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No. 09-1426

IN THE

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

REPLY BRIEF

Of Counsel:

BARRY P. SCHWARTZ
SCOTT SHORR

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
LEONARD J. KOERNER*
100 Church Street
New York, New York 10007
(212) 788-1010 or 1089
lkoerner@law.nyc.gov

* *Counsel of Record*

Counsel for Petitioners

231445

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

REPLY ARGUMENT

A. Petitioners' Exigent Circumstances Arguments are Preserved.

Generally, this Court only decides questions raised, involved in, or passed upon by lower courts. *See, e.g., Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998).

Respondent challenges only one of petitioners' contentions on preservation grounds: whether the ADA applies 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 (Opp. Br. at 1, 20-21).[1]

Petitioners made the supposedly unpreserved exigency argument seven years ago, in support of their summary judgment motion. Seeking dismissal of Walter Green's ADA claim, petitioners contended that they had made a reasonable decision, based upon Green's dire medical condition and the failure of his mechanical ventilators, to transport him to a hospital for evaluation (City June 30, 2003, Mem. Supp. SJ, S.D.N.Y. Dkt. No. 41, at 9-10). Under these circumstances, petitioners

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[1] Contrary to respondent's mischaracterization (Opp. Br. at 20-21), petitioners do not seek "blanket immunity from ADA liability" for emergency medical responders. As the Second Circuit and the District Court held here (65a; CA61.14-.15), individuals are not "public entities" subject to ADA liability under 42 U.S.C. § 12131(1).

submitted, "Title II of the ADA is not applicable" (*id.* at 10). Even if the ADA were applicable, petitioners added, the Greens had failed to prove the existence of a "reasonable accommodation" for someone whose recent oxygen deprivation and unconsciousness had compromised his capacity "to refuse further medical assistance (especially where such refusal might result in death)" (*id.*).

Recommending dismissal of Green's ADA claim on summary judgment, Magistrate Judge Gorenstein concluded that emergency medical responders transported Green to the hospital, without "accommodat[ing]" his "initial wish not be treated," because he urgently needed professional medical care, not because of his inability to speak (CA61.16-.19). The Magistrate Judge even described the conditions the emergency medical responders encountered on March 19, 2000, as "exigent circumstances" (*id.*; CA61.32-33).

Magistrate Judge Gorenstein also recommended dismissal of Green's Fourteenth Amendment due process claim. Imposing liability under the circumstances presented in this case, the Magistrate Judge noted, "could cause future decision makers to err on the side of leaving critically ill patients without professional medical assistance" (CA61.23). Moreover, the Magistrate Judge reasoned, "the crisis atmosphere" inside the Greens' apartment on March 19, 2000, "would reasonably have caused the officers to conclude that this was not a setting in which Walter Green could make an informed and competent decision regarding his treatment" (CA61.23).

Objecting to Magistrate Judge Gorenstein's Report and Recommendation, the Greens criticized the Magistrate Judge for "seemingly adopt[ing]" three defenses to ADA claims, available when emergency medical responders transport a disabled person to the hospital despite the person's refusal of medical assistance (Pl. Jan. 26, 2004, Objections to R&R, S.D.N.Y. Dkt. No. 48, at 17-21). The Greens summarized two of the three ADA defenses as follows: (1) an "exigency" defense, applicable when the disabled person is "*in extremis*"; and (2) a "liability" defense, applicable when emergency medical responders act out of fear that accepting the person's refusal of medical assistance would trigger liability (*id.* at 17-19).

Beyond adopting Magistrate Judge Gorenstein's Report and Recommendation in its entirety (93a-98a), the District Court expanded upon the Magistrate Judge's rationale for dismissing Green's ADA claim (97a-98a). Under the circumstances presented by the summary judgment evidence, the District Court determined, petitioners decided to "treat" Green because he was "*in extremis*," could not breathe on his own, and needed to go to a hospital, not because of his inability to talk (97a-98a). "Indeed," the District Court added, petitioners "may have subjected themselves to liability had they not acted as they did" (98a).

