

No. _____

**In The
Supreme Court of the United States**

CITY AND COUNTY OF SAN FRANCISCO,
KIMBERLY REYNOLDS, and KATHRINE HOLDER,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

SAN FRANCISCO CITY ATTORNEY'S OFFICE
DENNIS J. HERRERA
City Attorney
BLAKE P. LOEBS
PETER J. KEITH, *Counsel of Record*
CHRISTINE VAN AKEN
Deputy City Attorneys
1390 Market Street, 7th Floor
San Francisco, California 94102-5408
Telephone: (415) 554-3908
Facsimile: (415) 554-3837
E-Mail: peter.keith@sfgov.org

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody.

2. Whether it was clearly established that even where an exception to the warrant requirement applied an entry into a residence could be unreasonable under the Fourth Amendment by reason of the anticipated resistance of an armed and violent suspect within.

PARTIES TO THE PROCEEDING

Petitioners are the City and County of San Francisco, a California municipal corporation, and two individual San Francisco police officers, Kimberly Reynolds and Kathrine Holder. Petitioners were defendants-appellees in the court of appeals. Police Chief Heather Fong was a defendant-appellee in the court of appeals, but she is not a petitioner here because the judgment in her favor was affirmed by the court of appeals.

Respondent is Teresa Sheehan, an individual. Respondent was the plaintiff-appellant in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	3
Relevant constitutional, statutory, and regulatory provisions	3
Statement	8
Reasons for granting the petition	18
I. This Court should resolve whether and how the Americans With Disabilities Act applies to arrests of armed and violent suspects who are disabled.....	18
A. The circuits are in conflict on this question.....	18
B. The question presented is recurring and important.....	22
C. Title II of the ADA does not require accommodations for armed and violent suspects who are disabled.....	25
II. The Court should review the Ninth Circuit's erroneous qualified immunity decision	28
A. It was not clearly established that the Fourth Amendment requires more than an exception to the warrant requirement for officers to immediately enter a residence	29

TABLE OF CONTENTS – Continued

	Page
B. The Fourth Amendment does not require officers to desist from making a lawful entry and arrest of a suspect – mentally disturbed or not – by reason of the suspect’s resistance	39
III. The Court should hold this petition for <i>Plumhoff v. Rickard</i>	41
Conclusion.....	43
 Appendix:	
Court of appeals opinion (Feb. 21, 2014).....	App. 1
District court order (May 6, 2011)	App. 55

TABLE OF AUTHORITIES

Page

CASES:

<i>Alexander v. City and County of San Francisco</i> , 29 F.3d 1355 (9th Cir. 1994)	17, 33
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987).....	29
<i>Ashcroft v. Al-Kidd</i> , 131 S. Ct. 2074 (2011)	29, 32, 36
<i>Bahl v. County of Ramsey</i> , 695 F.3d 778 (8th Cir. 2012)	21
<i>Barnes v. Gorman</i> , 536 U.S. 181 (2002).....	24
<i>Bates v. Chesterfield County</i> , 216 F.3d 367 (4th Cir. 2000)	22, 39
<i>Billington v. Smith</i> , 292 F.3d 1177 (9th Cir. 2002)	34
<i>Bircoll v. Miami-Dade County</i> , 480 F.3d 1072 (11th Cir. 2007).....	21
<i>Bragdon v. Abbott</i> , 524 U.S. 624 (1998).....	25
<i>Brigham City v. Stuart</i> , 547 U.S. 398 (2006).....	30
<i>Buchanan v. Maine</i> , 469 F.3d 158 (1st Cir. 2006)	36
<i>Calef v. Gillette Co.</i> , 322 F.3d 75 (1st Cir. 2003).....	26
<i>Deorle v. Rutherford</i> , 272 F.3d 1272 (9th Cir. 2001)	33
<i>Elizondo v. Green</i> , 671 F.3d 506 (5th Cir.), <i>cert.</i> <i>denied</i> , 133 S. Ct. 409 (2012).....	36

TABLE OF AUTHORITIES – Continued

	Page
<i>Estate of Allen v. City of West Memphis</i> , 509 F. App'x 388 (6th Cir. 2012), <i>cert. granted sub nom. Plumhoff v. Rickard</i> , 134 S. Ct. 635 (2013).....	41
<i>Estate of Bennett v. Wainwright</i> , 548 F.3d 155 (1st Cir. 2008).....	36
<i>Fisher v. City of San Jose</i> , 558 F.3d 1069 (9th Cir. 2009).....	34, 35
<i>Gohier v. Enright</i> , 186 F.3d 1216 (10th Cir. 1999).....	21
<i>Graham v. Connor</i> , 490 U.S. 386 (1989)	16, 32
<i>Hainze v. Richards</i> , 207 F.3d 795 (5th Cir.), <i>cert. denied</i> , 531 U.S. 959 (2000).....	<i>passim</i>
<i>Harris v. Serpas</i> , 745 F.3d 767 (5th Cir. 2014).....	36
<i>Hernandez v. City of Pomona</i> , 46 Cal. 4th 501 (2009).....	35
<i>Kentucky v. King</i> , 131 S. Ct. 1849 (2011).....	32
<i>Menuel v. City of Atlanta</i> , 25 F.3d 990 (11th Cir. 1994)	37
<i>Michigan v. Tyler</i> , 436 U.S. 499 (1978)	<i>passim</i>
<i>Monell v. Dep't of Soc. Servs. of City of New York</i> , 436 U.S. 658 (1978).....	24
<i>Palmer v. Circuit Court of Cook County, Ill.</i> , 117 F.3d 351 (7th Cir. 1997).....	26
<i>Pearson v. Callahan</i> , 555 U.S. 223 (2009)	39

TABLE OF AUTHORITIES – Continued

	Page
<i>Plumhoff v. Rickard</i> , No. 12-1117 (U.S. argued Mar. 4, 2014)	29, 41, 42
<i>Roberts v. City of Omaha</i> , 723 F.3d 966 (8th Cir. 2013)	20
<i>Rockwell v. Brown</i> , 664 F.3d 985 (5th Cir. 2011), <i>cert. denied</i> , 132 S. Ct. 2433 (2012)	36
<i>Ryburn v. Huff</i> , 132 S. Ct. 987 (2012)	37, 38, 42
<i>Sanders v. City of Minneapolis</i> , 474 F.3d 523 (2007)	40
<i>Saucier v. Katz</i> , 533 U.S. 194 (2001)	32
<i>Scott v. Harris</i> , 550 U.S. 372 (2007)	31, 42
<i>Seremeth v. Bd. of County Comm’rs Frederick County</i> , 673 F.3d 333 (4th Cir. 2012)	21
<i>Stanton v. Sims</i> , 134 S. Ct. 3 (2013)	29, 32, 35, 38
<i>Thompson v. Williamson County</i> , 219 F.3d 555 (6th Cir. 2000)	21, 27
<i>Tsombanidis v. W. Haven Fire Dep’t</i> , 352 F.3d 565 (2d Cir. 2003)	27
<i>Tucker v. Tennessee</i> , 539 F.3d 526 (6th Cir. 2008), <i>cert. denied</i> , 558 U.S. 816 (2009)	20, 22, 27
<i>United States v. Echegoyen</i> , 799 F.2d 1271 (9th Cir. 1986)	34
<i>United States v. Kaplan</i> , 895 F.2d 618 (9th Cir. 1990)	34
<i>United States v. Snipe</i> , 515 F.3d 947 (9th Cir. 2008)	30

TABLE OF AUTHORITIES – Continued

	Page
<i>Waller v. City of Danville</i> , 556 F.3d 171 (4th Cir. 2009).....	20, 27, 28
<i>Warden, Md. Penitentiary v. Hayden</i> , 387 U.S. 294 (1967).....	31, 38
<i>Wilson v. Layne</i> , 526 U.S. 603 (1999).....	35, 38

CONSTITUTION, STATUTES, AND REGULATIONS:

U.S. Const. Amend IV	<i>passim</i>
28 U.S.C. § 1254(1).....	3
28 U.S.C. § 1331	11
42 U.S.C. § 1983	12, 14, 20, 24
Americans With Disabilities Act of 1991, 42 U.S.C. §§ 12101 <i>et seq.</i> :	
Tit. II, 42 U.S.C. §§ 12131 <i>et seq.</i>	<i>passim</i>
42 U.S.C. § 12131(1)(A).....	24
42 U.S.C. § 12131(2).....	3, 26
42 U.S.C. § 12132	4
42 U.S.C. § 12134(a).....	25
42 U.S.C. § 12205.....	24
Cal. Penal Code § 835a.....	7, 35
Cal. Welf. & Inst. Code § 5150	8, 9, 22
Del. Code Ann. tit. 11, § 464(e)(2)(c)	40
Fla. Stat. § 776.05.....	40
Haw. Rev. Stat. § 703-304(5)(b)(ii)	40

TABLE OF AUTHORITIES – Continued

	Page
Kan. Stat. Ann. § 21-5227	40
Mo. Ann. Stat. § 563.046	40
Neb. Rev. Stat. § 28-1409(4)(b)(ii)	40
N.J. Stat. Ann. § 2C:3-4(b)(2)(b)(ii)	40
18 Pa. Cons. Stat. § 508(a)(1)	40
28 C.F.R.:	
Pt. 35, §§ 35.101 <i>et seq.</i>	18
§ 35.104	5, 26
§ 35.130	5
§ 35.139(a)	4, 26
MISCELLANEOUS:	
Tim A. Bruckner, Jangho Yoon, Timothy T. Brown & Neal Adams, <i>Involuntary Civil Commitments After the Implementation of California’s Mental Health Services Act</i> , 61 Psychiatric Services 1006 (2010)	23
United States Department of Justice, <i>Ameri- cans with Disabilities Act Title II Technical Assistance Manual Covering State and Local Government Programs and Services</i> (1993)	6, 26
Amy C. Watson, Patrick W. Corrigan & Victor Ottati, <i>Police Responses to Persons With Mental Illness: Does the Label Matter?</i> , 32 J. Am. Acad. Psychiatry Law 378 (2004)	23

PETITION FOR A WRIT OF CERTIORARI

This case presents an important question concerning the reach and meaning of the Americans with Disabilities Act that has divided the circuit courts. In a case of first impression in the Ninth Circuit Court of Appeals, that court exacerbated an existing circuit conflict in holding that Title II of the Americans with Disabilities Act curbs the ability of police officers to arrest violent, mentally ill suspects. Joining the Fourth, Eighth, and Eleventh Circuits, and in conflict with the Fifth and Sixth Circuits, the Ninth Circuit held that a police officer may be required to provide accommodations to a disabled suspect in the course of arresting her, such as by delaying her arrest. Moreover, even circuits that agree with the Ninth Circuit that police may be required to make accommodations have, in practice, refused to find requested accommodations reasonable where public safety might even arguably be jeopardized. Here, the Ninth Circuit remanded for a jury's determination whether police officers should have delayed re-entering a residence to disarm and arrest a mentally ill suspect who responded to the officers' initial entry by attacking them with a knife.

In addition, the Ninth Circuit imposed a novel Fourth Amendment rule on officers entering a private home: Even when an established exception to the warrant requirement exists, the Fourth Amendment nonetheless requires that officers delay entering the residence of an armed, violent, and mentally ill suspect if that suspect can be expected to resist arrest,

unless countervailing circumstances create an “immediate need” to enter. Here, the court of appeals held that a jury could find the officers’ entry into respondent’s residence unreasonable because it “force[d] a confrontation” with the armed, agitated, and mentally ill respondent – and that this Fourth Amendment rule was clearly established. This holding departs from established jurisprudence and the decisions of this Court. As a result, the Ninth Circuit erred in denying qualified immunity to the two officers in this case.

Police officers regularly face erratic, dangerous behavior from suspects. They need clarity concerning their obligations under the ADA, and they need robust protection from liability where their conduct comports with clearly established law.

The City and County of San Francisco, Kimberly Reynolds, and Kathrine Holder thus respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. This Court should grant the writ and reverse the judgment.



OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported at 743 F.3d 1211. The order of the district

court, App. 55, is unreported but available at 2011 WL 1748419.

◆

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

◆

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Provisions relevant to the first question presented.

42 U.S.C. § 12131 states in relevant part:

* * *

(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 states:

Subject to the provisions of this subchapter, 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.

28 C.F.R. § 35.139 states:

(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

28 C.F.R. § 35.104 states in relevant part:

§ 35.104 Definitions

* * *

Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139.

* * *

28 C.F.R. § 35.130 states in relevant part:

* * *

(b) * * *

* * *

(7) 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.

* * *

(h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on

actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

The United States Department of Justice's *Americans with Disabilities Act Title II Technical Assistance Manual Covering State and Local Government Programs and Services* (1993) states in relevant part:

II-2.8000. Qualified individual with a disability. In order to be an individual protected by title II, the individual must be a "qualified" individual with a disability.

* * *

Can health and safety factors be taken into account in determining who is qualified? Yes. An individual who poses a direct threat to the health or safety of others will not be "qualified."

What is a "direct threat"? A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated or reduced to an acceptable level by the public entity's modification of its policies, practices, or procedures, or by the provision of auxiliary aids or services. The public entity's determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability.

How does one determine whether a direct threat exists? The determination must be based on an individualized assessment that

relies on current medical evidence, or on the best available objective evidence, to assess –

- 1) The nature, duration, and severity of the risk;
- 2) The probability that the potential injury will actually occur; and,
- 3) Whether reasonable modifications of policies, practices, or procedures will mitigate or eliminate the risk.

* * *

Provisions relevant to the second question presented.

The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

California Penal Code § 835a (West 2008) states:

Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance.

A peace officer who makes or attempts to make an arrest need not retreat or desist

from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.



STATEMENT

1. When respondent Teresa Sheehan threatened to kill her social worker with a knife, he called the police. A dispatcher broadcast the call, advising that respondent “is known to make violent threats.” The petitioner San Francisco police officers, Officer Kathrine Holder and Sergeant Kimberly Reynolds, responded. The officers met the social worker, Heath Hodge, outside respondent’s home. Respondent lived in a San Francisco flat that served as a group home for mentally ill individuals living in an integrated community setting. Hodge explained that he needed assistance in detaining respondent for an involuntary psychiatric evaluation under state law. California law permits law enforcement officers or designated persons (like Hodge) to make such detentions where the person is a danger to others, a danger to himself, or “gravely disabled.” Cal. Welf. & Inst. Code § 5150 (West Supp. 2014). App. 7-8.

Hodge explained what had just happened, and gave the officers more background about respondent’s psychiatric history. He showed them a completed

§ 5150 detention form that summarized what he told them:

Client has been without psychotropic meds times one and a half years. Has been presenting with increased symptoms for several weeks. Client has not been seen by the house counselor times two weeks. Housemates reported that client has been coming and going at odd hours and reportedly said she had stopped eating. It was also reported that client has been wearing the same clothing for several days. Writer conducted outreach to client and she was not responsive. Made no sound behind her closed door. Writer and property management keyed in for wellness check. Upon opening the door, client was found lying in her bed with a book over her face, eyes open and was not responsive. Addressed client several times and she did not move or answer. Client then suddenly got up, threw the covers, and yelled at writer violently, "Get out of here! You don't have a warrant! I have a knife and I'll kill you if I have to!" Client then slammed her door and locked it behind her.

