UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 16-56791

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal From the United States District Court
For the Central District of California, Southern Division,
(District Court No. 08-15-cv-00768-JVS-DFM)
Hon. James V. Selna, U.S. District Judge

AMICUS CURIAE BRIEF BY CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLEES' PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other

I.

CORPORATE DISCLOSURE STATEMENT

Amici Curiae California State Association of Counties (CSAC) is a non-profit corporation. CSAC has no parent corporation and no publically held corporation owns more than 10% of its stock.

II.

AMICUS IDENTITY STATEMENT AND INTEREST IN THE CASE

CSAC's membership consists of the 58 California Counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsel's Association of California and overseen by the Association's Litigation Overview Committee. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that *Vos v. City of Newport Beach*, ___ F.3d___ 1118, 2018 WL 2771049 (9th Cir. 2018), raises issues affecting all counties. CSAC is interested in this case because the issues of national importance presented have a

profound impact on all California counties, as well as other government agencies throughout California.

III.

STATEMENT OF AUTHORSHIP AND FINANCIAL SUPPORT

No counsel for any party in this case authored any part of this brief. No party or counsel for any party in this case contributed money intended to fund preparation or submission of this brief. No person or entity other than CSAC and its counsel contributed money intended to fund preparation or submission of this brief.

IV.

STATEMENT REGARDING CONSENT TO FILE

All parties have consented to the filing of this brief.

V.

INTRODUCTION

Law enforcement officers have become the de facto first responders to incidents involving the mentally ill as more mentally ill persons living in the community receive little or no treatment, or do not comply with the treatment they do

receive. Just like suspects who are not mentally ill, suspects who are mentally ill may engage in violent behavior threatening the safety of officers, bystanders and the suspects. Make no mistake, law enforcement officers are not mental health professionals. Nonetheless, recognizing that encounters with mentally ill persons may require specialized responses, some local law enforcement agencies have developed new and innovative approaches for responding to mentally ill suspects. But there is no conclusive evidence that these specialized approaches reduce the rate or severity of injuries suffered during police encounters with mentally ill suspects. In fact, several studies suggest that these specialized approaches have no impact whatsoever on injuries or the use of force. This is not surprising.

Situational factors – not the characteristics of the suspect – typically determine the outcome of a police encounter. Police officers also encounter a wide range of mental illnesses under very diverse circumstances, precluding any one-size-fits-all approach. Finally,

knowledge of a suspect's mental illness does not give officers any greater insight into whether a mentally ill suspect will act violently toward herself or others. 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.

As Justice Bea observed in his dissent in this case, this Court's precedent "stands for a fairly common-sense and non-controversial result: a mentally disturbed person may respond differently to police intervention than does a person who is not mentally disturbed. Officers should bear this in mind when going about their duties." *Vos*, 2018 WL 2771049, at *14. But as Justice Bea also observed "[a court] may consider whether a person is emotionally disturbed in determining what level of force is reasonable," but "[this Court] ha[s] never ruled that police are obligated to put themselves in danger so long as the person threatening them

is mentally ill. Such a conclusion would be illogical—especially given the admonition in *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010) ... that we will not 'create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.'" *Id.* To be sure, Justice Bea acknowledged what the panel majority ignored: "[T]he 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." *Id.*

This Circuit and others hold that Title II of the Americans with Disabilities Act applies to arrests and requires law enforcement officers – who are not mental health professionals – to provide "reasonable accommodations" to suspects, even dangerous ones. *Vos*, 2018 WL 2771049, at *9 (citing *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1231 (9th Cir.) (*Sheehan I*) *cert. granted sub nom.*, *City & County of San Francisco v.*

Sheehan, 135 S.Ct. 702 (2014), and *rev'd in part, cert. dismissed in part sub nom.*, *Sheehan II*, 135 S.Ct. at 1778); *Bircoll v. Miami–Dade County*, 480 F.3d 1072, 1185 (11th Cir. 2007); *Waller ex rel. Estate of Hunt v. City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009). But the Supreme Court has not yet addressed this important issue. *Sheehan II*, 135 S.Ct. at 1772-1774 (granting review to answer the "important question" of whether Title II of the ADA applies to arrests, but dismissing certiorari on this ground due to inadequate briefing). And at least one other Circuit holds Title II does not apply to arrests. *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000); *see Rosen v. Montgomery County*, 121 F.3d 154, 157 (4th Cir. 1997) (observing that "[t]he most obvious problem" with plaintiff's argument "is fitting an arrest into the ADA at all.") Given the disagreement amongst Circuit Courts and the absence of an answer from the Supreme Court, "the question" of whether Title II "applies when polices officers make an arrest . . . is

debatable." *Haberle v. Troxell*, 885 F.3d 170, 178 (3d Cir. 2018).

