (CA 366[711]). Paramedic Collins responded that Green needed to be taken to a hospital (CA392[816]). Mrs. Green insisted that she could handle Green's care (CA393[819]). At 3:09 p.m., the paramedics reported to EMS dispatch: "family refusing to let [patient] . . . leave the house" (CA684).

The FDNY Refusal of Medical Assistance guidelines (the "Guidelines") provide standards for handling refusals of medical assistance (CA690-98). Under the Guidelines, emergency medical responders must contact "Telemetry" – the FDNY's system for assisting emergency medical responders in the field – when patients "require immediate treatment and transportation to a medical facility," or when someone "seeks to refuse emergency medical care on behalf of the patient" (CA219; CA393-94[821-22]; CA692-93).

Contacting Telemetry at 3:14 p.m., Paramedic Collins reported Green's medical condition (CA394[822]; CA684; CA706). Collins also explained that Mrs. Green, without providing any documentary authority, was attempting to refuse medical transport on Green's behalf (CA707). At the time, Green had no documents stating that (1) he did not want to be transported to a hospital; (2) Mrs. Green could refuse to have him transported to a hospital; or (3) Mrs. Green had authority to make medical decisions for him (CA378[759]).

Telemetry asked whether Green "could talk." Paramedic Collins replied that Green has "a trachea and he is being bagged [and] can communicate via computer." Telemetry responded, "well that's not going to help us" (CA707).

After speaking to a physician, the Telemetry paramedic instructed Paramedic Collins to wait for a supervising lieutenant to arrive (CA394; CA709). Telemetry physician Flavio Crisari explained at trial that when patients cannot speak, and a difficult situation arises regarding the refusal of medical assistance, Telemetry sends "higher medical authority" – an EMS lieutenant, for example – to the scene to assess the situation, assess the patient, and determine whether "a refusal of medical aid [is] appropriate or transport is necessary" (CA223-24[319-21]).

At 3:20 p.m., Green scored a 12 or 15 on the GCS, indicating that his eyes were open and he responded to verbal communications by blinking. Green's GCS score did not, however, reveal whether he possessed decisional capacity (CA350[648-49]; CA687; CA689).

Under the Guidelines, only patients who possess "decisional capacity" – *i.e.*, the "ability to understand the meaning or consequences of their actions" – may refuse medical assistance (CA690). To demonstrate decisional capacity, the patient must be alert; oriented to person, place, and time; and able "to communicate, verbally or non-verbally," that he understands his medical condition, the risks of refusing medical aid, and the treatment and transportation alternatives (CA690). Patients impaired by hypoxia – *i.e.*, oxygen deprivation

– lack decisional capacity (CA239; CA691). Emergency medical responders must transport patients who require "further treatment or transportation," but lack "the decisional capacity to refuse medical aid" (CA693).

EMS Lieutenant Paul Giblin entered the Greens' apartment – a scene of relative "chaos and pandemonium" – at approximately 3:33 p.m. (CA264[398]). Lieutenant Giblin learned that Green, probably due to hypoxia, was not "alert and oriented times 3," and thus unable to communicate and without capacity to make decisions (CA238-39).

The Greens nevertheless testified that Green signaled his desire to refuse transport by blinking "yes" or "no" answers to an emergency responder's questions, and instructing his computer to voice the words, "I fine no hosp" (CA217[295-96]; CA285[483-85]). Unaware that Green had regained consciousness or tried to communicate, Lieutenant Giblin neither attempted to communicate with him; assessed his ability to communicate; nor evaluated his awareness or decisional capacity (CA235[365-66]; CA238[377]; CA279[459-60]).

For the following reasons, Lieutenant Giblin concluded that Green should go to the hospital: (1) Green was "in extremis," that is, unable to breathe for himself and certain to die without medical intervention; (2) Green's ventilators were broken; and (3) there was no "competent medical authority" with whom to leave Green (CA238; CA273[433-34]). Even if Green had been able to speak, Lieutenant Giblin explained at trial, nothing Green might have said would have altered his decision (CA274[437]).

Informed of Lieutenant Giblin's transport decision, Mrs. Green became hostile; insisted Green did not want to go to the hospital; and physically obstructed his removal (CA273-74; CA395).