Hodge checked boxes on the bottom of the form indicating that respondent was both "a danger to others" and "gravely disabled." Hodge told the officers that he had cleared the group home of other residents. He also told them that the only way out of Sheehan's bedroom other than her door was a second-story window that required a ladder. App. 8-10.

Based on this information, the officers decided to contact respondent to confirm Hodge's assessment of her condition and to take her into custody for evaluation. The officers and Hodge went into the flat and down a long hallway to reach Sheehan's room. The officers knocked on the door and told respondent they were police officers. The officers then used Hodge's key to unlock and open respondent's door. App. 10.

Respondent was lying on her bed. Immediately, she grabbed the larger of several knives from a plate next to her. Respondent came at the officers with her knife, yelling that she was going to kill them. The officers ordered respondent to put down the knife. She refused. With respondent getting closer, the officers – who did not have their weapons out – retreated, and respondent shut the door. App. 10-12.

The officers called for backup and drew their service weapons and pepper spray. Rather than wait, they decided to re-enter immediately to disarm and arrest respondent. Sergeant Reynolds explained the officers' concerns:

With the door being closed and us not having the ability to see what she was doing, we had no way of knowing whether or not, one, she . . . had an avenue of escape. Two, there were the possibility of other weapons that she could gain access to. And so in my opinion, as soon as that door was closed, the threat

became more scary for us and more uncertainty about what we were dealing with.

App. 12. Reynolds deemed the entry necessary to ensure officer safety and prevent escape and potential harm to others, because respondent had “displayed obvious signs of violence and wanting to kill” the officers. *Id.*

The officers immediately started trying to kick and shoulder open respondent’s door. When the door opened, respondent immediately charged at the officers with a knife while screaming that she was going to kill them. Reynolds pepper-sprayed respondent, but respondent came out the door toward Holder. Respondent was between two and four feet from Holder when Holder first fired – so close that Holder was forced to fire from the hip to prevent respondent from cutting her arm. Respondent then turned and moved toward Reynolds, and Reynolds fired two or three times at point blank range, striking respondent. Even on the ground, respondent continued to swing her knife at Holder. Holder remained cornered until a backup officer ran down the hall and finally kicked the knife out of respondent’s hand. Respondent survived. App. 12-14.

2. Respondent filed suit in the United States District Court for the Northern District of California (Breyer, J.), invoking jurisdiction under 28 U.S.C. § 1331 and naming as defendants the two petitioner officers, petitioner City and County of San Francisco, and Police Chief Heather Fong. Respondent alleged

violations of the Fourth Amendment under 42 U.S.C. § 1983, violations of the “reasonable accommodation” requirement of Title II of the Americans With Disabilities Act, and state law torts. App. 15.

After discovery, petitioners and Chief Fong moved for summary judgment on all of respondent’s claims. The district court granted the motion. App. 55-82. As pertinent to this petition, the district court noted the absence of Ninth Circuit authority as to whether the ADA reasonable accommodation requirement applied to situations like this one. The district court relied on the Fifth Circuit’s decision in *Hainze v. Richards*, 207 F.3d 795 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000), to hold that “it would be unreasonable to ask officers, in such a situation, to first determine whether their actions would comply with the ADA before protecting themselves and others.” App. 79-80.

The district court also held that none of the officers’ conduct violated the Fourth Amendment (thus finding no need to reach the “clearly established” prong of qualified immunity analysis). The district court held the officers’ initial entry into respondent’s room satisfied the emergency aid exception to the warrant requirement. App. 69-70. As to the re-entry, the district court held it was simply a continuation of the same valid search and required no separate analysis under the “continuous search” doctrine of *Michigan v. Tyler*, 436 U.S. 499, 511 (1978); and respondent’s first knife attack also provided an independent legal justification for re-entering. App. 70-71.

The district court also noted that the officers “had no way of knowing whether she might escape through a back window or fire escape, whether she might hurt herself, or whether there was anyone else in her room whom she might hurt.” App. 71. Finally, the district court held that the officers’ deadly force was a reasonable response to respondent’s second knife attack. App. 72-77.

3. The court of appeals affirmed in part and vacated in part, App. 1-48, with a partial dissent by Judge Graber as to the Fourth Amendment issues, App. 48-54.¹

a. The court of appeals remanded respondent’s ADA claim against the City and County of San Francisco for trial. App. 41-45. The court of appeals acknowledged “some disagreement among other circuits” concerning how the ADA reasonable accommodation requirement applied to arrests. App. 42-43 (reviewing decisions). The court expressly rejected the Fifth Circuit’s rule stated in *Hainze* – that the reasonable accommodation requirement of the ADA simply does not apply “prior to the officer’s securing the scene and ensuring that there is no threat to human life.” App. 42-43 (quoting *Hainze*, 207 F.3d at 801). Having found that respondent’s ADA claim was cognizable, the court of appeals held that a jury

¹ The court of appeals also vacated the judgment and remanded as it pertained to respondent’s California law claims. Petitioners do not seek review of that ruling.

should decide whether the accommodations proposed by respondent's litigation expert were reasonable: that "the officers should have respected her comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation." App. 45. A jury might find that "the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary." *Id.*

b. As to the § 1983 municipal liability claims against the City and Chief Fong, the court affirmed. App. 39-41.

c. Over Judge Graber's dissent, the panel majority (Fisher, J., joined by Noonan, J.) vacated the judgment as to two of respondent's § 1983 claims against Holder and Reynolds. App. 16-39. The majority remanded for trial respondent's claims that the officers violated the Fourth Amendment (and had no qualified immunity) when they (i) re-entered respondent's room and (ii) used deadly force.

i. The full panel held that the officers' initial entry into Sheehan's room was lawful under the Fourth Amendment's emergency aid exception, given Hodge's report of respondent's condition and her threats against him. App. 20-22.

As to the officers' re-entry following respondent's first attack, the panel also held as a matter of law

that the same emergency aid exception that justified the initial entry continued to apply, and also that the “continuous search” rule under *Michigan v. Tyler* applied. App. 23-25.

That, however, did not end the majority’s Fourth Amendment analysis of the officers’ re-entry. Rather, the majority held that these well established legal bases to re-enter respondent’s room did not, as a matter of law, permit the officers to actually do so. App. 25-32. Rather, the majority held that a second layer of reasonableness analysis is required: Officers *cannot* make an otherwise lawful entry to arrest an armed and violent mentally ill suspect if it would “force a confrontation” and there is “no immediate need to subdue [the suspect] and take [the suspect] into custody.” App. 28-29. In evaluating the reasonableness of the officers’ entry, the majority focused on the officers’ decision to enter immediately rather than delaying or trying other tactics. App. 26 n.9.

Applying this rule to the officers’ decision to enter, the majority found the “immediate need” standard was not met as a matter of law. Neither the existence of an exception to the warrant requirement, nor the need to arrest an armed and violent suspect necessarily satisfied this standard. Rather, the majority held that a jury should weigh these interests against the risk of a violent confrontation in which respondent could be injured. Further, a jury might conclude the risks of delay were minor, if it concluded respondent would not try to escape or use her weapons for anything other than defending against an

entry. The majority also allowed that “a reasonable jury could find that the officers acted reasonably by forcing the entry.” App. 32. A jury might agree that “the officers had reason to fear Sheehan’s escape” or “that Sheehan was not contained”; or the jury might doubt whether “the officers could have ensured their safety by retreating.” The majority left it to the jury to balance the risks. App. 26-32.

On the second prong of immunity analysis, the majority held its rule – that an otherwise lawful entry must be justified by an additional “immediate need” if officers will face armed and violent resistance – was clearly established. App. 32-36. In so holding, the majority relied only on *Graham v. Connor*, 490 U.S. 386 (1989), and two Ninth Circuit decisions, none of which involved an entry under an established exception to the warrant requirement or the “continuous search” rule. App. 35.

ii. As to respondent’s deadly force claim, the full panel expressly held that on the material undisputed facts, both officers’ “use of deadly force – *viewed from the standpoint of the moment of the shooting* – was reasonable as a matter of law.” App. 37.

Nevertheless, as with the entry claim, that did not end the Fourth Amendment analysis for the majority. Instead, the majority denied qualified immunity on the deadly force claim, on the theory that the legal cause of the need to use deadly force was the officers’ possibly unlawful re-entry (as opposed to respondent’s resistance). App. 37-38.

d. Judge Graber dissented from the denial of qualified immunity on the Fourth Amendment claims. App. 48-54. Judge Graber would have held that respondent could not create a Fourth Amendment question by relying on a litigation expert who criticized officers' decision to make an otherwise lawful entry as "imprudent or inappropriate." App. 50. Judge Graber also would have held that a reasonable officer could have concluded that the search was lawful under the *Michigan v. Tyler* "continuous search" rule as well as the emergency and exigent circumstances exceptions to the warrant requirement. Like the district court, Judge Graber emphasized "the need to resolve an ongoing emergency that involved a deadly weapon" and the prohibition on 20/20 hindsight. App. 52-53. As to whether the law was clearly established, Judge Graber did not find the majority's rule clearly established or that there were any clear-cut Fourth Amendment rules regarding suspects with mental illness: "In view of the extant legal principles, reasonable officers could conclude that their actions were permitted even though Plaintiff suffered from a mental illness. Police officers often interact with individuals who have a wide variety of specific needs, and there is no controlling case law that requires a different Fourth Amendment analysis for an officer on the street who faces those circumstances." App. 53. Finally, Judge Graber observed that the majority's qualified immunity analysis relied on a decision, *Alexander v. City and County of San Francisco*, 29

F.3d 1355 (9th Cir. 1994), that the Ninth Circuit had expressly limited in later decisions. App. 50.



REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve Whether And How The Americans With Disabilities Act Applies To Arrests Of Armed And Violent Suspects Who Are Disabled.

A. The Circuits Are In Conflict On This Question.

The Ninth Circuit's ruling here is the only published court of appeals ruling to have ever sent to a jury a claim that law enforcement officers should have provided reasonable accommodations for an armed and violent individual. In that respect it is at odds with the decisions of every other circuit, and it exacerbates an existing division among the circuits concerning whether accommodations to disabled armed and violent suspects can ever be reasonable under Title II of the ADA, 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulations, 28 C.F.R. pt. 35, §§ 35.101 *et seq.*

1. In holding that the ADA's reasonable accommodation requirement applies to officers facing violent circumstances, the Ninth Circuit adopted a rule in direct conflict with the categorical prohibition on such claims adopted by the Fifth and Sixth Circuits. Indeed, the Ninth Circuit expressly acknowledged its disagreement with the Fifth Circuit. App. 42-43.

In the Fifth Circuit, “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 involve subjects with mental disabilities, prior to the officer’s securing the scene and ensuring that there is no threat to human life.” *Hainze*, 207 F.3d at 801. The corollary to this rule is that *after* an individual is safely in custody, the reasonable accommodation requirement does apply. *Id.* at 802. The Fifth Circuit adopted this rule in a case with similar facts and similar claims: Officers were called to respond to a mentally ill individual. The individual, Hainze, came at police officers with a knife, refused orders to drop the knife, and was shot. *Id.* at 797. Like respondent, Hainze claimed that the officers did not try to calm him down, and did not follow their training for dealing with mentally ill individuals. *Id.* at 800.

Similarly, the Sixth Circuit gives controlling weight to exigent circumstances and public safety concerns when considering whether any requested accommodation is reasonable:

Where, as it occurred in this case, officers are presented with exigent or unexpected circumstances, it would be unreasonable to require certain accommodations be made in light of the overriding public safety concerns. [Citation omitted.] Further, we rely on and expect law enforcement officers to respond fluidly to changing situations and individuals they encounter. Imposing a stringent requirement under the ADA is inconsistent

with that expectation, and impedes their ability to perform their duties.

Tucker v. Tennessee, 539 F.3d 526, 536 (6th Cir. 2008), *cert. denied*, 558 U.S. 816 (2009). Like this case and *Hainze*, *Tucker* involved individuals who assaulted police officers. *Tucker* held there could be no ADA reasonable accommodation claim under those circumstances.

2. The Fourth, Eighth, and Eleventh Circuits have not adopted a rule barring reasonable accommodation claims against public agencies arising from police officers' actions in the face of violent conduct or other exigent circumstances. These circuits acknowledge that accommodations for disabled arrestees may be reasonable in some circumstances. In practice, however, these circuits have never found a proposed accommodation to be reasonable where exigent circumstances even arguably existed.

In *Waller v. City of Danville*, 556 F.3d 171 (4th Cir. 2009), the Fourth Circuit rejected a reasonable accommodation claim arising from officers' two-hour standoff with an armed and violent mentally ill individual that ended in the use of deadly force. The court engaged in an extensive analysis explaining why the proposed accommodations were not reasonable as a matter of law. *Id.* at 175-77; *cf. Roberts v. City of Omaha*, 723 F.3d 966, 973 (8th Cir. 2013) (holding qualified immunity barred § 1983 claim against individual police officer premised on violation of ADA rights, because it was not clearly established

“what duties, if any, the ADA and Rehabilitation Act impose on officers who are attempting to secure a potentially violent suspect in an uncertain and rapidly evolving situation”).

Even in cases involving less pressing threats to public safety, these circuits have rejected reasonable accommodation claims arising from law enforcement officers’ conduct under exigent circumstances. *Seremeth v. Bd. of County Comm’rs Frederick County*, 673 F.3d 333, 339 (4th Cir. 2012) (“We find that due to the exigencies inherent in responding to a domestic violence situation, no further accommodations were required than the ones made by the deputies.”); *Bahl v. County of Ramsey*, 695 F.3d 778, 784 (8th Cir. 2012) (“Even if the ADA applied to the traffic stop, we agree with the district court’s conclusion that under the exigencies of the traffic stop, Bobrowski was not required to honor Bahl’s request to communicate by writing.”); *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1086 (11th Cir. 2007) (unreasonable to expect officer performing roadside DUI test to summon interpreter for deaf arrestee).²

² Although the majority cited *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999) in its discussion, App. 42, the Tenth Circuit has taken no position on the question presented here. *Id.* at 1222 (noting that plaintiff did not claim entitlement to accommodation). Rather, *Gohier* involved a different type of ADA claim: that officers discriminated when they responded with force to violent conduct that was caused by mental illness. The Tenth Circuit rejected that theory, *id.*, and so have other circuits. See *Thompson v. Williamson County*, 219 F.3d 555, 558

(Continued on following page)

3. This case presents a suitable vehicle to address this conflict. Certiorari was sought only twice before in the relevant cases. A petition for certiorari was filed seeking review of the Fifth Circuit's *Hainze* decision and denied – before the conflict had ripened. 531 U.S. 959 (2000). A second petition was filed seeking review of the Sixth Circuit's *Tucker* decision, but that petition did not address the same issue as presented here; instead, it concerned the culpability standard for a Title II damages claim and whether the “effectiveness” of an “auxiliary aid” is a legal or a factual question. 2009 WL 1061254. The petition was denied. 558 U.S. 816 (2009). This case provides the Court with its first opportunity to resolve this question, in a case where a public entity's potential liability turns on the answer.