Concluding that Title II applies to arrests is just the beginning. Unresolved by this Court and other courts are extremely important and exceptionally difficult questions regarding actual on-the-street implementation of Title II's reasonable accommodation mandate. Here are many important and unanswered questions, but in no way is this a complete list: Must law enforcement officers provide individualized reasonable accommodations to mentally ill suspects in tense and uncertain circumstances where delay in using force might result in serious injury or harm to the officer, suspect or bystander? Are accommodations required simply because an officer has been told or otherwise suspects a mental illness but does not know for sure? If so, what constitutes a reasonable accommodation? Are different accommodations required for different mental illnesses and how is an officer supposed to determine (i.e., diagnose) what accommodation is appropriate? 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? And if so, is qualified immunity available, or is it essentially strict liability if the officers provide what they believe are reasonable accommodations based on the limited guidance currently available, and a court (or jury) in hindsight decided they were wrong? Is it sufficient for law enforcement agencies to implement system wide accommodations (e.g., a psychiatric emergency or critical response team)? What are the obligations of employers regarding training on reasonable accommodations during arrests?

This Court should grant en banc review to clarify the law and to provide guidance to law enforcement officers and agencies on these critically important issues.

Also, en banc review is necessary to evaluate whether the inclusion by the panel majority of mental illness and "events leading up to the shooting, including the officer's tactics" expands the *Graham*[1] factors beyond what the Supreme Court would likely allow in the analysis of whether force was objectively reasonable under the Fourth Amendment. *See County of Los Angeles v. 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."). As the Fourth Circuit has held, "[k]nowledge of a person's disability 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, 372 (4th Cir, 2000); *Sanders v. Minneapolis* 474 F.3d 523, 527 (8th Cir. 2007) (following *Bates*). And the majority of other Circuit Courts have long held that preforce tactics are not included in the

[1] *Graham v. Connor*, 490 U.S. 386 (1989).

reasonableness analysis. *E.g., 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."); *Fraire v. City of Arlington*, 957 F.2d 1268, 1275-1276 (5th Cir. 1992); *Sherrod v. Berry*, 856 F.2d 802, 805-806 (7th Cir. 1988) (en banc).

VI.

EN BANC REVIEW IS NECESSARY AND APPROPRIATE

A. The Supreme Court Has Not Decided The Important Questions Of Whether Title II Applies To Arrests And, If So, How It Applies; This Court Has Not Addressed These Questions En Banc; And Decisions From Other Circuit Courts Are Not Uniform

Title II of the ADA 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. "[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). This does not, "however, ... require a public entity to employ any and all means to make auxiliary aids and services accessible to persons with disabilities, but only

to make 'reasonable modifications' that would not fundamentally alter the nature of the service or activity of the public entity or impose an undue burden." *Bircoll*, 480 F.3d at 1082. Moreover, Title II has a "direct threat" exception. 28 C.F.R. § 35.139(a).

"[C]ourts across the country are divided on whether police fieldwork and arrests can rightly be called "services, programs, or activities of a public entity....[Citation]." *Haberle,* 885 F.3d at 180 & n.10. Even courts finding Title II applies to arrests do so for different reasons. *See Bircoll*, 480 F.3d at 1084 ("We need not enter the circuits' debate about whether police conduct during an arrest is a program, service, or activity covered by the ADA. This is because Bircoll, in any event, could still attempt to show an ADA claim under the final clause in the Title II statute: that he was 'subjected to discrimination' by a public entity, the police, by reason of his disability.").

The principal dispute amongst the courts is how Title II and its reasonable accommodation mandate apply to law

enforcement officers' on-the-street interactions with mentally ill suspects.

Like the Eleventh and Fourth Circuits, this Circuit holds that Title II applies to arrests with "exigent circumstances" presented being considered in the analysis of whether reasonable accommodations were provided. *Sheehan I*, 743 F.3d at 1232; *Waller*, 556 F.3d at 175; *Bircoll*, 480 F.3d at 1085.

The Fifth Circuit takes a different approach, which is the one CSAC believes best ensures the safety of officers, suspects and bystanders, and the one this Court should adopt if Title II applies to arrests. In *Hainze,* the Fifth Circuit held "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." *Id.* at 801. The Fifth Circuit's thoughtful reasoning was as follows:

> 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.