Mrs. Green's friend Joan Bertin arrived at the Greens' apartment sometime after 3:15 p.m. Bertin described the scene in the apartment as "chaos and pandemonium," with furniture moved to block Green's removal, and people yelling and screaming (CA162[132]; CA178[139]).

Without medical experience or training, Bertin believed, based upon Green's blinked answers to her questions, that he wished to refuse treatment (CA179[143]; CA190-91). Challenging Lieutenant Giblin's transport decision, Bertin allegedly asked, "if [Green] could say, No, I don't want to go to the hospital, would you then take him?," to which Lieutenant Giblin supposedly responded, "no, he would not" (CA181[152]).

Emergency responders carried Green to an ambulance. After arriving at St. Luke's in critical condition, Green was placed on a ventilator at 4:32 p.m. (CA405; CA764). From the time Green's home ventilator failed, until the time he was placed on a ventilator at St. Luke's, Green could not breathe without the assistance of other people.

Informed that Green had been hypoxic for six minutes, St. Luke's emergency medicine resident Dr. Tiffany Reiser kept him on 100 percent oxygen (CA405[869]; CA436[891]). Dr. Reiser found Green's blood gas levels "[s]uggestive" of earlier hypoxia and

diagnosed him with "right lower lobe pneumonia" (CA406[872]; CA435[890]). Having breathed pure oxygen for approximately two hours, Green agreed to be admitted to St. Luke's (CA405[866]).

## B. This Litigation.

The Greens commenced this action in 2001, alleging that the City, Lieutenant Giblin, and St. Luke's had violated the ADA; 42 U.S.C. § 1983; and the New York State Human Rights Law, Executive Law § 290 *et seq.* (the "HRL").

### 1. The decisions in Green I.

In *Green I*, the District Court granted the defendants' motions for summary judgment (CA61.1-.43; App. 92a-98a). Rejecting Green's ADA claim, the District Court found the evidence insufficient to show that Green was transported because of his inability to talk, rather than on the basis of medical necessity.

On appeal, the United States Court of Appeals for the Second Circuit deemed the summary judgment evidence sufficient to support a jury finding that Lieutenant Giblin "declined to evaluate [Green's] alleged non-verbal and computer-generated indicators of refusal to accept treatment" because of disability discrimination (App. 65a-70a). The Court of Appeals thus remanded Green's ADA and HRL claims for trial.

### 2. The trial in Green II.

On remand, in *Green II*, the parties presented the evidence summarized above (at pages 3-9). In addition, the City's unrebutted emergency medicine expert, Dr. Anthony Mustalish, stated that the decision to transport Green was consistent with the standards of good and acceptable emergency medicine practice (CA356[672]). It would not have mattered whether Green had expressed a desire to refuse transport, Dr. Mustalish added, because Green's hypoxia would have made it impossible to validate his decisional capacity (CA356[670-71]).

The jury determined that although the City and Lieutenant Giblin had violated Green's HRL rights, and the City had violated the ADA, Lieutenant Giblin had made a reasonable decision to transport Green to the hospital. Without awarding any damages as against Lieutenant Giblin, the jury awarded Mrs. Green (the executrix of Green's estate) $400,000 in compensatory damages as against the City (CA511-12).

### 3. The decisions in Green II.

Granting the City's motion for judgment as a matter of law, the District Court held that: (1) Telemetry personnel did not discriminate against Green by sending a supervisor to evaluate the situation; (2) Green lacked the decisional capacity to refuse medical evaluation and transport; and (3) the decision to transport Green was reasonable and medically-driven, rather than discriminatory (App. 26a-37a). Alternatively granting the City's new trial motion, the District Court described

the jury's ADA and HRL findings as "seriously erroneous," a "gross miscarriage of justice," and "(overwhelmingly) against the weight of the credible evidence (and the law)" (App. 40a-43a). Again in the alternative, the District Court held that Mrs. Green would be entitled to only nominal damages (App. 43a-44a & n.19).