On appeal to the Second Circuit in *Green I*, the Greens characterized the District Court as permitting emergency medical responders to "impose unwanted medical treatment on a disabled person solely because the medical personnel deem[ ] such treatment necessary" (Pl. *Green I* App. Br. at 3; *see also id.* at 33).

The Greens also denied the existence of any "emergency" in their apartment, when emergency medical responders arrived on March 19, 2000, "which required the officers to make a split second decision" (*id.* at 2).

In their *Green I* appellees' brief, petitioners urged dismissal of Green's ADA claim based upon the "overwhelming evidence" that emergency medical responders had transported him to the hospital because of his urgent medical condition, rather than because of his disability (City *Green I* App'ee Br. at 21-24, 44-45). At any rate, petitioners contended, the circumstances had rendered it unreasonable to "accommodate" Green's speech disability by performing a full Telemetry evaluation of his purported refusal of medical assistance (*id.* at 41-43). Given the extremely slow pace of Green's computer-assisted communications, petitioners explained, such an "accommodation" would have threatened Green's life, monopolized scarce Telemetry resources, and prevented Green's emergency medical responders from attending to the needs of other emergency patients in New York City (*id.* at 6-7, 41-43).

On reply, the Greens summarized petitioners' argument as follows: "the situation in the Green apartment was exigent, requiring their immediate assistance to save Walter Green's life and precluding all efforts talk to him about his wishes to be treated" (Pl. *Green I* Reply Br. at 2, 4). The Greens also disputed petitioners' "claims that their actions were reasonable in light of the exigencies of the situation" (*id.* at 6).

In its *Green I* decision (46a-91a), the Second Circuit implicitly rejected the District Court's exigent circumstances rationale for dismissing Green's ADA claim, vacated the District Court's judgment dismissing that claim, and remanded Green's ADA claim for trial (65a-70a; 91a). The Second Circuit also rejected, explicitly, the District Court's exigent circumstances rationale for dismissing Green's Fourteenth Amendment claim against Lieutenant Giblin, but upheld the dismissal of that claim on alternative grounds (85a-86a; *see also* CA61.23).

Contrary to respondent's assertion (Opp. Br. at 20), petitioners did not, on remand in *Green II*, "effectively stipulate that the ADA applied" by "adopting" the District Court's jury charge. Given the Second Circuit's holding in *Green I* that Green's ADA claim warranted a trial, petitioners acceded to the necessity of an ADA jury charge on remand (CA495-97). For purposes of that charge, petitioners did not dispute that Green was "disabled" within the meaning of the ADA, or that he challenged the manner in which a "public entity," as defined by the ADA, provided the "service" of evaluating refusals to accept medical assistance (*id.*).

After the jury reached a verdict in *Green II*, the District Court granted petitioners' motion for judgment as a matter of law (10a-45a). Viewing the evidence in the light most favorable to respondent, the District Court found that emergency medical responders faced the following circumstances, among others, in the Greens' apartment on March 19, 2000: (1) Walter Green's ventilators had failed and he was unable to breathe without assistance; (2) Green had been without

oxygen – *i.e.*, hypoxic – long enough to deprive him of the decisional capacity necessary to refuse medical assistance or transport; and (3) there were no trained medical personnel to care for Green at home (26a-35a). Under these circumstances, the District Court determined, emergency medical responders made a reasonable, medically sound decision to transport Green to a hospital for evaluation and treatment (22a-23a; 26a-35a). Accordingly, the District Court held, no disability discrimination occurred (22a-23a).

In substance, the District Court held in *Green II* that exigent circumstances defeated respondent's ADA claim. To support its holding, the District Court cited *Application of the President & Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1001-02 (D.C. Cir. 1964), in which a single judge granted a temporary emergency writ allowing physicians to administer life-saving blood transfusions to an "*in extremis*" emergency patient. The patient, whose religion prevented her from consenting to blood transfusions, had indicated a desire to withhold consent, but appeared to lack decisional capacity. *Id.* at 1006-07, 1009. Analogizing the judge in *Georgetown* to the emergency medical responders here, the District Court, quoting *Georgetown*, 331 F.2d at 1009, observed that "a life hung in the balance. There was no time for research and reflection" (31a).