B. Given The Importance Of The Issues Surrounding Title II's Application To Arrests, En Banc Review Is Necessary To Provide Concrete Guidance

Assuming Title II applies to arrests, law enforcement officers and agencies need guidance on when and how to offer reasonable accommodations, and what constitutes a reasonable accommodation. Neither *Vos* nor *Sheehan I* provide sufficient guidance. Although both opinions

discussed employing de-escalation techniques, further communication or providing specialized help, and these things *might help* in certain situations, responding to an emergency where a mentally ill person is threatening themselves or others is not the same as most other encounters between law enforcement officers and a disabled person.

The truth is that no one knows what might help these situations and evidence suggests that intervention and de-escalation techniques do not work. 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).

Further, the panel majority provided no guidance on whether the finding of reasonable accommodations is one of fact or law. And if not one of law, how would a jury resolve the factual disputes given the research showing it is pure speculation to say that some reasonable accommodation would have eliminated the need for force. This is not merely hypothetical concern. In this case, the officers were found immune for any Fourth Amendment violation. *Vos*, 2018 WL 27771049, at * 7-8. Thus, the main issue to be resolved on remand is the Title II claim, and yet the panel majority provided no guidance to the parties or the district court on how to resolve the Title II claim. Thus, it should surprise no

one to see this case make a second trip to this Court, regardless of which party prevails.

Given the significance of the issues, and lack of guidance, en banc review is requires so that law enforcement officers and public agencies (and courts) know exactly what is expected of them when they are required to make split second decisions in dangerous situations in the field.

Moreover, what *Vos* and *Sheehan* proposed were reasonable accommodations provided by the officers on the scene. But an officer on the scene of an arrest or at any other time, has no obligation under Title II to provide any accommodation. Title II imposes obligations on public entities, not individuals. 42 U.S.C. § 12132 (imposing obligations on "public entity"); *id.* at 12131 (defining "public entity"); *Kaur v. City of Lodi*, 263 F. Supp. 3d 947, 981 (E.D. Cal. 2017) ("[i]ndividual liability is precluded under ADA Title II"); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n. 8 (8th Cir.1999) (same).

C. The Panel Majority's Inclusion Of A Suspect's Mental Illness And Preforce Tactical Decisions By Officers In The Reasonableness Analysis Stretches *Graham* Beyond What The Supreme Court Will Likely Accept, And Beyond What Other Circuit Courts Allow

Graham dictates that to determine whether a use of force was objectively reasonable, courts must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the "countervailing government interests at stake." *Graham*, 490 U.S. at 396-397; *see also Mendez*, 137 S.Ct. at 1546; *Scott v. Harris*, 550 U.S. 372, 383 (2007). *Graham* "sets forth a settled and *exclusive framework* for analyzing whether the force used in making a seizure complies with the Fourth Amendment." *Mendez*, 137 S.Ct. at 1546 (italics added). 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." *Graham*, 490 U.S. at

396. Deference is given to the officers on-the-scene decisions and hindsight is prohibited. *Id.* When it comes to deadly force, it is clear that the Fourth Amendment is not violated if the officer reasonable believes a suspect poses a threat of injury or death, *Brousseau v. Haugen*, 543 U.S. 194, 197-198 (2004), "at the moment when the shots were fired." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014).

The panel majority noted "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*, 2018 WL 2771049, at *6 (citing *Bryan v. MacPherson*, 630 F.3d 805, 831 (9th Cir. 2010); *Deorle v. Rutherford*, 272 F.3d 1272, 1282-1283 (9th Cir. 2001)). The conclusion that the *Graham* factors are not exclusive seems to be diametrically opposed to what the Supreme Court said in *Mendez*. Certainly the Supreme Court never said in *Graham*, and has never subsequently held, that a suspect's mental illness is a factor to be considered in the 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. Moreover, including a suspect's mental illness requires hindsight, as it did in this case. *Vos*, 2018 WL 2771049, at *3 ("*Vos's* medical history *later revealed* that he had been diagnosed as schizophrenic.") (Italics added). Indeed, as Justice Bea aptly observed in his dissent, 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. *Vos*, 2018 WL 2771049, at *14-15.

The Supreme Court has likewise never held that an officer's preforce tactics are properly considered in the reasonableness analysis. Doing so violates *Graham's* prohibition of utilizing hindsight in the reasonableness analysis. 490 U.S. at 396 ("The 'reasonableness' of a

particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."). And the Supreme Court's abrogation of this Court's "provocation doctrine" in *Mendez* certainly provides some indication that it would reject the use of preforce tactics in *Graham's* reasonableness analysis.[2] 137 S. Ct. at 1548 ("[T]he fundamental problem of the provocation rule: [is] namely, that it is an unwarranted and illogical expansion of *Graham*."); *see Sheehan II*, 135 S. Ct. at 1777 (no Fourth Amendment violation "based merely on bad tactics that result in a deadly confrontation that could have been avoided"); *Greenidge*, 927 F.2d at 792. ("[T]he *Graham* decision contradicts appellants' argument that, in determining reasonableness, the chain of events ought to be traced backward to the officer's misconduct of failing to

[2] To be fair, the Supreme Court in *Mendez* declined to address the issue. 137 S. Ct. at 1547. The case was reargued on remand on May 14, 2018, and the plaintiffs subsequently submitted *Vos* as supplemental authority to support their assertion that preshooting conduct is properly considered in the reasonableness analysis. Case No. 13-56686 and 13-57072, Doc. No. 170.

comply with the standard police procedures for nighttime prostitution arrests.").