In an unreported summary order dated December 30, 2009, the Court of Appeals vacated the District Court's judgment and remanded for a new damages trial (App. 1a-9a). The City was not entitled to judgment as a matter of law, the Court of Appeals held, because the evidence, viewed in the light most favorable to Green, supported the jury's verdict (App. 3a-4a). Intimating that the District Court had ignored evidence of "discriminatory animus in the form of paternalistic stereotypes" and the Court of Appeals' decision in *Green I*, two members of the panel rejected the District Court's alternative order granting the City a new trial (App. 4a-5a). The third panel member, dissenting in part, would have affirmed the District Court's new trial order (App. 9a).[2]

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2. Second Circuit Internal Operating Procedure 32.1.1(a) permits rulings by summary order only "[w]hen a decision in a case is unanimous."

## REASONS FOR GRANTING THE PETITION

This Court should review the Court of Appeals' decisions in *Green I* and *Green II*, and clarify that when a disabled person's life is at stake, and evaluating his refusal of medical assistance ("RMA") is not feasible, emergency medical responders are free to exercise their medical judgment without fear of ADA liability. Although other Circuit courts have held that exigent circumstances render the ADA inapplicable, or at least reduce ADA accommodation requirements, the Court of Appeals wrongly declined to do so here. By requiring emergency medical responders to evaluate the RMAs of even hypoxic non-verbal ALS sufferers, the Court of Appeals' decisions may well endanger the lives of disabled emergency patients.

Under the Court of Appeals' decisions here, when a minimally communicative disabled emergency patient indicates a desire to refuse medical assistance, emergency medical responders face an impossible choice: (1) reject the RMA without an evaluation, perhaps saving the patient's life but triggering ADA liability; (2) perform a time-consuming full evaluation of the RMA, despite the risk to the patient's medical condition and the needs of other emergency patients; or (3) accept the RMA without a full evaluation, perhaps imperiling the patient and incurring both ADA and wrongful death liability. By granting certiorari and recognizing an exigent circumstances exception to the ADA, this Court can eliminate the tri-lemma and allow emergency medical responders to err, if at all, on the side of saving lives.

### A. The Court of Appeals' Decisions Conflict with this Court's Precedent and the Holdings of Other Circuits.

This Court has recognized exigent circumstances exceptions to even constitutional rights. Several Circuit Courts have either recognized an exigent circumstances exception to the ADA, or recognized that exigent circumstances affect the reasonableness of possible disability accommodations. The Court of Appeals wrongly declined to recognize any exigent circumstances exceptions to the ADA here.

As this Court explained in *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006), "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency" (quoting *Mincey v. Arizona*, 437 U.S. 385, 392-92 [1978]). Notwithstanding the Fourth Amendment, for example, "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant." *Brigham*, 547 U.S. at 403; *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981) (emergency exception to pre-deprivation hearing normally required by due process); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*) (exception to First Amendment for inflammatory speech likely to incite imminent violence).

Similarly, in *New York v. Quarles*, 467 U.S. 649 (1984), this Court created a public safety exception to the *Miranda* rule, which protects the Fifth Amendment's privilege against self-incrimination. This Court

reasoned that police officers confronting threats to public safety should not be forced to choose between (1) asking necessary questions without *Miranda* warnings, rendering any evidence thereby obtained inadmissible; and (2) providing *Miranda* warnings, at the risk of damaging or destroying the police officers' "ability to obtain that evidence and neutralize the volatile situation confronting them." *Id.* at 657-58.

Citing similar policy concerns, the Fifth Circuit held in *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000), that "Title II [of the ADA] does not apply" when police officers respond to reported incidents involving mentally disabled subjects, until police officers have secured the scene and minimized threats to human life. The Fifth Circuit reasoned that under exigent circumstances, when police officers must quickly identify, assess, and react to potentially life-threatening situations, they should not have to "factor in whether their actions are going to comply with the ADA." *Id.*; *see also id.* at 800 (Congress could not have intended ADA to prevent disability discrimination at the expense of public safety).