B. The Question Presented Is Recurring And Important.

Police officers regularly encounter, and often detain, mentally ill individuals. In California alone, law enforcement officers and other authorized individuals make a staggering number of involuntary mental health detentions of persons who meet the § 5150 criteria. Over a seven-year period ending in July 2007, 28 California counties representing two-thirds of the state's population reported more than

(6th Cir. 2000); *Bates v. Chesterfield County*, 216 F.3d 367, 373 (4th Cir. 2000).

597,000 detentions of persons as a danger to themselves, a danger to others, or gravely disabled. Tim A. Bruckner, Jangho Yoon, Timothy T. Brown & Neal Adams, *Involuntary Civil Commitments After the Implementation of California's Mental Health Services Act*, 61 *Psychiatric Services* 1006, 1007-08 (2010) (analyzing California Dept. of Mental Health data) (available at <http://psychiatryonline.org/data/Journals/PSS/3916/10ps1006.pdf> (last visited May 20, 2014)). The challenges of responding to mental illness are not unique to California. Nationwide, studies indicate that 2.7 to 5.9 percent of individuals considered suspects by police have a serious mental illness. Medium and large police departments estimate that 7 percent of their contacts with the public involve persons with mental illness. Amy C. Watson, Patrick W. Corrigan & Victor Ottati, *Police Responses to Persons With Mental Illness: Does the Label Matter?*, 32 *J. Am. Acad. Psychiatry Law* 378, 378 (2004).

When mental illness manifests in unpredictable, violent behavior as it did in this case, officers must make split-second decisions that protect the public and themselves from harm. The dangers they face are compounded when they lack clear rules concerning what actions the law requires or forbids in responding to an armed and violent individual. The Ninth Circuit's ruling here does not establish any such rule – it provides only a “reasonableness” standard for the jury, insufficient guidance for officers in life or death situations. While the Fourth Amendment imposes a similar reasonableness standard for officers' uses of

force, Fourth Amendment analysis gives latitude for officers' decisionmaking, and refuses to impose liability for conduct that looks unreasonable only in hindsight and not in the exigencies of the moment. Under the Ninth Circuit's broad reading of the ADA's requirements, however, the reasonable accommodation analysis does not accord similar latitude.³ Thus, this question has considerable import for police officers. Moreover, expanded ADA liability will result in municipal liability in many cases where liability for Fourth Amendment violations would not otherwise attach to the municipality. Under Title II, it is the "public entity" that is subject to liability, not its employees. 42 U.S.C. § 12131(1)(A). And municipalities may be subject to compensatory damages and fee awards when their employees do not provide reasonable accommodations. *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (damages remedy); 42 U.S.C. § 12205 (fee award). Unlike in a § 1983 action, liability under the ADA does not require proof that an unconstitutional municipal policy was the "moving force" that caused the violation. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978).

³ That is especially true because there is no qualified immunity from ADA liability. Thus, the prospect of public entity liability for ADA violations under novel interpretations of Title II is a real one – as is illustrated by this very case, where the dissenting judge agreed that San Francisco's ADA liability was a question for the jury but would have affirmed the district court's determination that the officers were entitled to qualified immunity from claims brought under section 1983. App. 48-49.

C. Title II Of The ADA Does Not Require Accommodations For Armed And Violent Suspects Who Are Disabled.

1. Congress did not intend the Americans with Disabilities Act to task public entities with accommodating disabled individuals who pose a direct threat to safety. That was the chief rationale for the Fifth Circuit's categorical bar on reasonable accommodation claims by violent individuals:

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*.

Hainze, 207 F.3d at 801 (emphasis added).

The Fifth Circuit's focus on public safety is consistent with Department of Justice regulations and guidance promulgated under 42 U.S.C. § 12134(a) – administrative constructions of the ADA that are entitled to deference. *Bragdon v. Abbott*, 524 U.S. 624,

646 (1998). The Department of Justice construes the word “qualified” in 42 U.S.C. § 12131(2) to exclude any individual who poses a “direct threat” to the health or safety of others, because such persons are not “qualified” to participate in public programs or services. United States Department of Justice, *Americans with Disabilities Act Title II Technical Assistance Manual Covering State and Local Government Programs and Services*, at II-2.8000 (1993). Title II “does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.” 28 C.F.R. § 35.139(a). A “direct threat” means “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139.” 28 C.F.R. § 35.104. These Department of Justice regulations construing Title II simply state what has long been the rule in the Title I employment context: a person who threatens other people is not “qualified” under the ADA, even when that behavior is caused by a disability. See *Calef v. Gillette Co.*, 322 F.3d 75, 87 (1st Cir. 2003); *Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351, 352 (7th Cir. 1997).

Respondent’s behavior here – threatening Hodge and the officers, and then charging the officers with a knife – plainly met the definition of a “direct threat.” The significant risk respondent posed could not be “eliminated,” because she refused to drop her knife

and to cooperate in a peaceable detention. Respondent was not “qualified” under Title II due to her ongoing violent behavior. *Cf. Thompson v. Williamson County*, 219 F.3d 555, 558 (6th Cir. 2000) (explaining that deputy sheriff could not provide ADA “services” to the disabled decedent without first disarming him).

2. Even if an armed and violent individual were “qualified” within the meaning of Title II, it is not reasonable to expect public employees to consider and provide accommodations for violent individuals. *Tucker*, 539 F.3d at 536. Standoffs with violent individuals are “unstable” and officers are “operating under the pressure of time from the start.” *Waller*, 556 F.3d at 175. In contrast, a typical ADA reasonable accommodation claim against an entity involves someone who will actually communicate with public employees about accommodations – not someone who poses a deadly threat to them. *E.g., Tsombanidis v. W. Haven Fire Dept.*, 352 F.3d 565, 579 (2d Cir. 2003) (“[A] plaintiff must first use the procedures available to notify the governmental entity that it seeks an exception or variance from the facially neutral laws when pursuing a reasonable accommodation claim.”).

Moreover, when officers are dealing with irrational, unstable, and violent individuals, it is difficult to identify any particular accommodation as “reasonable,” because no one knows what will work. By contrast, it is far more straightforward to determine that an interpreter can assist a deaf arrestee, or that a van can be used to transport an arrestee who uses a wheelchair – provided each is cooperative. But with

an irrational and uncooperative individual, there is no guarantee that any particular accommodation will work. Under those circumstances, proposing “reasonable accommodations” after the fact becomes an exercise in 20/20 hindsight, where “there was always something more or different that could have been done.” *Waller*, 556 F.3d at 176.

II. The Court Should Review The Ninth Circuit’s Erroneous Qualified Immunity Decision.

Under the majority’s new Fourth Amendment rule, an officer making a decision whether to enter a residence can no longer rely on the existence of an established exception to the warrant requirement, or the *Michigan v. Tyler* “continuous search” rule. Rather, in cases involving armed and violent suspects who are mentally ill, an officer cannot enter *even under an established exception to the warrant requirement* when it would “force a confrontation” and there is “no immediate need to subdue [the suspect] and take [the suspect] into custody.” App. 29. And a jury conducts this balancing test.

Whatever the merits of this rule, one thing can be said with certainty: it was not clearly established in 2008, when petitioners relied on established exceptions to the warrant requirement and the “continuous search” rule to re-enter respondent’s room. The 2-1 majority wrongly held otherwise only because it departed from this Court’s fundamental principles of

qualified immunity analysis. That error is so clear that the Court should summarily reverse, as it has in past decisions. Alternatively, the court could grant review on the merits, or hold this petition for consideration in light of *Plumhoff v. Rickard*, No. 12-1117 (U.S. argued Mar. 4, 2014), another case presenting questions about whether a Fourth Amendment rule was clearly established.

A. It Was Not Clearly Established That The Fourth Amendment Requires More Than An Exception To The Warrant Requirement For Officers To Immediately Enter A Residence.

The law is clearly established only when “every reasonable official would have understood that what he is doing violates that right.” *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (internal quotation marks omitted). The law and its application to the specific situation must be so clear-cut that it is “beyond debate” that the action would violate the Constitution. *Id.* Liability is reserved for actions that only a “plainly incompetent” official could have considered lawful in light of existing precedent. *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (per curiam). The majority disregarded these essential principles and erred in finding the law was clearly established here.

1. None of this Court’s past rulings clearly established that officers acting under an established

exception to the warrant requirement must delay making an entry into a residence, based on the expected armed resistance of a suspect within – mentally ill or otherwise.

In imposing that duty here, the majority relied on *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006), which stated that the “manner of entry” during an emergency search must be reasonable. App. 18. But in that regard, *Stuart* did not require anything other than compliance with “the Fourth Amendment’s knock-and-announce rule,” *id.* at 407 – and the petitioners did that here, as the majority held, App. 22.⁴ And no other decision of this Court has imposed a rule that when an established exception to the warrant requirement applies, officers may need to delay or desist from entering for *any* reason, let alone the reasons cited by the majority here.

And no decision of this Court has indicated that the “continuous search” rule of *Michigan v. Tyler* – which the majority found applicable here, App. 24 – is subject to the limitations imposed by the majority’s ruling. As the dissent concluded, a reasonable officer could conclude that the “continuous search” rule applied. App. 52.

⁴ Similarly, the Ninth Circuit decision cited by the majority for the “manner of entry” requirement also construed this to mean compliance with the knock-and-announce rule. App. 18; *United States v. Snipe*, 515 F.3d 947, 954 (9th Cir. 2008).

Indeed, several of this Court’s decisions could be read to foreclose the majority’s new rule that officers must refrain from a lawful entry based on a suspect’s anticipated armed resistance unless there is an “immediate need” to enter. Most significantly, this Court has already held that when a resisting individual in a residence has access to weapons, that is an exigency that *in and of itself proves an immediate need to enter* – not to delay, as the majority’s rule requires. “Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.” *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 299 (1967). This Court has also, in other contexts, rejected a rule requiring an officer to relent based on a suspect’s resistance to a lawful arrest. In *Scott v. Harris*, 550 U.S. 372, 385 (2007), this Court rejected an argument that a suspect could use his own dangerous resistance as a shield against officers’ otherwise lawful efforts to make an arrest. “The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness.” *Id.* at 385. And as to the majority’s requirement that officers base the timing of their entry on a prediction whether the suspect within will engage in violence, this Court has recognized that a Fourth Amendment test that requires officers to predict a lawless response to their lawful conduct – like the majority’s – “would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field” as well

as for any factfinder attempting to judge that prediction in hindsight. *Kentucky v. King*, 131 S. Ct. 1849, 1860 (2011) (officers may attempt to knock-and-talk without needing to predict whether that will prompt destruction of evidence). As the dissent stated, a reasonable officer could conclude that an established exception to the warrant requirement was enough to satisfy the Fourth Amendment. App. 50-51.

2. This Court has “repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established law at a high level of generality” in conducting qualified-immunity analysis. *Al-Kidd*, 131 S. Ct. at 2084. A court of appeals cannot find clearly established law from “equivocal” statements in this Court’s past decisions or its own distinguishable precedents. *Stanton*, 134 S. Ct. at 7.

Here, none of the three cases relied on by the majority in its qualified immunity analysis, App. 35, clearly established that the officers could not rely on an established exception to the warrant requirement or the “continuous search” rule, and immediately re-enter respondent’s room.

The first case cited by the majority was *Graham v. Connor*. But *Graham* held simply that the Fourth Amendment reasonableness standard applies to the force used to make a search or seizure. Nevertheless, just like it did in *Saucier v. Katz*, 533 U.S. 194 (2001), the Ninth Circuit erroneously treated *Graham* as establishing “the legal constraints on [the] particular police conduct” at issue here. *Id.* at 205.

The second case cited by the majority, *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), was a Fourth Amendment force case holding that officers cannot use a beanbag shotgun against a mentally disturbed person who is unarmed, poses no threat, and had assaulted no one. *Id.* at 1285. *Deorle* stated nothing about entries, and its facts are a far cry from this case.

Third, the decision in *Alexander v. City and County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), did not clearly establish the majority's rule. Like this case, *Alexander* involved Fourth Amendment entry and force claims premised on officers' decision not to wait before entering the home of an armed mentally ill person. The court held that a jury should determine factual disputes affecting the legality of the officers' entry and the reasonableness of the force used to make the entry. *Id.* at 1366-67. But *Alexander* is readily distinguishable: petitioners here, unlike the officers in *Alexander*, were indisputably entering under an established exception to the warrant requirement. *Cf. Alexander*, 29 F.3d at 1361 ("Without an arrest warrant, and without exigent circumstances, the police had no right to enter Quade's house for the primary purpose of arresting him. The inspection warrant was just that: an inspection warrant.") (emphasis added).⁵ Indeed, as the dissenting judge noted,

⁵ The majority disregarded this holding in *Alexander*; the majority incorrectly stated that the "police officers had a legal
(Continued on following page)

App. 50-51, the Ninth Circuit subsequently limited *Alexander* to its facts, holding that so long as an entry satisfies an exception to the warrant requirement, it does not violate the Fourth Amendment even if it is “imprudent” or “inappropriate” or even “reckless.” *Billington v. Smith*, 292 F.3d 1177, 1188-90 (9th Cir. 2002). Given these “important limitations on *Alexander*,” *Billington*, 292 F.3d at 1188, it was not beyond debate in 2008 that petitioners could not proceed under an established exception to the warrant requirement. App. 49-51 (dissent).

None of these three decisions had anything to do with the “continuous search” rule of *Michigan v. Tyler*. And none of the other “continuous search” decisions cited by the majority – before or after 2008 – clearly established the rule the majority imposed on petitioners. App. 24; *Fisher v. City of San Jose*, 558 F.3d 1069 (9th Cir. 2009) (en banc); *United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir. 1990); *United States v. Echegoyen*, 799 F.2d 1271, 1280 (9th Cir. 1986). Indeed, language in the Ninth Circuit’s 2009 en banc decision in *Fisher v. City of San Jose* rejected the very premise of the majority’s rule – that an armed, violent suspect can keep officers at bay and thereby avoid application of the “continuous search” rule: “We reject the notion that trained officers, who put themselves in harm’s way when handling a dangerous armed standoff, essentially increase the constitutional

right to enter . . . to execute an administrative warrant in *Alexander*.” App. 35.

rights of suspects who, by their actions, both provoke and prolong the need for continuing police action.” *Fisher*, 558 F.3d at 1080. Where a 2014 panel majority embraced a notion that an en banc court expressly rejected in 2009, the majority’s rule could not have been clearly established for police officers in 2008. *Wilson v. Layne*, 526 U.S. 603, 618 (1999) (“If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.”).

3. Moreover, in the qualified immunity analysis, officers are entitled to rely on existing state law that authorizes their conduct. *Stanton*, 134 S. Ct. at 7. Contrary to the majority’s rule, California law provides that officers with probable cause to make an arrest have no duty to delay in order to avoid a conflict. Section 835a of the California Penal Code provides that an officer with probable cause to make an arrest “need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested.” In 2009, California’s highest court explained this long-established principle of state law: “Long ago, we explained that an officer with probable cause to make an arrest is not bound to put off the arrest until a more favorable time and is under no obligation to retire in order to avoid a conflict. Instead, an officer may press forward and make the arrest, using all the force reasonably necessary to accomplish that purpose.” *Hernandez v. City of Pomona*, 46 Cal. 4th 501, 518 (2009) (internal quotation marks, brackets, and citations omitted).