On respondent's appeal to the Second Circuit in *Green II*, *amicus curiae* the New York Lawyers for the Public Interest criticized the District Court for having created an emergency exception to the ADA (*Green II* Amicus Br. at 22-23). By supposedly "allowing 'reasonableness' and 'medical need' to stand as

justifications" for overruling a speech-disabled person's refusal of medical assistance, *amicus curiae* argued, the District Court "effectively gutted the protections of the ADA" (*id.* at 22). Respondent similarly accused the District Court of "condon[ing]" disability discrimination "under the guise of expediency and 'medical necessity'" (Pl. *Green II* Reply Br. at 21-22).

Given the Second Circuit's rejection of the District Court's exigent circumstances analyses in *Green I* (see pages 3-5 above), petitioners considered it futile to defend the District Court's decision in *Green II* on exigent circumstances grounds. Petitioners instead focused on the evidence that Green lacked decisional capacity (City *Green II* App'ee Br. at 35-44), and reiterated in a footnote that a Telemetry evaluation of Green's purported refusal of medical assistance would have been dangerously time-consuming (*id.* at 47 n.18).

As it had in *Green I*, the Second Circuit implicitly rejected the District Court's exigent circumstances rationale in *Green II* (2a-9a). Without mentioning the difficult circumstances emergency medical responders faced on March 19, 2000, the Second Circuit concluded that the record contained sufficient evidence of disability discrimination to support the jury's verdict (4a-5a).

Especially given respondent's repeated admissions that this case raises the question of whether the ADA applies under exigent medical circumstances, this Court should reject respondent's mistaken preservation argument.

B. Respondent Ignores the Circuit Conflict over Exigent Circumstances and the ADA.

This Court should also reject respondent's attempt to deny the existence of a Circuit conflict as to the applicability of the ADA under exigent circumstances (Opp. Br. at 1, 21-27).

Respondent's lengthy quotation from *Bircoll v. Miami-Dade County*, 480 F.3d 1072 (11th Cir. 2007), highlights the Circuit conflict (Opp. Br. at 23-25). In the quoted portion of *Bircoll*, the Eleventh Circuit disagreed with the Fifth Circuit's holding, in *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000), that "Title II [of the ADA] *does not apply* to an officer's on-the-street responses to reported disturbances or other similar incidents . . . prior to the officer's securing the scene and ensuring that there is no threat to human life." *Bircoll*, 480 F.3d at 1085-86. In the Eleventh Circuit's view, the exigent circumstances "presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance." *Id.* at 1085.

Nor can respondent eliminate the conflict by noting that ADA exigent circumstances issues often arise in the law enforcement setting, rather than the emergency medicine setting (Opp. Br. at 22-27 & n.1). Based on the ADA principles enunciated in *Hainze* and *Bircoll*, the Fifth Circuit and the Eleventh Circuit would have reached conflicting decisions in the case at bar.

C. Transporting a Disabled Emergency Patient to a Hospital does not Constitute Paternalistic Discrimination.

Respondent mistakenly asserts that the exigent circumstances exception to ADA liability at issue here would expose disabled people to paternalistic medical treatment without their consent (27-37). At issue, however, is whether the ADA allows emergency medical responders, acting under exigent circumstances, to transport a disabled patient to a hospital for evaluation and treatment.

By transporting Green to a hospital, emergency medical responders moved Green from a setting where his purported refusal of medical assistance could not be reliably evaluated, to a setting where a physician could perform a reliable evaluation. Upon that evaluation, Green agreed to be admitted to the hospital (CA405[866]). Thus, rather than making a paternalistic decision to override Green's right to refuse medical treatment, emergency medical responders enhanced Green's ability to exercise that right. Their conduct should not trigger ADA liability.

CONCLUSION

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

Respectfully submitted,

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
LEONARD J. KOERNER*
100 Church Street
New York, New York 10007
(212) 788-1010 or 1089
lkoerner@law.nyc.gov

* *Counsel of Record*

Counsel for Petitioners

Of Counsel:

BARRY P. SCHWARTZ
SCOTT SHORR