Without deciding whether the ADA is wholly inapplicable under exigent circumstances, the Fourth Circuit stated in *Waller v. City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009), that exigency affects the reasonableness of ADA accommodations. Thus, accommodations "that might be expected when time is of no matter become unreasonable to expect when time is of the essence." *Id.*; *see also Bates v. Chesterfield County*, 216 F.3d 367, 372 (4th Cir. 2000) ("[T]he volatile nature of a situation may make a pause for psychiatric

diagnosis impractical and even dangerous."). Applying these principles in *Waller*, the Fourth Circuit held that the ADA had not required police officers to contact mental health professionals during a two-hour standoff with an armed, mentally ill, and "barely speaking" hostage-taker. 556 F.3d at 175-77.

Like the Fourth Circuit, the Eleventh Circuit treats exigent circumstances as relevant to the reasonableness of ADA accommodations. *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085-86 (11th Cir. 2007). In *Bircoll*, the Eleventh Circuit held that under the exigent circumstances of highway DUI stops, where police officers must make on-the-spot judgments involving public safety, waiting for an oral interpreter before testing the sobriety of a deaf driver "is not a reasonable modification of police procedures." *Id.* at 1086. *Accord*, *Rosen v. Montgomery County*, 121 F.3d 154, 158 (4th Cir. 1997) (field sobriety test).

The Eighth Circuit will soon consider whether and how the ADA applies during a late-night health emergency. In *Loye v. County of Dakota*, 647 F. Supp. 2d 1081, 1088-90 (D. Minn. 2009), *appeal docketed*, No. 09-3277 (8th Cir. Sept. 9, 2009), the District Court for the District of Minnesota held that under such exigent circumstances, the ADA did not require emergency responders to wait for an interpreter before decontaminating deaf people exposed to mercury.[3]

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3. The Eighth Circuit has scheduled oral argument for June 16, 2010.

The decisions in *Bircoll* and *Loye* are consistent with advice provided by the U.S. Department of Justice, the federal agency responsible for promulgating rules under Title II of the ADA. In its "Commonly Asked Questions About the [ADA] and Law Enforcement," the Department of Justice includes the following question and answer:

> Do I have to take a sign language interpreter to a call about a violent crime in progress or a similar urgent situation involving a person who is deaf?
>
> No. An officer's immediate priority is to stabilize the situation. If the person being arrested is deaf, the officer can make an arrest and call for an interpreter to be available later at the booking station.

U.S. Department of Justice, Civil Rights Division, Disability Rights Section, Commonly Asked Questions About the [ADA] and Law Enforcement (www.ada.gov/q&a_law.htm) (Last revised April 4, 2006).

In a case quite similar to the one at hand, the District Court for the District of Colorado recognized an exception to the ADA's precursor, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *Ross v. Hilltop Rehabilitation Hosp.*, 676 F. Supp. 1528 (D. Colo. 1987). The patient in *Ross* – paralyzed, and able to communicate only by nodding his head or using a letter board – asked his health care providers to discontinue life-sustaining treatment. *Id.* at 1530. Reasonably concerned about the patient's decisional capacity, his

health care providers refused, pending a judicial determination of his capacity. *Id.* at 1530-31. Finding that the health care providers had made a life-or-death "judgment call," the District Court held that "the Rehabilitation Act does not apply to the medical treatment decisions of a physically handicapped individual, of questionable mental competency," who asks health care providers to terminate medical treatment. *Id.* at 1539-40; *see also Schiavo v. Schiavo*, 403 F.3d 1289, 1294 (11th Cir. 2005) ("The Rehabilitation Act, like the ADA, was never intended to apply to decisions involving the termination of life support or medical treatment."); *United States v. University Hosp.*, 729 F.2d 144 (2d Cir. 1984) (Rehabilitation Act inapplicable to treatment decisions involving deformed neonates).

Nor should the ADA apply under the far more exigent circumstances presented here. Emergency medical responders encountered a hypoxic late-term ALS sufferer recovering from respiratory arrest and unconsciousness; unable to breath without assistance; likely to die without medical intervention; and only able to communicate by blinking and slowly selecting letters and words on his computer screen. Had Green indicated a desire to refuse medical assistance, a full evaluation of his decisional capacity on the scene would have been time-consuming, potentially adverse to his medical condition and, given Green's hypoxia, unreliable.