Probable cause existed to arrest respondent based on threats to the officers and Hodge, and based on her initial knife attack. App. 25 n.8, 29. Thus, under this law, it cannot be said that only a plainly incompetent officer could conclude that petitioners had lawful authority to persist in arresting respondent.

4. “Absent controlling authority,” “a robust consensus of cases of persuasive authority” was necessary to clearly establish the law. *Al-Kidd*, 131 S. Ct. at 2084. And there is no such consensus in support of the majority’s rule here. To the contrary, published decisions in the First, Fifth, and Eleventh Circuits found no Fourth Amendment liability in similar situations where officers made an entry (or re-entry) to arrest an armed and violent individual who was mentally disturbed, and ended up using deadly force. Unlike the majority’s decision here, each of these decisions confined the Fourth Amendment entry inquiry to whether an exception to the warrant requirement applied. None of these other circuits’ decisions held that a Fourth Amendment violation could arise from a finding that it was unwise for officers to enter, given the likelihood that they could end up needing to use deadly force against an armed and violent mentally ill person. See *Harris v. Serpas*, 745 F.3d 767, 773 (5th Cir. 2014); *Elizondo v. Green*, 671 F.3d 506, 508 (5th Cir.), *cert. denied*, 133 S. Ct. 409 (2012); *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 2433 (2012); *Estate of Bennett v. Wainwright*, 548 F.3d 155, 170, 174-75 (1st Cir. 2008); *Buchanan v. Maine*, 469 F.3d 158, 169-70

(1st Cir. 2006); *Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994).

5. Finally, even assuming that the Fourth Amendment required a finding of an “immediate need” to enter – beyond the finding of immediate need implicit in a determination that an exception to the warrant requirement applies – a reasonable officer could have concluded here that such an immediate need existed.

The majority in this case disregarded the principle that qualified immunity permits a broad range of judgments to officers on the scene – especially when it comes to evaluating risks to officer safety and public safety. In that regard, the majority committed the same error as in *Ryburn v. Huff*, 132 S. Ct. 987 (2012) (per curiam). In *Ryburn*, this Court summarily reversed the Ninth Circuit’s denial of qualified immunity to officers who made an entry based on “officer safety” concerns. *Id.* at 989. The Ninth Circuit, “far removed from the scene and with the opportunity to dissect the elements of the situation,” failed to follow the principle that “judges should be cautious about second-guessing a police officer’s assessment, made on the scene, of the danger presented by a particular situation.” *Id.* at 991-92. Under the properly applied qualified immunity standard, an officer’s assessment that a risk exists on a given set of facts is permissible if “a reasonable officer *could have* come to such a conclusion based on the facts.” *Id.* at 992 (emphasis added).

Under the *Ryburn* standard, the majority here should have recognized qualified immunity. There was a plausible basis for the officers to conclude that the need to disarm a violent and irrational person posed a risk justifying immediate action. *Hayden*, 387 U.S. at 299 (holding exigency existed, where “speed” was “essential” to ensure “that the police had control of all weapons which could be used against them or to effect an escape”). Both the dissenting judge and the district court so found. App. 49, 71. Indeed, even the majority allowed that a reasonable jury could *agree* with the officers that immediate action was necessary on the facts most favorable to respondent. App. 32. Where reasonable minds can differ, qualified immunity applies. *Wilson*, 526 U.S. at 618.

6. This Court has summarily reversed Ninth Circuit denials of qualified immunity twice in the past three years – in *Stanton v. Sims* and *Ryburn v. Huff*. Like this case, both of those decisions involved whether officers could rely on established exceptions to the warrant requirement. This Court found the Ninth Circuit’s decisions to strip officers of immunity “troubling,” *Stanton*, 134 S. Ct. at 7, and “flawed for numerous reasons,” *Ryburn*, 132 S. Ct. at 991. The same is true here. Summary reversal is warranted.

B. The Fourth Amendment Does Not Require Officers To Desist From Making A Lawful Entry And Arrest Of A Suspect – Mentally Disturbed Or Not – By Reason Of The Suspect’s Resistance.

Because the majority plainly erred at the second prong of immunity analysis in concluding its rule was clearly established, the Court need not reach the first-prong qualified immunity question: whether the majority’s rule correctly construed the Fourth Amendment. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Nevertheless, the majority’s rule is wrong on this important question of federal law.

1. As already noted above, *supra* section II.A.1., the majority’s rule is inconsistent with this Court’s past decisions. The Fourth Amendment does not require officers to desist from making an otherwise lawful entry to arrest an armed and violent suspect.

And there cannot be a different rule where mental illness is concerned. The majority’s rule overlooks that dangerous criminal behavior and mental illness can exist side-by-side, as happened here. When a mentally disturbed individual is presently armed and violent, the balance must favor officer safety and public safety. *Bates v. Chesterfield County*, 216 F.3d 367, 372 (4th Cir. 2000) (“Knowledge 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 disabled individual.”). A knife attack on an officer or a

civilian is no less deadly, just because the person wielding the knife has been diagnosed with mental illness. *Sanders v. City of Minneapolis*, 474 F.3d 523, 527 (2007). The majority's rule will induce hesitancy and delay during these emergency situations, by forcing officers to ascertain the *causes* of dangerous behavior instead of dealing with its *effects*. It is tragic that mental illness can sometimes be a cause of violent behavior. But it is no solution to blame the police officer whose duty it is to respond.

2. The majority's rule also conflicts with the statutes of several states – not just California's – which expressly authorize officers to press forward and make an arrest in the face of resistance. *See, e.g.*, Del. Code Ann. tit. 11, § 464(e)(2)(c) (West, Westlaw through 79 Laws 2014, ch. 214); Fla. Stat. § 776.05 (West, Westlaw through Mar. 31, 2014); Haw. Rev. Stat. § 703-304(5)(b)(ii) (West, Westlaw through 2014 Act 17); Kan. Stat. Ann. § 21-5227 (West, Westlaw through 2013 Reg. & Spec. Sess.); Mo. Ann. Stat. § 563.046 (West, Westlaw through Feb. 19, 2014); Neb. Rev. Stat. § 28-1409(4)(b)(ii) (West, Westlaw through 2013 Reg. Sess.); N.J. Stat. Ann. § 2C:3-4(b)(2)(b)(ii) (West, Westlaw through L.2014, c.2 & J.R. No. 1); 18 Pa. Cons. Stat. § 508(a)(1) (West, Westlaw through 2014 Reg. Sess. Acts 1-21, 23-36, 38-40).

3. Finally, this Fourth Amendment issue will recur, as surely as the ADA issues discussed above. *Supra* section I.B.

III. The Court Should Hold This Petition For *Plumhoff v. Rickard*.

This case concerns a denial of qualified immunity from a Fourth Amendment claim, just like another case pending in this Court: *Plumhoff v. Rickard*, No. 12-1117 (U.S. argued Mar. 4, 2014). The two cases have much in common, and the outcome of *Plumhoff* may well control this case.

1. Just like the majority here, the court of appeals in *Plumhoff* identified no controlling authority that clearly established a rule prohibiting the officers' challenged conduct in the specific situation they faced. *Estate of Allen v. City of West Memphis*, 509 F. App'x 388, 392 (6th Cir. 2012), *cert. granted sub nom. Plumhoff v. Rickard*, 134 S. Ct. 635 (2013).

2. The similarities, however, are not limited to a circuit court's treatment of general qualified immunity principles. The two cases involve similar specific decisions by police officers: to seize a suspect and to use deadly force to do so, based on the risk of danger to officers and the public so long as the suspect remained out of police custody. In each case, the suspect had been engaged in dangerous conduct moments before – the *Plumhoff* decedent's reckless vehicular flight, 509 F. App'x at 389, and respondent's knife assault.

Under these similar circumstances, the courts of appeals denied immunity for similar reasons. Each court held that police officers could be found at fault for taking action when a suspect appeared to be

momentarily cornered – but still refused to submit or to relinquish a dangerous instrument. 509 F. App'x at 392 (“In our case, the fleeing vehicle was essentially stopped and surrounded by police officers and police cars although some effort to elude capture was still being made.”). In both cases, the denial of immunity imposed the specter of liability for officers who did not “cease[] their pursuit” and “hope[] for the best,” *Scott*, 550 U.S. at 385.

3. Both cases also involve the question of what range of judgments qualified immunity permits officers to make about public safety risks and officer safety risks in the midst of a dangerous confrontation. If the correct rule is that qualified immunity applies where reasonable minds can differ regarding issues of risk assessment – as this Court’s decisions strongly suggest, *e.g.*, *Ryburn*, 132 S. Ct. at 992 – then that principle may be dispositive in *Plumhoff* as well as here. Indeed, in both cases, *parties other than the officers* frankly acknowledged that reasonable minds could differ as to whether the officers acted reasonably. The respondent in *Plumhoff* stated “reasonable minds could differ on the issue of the Petitioners’ objective reasonableness.” Resp. Brief at 25, *Plumhoff v. Rickard*, No. 12-1117 (filed Jan. 29, 2014). Similarly, the majority here acknowledged that a reasonable jury could agree with the officers’ risk assessment. App. 32. In both cases, that is a good reason to recognize qualified immunity, not deny it.



CONCLUSION

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

Respectfully submitted,

SAN FRANCISCO CITY

ATTORNEY'S OFFICE

DENNIS J. HERRERA

City Attorney

BLAKE P. LOEBS

PETER J. KEITH, *Counsel of Record*

CHRISTINE VAN AKEN

Deputy City Attorneys

Counsel for Petitioners

May 22, 2014

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERESA SHEEHAN,
Plaintiff-Appellant,

v.

CITY AND COUNTY OF
SAN FRANCISCO, a municipal
corporation; HEATHER FONG,
in her capacity as Chief of
Police for the City and County
of San Francisco; KIMBERLY
REYNOLDS, individually, and in
her capacity as police officer
for the City and County of
San Francisco; KATHERINE HOLDER,
individually, and in her capacity
as police officer for the City and
County of San Francisco,
Defendants-Appellees.

No. 11-16401

D.C. No.
3:09-cv-03889-CRB

OPINION

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted
January 16, 2013 – San Francisco, California

Filed February 21, 2014

Before: John T. Noonan, Susan P. Graber and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher;
Partial Concurrence and Partial Dissent
by Judge Graber

COUNSEL

John L. Burris and Benjamin Nisenbaum (argued),
Law Offices of John L. Burris, Oakland, California,
for Plaintiff-Appellant.

Dennis J. Herrera, City Attorney, Joanne Hoeper,
Chief Trial Deputy, Blake P. Loeb and Peter J. Keith
(argued), Deputy City Attorneys, San Francisco, Cal-
ifornia, for Defendants-Appellees.

OPINION

FISHER, Circuit Judge:

This case involves a near fatal tragedy in which police officers attempted to help a mentally ill woman who needed medical evaluation and treatment but wound up shooting and nearly killing her instead. They did so after entering her home without a warrant, causing her to react with violent outrage at the intruders. Fundamentally at issue is the constitutional balance between a person's right to be left alone in the sanctity of her home and the laudable efforts of the police to render emergency assistance, but in a way that does not turn the intended beneficiary into a victim or a criminal.

Teresa Sheehan, a woman in her mid-50s suffering from a mental illness, lived in a San Francisco

group home that accommodated such persons. Her assigned social worker, Heath Hodge, became concerned about her apparently deteriorating condition and summoned the police for help in transporting her to a mental health facility for a 72-hour involuntary commitment for evaluation and treatment under California Welfare & Institutions Code § 5150. Hodge deemed Sheehan “gravely disabled,” because she was not taking her medication or taking care of herself, and a danger to others, because she had threatened him when he attempted to perform a welfare check on her. When San Francisco police officers Kimberly Reynolds and Katherine Holder arrived on the scene, they entered Sheehan’s room, without a warrant, to confirm Hodge’s assessment and take her into custody. Sheehan reacted violently to the officers’ presence, grabbing a knife, threatening to kill the officers, telling the officers that she did not wish to be detained in a mental health facility and forcing the officers to retreat to the hallway, outside Sheehan’s closed door, for their safety. The officers called for backup, but rather than waiting for backup or taking other actions to maintain the status quo or de-escalate the situation, the officers drew their weapons and forced their way back into Sheehan’s room, presumably to disarm, subdue and arrest her, and to prevent her escape (although there do not appear to have been any means of escape available). Sheehan once again threatened the officers with a knife, causing the officers to shoot Sheehan five or six times. Sheehan, who survived, filed this 42 U.S.C. § 1983 action against the officers and the city, asserting

violations of her rights under the Fourth Amendment and the Americans with Disabilities Act, as well as tort and statutory claims under state law. The district court granted summary judgment to the defendants, and Sheehan appealed.

Although a warrantless search or seizure in a person's home is presumptively unreasonable under the Fourth Amendment, our case law recognizes exceptions to the warrant requirement to render emergency assistance or respond to exigent circumstances. We hold that the officers were justified in entering Sheehan's home *initially* under the emergency aid exception because they had an objectively reasonable basis to believe that Sheehan was in need of emergency medical assistance and they conducted the search or seizure in a reasonable manner up to that point. Officers conducting a welfare search, where the objective is rescue, are expected to err on the side of caution, and under the circumstances of this case the officers reasonably could have believed that Sheehan's situation presented a genuine emergency and that entering as they did was a reasonable means of providing her with assistance.

We nonetheless hold that there are triable issues of fact as to whether the *second entry* violated the Fourth Amendment. If the officers were acting pursuant to the emergency aid exception, then they were required to carry out the search or seizure in a reasonable manner. Similarly, if they were acting pursuant to the exigent circumstances exception, they were required to use reasonable force. Under either

standard, a jury could find that the officers acted unreasonably by forcing the second entry and provoking a near-fatal confrontation. We therefore cannot say that the second entry was reasonable as a matter of law.

We further hold that there are triable issues of fact as to whether the officers used excessive force by resorting to deadly force and shooting Sheehan. The shooting was lawful when viewed from the moment of the shooting because at that point Sheehan presented an immediate danger to the officers' safety. Under our case law, however, officers may be held liable for an otherwise lawful defensive use of deadly force when they intentionally or recklessly provoke a violent confrontation by actions that rise to the level of an independent Fourth Amendment violation. *See Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002). Here, Sheehan has presented a triable issue as to whether the officers committed an independent Fourth Amendment violation by unreasonably forcing their way back into her home, and she has also presented evidence from which a reasonable jury could find that the officers acted recklessly in doing so. She has therefore presented a triable issue of the unreasonable use of deadly force under *Billington's* provocation theory.

We hold that the district court properly rejected Sheehan's claims of municipal liability under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Sheehan's claim that the city is liable on a failure to train theory fails because

she concedes that the police department employed appropriate training materials to guide police officers' responses to persons they knew to be suffering from mental illness. That the officers may not have followed those policies does not establish that the city was deliberately indifferent to Sheehan's rights. Sheehan's claim that the city is liable for ratifying the officers' allegedly unconstitutional acts fails because there is no evidence that the city adopted or expressly approved the officers' actions.