Nonetheless, citing to *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1087 (9th Cir. 2017) and *Bryan*, 630 F.3d at 831, the panel majority stated "the events leading up to ths shooting, including the officers tactics, are encompassed in the facts and circumstances for the reasonableness analysis." *Vos*, 2018 WL 2018 WL 2771049, at *6.

As stated *ante*, including the events leading up to a shooting in the reasonableness analysis is contrary to decisions from other courts. *E.g., Dickerson,* 101 F.3d at 1162; *Salim,* 93 F.3d at 92; *Plakas,* 19 F.3d at 1150; *Bella,* 24 F.3d at 1256; *Cole,* 993 F.2d at 1333; *Greenidge,* 927 F.2d at 792; *Fraire,* 957 F.2d at 1275-1276; *Sherrod,* 856 F.2d at 805-806.

Moreover, *Bryan* does not support such an expansive inclusion of an officer's preforce decision making into the reasonableness analysis. The issue regarding tactics in *Bryan* was limited solely to whether less intrusive means of

force were available. *Bryan*, 630 F.3d at 831 ("[W]e have held that police are 'required to consider '[w]hat other tactics if any were available' to effect the arrest.'" [Citations]. Officer MacPherson argues that there were no less intrusive alternatives available to apprehend Bryan. Objectively, however, there were clear, reasonable, and less intrusive alternatives."). While the panel majority's inclusion of preforce tactics beyond the existence of lesser means of force does find support in *Hung Lam*, the court's conclusion in that case that "[t]he events leading up to the shooting, such as the officer's tactics, are encompassed in" the reasonableness analysis was not supported by citation to any precedent. *Hung Lam*, 869 F.3d at 1087. Indeed, the absence of citation in the relevant passage of the opinion is noteworthy given the citations that are provided. *Id.*

VII.

CONCLUSION

The public, and courts, sometimes forget how truly dangerous and difficult it is to be a law enforcement officer. Every day, law enforcement officers face a "dangerous and complex world." *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992). "Every day of the year, law enforcement officers leave their homes to police, protect, and serve their communities. Unlike most employees in the workforce, peace officers carry firearms because their occupation requires them on occasion to confront people who have no respect either for the officers or for the law." *Gonzalez v. City of Anaheim,* 747 F.3d 789, 799 (9th Cir. 2014) (Trott, J., dissenting in part and concurring in part). "By asking police to serve and protect us, we citizens agree to comply with their instructions and cooperate with their investigations. Unfortunately, not all of us hold up our end of the bargain. As a result, officers face an ever-present risk that routine police work will suddenly become dangerous." *Mattos v.*

Agarano, 661 F.3d 433, 453 (9th Cir. 2011) (en banc) (Kozinski, C.J., concurring in part and dissenting in part). Indeed, "[p]olice officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397.

The panel majority's opinion makes the job of law enforcement officers significantly more difficult and dangerous by requiring officers to not only recognize mental illness but determine – in the heat of the moment under stressful and chaotic circumstances – what accommodations could be made for the particular suspect, who has his or her own unique mental illness.

Given the significance of the issues presented, the actual and apparent divergence from other Circuit Courts and the Supreme Court, this Court should, and needs to,

grant en banc review. Issues of this magnitude should not be decided in a 2-1 panel opinion.

Dated: July 2, 2018

Daley & Heft, LLP

By:

/s/ Lee H. Roistacher

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 29-2(c)(2), I certify that the Amicus Brief by the California State Association of Counties in support of the petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more and contains 4,168 words.

Dated: July 2, 2018

Daley & Heft, LLP

By:

/s/ Lee H. Roistacher

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CERTIFICATE OF SERVICE

Re: *Richard Vos, et al. v. City of Newport Beach, et al.*
United States District Court of Appeals for the Ninth Circuit No. 16-56791
USDC Case No. 08-15-cv-00768-JVS-DFM

I hereby certify that I electronically filed the foregoing:

AMICUS CURIAE BRIEF BY CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLEES' PETITION FOR REHEARING EN BANC

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