Under Fourth, Fifth, and Eleventh Circuit precedent, the ADA did not require emergency medical responders, in these exigent circumstances, to accommodate Green's disabilities by conducting a

lengthy and potentially life-threatening evaluation of his RMA. Nor should the ADA have forced emergency medical responders to choose between saving Green's life and avoiding discrimination liability. An exigent circumstances exception would have allowed emergency medical responders to exercise their medical judgment, by transporting Green to a hospital for stabilization of his medical condition and a full evaluation of his RMA, without fear of ADA liability.

The Court of Appeals, however, declined to recognize any such exception. This Court should grant certiorari to resolve the conflict.

### B. The Court of Appeals' Paternalism Concerns are Insufficient to Preclude an Exigent Circumstances Exception to the ADA.

The Court of Appeals expressed concern that the City and Lieutenant Giblin may have "denied" Green access to the City's "services for refusing medical treatment based on discriminatory animus in the form of paternalistic stereotypes" about the mental competency of physically disabled people (App. 3a, 70a). Congress indeed cited negative stereotypes about the ability of disabled people "to participate in, and contribute to, society" as a reason for enacting the ADA. 42 U.S.C. § 12101(a)(7). Under this Court's decision in *Chevron v. Echazabal*, 536 U.S. 73 (2002), however, an exigent circumstances exception to the ADA is consistent with Congressional intent.

In *Echazabal*, this Court unanimously upheld, as consistent with the ADA, a regulation of the Equal

Employment Opportunity Commission allowing employers to reject disabled job candidates for positions that would, based on reasonable medical judgment and an individualized risk assessment, pose a direct threat to the applicant's health. 536 U.S. at 76, 86. After reviewing ADA legislative history, this Court rejected the assertion that the regulation would allow "the kind of workplace paternalism the ADA was meant to outlaw." *Id.* at 85-86 & n.5. Congress sought to prevent employers from using stereotypes to discriminate against disabled applicants "for their own good," this Court reasoned, not to prevent employers from considering "specific and documented risks" to job candidates – even candidates willing to accept the risk. *Id.*

By analogy here, an exigent circumstances exception to the ADA, permitting reasonable emergency medical judgments that a disabled patient must go to the hospital without a full evaluation of his RMA, does not condone the kind of paternalism the ADA condemns. *See Knapp v. Northwestern Univ.*, 101 F.3d 473, 485-86 (7th Cir. 1996) (where university made medically sound judgment to exclude student from basketball team, despite student's willingness to accept risk of death from heart condition, university did not make paternalistic decision barred by Rehabilitation Act), *cert. denied*, 520 U.S. 1274 (1997).

Indeed, two factors reduce the risk that an exigent circumstances exception to the ADA would expose non-speaking disabled emergency patients to unwanted and paternalistic medical intervention. First, people may prepare, and have available in their homes, documents

communicating their wishes regarding non-hospital treatment. For example, New York law generally obligates emergency medical responders to comply with the terms of a non-hospital "Do Not Resuscitate" (or "DNR") order. *See* N.Y. Pub. Health Law § 2977(10) (effective until June 1, 2010); N.Y. Pub. Health Law § 2994-ee (effective June 1, 2010); 10 N.Y.C.R.R. 800.15(c). The New York State DNR form is available at www.health.state.ny.us/forms/doh-3474.pdf. To exercise more specific control over the provision of non-hospital emergency care, New York residents may now complete a Medical Order for Life-Sustaining Treatment (or "MOLST") indicating, among other information, whether the person would like to receive "comfort care only," without being transferred to a hospital for life-sustaining treatment. A sample MOLST form is available at www.compassionandsupport.org/pdfs/professionals/molst/MOLST%20August%202008%20Revision.FINAL_.101308_.kr_.SAMPLE_.pdf.

Second, even for disabled patients who lack a DNR or MOLST, the proposed exigent circumstances exception would apply only in non-hospital settings, when emergency medical responders are on the scene attempting to determine whether a disabled patient requires hospital transport. Here, once emergency medical responders removed Green from the "chaos and pandemonium" of his apartment to a hospital, where he was placed on a respirator and no longer appeared hypoxic, Dr. Reiser could fully and safely evaluate Green's wishes, and provide appropriate medical treatment.

Accordingly, this Court should grant certiorari in order to clarify that Congress' paternalism concerns do not prevent the recognition of an exigent circumstances exception to the ADA.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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