Turning to an issue of first impression, we join the majority of circuits that have addressed the issue and hold that Title II of the Americans with Disabilities Act applies to arrests. But we emphasize, as have those other circuits, that the exigencies surrounding police officers' decisions in the field must be taken into account when assessing the reasonableness of the officers' actions. We hold that, on the facts presented here, there is a triable issue whether the officers failed to reasonably accommodate Sheehan's disability when they forced their way back into her room without taking her mental illness into account or employing generally accepted police practices for peaceably resolving a confrontation with a person with mental illness.

Finally, we vacate summary judgment on Sheehan's state law claims and remand for further proceedings.

BACKGROUND

Teresa Sheehan was a resident of Conrad House [sic], a group home for persons dealing with mental illness located in San Francisco. Residents of the home have private rooms and share common areas, like the kitchen and living room. On August 7, 2008, Heath Hodge, a social worker, attempted to perform a welfare check on Sheehan. When he entered Sheehan's room without her permission, Sheehan told him to get out. She also told him that she had a knife and threatened him.

In light of Sheehan's threat, Hodge cleared the building of other residents. He also completed an application under California Welfare & Institutions Code § 5150 for Sheehan's 72-hour detention for psychiatric evaluation and treatment. He telephoned the police department's nonemergency number and requested police assistance in transporting Sheehan to a mental health facility.

Section 5150 provides a mechanism for mental health professionals or others to initiate a temporary detention of persons who are a danger to themselves or others or "gravely disabled." Section 5150 states in pertinent part:

When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, or other professional

person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Health Care Services as a facility for 72-hour treatment and evaluation.

Cal. Welf. & Inst. Code § 5150(a). The statute defines “gravely disabled” as, inter alia, “[a] condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter.” *Id.* § 5008(h)(1).

The San Francisco Police Department dispatched Officer Katherine Holder and Sergeant Kimberly Reynolds to respond to Hodge’s call for assistance. The computer automated dispatch information provided to the officers stated: “Social worker just went inside to check on his patient, subject is known to make violent threats, told reporting party to get out or she’ll knife him (no weapon seen) //Name is Teresa Sheehan/Eurasian, early 50’s, wearing striped shirt/pants.”

Officer Holder and Sergeant Reynolds met Hodge outside the group home. Hodge showed the officers a card issued by the city identifying him as a person authorized to initiate a 72-hour detention under § 5150. Hodge advised the officers of his reason for the call. He explained that he had gone into Sheehan’s room to check on her and that Sheehan had threatened to kill him with a knife. He explained that Sheehan had been off her medication for a

matter of months and that she had not been taking care of herself. Hodge also informed the officers that he had cleared the building of other residents and that the only way out of Sheehan's room, other than the main door to the second floor hallway, was a second floor window that could not be used as a means of egress without a ladder.¹

Hodge also showed the officers the § 5150 application he had completed before their arrival. The application said:

Client has been without psychotropic meds times one and a half years. Has been presenting with increased symptoms for several weeks. Client has not been seen by the house counselor times two weeks. Housemates reported that client has been coming and going at odd hours and reportedly said she had stopped eating. It was also reported that client has been wearing the same clothing for several days. Writer conducted outreach to client and she was not responsive. Made no sound behind her closed door. Writer and property management keyed in for wellness check. Upon opening the door, client was found lying in her bed with a book over her face, eyes open and was not responsive.

¹ Whether Hodge told the officers that no one else was in the building appears to be disputed, but for purposes of evaluating the defendants' motion for summary judgment we view the evidence in the light most favorable to Sheehan, the nonmoving party.

Addressed client several times and she did not move or answer. Client then suddenly got up, threw the covers, and yelled at writer violently, "Get out of here! You don't have a warrant! I have a knife and I'll kill you if I have to!" Client then slammed her door and locked it behind her.

Near the bottom of the application form, Hodge checked two boxes, one to indicate that Sheehan was a danger to others and one to indicate that she was gravely disabled. Hodge did not check the box to indicate that Sheehan was a danger to herself, nor did he give the officers any other reason to believe Sheehan was suicidal or likely to injure herself.

Based on the information furnished by Hodge, the officers decided to contact Sheehan to confirm Hodge's assessment and take Sheehan into custody. Sheehan's room was located at the end of a hallway on the second floor. As the officers faced Sheehan's closed door, there was a closed door to the right and a small alcove, also containing closed doors, to the left.

When they reached Sheehan's door, the officers, accompanied by Hodge, knocked on the door and announced that they were police officers. They used a key that Hodge had given them and opened the door. When the door opened, the officers saw Sheehan lying on her bed with a book on her chest or stomach.

What happened next is mostly, though not entirely, undisputed. In Sergeant Reynolds' telling, Sheehan "raised up, reached over with her left hand

very quickly grabbed one of the knives, a larger knife, from the plate and immediately walked in an aggressive threatening manner towards us saying, get out of here. I'm going to kill you. Get out of my room. I don't need your help. Stuff like that, and was repeating it over and over and over again." The "knife was shoved out in front of her, blade pointed towards us. She had her hand on the . . . handle, and as she approached closer to us the knife was always in front of her and there was some moving going on, like a jabbing motion or a stabbing motion." In Officer Holder's telling, Sheehan "grabbed the knife" and "raised it above her head coming towards Sergeant Reynolds and me saying I'm going to kill you." Hodge confirmed that Sheehan held a knife in her hands and said several times that she would kill the officers if they came near her. Although Sheehan's version of events departs in certain respects from those of the other three witnesses, Sheehan concedes that she held a knife and threatened to kill the officers.² Sheehan testified that she told the officers that they didn't have a search warrant and that they needed to subpoena her

² Sheehan's appellate briefs acknowledge that her deposition testimony was conflicting and inconsistent. Her briefs state that "there were obvious gaping inconsistencies in her testimony," and that her "testimony also smacks of irrationality that begs the question whether any of it is credible." They say that "the inherent inconsistencies in her testimony cast suspicion over all of it." With respect to some events, in fact, Sheehan's briefs adopt the officers' version of events rather than Sheehan's own.

if they wanted to talk to her. She testified that she told the officers to go away and leave her alone.

This encounter ended when the officers retreated and Sheehan closed the door, leaving Sheehan in her room and the officers and Hodge in the hallway. The officers responded to this situation by calling for backup, drawing their service weapons and directing Hodge to go downstairs to let in additional officers who would be responding to the call for backup. Rather than waiting for backup to arrive, however, the officers decided to forcibly reenter Sheehan's room. As Sergeant Reynolds later explained:

With the door being closed and us not having the ability to see what she was doing, we had no way of knowing whether or not, one, she . . . had an avenue of escape. Two, there were the possibility of other weapons that she could gain access to. And so in my opinion, as soon as that door was closed, the threat became more scary for us and more uncertainty about what we were dealing with.

Because Sheehan had "displayed obvious signs of violence and wanting to kill" the officers, Reynolds deemed the entry necessary to ensure officer safety and to prevent Sheehan from escaping (and becoming a threat to others). Consequently, Reynolds directed Holder to attempt to force the door open. Reynolds acknowledges that she did not take Sheehan's mental illness into account when she decided to force the second entry. As Holder used her feet and shoulders to attempt to gain entry, Reynolds stood behind Holder

with her pepper spray in one hand and her service weapon in the other. Holder also had her service weapon out. The door opened.³

What happened next is subject to some dispute. Under the officers' account, Sheehan emerged from the room brandishing a knife and advanced on the officers. Reynolds pepper sprayed Sheehan, but without effect. When Sheehan continued to advance, Holder, and then Reynolds, fired their weapons, hitting Sheehan five or six times. Sheehan fell to the ground, but continued to swing the knife at the officers until a backup officer arrived and kicked the knife from Sheehan's hand. The officers testified that Sheehan was between two and four feet from Holder when Holder first fired – so close that Holder was forced to fire from the hip to prevent Sheehan from cutting her arm.

In Sheehan's telling, she opened the door and showed the officers the knife. She had the knife upraised in her right hand and took one step toward the officers. This step placed her on the threshold and

³ The officers used considerable force in gaining entry. Sergeant Reynolds first tried to get the door open, presumably by kicking and shouldering it, without success. When she could not force it open, Officer Holder took over. She unsuccessfully tried to kick it open. She then resorted to using her shoulder. After four to six such attempts, the door finally budged. The officers also had their firearms drawn, itself a significant use of force.

it was at that point that she was pepper sprayed by the officers. Sheehan testified:

And then I screamed at them. You're blinding me, you're blinding me. I can't see. And then I started . . . to fall. And they right away were shooting me. I started to come out the door because I was blinded. I had my knife in my hand. . . . I was wearing my glasses. And I started to raise my other arm. And then the shots happened. . . . And then I fell against the wall in the corridor. Close to the kitchen door.

After she fell to the floor, an officer kicked the knife from her hand. Sheehan acknowledges that she continued to hold the knife after she was pepper sprayed and shot. She also concedes that it was her intent to resist arrest and to use the knife to defend herself against the officers because she did not want to be removed from her home or detained for a 72-hour evaluation.

There is some dispute over whether Sheehan was standing, falling or had reached the ground when Reynolds fired the final shot. Holder testified that Sheehan had already reached the ground. Reynolds testified that Sheehan was still standing. Sheehan testified that she was falling against the wall.

Sheehan survived the shooting, and the city prosecuted her for two counts of assault with a deadly weapon, two counts of assaulting a police officer with a deadly weapon and one count of making criminal threats against Hodge. *See* Cal. Penal Code §§ 245(a),

(c), 422. The jury hung on the four assault counts and acquitted on the criminal threats count. The city elected not to retry Sheehan.

Sheehan then filed this 42 U.S.C. § 1983 action against the City and County of San Francisco, Police Chief Heather Fong, Sergeant Reynolds and Officer Holder, alleging violations of her Fourth Amendment rights against unreasonable search and seizure, including a warrantless search and use of excessive force. She also alleged violation of her rights under the Americans with Disabilities Act and state law claims for assault and battery, negligence, intentional infliction of emotional distress and violation of California Civil Code § 52.1. The district court granted the defendants' motion for summary judgment, and Sheehan timely appealed.

STANDARD OF REVIEW

We review the district court's summary judgment rulings, including its rulings on qualified immunity, de novo. *See Maxwell v. Cnty. of San Diego*, 697 F.3d 941, 947 (9th Cir. 2012). "Summary judgment should be granted 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). We view the evidence in the light most favorable to Sheehan, the nonmoving party, and draw all reasonable inferences in her favor. *See id.*

Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009). To determine whether a government official is entitled to qualified immunity, we conduct a two-part analysis. Government officials are denied qualified immunity only if (1) the facts that a plaintiff has alleged or proved show a violation of a constitutional right and (2) the right at issue was clearly established at the time of the defendant's alleged misconduct. *See id.* at 232. We have discretion in deciding which of the two qualified immunity prongs should be addressed first. *See id.* at 242.

DISCUSSION

I. FOURTH AMENDMENT

Sheehan contends that the officers violated her Fourth Amendment rights by entering her home without a warrant and using excessive force. We evaluate the officers' actions in the sequence in which they occurred.

A. Initial Entry

We reject Sheehan's contention that the officers violated her Fourth Amendment rights by initially entering her home without a warrant.

1.

Searches and seizures inside a home without a warrant are presumptively unreasonable, but that presumption is not irrebuttable, and a warrantless search or seizure is permitted to render emergency aid or address exigent circumstances. *See United States v. Struckman*, 603 F.3d 731, 737-38 (9th Cir. 2010). The emergency aid exception applies when: “(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search’s scope and manner were reasonable to meet the need.” *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008). To satisfy the exigency exception, the government must prove: (1) that the officer had probable cause to search or arrest; and (2) that exigent circumstances justified the warrantless intrusion. *See Hopkins v. Bonvicino*, 573 F.3d 752, 766-67 (9th Cir. 2009). Exigent circumstances include “those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts,” *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir. 1984) (en banc), *overruled on other grounds by Estate of Merchant v. Comm’r*, 947 F.2d 1390, 1392-93 (9th Cir. 1991), or when police are in hot pursuit of a

suspect, *see United States v. Johnson*, 256 F.3d 895, 907 (9th Cir. 2001) (en banc) (per curiam).

A search or seizure conducted pursuant to either of these exceptions must be carried out in a reasonable manner. Under the emergency aid exception, “the search’s scope and manner [must be] reasonable to meet the need.” *Snipe*, 515 F.3d at 952; *see also Brigham City v. Stuart*, 547 U.S. 398, 406-07 (2006) (examining whether “[t]he manner of the officers’ entry was also reasonable” under the emergency aid exception). Similarly, under the exigent circumstances exception officers are required to use reasonable force in carrying out the search or seizure. As we said in *Fisher v. City of San Jose*, 558 F.3d 1069 (9th Cir. 2009) (en banc), where we applied the exigent circumstances exception:

Nothing in today’s opinion . . . even hints at disturbing the Fourth Amendment requirement that the force, deadly or not, used in the course of arrest, investigatory stop, or other “seizure” of a person must satisfy the “objective reasonableness” standard. To be clear, we do not suggest that the initial exigency and seizure thereafter condoned unfettered force to resolve the armed standoff, discharged all of Fisher’s Fourth Amendment protections, or reduced in any way the probable cause needed to arrest. A court can certainly later examine the officers’ actions in connection with a suspect’s subsequent criminal trial or a collateral civil rights suit for

other alleged Fourth Amendment violations,
as the jury did here.

Id. at 1084 (citation omitted).

Under the circumstances of this case, we see no meaningful distinction between the emergency aid exception’s requirement that a search or seizure be conducted in a reasonable manner and the Fourth Amendment’s requirement that it be carried out without the use of excessive force. Both inquiries stem from the common principle that an otherwise lawful search or seizure – whether justified by a warrant or by an exception to the warrant requirement – “may be invalid if carried out in an *unreasonable* fashion.” *Franklin v. Foxworth*, 31 F.3d 873, 875 (9th Cir. 1994). Thus, regardless of whether the officers rely on the emergency aid exception or the exigent circumstances exception, they were required to conduct the search or seizure in a reasonable manner, using reasonable force. We therefore apply the Supreme Court’s excessive force standard to both inquiries.⁴

Under that standard, “[d]etermining whether the force used to effect a particular seizure is reasonable

⁴ It also [sic] immaterial whether we characterize the officers’ entry as a search or a seizure. Regardless, they were required to use reasonable force. *See Hopkins*, 573 F.3d at 776 (“It is clearly established that the use of excessive force in effecting a seizure violates the Fourth Amendment.”); *Boyd v. Benton Cnty.*, 374 F.3d 773, 780 (9th Cir. 2004) (“This Circuit has clearly recognized that the use of excessive force during a search makes that search unreasonable under the Fourth Amendment.”).

under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks omitted). This test of reasonableness "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 he is actively resisting arrest or attempting to evade arrest by flight." *Id.* The reasonableness of a particular use of force, moreover, "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," making "allowance for the fact that police 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." *Id.* at 396-97.

2.

Applying these standards here, we hold that the officers' initial entry into Sheehan's home was lawful under the emergency aid exception.

First, the officers had an objectively reasonable basis for concluding that there was an urgent need to protect Sheehan from serious harm. The officers knew that Sheehan was off her medication, was not taking care of herself and had acted in a threatening

manner toward Hodge. They were also aware that, in Hodge's view, she was both "gravely disabled" and in need of temporary, involuntary hospitalization to receive psychological evaluation and treatment. Sheehan points out that she may not have required *immediate* assistance. Hodge had not suggested Sheehan was suicidal and the conditions Hodge described – not eating, not taking medication, not changing clothes – suggested a gradual rather than a sudden deterioration. The officers, however, reasonably took a cautious view of the situation. Hodge, who was a trained social worker and personally familiar with Sheehan's condition, considered the situation dire enough to apply for a § 5150 detention and to call for police assistance in transporting Sheehan to a mental health facility. Hodge had telephoned the police immediately after his encounter with Sheehan, suggesting that the situation was urgent. Sheehan's threatening behavior toward Hodge suggested that her condition had deteriorated precipitously, again suggesting urgency. Under the circumstances, the officers acted reasonably by treating the situation as a genuine emergency. As we stated in *United States v. Black*, (9th Cir. 2007):

This is a case where the police would be harshly criticized had they not investigated. . . . Erring on the side of caution is exactly what we expect of conscientious police officers. This is a "welfare search" where rescue is the objective, rather than a search for crime. We should not second-guess the

officers['] objectively reasonable decision in such a case.

Id. at 1040. *See also Michigan v. Fisher*, 558 U.S. 45, 49 (2009) (per curiam) (“Officers do not need ironclad proof of ‘a likely serious, life-threatening’ injury to invoke the emergency aid exception.”).

Second, the officers carried out the search or seizure in a reasonable manner up to and including the initial entry. Accompanied by Hodge, the officers knocked and announced that they were police officers. They then used a pass key supplied by Hodge to let themselves in for the purpose of assessing whether Sheehan needed emergency treatment under § 5150. Their weapons were not drawn and they had no reason to believe that their entry would trigger a violent confrontation. The officers therefore used reasonable force under the circumstances.

Accordingly, we hold that the officers’ initial entry into Sheehan’s home did not violate the Fourth Amendment.⁵

⁵ Because we hold that the initial entry falls under the emergency aid exception, we need not decide whether the exigent circumstances exception would also apply. Nor need we address whether the officers’ warrantless entry may have been covered by a “special need” exception to the warrant requirement. *See Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). The First and Third Circuits have held that a special need exception applies when police officers enter a subject’s home to take her into custody pursuant to a state law authorizing emergency hospitalization of a person suffering from mental illness. *See Doby*

(Continued on following page)

B. Second Entry

We hold, however, that there are triable issues of fact as to whether the second entry violated the Fourth Amendment.

1.

We do not suggest that the officers are liable for acting without a warrant. There are at least two, and possibly three, reasons why the officers were permitted to act without a warrant at the time of the second entry. First, the officers continued to have an objectively reasonable basis for concluding that there was an urgent need to protect Sheehan from serious harm, satisfying the emergency aid exception's first prong. *See Snipe*, 515 F.3d at 952.⁶ The emergency

v. DeCrescenzo, 171 F.3d 858, 872 (3d Cir. 1999); *McCabe v. Life-Line Ambulance Serv., Inc.*, 77 F.3d 540, 553 (1st Cir. 1996). The parties have not raised that issue here, however.

⁶ The two prongs of the emergency aid exception address distinct Fourth Amendment requirements. The first prong – whether law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm – addresses whether the officers proceeded lawfully by acting without a warrant. The second prong – whether the search's scope and manner were reasonable to meet the need – addresses whether, even if a warrant was not required, the officers carried out the search or seizure in an unreasonable manner. A search or seizure comports with the Fourth Amendment only if both prongs are satisfied. *Cf. Fisher*, 558 F.3d at 1080, 1084 (holding that the Fourth Amendment's warrant requirement was satisfied under the exigent circumstances exception but that the officers still could be liable for

(Continued on following page)

that existed at the time of the initial entry was no less apparent at the time of the second entry. On the contrary, Sheehan's behavior toward the officers during their initial entry only confirmed that her condition had deteriorated to the point of creating an emergency. Second, because the two entries were part of a single, continuous search or seizure, the officers are not required to separately justify the continuing emergency with respect to the second entry. See *Michigan v. Tyler*, 436 U.S. 499, 511 (1978) (“[W]e find that the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence” where the initial entry was justified by exigent circumstances); *Fisher*, 558 F.3d at 1077 (“[W]e conclude that when Fisher was seized at the beginning of the standoff, the officers were not required to periodically reassess whether the exigency persisted throughout the standoff because the standoff was ‘no more than an actual continuation’ of the initial seizure.”); *United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir. 1990); *United States v. Echegoyen*, 799 F.2d 1271, 1280 (9th Cir. 1986).⁷ Third, although the point

carrying out the seizure in an unreasonable manner). The first prong is satisfied here, justifying the officers for acting without a warrant. But there are triable issues as to whether the second prong is satisfied.

⁷ Although the continuous search doctrine applies here, that doctrine speaks only to the warrant requirement, not to the separate requirement that officers carry out a search or seizure in a reasonable manner. See *Fisher*, 558 F.3d at 1084. Thus, although the officers were not required to reassess the existence of

(Continued on following page)

is debatable, the officers may have been justified in acting without a warrant under the exigent circumstances exception.⁸ That the officers did not have a warrant at the time of the second entry, therefore, did not violate the Fourth Amendment.

2.

We are not persuaded, however, that the officers carried out the search or seizure in a reasonable manner at the point of the second entry. As we have explained, regardless of whether the officers invoke the emergency aid exception or the exigent circumstances exception, they were required to carry out the search or seizure in a reasonable manner, without the

an emergency or the need for a warrant periodically, they were required *at all times* to conduct the search or seizure in a reasonable manner.

⁸ Because we hold that the absence of a warrant was justified under both the emergency aid exception and the continuous search doctrine, we need not address whether the exigent circumstances exception applies to the second entry. Whether as a matter of law it would apply is at least questionable. By the time of the second entry, the officers had probable cause to believe Sheehan had committed a crime by threatening the officers. Arguably, the officers could have avoided harm to themselves by retreating a safe distance from the door; the knife was not in imminent danger of destruction; there was no “hot pursuit” given that Sheehan “was already inside the [room] when the police officers arrived,” *Struckman*, 603 F.3d at 744; and given that Hodge had informed them that the only way out of the room was an inaccessible second story window, and Sheehan had shown no interest in leaving her room, there was no reason to fear Sheehan’s escape.

use of excessive force. *See Fisher*, 558 F.3d at 1084; *Snipe*, 515 F.3d at 952. Although we have no trouble with the manner in which the officers carried out the search or seizure up to and including the initial entry, we cannot say as a matter of law that the officers continued to carry out the search or seizure in a reasonable manner when they decided to force the second entry, without taking Sheehan's mental illness into account and in an apparent departure from their police officer training.⁹

Sheehan presented an expert report by Lou Reiter, a former deputy chief of the Los Angeles Police Department. We treat Reiter's report as relevant evidence of reasonableness, as we are required to do. Although we have held that the mere fact that an expert disagrees with an officer's actions does not itself compel the conclusion that the officer's actions were unreasonable, *see Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002); *Reynolds v. Cnty. of San Diego*, 84 F.3d 1162, 1170 (9th Cir. 1996), *overruled on other grounds by Acri v. Varian Assocs., Inc.*, 114 F.3d

⁹ In examining whether the officers conducted the search or seizure in a reasonable manner at the point of the second entry, we do not focus on the amount of force they employed to force open the door (considerable) and that they did so with their firearms drawn (itself a significant use of force). *See* footnote 3, *supra*. Rather, we focus on their critical decision to enter at all. *See Alexander v. City & Cnty. of San Francisco*, 29 F.3d 1355, 1366-67 (9th Cir. 1994) (holding that there were triable issues as to whether officers used excessive force by storming the house of a mentally ill recluse who had threatened to shoot anybody who entered).

999, 1001 (9th Cir. 1997), a rational jury may rely upon expert evidence in assessing whether an officer's use of force was unreasonable, *see Glenn v. Washington Cnty.*, 673 F.3d 864, 877 (9th Cir. 2011); *Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005) (en banc); *Reynolds*, 84 F.3d at 1169. Reiter's report is therefore relevant to the excessive force inquiry.

Reiter described general police practices for dealing with persons who are mentally ill or emotionally disturbed, explaining that officers are trained not to unreasonably agitate or excite the person, to contain the person, to respect the person's comfort zone, to use nonthreatening communications and to employ the passage of time to their advantage. He also cited materials used by the San Francisco Police Department to train officers on "appropriate tactical actions" to be used when confronting the mentally ill. These materials, which are germane to the excessive force inquiry because they were designed to protect individuals such as Sheehan from harm, *see Scott v. Henrich*, 39 F.3d 912, 915-16 (9th Cir. 1994), advise officers to request backup, to calm the situation, to communicate, to move slowly, to assume a quiet, non-threatening manner, to take time to assess the situation and to "give the person time to calm down."

Reiter deemed the officers' second entry into Sheehan's home tactically unreasonable under those policies. In his view, the officers should have "elected to . . . relocate to a safer tactical position, call for

special units/equipment, and determine the propriety of seeking a warrant.” He opined that there was

no logical reason that the officers did not pull back from the landing outside Ms. Sheehan’s private residence after their first attempt to enter. The location was a tactical disadvantage for the officers. Both officers knew that Ms. Sheehan had refused their entry and made specific comments regarding the necessity for a warrant. They knew that other resources were en-route to their call for backup. Officer Holder’s and Sgt. Reynold’s [sic] continued conduct exacerbated the confrontation, rather than any effort to [defuse] the agitation.

In view of Reiter’s report, the officers’ training and the totality of the circumstances – viewing the facts favorably to Sheehan as we must – we conclude that a reasonable jury could find that the officers’ decision to force a confrontation with Sheehan was objectively unreasonable. *See Alexander v. City & Cnty. of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994) (explaining that the operative question is whether “the force the police used was unreasonable under *all* of the circumstances”). Although Sheehan needed assistance, the officers had no reason to believe that a delay in entering her room would cause her serious harm, especially when weighed against the high likelihood that a deadly confrontation would ensue if they forced a confrontation. Sheehan was not suicidal, *cf. Fitzgerald v. Santoro*, 707 F.3d 725, 731 (7th Cir. 2013); *West v. Keef*, 479 F.3d 757, 759 (10th

Cir. 2007); *Bias v. Moynihan*, 508 F.3d 1212, 1220 (9th Cir. 2007), or bleeding to death. In addition, although the officers may have been justified in believing that Sheehan had assaulted them and should be arrested, under her version of the facts there was no immediate need to subdue her and take her into custody. A reasonable jury could find that Sheehan was in a confined area and not a threat to others – so long as they did not invade her home.

According to Hodge, the officers knew that there was no way out of the room other than the door they were guarding and that there were no other occupants in the building, facts that distinguish this case from those in which officers' more confrontational tactics were held to be reasonable based on the need to protect others. *See, e.g., Reynolds*, 84 F.3d at 1168 (“Reynolds was not in a confined area and there were other people in the vicinity.”); *Estate of Bennett v. Wainwright*, 548 F.3d 155, 169 (1st Cir. 2008) (“[A] reasonable officer under the circumstances could have reasonably believed . . . that entering the house without first obtaining a warrant or express consent was necessary to prevent injury to Bennett himself, and to the family members present inside.”), *overruled on other grounds by Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009); *Black*, 482 F.3d at 1039 (“The police were justified in their entry because they feared that [a domestic violence victim] could have been inside the apartment, badly injured and in need of medical attention. . . .”); *Ewolski v. City of Brunswick*, 287 F.3d 492, 502 (6th Cir. 2002) (the subject’s

“dramatic reaction” to police, “combined with the officers’ knowledge that he was armed and volatile and that his wife and child were in the house with him, reveals an undisputed body of evidence from which a reasonable officer could have reasonably concluded that there was an immediate threat to [the subject’s] wife and son”). Sheehan, with some force, argues that whatever her behavior in resisting unwanted medical assistance and claiming the sanctity of her home, once the officers exited her room and her door was shut the threats to the safety of the officers or others were under control and there was no need to force a confrontation. Of significance, all of the information known to the officers suggested that Sheehan wanted only to be left alone in her home. She had shown no desire to leave the room. Although she had acted in a threatening manner, she had done so only to those who had entered her home without her permission. The officers also were aware that Sheehan, who they knew was both mentally ill and emotionally disturbed, was not likely to respond rationally to police officers breaking down her door. A rational person, recognizing that she was outnumbered and facing superior firepower, might have been expected to drop the knife and surrender. As the officers knew, however, Sheehan was mentally ill and acting irrationally, and, given her initial reaction to the officers, likely to react violently to an escalating show of force. As we explained in *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), the tactics to be employed against an

emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end.

Id. at 1282-83; *see also Glenn*, 673 F.3d at 875 (“Another circumstance relevant to our analysis is whether the officers were or should have been aware that Lukus was emotionally disturbed.”); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003) (if “it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed” (quoting *Deorle*, 272 F.3d at 1283)).¹⁰ The officers’ decision to force an entry was in effect a decision to cause a violent – and potentially deadly – confrontation with a mentally ill person without a countervailing need. Thus, on this record, we cannot say as a matter of law that the officers conducted the search or seizure in a reasonable manner

¹⁰ In contrast to *Deorle*, Sheehan was armed. But she was also contained (or so a reasonable jury could find), so *Deorle* remains relevant.

or used appropriate force by forcing their way back into Sheehan's home.

Of course, a reasonable jury could find that the officers acted reasonably by forcing the entry. Whether Sheehan was contained, the officers had reason to fear Sheehan's escape, the officers knew the building was empty and the officers could have ensured their safety by retreating are all disputed facts that a jury could resolve in the officers' favor. To find the officers liable, moreover, the jury would have to conclude not only that freezing or attempting to de-escalate the situation were reasonable courses of action but also that forcing an entry was *unreasonable*. See *Glenn*, 673 F.3d at 876 (explaining that police officers "need not avail themselves of the least intrusive means of responding to an exigent situation" and that "they need only act within that range of conduct we identify as reasonable" (quoting *Scott*, 39 F.3d at 915) (internal quotation marks omitted)). Viewing the evidence favorably to Sheehan, however, we cannot say that the officers acted reasonably *as a matter of law*.

3.

Having determined that a reasonable jury could find a Fourth Amendment violation, we next consider whether the officers are nonetheless entitled to qualified immunity. At this stage of the proceedings, the operative question is whether, again viewing the facts in the light most favorable to Sheehan, the officers violated a clearly established Fourth Amendment

right of which all but the plainly incompetent would have been aware. *See Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (per curiam).

As noted, determining whether the force used to effect a particular search or seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. *See Graham*, 490 U.S. at 396. Put differently, we “balance the amount of force applied against the need for that force.” *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003). Construing the facts favorably to Sheehan, the officers' intrusion on Sheehan's Fourth Amendment rights was profound – the officers forced an entry into her home, apparently without warning and with guns drawn, under conditions that were likely to result in her death. On the other side of the equation, the governmental interest in the intrusion was minimal because she was fully contained, not a flight risk and not a danger to the safety of the officers or others; backup was on the way; and trained negotiators could have been used to defuse the crisis. If there was no pressing need to rush in, and every reason to expect that doing so would result in Sheehan's death or serious injury, then any reasonable officer would have known that this use of force was excessive. *See Deorle*, 272 F.3d at 1281-85 (holding that the use of nonlethal force was excessive when the officers had a clear line of retreat and

“could easily have avoided a confrontation, and awaited the arrival of a negotiating team”).

Our decision in *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), is instructive. There, police were present outside the decedent Quade’s home to assist in executing an administrative forcible entry warrant permitting local health officials to inspect the home for a sewage leak. *See id.* at 1358. Quade refused to let the inspectors in and threatened to shoot anyone who entered. *See id.* The officers cordoned off the area, attempted to negotiate a peaceful resolution of the standoff for an hour and then forcibly entered the home. *See id.* When the officers entered, Quade pointed and fired a gun at the officers, who returned fire, shooting and killing him. *See id.* The plaintiff (Quade’s executor) alleged that the officers used excessive force, challenging not the shooting itself but rather the force the officers used in entering the house. *See id.* at 1366 & n.12. We denied summary judgment to the defendants both on the merits and on their qualified immunity defense. *See id.* at 1366-67. We held that the plaintiff’s claim “that it was unreasonable for the officers to storm the house of a man whom they knew to be a mentally ill, elderly, half-blind recluse who had threatened to shoot anybody who entered” stated “a classic Fourth Amendment violation under *Graham*.” *Id.* at 1366. We said that, if the jury were to find that the officers stormed the house to carry out the health inspection, “then the jury may also conclude that the

force used . . . was excessive in relation to the purpose for which it was used.” *Id.* at 1367.

Alexander and this case have much in common. In both cases, police officers had a legal right to enter a person’s home (to render emergency aid in Sheehan’s case and to execute an administrative warrant in *Alexander*). In both cases, the subject was contained and had threatened those who entered. In both, the officers knew they were dealing with someone who was mentally ill and acting irrationally. And in both, police officers decided to force an entry, knowing it was likely to result in a violent confrontation, absent the need to do so. Indeed, the facts here are in one respect even more troubling than those in *Alexander*. The officers radioed for reinforcements in both cases, but only in *Alexander* did the officers wait for backup to arrive and at least attempt negotiation before storming in.¹¹

Although the facts of *Alexander* are not identical to those of this case, *Graham*, *Alexander* and *Deorle*

¹¹ We acknowledge that *Alexander* has been limited by subsequent circuit precedent to the extent it informs our provocation doctrine – the principle discussed in part I.C. of this opinion that an officer may be liable for an otherwise reasonable use of deadly force when the officer has intentionally or recklessly provoked the deadly confrontation. See *George v. Morris*, 736 F.3d 829, 839 n.14 (9th Cir. 2013); *Billington*, 292 F.3d at 1188-91. Those cases are inapplicable here, however, where the issue at this point is not whether *the shooting* violated the Fourth Amendment (on a provocation theory) but rather whether the officers’ antecedent *forcible entry* did.

would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry. We emphasize that at trial the facts may show that Sheehan was not contained, that she presented a flight risk, that officers or others were in danger, or that the officers reasonably but mistakenly believed that their entry was necessary to prevent Sheehan's escape or ensure the safety of themselves or others. The facts, however, are disputed, and it would be premature to hold at this stage of the proceedings that the officers are – as a matter of law – entitled to qualified immunity. *See Glenn*, 673 F.3d at 870 & n.7; *Alexander*, 29 F.3d at 1366-67.¹²

C. Deadly Force

We turn, then, to the officers' use of deadly force. “[A]n officer’s use of deadly force is reasonable if ‘the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.’” *Reynolds*, 84 F.3d at

¹² If Sheehan is able to establish that the second entry violated the Fourth Amendment (and the officers are not entitled to qualified immunity), then she can recover damages proximately caused by the violation. *See Jackson v. Gates*, 975 F.2d 648, 655 (9th Cir. 1992) (“Under § 1983 Jackson was entitled to sue for all consequential damages resulting from the violation of his Fourth Amendment rights.”).

1167 (quoting *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)). “Thus, where a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force.” *Smith v. City of Hemet*, 394 F.3d 689, 704 (9th Cir. 2005) (en banc).

Here, the officers’ use of deadly force – *viewed from the standpoint of the moment of the shooting* – was reasonable as a matter of law. Although the parties disagree over the details surrounding the shooting, the material facts are undisputed: Sheehan had threatened to kill the officers, she wielded a knife in an upraised position, she advanced toward the officers, she did not drop the knife after being pepper sprayed (or even after being shot) and the shooting took place while Sheehan was only a few feet from a cornered Officer Holder. Although Sheehan insists that she was blinded and disabled by the pepper spray, she indisputably continued to hold the knife and advance toward the officers, in cramped quarters, after being sprayed. Thus, even if Sheehan *in fact* was not intending to attack the officers at that point in the confrontation, the officers reasonably believed they were still in danger. At the moment of the shooting, the defensive use of deadly force, although unfortunate, did not violate the Fourth Amendment.

We must also consider whether the shooting was reasonable when the events leading up to the shooting are taken into account. As previously discussed, “where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be

held liable for his otherwise defensive use of deadly force.” *Billington*, 292 F.3d at 1189 (emphasis added) [sic]. Here, Sheehan has presented a triable issue as to whether the officers committed an independent Fourth Amendment violation by their forcible second entry into her room, as discussed above. In addition, Sheehan has presented evidence from which a reasonable jury could find that the officers acted recklessly in failing to take Sheehan’s mental illness into account and in forcing a deadly confrontation rather than freezing or attempting to de-escalate the situation. We therefore hold that there are triable issues of fact as to whether the shooting was unreasonable on a provocation theory.

Finally, we address Sheehan’s claim that Sergeant Reynolds’ final shot amounted to excessive force. Assuming, as we must, that Sheehan had already reached the ground when Reynolds fired the final shot, we nonetheless hold that Reynolds is entitled to qualified immunity. Even if Reynolds continued to fire after Sheehan reached the ground, “it is clear from the very brief time that elapsed that [Reynolds] made a split-second judgment in responding to an imminent threat and fired a fusillade in an emergency situation.” *Berube v. Conley*, 506 F.3d 79, 85 (1st Cir. 2007). Reynolds’ actions “cannot be found unreasonable because she may have failed to perfectly calibrate the amount of force required to protect herself.” *Id.* Even if Sheehan was on the ground, she was certainly not subdued, and she continued to hold a knife and threaten the officers, especially Holder,

who was cornered and in close proximity to Sheehan. Sheehan has presented no authority holding that the use of deadly force under similar circumstances was excessive. Thus, Reynolds is entitled to qualified immunity on this basis.

II. **MONELL CLAIMS**

Sheehan asserted § 1983 claims against the city under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). She raises two theories of municipal liability: (1) failure to train and (2) ratification. We hold that the district court properly granted summary judgment to the city on each of these claims.

A. **Failure to Train**

“The ‘inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.’” *Price v. Sery*, 513 F.3d 962, 973 (9th Cir. 2008) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). Here, Reynolds acknowledges that she did not take Sheehan’s mental illness into account when she ordered the second entry into Sheehan’s room. Sheehan, however, has not pointed to anything in the record to suggest that Reynolds’ training was responsible for her decision to disregard Sheehan’s mental illness. On the contrary, Sheehan concedes that the department employed appropriate training materials

to guide police officers' responses to persons they knew to be suffering from mental illness. That Reynolds may have disregarded her training does not show that the city was deliberately indifferent.

B. Ratification

Sheehan's ratification theory also fails. "To show ratification, a plaintiff must prove that the 'authorized policymakers approve a subordinate's decision and the basis for it.'" *Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)). "We have found municipal liability on the basis of ratification when the officials involved adopted and expressly approved of the acts of others who caused the constitutional violation." *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir. 1996).

Sheehan contends that the city ratified the officers' conduct by not disciplining them. Ratification, however, generally requires more than acquiescence. There is no evidence in the record that policymakers "made a deliberate choice to endorse" the officers' actions. *Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992). The mere failure to discipline Reynolds and Holder does not amount to ratification of their allegedly unconstitutional actions. See *Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1253-54 (9th Cir. 2010) (holding that the failure to discipline employees, without more, was insufficient to establish ratification); *Santiago v. Fenton*, 891 F.2d 373, 382

(1st Cir. 1989) (refusing to hold that the “failure of a police department to discipline in a specific instance is an adequate basis for municipal liability under *Monell*”).

III. AMERICANS WITH DISABILITIES ACT

We next address Sheehan’s claim that the city violated her rights under the Americans with Disabilities Act (ADA).

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. Discrimination includes a failure to reasonably accommodate a person’s disability. As United States Department of Justice regulations state:

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).

We have not previously addressed whether the ADA applies to arrests, *see Thompson v. Davis*, 295

F.3d 890, 897 (9th Cir. 2002), and the question is a matter of some disagreement among other circuits. The Fifth Circuit has held that “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 involve subjects with mental disabilities, prior to the officer’s securing the scene and ensuring that there is no threat to human life.” *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000). Other circuits have declined to adopt the Fifth Circuit’s approach. In *Bircoll v. Miami-Dade County*, 480 F.3d 1072 (11th Cir. 2007), the Eleventh Circuit held that “the question is not so much one of the applicability of the ADA because Title II prohibits discrimination by a public entity by reason of [a person’s] disability. 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. Similarly, in *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999), the Tenth Circuit held that “a broad rule categorically excluding arrests from the scope of Title II . . . is not the law.” *Id.* at 1221. In *Waller ex rel. Estate of Hunt v. City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009), the Fourth Circuit reserved judgment on the Fifth Circuit’s approach and then went on to consider a reasonable accommodation claim involving an arrest. Like the Eleventh Circuit, *Waller* held that “exigency is one circumstance that bears materially on the inquiry into reasonableness under the ADA.” *Id.* See also *Tucker v. Tennessee*, 539 F.3d 526, 534

(6th Cir. 2008) (addressing a Title II reasonable accommodation claim in which the plaintiffs asserted that police officers “discriminated against them in violation of the ADA by failing to provide a qualified sign language interpreter or other such reasonable accommodation(s) during the domestic disturbance call that resulted in their arrest”).

We agree with the majority of circuits to have addressed the question that Title II applies to arrests. The ADA applies broadly to police “services, programs, or activities.” 42 U.S.C. § 12132. We have interpreted these terms to encompass “anything a public entity does.” *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001)) (internal quotation marks omitted). The ADA therefore applies to arrests, though we 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. *See Waller*, 556 F.3d at 175 (“Just as the constraints of time figure in what is required of police under the Fourth Amendment, they bear on what is reasonable under the ADA.”).

Courts have recognized at least two types of Title II claims applicable to arrests: (1) wrongful arrest, where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity; and (2) reasonable accommodation, where, although police properly investigate and arrest a person with a disability for a crime unrelated

to that disability, they fail to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees. *See Waller*, 556 F.3d at 174; *Gohier*, 186 F.3d at 1220-21.

Sheehan raises the second type of claim here. She asserts that the officers failed to reasonably accommodate her disability by forcing their way back into her room without taking her mental illness into account and without employing tactics that would have been likely to resolve the situation without injury to herself or others. To state a claim under Title II of the ADA, a plaintiff generally must show: (1) she is an individual with a disability; (2) she is otherwise qualified to participate in or receive the benefit of a public entity's services, programs or activities; (3) she was either excluded from participation in or denied the benefits of the public entity's services, programs or activities or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits or discrimination was by reason of her disability. *See O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1060 (9th Cir. 2007). In a Title II claim grounded in a public entity's alleged failure to provide a reasonable accommodation under 28 C.F.R. § 35.130(b)(7), the plaintiff bears the initial burden of producing evidence of the existence of a reasonable accommodation. *See Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002). A public entity may defeat a reasonable accommodation claim by showing "that

making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7); *see Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1047 (9th Cir. 1999).

It is undisputed that Sheehan had a disability and that the officers knew it at the time they encountered her. We turn, therefore, to whether the city discriminated against Sheehan by failing to provide a reasonable accommodation during the second entry. Sheehan asserts that the city failed to provide a reasonable accommodation when the officers forced their way back into her room without taking her mental illness into account. She asserts that the officers should have respected her comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation. We acknowledge that the officers were forced to make split-second decisions. A reasonable jury nevertheless could find that the situation had been defused sufficiently, following the initial retreat from Sheehan’s room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary. For the reasons stated here, and because the reasonableness of an accommodation is ordinarily a question of fact, *see EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1110 (9th Cir. 2010), we hold that the city is not entitled to judgment as a matter of law on Sheehan’s ADA claim.

IV. STATE LAW CLAIMS

Sheehan asserts state law claims for negligence, assault and battery, intentional infliction of emotional distress and violation of California Civil Code § 52.1. The district court ruled that the defendants are immune from liability on those claims under California Welfare & Institutions Code § 5278, which provides: “Individuals authorized under this part to detain a person for 72-hour treatment and evaluation . . . shall not be held either criminally or civilly liable for exercising this authority in accordance with the law.”

In *Bias v. Moynihan*, 508 F.3d 1212, 1221 (9th Cir. 2007), we held that a police officer was immune under § 5278 from state law claims for assault and battery, false arrest, illegal imprisonment and intentional infliction of emotional distress where the officer had probable cause to take the plaintiff into custody in accordance with § 5150. The scope of § 5278 immunity, however, is not as all-encompassing as the defendants argue. Section 5278 is part of the Lanterman-Petris-Short Act, which must be construed to protect mentally disordered persons. *See Gonzalez v. Paradise Valley Hosp.*, 3 Cal. Rptr. 3d 903, 907 (Ct. App. 2003). In *Jacobs v. Grossmont Hospital*, 133 Cal. Rptr. 2d 9 (Ct. App. 2003), the California Court of Appeal held that

the immunity of section 5278 extends to claims based on *circumstances that are inherent in an involuntary detention* pursuant to section 5150. Without the immunity provided by section 5278, an involuntary detention and

treatment without consent would arguably constitute kidnapping, false imprisonment, or battery. Section 5278 was intended to provide immunity for claims based on *conduct that is expressly authorized by the LPS Act but would otherwise constitute a civil or criminal wrong*. . . . [A] plaintiff who is properly detained in accordance with the LPS Act may not assert any civil claim based solely on the fact that he was detained, evaluated, or treated without his consent [but] section 5278 [does not] confer blanket immunity for any act or omission that might occur during a 72-hour hold, no matter how negligent, wrongful, or even criminal.

Id. at 15 (emphasis added).

Thus, § 5278 immunizes the police officers from the *decision to detain* Sheehan under § 5150. Section 5278 also immunizes the officers from liability for the *fact of Sheehan's detention*. Finally, § 5278 immunizes the officers based on circumstances *inherent* in her involuntary detention. *See id.* at 16. Section 5278, however, does not immunize the officers if they were negligent in executing the detention. Any injury Sheehan suffered from the officers' failure to exercise ordinary care in taking Sheehan into custody would not be an "inherent attribute[]" of her detention and therefore would not be subject to § 5278 immunity. *Id.* *Bias* does not hold to the contrary.

The district court therefore erred by granting summary judgment to the defendants under § 5278. The defendants argue that they are entitled to immunity

under several other statutes. *See* Cal. Gov't Code § 821.6; Cal. Penal Code §§ 196, 836.5, 835a, 847(b). Although we may affirm on any ground supported by the record, we decline to address the defendants' alternative arguments because they have not been passed upon by the district court. We therefore vacate the dismissal of these claims and remand to the district court.

CONCLUSION

The district court properly granted summary judgment to the defendants on Sheehan's warrantless entry Fourth Amendment claims and on her *Monell* claims against the city. The district court erred by granting summary judgment on Sheehan's Fourth Amendment claims challenging the manner of the second entry and the use of deadly force and on her ADA and state law claims. We therefore affirm the judgment in part, vacate it in part and remand for further proceedings. Each party shall bear its own costs on appeal.

**AFFIRMED IN PART, VACATED IN PART
AND REMANDED.**

GRABER, Circuit Judge, concurring in part and dissenting in part:

Although I agree with the remainder of the opinion, I respectfully dissent from the majority's decision on the Fourth Amendment excessive force claim with

respect to the second entry into Plaintiff's apartment. Whether that second entry is viewed as a separate search or, instead, as part of one continuous search, the officers are entitled to qualified immunity even when taking all facts in the summary judgment record in Plaintiff's favor. Accordingly, I would affirm the summary judgment in favor of Defendants on that claim.

A. If the Second Entry Is a Separate Search

The second entry met an exception to the warrant requirement – the emergency aid doctrine or the exigent circumstances doctrine or both. Plaintiff was off her psychotropic medications, was not taking care of herself, and was making violent threats toward other people. Upon the first entry, which the majority agrees was lawful under the Fourth Amendment, Plaintiff had threatened to kill the officers while wielding a knife. Defendants did not know whether Plaintiff could escape from the apartment by another route, such as a window, or whether she had access to additional weapons, such as firearms, in either event creating the immediate possibility of harm to the officers, Plaintiff, and others. Accordingly, as the majority holds, the officers could enter the apartment for the second time without violating the warrant requirement of the Fourth Amendment.

As to the method of effecting the second entry, Defendants determinedly pushed the door open while holding pepper spray and a service weapon. In light

of the danger posed by Plaintiff, who held a knife and had threatened to kill the officers, the officers reasonably could conclude that entering the apartment in that way would not violate the Fourth Amendment's prohibition on the use of excessive force.

The expert's report that faulted the officers for electing to enter Plaintiff's apartment when and as they did does not create an issue of fact on either the timing or the method of the second entry. As we have cautioned, a plaintiff cannot avoid summary judgment merely by producing an expert's report opining that an officer's conduct was imprudent or inappropriate:

We have since placed important limitations on *Alexander v. City of San Francisco*, 29 F.3d 1355 (9th Cir. 1994). In *Scott v. Henrich*, [39 F.3d 912, 915 (9th Cir. 1994)], we held that even though the officers might have had "less intrusive alternatives available to them," and perhaps under departmental guidelines should have "developed a tactical plan" instead of attempting an immediate seizure, police officers "need not avail themselves of the least intrusive means of responding" and need only act "within that range of conduct we identify as reasonable." We reinforced this point in *Reynolds v. County of San Diego*, [84 F.3d 1162, 1169 (9th Cir. 1996),] which distinguished *Alexander* because "the court must allow for the fact that officers are forced to make split second decisions." We affirmed summary judgment for the defendant police officers despite experts'

reports stating – like the expert report in the case at bar – that the officers should have called and waited for backup, rather than taking immediate action that led to deadly combat. [*Id.* at 1169-70.] We held that, even for summary judgment purposes, “the fact that an expert disagrees with the officer’s actions does not render the officer’s actions unreasonable.” [*Id.* at 1170.] Together, *Scott* and *Reynolds* prevent a plaintiff from avoiding summary judgment by simply producing an expert’s report that an officer’s conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless. [*Id.*] Rather, the court must decide as a matter of law “whether a reasonable officer could have believed that his conduct was justified.” [*Id.*]

Billington v. Smith, 292 F.3d 1177, 1188-89 (9th Cir. 2002) (footnotes omitted).

B. *If the Second Entry Is Part of a Continuous Search*

The first and second entries may, in the alternative, be considered part of a single, continuous search. Insofar as the exigent circumstances that justified the first entry were ongoing, the second entry was justified under the emergency aid exception.

When the officers retreated from Plaintiff’s apartment after she had threatened them with a knife upon their initial entry, they had confirmation that Plaintiff in fact had a deadly weapon and appeared

willing to use it. That is, Plaintiff's behavior toward the officers during their initial entry only confirmed that her condition had deteriorated to the point of creating an emergency. She was now out of sight behind closed doors, where additional weapons, including firearms, could have been present. It was objectively reasonable, therefore, for the officers to believe that Plaintiff was even *more* of a danger to herself and to others than they had assumed before the first entry. Here, as in *Michigan v. Tyler*, 436 U.S. 499, 511 (1978), and *Fisher v. City of San Jose*, 558 F.3d 1069, 1077 (9th Cir. 2009) (en banc), the passage of time was brief and the exigent circumstances that motivated the first entry "did not materially change from the beginning of the standoff to the end." Because the exigency persisted or worsened throughout, "the officers were not required to periodically reassess whether the exigency persisted throughout the standoff because the standoff was 'no more than an actual continuation' of the initial seizure." *Fisher*, 558 F.3d at 1077 (quoting *Tyler*, 436 U.S. at 511).

I would hold that reasonable officers could have concluded that they were entitled to continue the initial search and that determinedly pushing the door open with weapons readied was a reasonable amount of force when balanced against the need to resolve an ongoing emergency that involved a deadly weapon. See *Billington*, 292 F.3d at 1184 ("We analyze excessive force claims in the arrest context under the Fourth Amendment's reasonableness standard. We balance 'the nature and quality of the intrusion on

the individual's Fourth Amendment interests against the countervailing governmental interests at stake' and ask whether, under the circumstances, 'including the severity of the crime at issue, the suspect poses an immediate threat to the safety of the officers or others' (quoting *Graham v. Connor*, 490 U.S. 386, 395-96 (1989))). In view of the extant legal principles, reasonable officers could conclude that their actions were permitted even though Plaintiff suffered from a mental illness. Police officers often interact with individuals who have a wide variety of specific needs, and there is no controlling case law that requires a different Fourth Amendment analysis for an officer on the street who faces those circumstances. See *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001) ("We do not adopt a per se rule [for excessive force] establishing two different classifications of suspects: mentally disabled persons and serious criminals."). Moreover, we must "judge reasonableness 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight' and allow 'for the fact that police 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.'" *Billington*, 292 F.3d at 1184 (quoting *Graham*, 490 U.S. at 396).

C. Conclusion

The district court properly granted summary judgment to Defendants on the Fourth Amendment

excessive force claim concerning the second entry into Plaintiff's apartment. Defendants are entitled to qualified immunity. I therefore respectfully dissent from the majority's contrary holding on that claim, but otherwise concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TERESA SHEEHAN,
Plaintiff,

v.

CITY AND COUNTY OF
SAN FRANCISCO, et al.,

Defendants. /

No. C 09-03889 CRB

**ORDER GRANTING
SUMMARY
JUDGMENT**

(Filed May 6, 2011)

Plaintiff Teresa Sheehan has brought various section 1983 and state law claims against the City of San Francisco and two of its police officers. The officers shot Plaintiff multiple times as she wielded a large knife and threatened to kill them. Prior to the shooting, the officers had been attempting to help a social worker transport Plaintiff to a psychiatric detention facility for evaluation and treatment. Plaintiff's main claim is that the officers applied excessive force. Defendants have moved for summary judgment as to all claims. As explained below, the Court GRANTS Defendants' motion.

I. BACKGROUND

On August 5, 2008, Heath Hodge, a social worker, went to Conrad House [sic], a cooperative housing program for adults in need of mental health support in San Francisco, to check the status of Plaintiff's neighbor. Nisembaum Decl., Ex. A (dkt.45) at 10, 33-34.

While there, Hodge knocked on Plaintiff's door and said through the door that he was concerned about Plaintiff's health, and that he would return in a few days if she did not open the door. *Id.* at 33-34. Plaintiff did not respond. *Id.* at 39-40.

On August 7, 2008, Hodge returned to Conrad House to check Plaintiff's health. *Id.* at 55. Once there, Hodge knocked on Plaintiff's door, announced himself, explained that he wanted [sic] check in on her and that he would enter the room if she did not respond. *Id.* at 57-58. After hearing no response, Hodge, with the assistance of the property manager, opened Plaintiff's apartment door. *Id.* at 59.

Once inside, Hodge observed Plaintiff lying on her bed with a book resting on her face and then attempted to engage Plaintiff by asking her if she was okay. *Id.* at 59-60. After initially not responding, Plaintiff leaped out of her bed and yelled for Hodge to leave her room, threatening to kill him with a knife if he did not.¹ *Id.* at 61. Hodge left the room, told the other residents to leave the building, and then went to his car to retrieve a 5150 form. *Id.* 63.²

Hodge called the police to help him place Plaintiff under a 72-hour detention under section 5150. *Id.* at

¹ Hodge did not actually see Plaintiff with a knife.

² 5150 refers to California Welfare & Institutions Code section 5150, which sets forth the means of taking into custody "any person" when he or she, "as a result of a mental disorder, is a danger to others, or to himself or herself, or gravely disabled."

64. Shortly after the call, Officer Holder arrived at the Conrad House [sic] to assist Hodge. *Id.* at 66. Because Officer Holder had never before helped a social worker to effectuate a 5150 arrest, she called her street sergeant, Kimberly Reynolds, for help. Loeb's Decl., Ex. B (dkt.40) at 58-59.

Upon arrival, Officer Reynolds spoke with Hodge, verified that Hodge had the authority to make such an arrest, and examined the 5150 form that Hodge had filled out. Keith Decl., Ex. B (Dkt.39) at 28. The 5150 form stated:

Client has been without psychotropic meds times one and a half years. Has been presenting with increased symptoms for several weeks. Client has not been seen by the house counselor times two weeks. Housemates reported that client has been coming and going at odd hours and reportedly said she had stopped eating. It was also reported that client has been wearing the same clothes for several days. Writer conducted outreach to client and she was not responsive. Made no sound behind her closed door. Writer and property management keyed in for wellness check.

Client, upon opening the door, [. . .] was found lying in her bed with a book over her face, eyes open and was not responsive. Addressed client several times and she did not move or answer. Client then suddenly got up, threw the covers, and yelled at writer violently, "Get out of here! You don't have a

warrant! I have a knife and I'll kill you if I have to!" Client then slammed her door and locked it behind her.

Loebs Decl., Ex. C at 21-22. Also on the form, Hodge checked the "gravely disabled" and "danger to herself or others" boxes to indicate the basis for the 5150 detention. *Id.* at 22. After speaking with Hodge and examining the 5150 form, Officer Reynolds decided to make contact with Plaintiff to verify that she met the criteria for detention under section 5150. Keith Decl., Ex. B at 29.

After giving Officer Reynolds a key to Plaintiff's room, Hodge led both officers to Plaintiff's apartment door, which was located at the end of a narrow "7" shaped hallway on the second floor. *Id.* at 30; see Loebs Decl., Ex. E-2 (photographs).³ Once at the door, Officer Reynolds knocked and inserted the key into the door at the same time, told Plaintiff, "we are the police, we want to help," and then pushed open the door. Keith Decl., Ex. B at 30. When the door opened, Plaintiff jumped out of bed and screamed for the officers to leave her unit. *Id.* at 30-31. While moving toward the officers, Plaintiff picked up a large kitchen knife and threatened to kill the police officers. *Id.* at 31-33. The officers retreated backwards and Plaintiff closed the door. *Id.* at 31.

³ The Court has attached photographs of the scene. The photographs depict rather cramped quarters. The open door in the photographs leads to Plaintiff's room. A small alcove is located next to Plaintiff's door.

Thereafter, the officers called for backup, drew their department-issued weapons and instructed Plaintiff to drop the knife, explaining that they were there to help her. Keith Decl., Ex. C at 7. Initially, Officer Reynolds attempted to force open the door while Officer Holder kept her gun and pepper spray aimed at the door. *Id.* After watching Officer Reynolds struggle, Officer Holder asked that they switch positions, handed Officer Reynolds her pepper spray and opened the door.⁴ *Id.* at 10-11.

Plaintiff, standing about five to eight feet from the door, proceeded to move toward the officers with the knife in her hand. *Id.* As she moved closer, Plaintiff raised the knife and said that she was going to kill the officers. *Id.* Officer Reynolds fired a stream of pepper spray into Plaintiff's eyes but it had "absolutely no effect" on Plaintiff's forward movement. *Id.* at 11. According to Plaintiff, the officers shot her with pepper spray while she still had the knife in a raised position, as she made it to the door's threshold. Loeb Decl., Ex. G at 81. She asserts that the pepper spray blinded her and caused her to move into the hallway. *Id.*⁵ Plaintiff turned towards Officer Holder, who had

⁴ It is unclear whether Officer Holder forced open the door or whether Plaintiff opened it herself. See Loeb Decl., Ex. G at 72. The Court finds that it is immaterial who opened the door.

⁵ The Court accepts this version of events as true. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (when deciding a summary judgment motion, a court must view the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences in its favor). In both Plaintiff's

(Continued on following page)

her back toward the short end of the hallway, and continued to move toward Officer Holder with the knife raised in her hand. Keith Decl., Ex. C at 11. Plaintiff was close enough to strike Officer Holder with the knife. *Id.* at 16. Officer Holder testified that Plaintiff was so close to her that if she had extended her arm to properly aim her firearm, she would have been “well within” Plaintiff’s striking distance. *Id.*

At this point, Officer Holder, with her back pressed against a wall, shot Plaintiff two to three times in the center mass area with her firearm. Loeb Decl., Ex. B (dkt.40) at 189-90. Plaintiff was about two to three feet from Officer Holder after the last shot. *Id.* After being shot, Plaintiff turned towards Officer Reynolds and took a step toward her with the knife still in her hand.⁶ *Id.* at 190. Officer Reynolds then rapidly shot Plaintiff two to three times, the last shot striking Plaintiff in the face.⁷ Keith Decl., Ex. B at 37. Officer Holder testified that Plaintiff was on the ground when Officer Reynolds fired the last shot.

account and the officers’ accounts, Plaintiff was pepper-sprayed while advancing toward the officers with the knife, and continued to advance with the knife after she was pepper-sprayed.

⁶ Officer Reynolds testified that she was not sure if Plaintiff completely turned towards her when she fired her weapon. Loeb Decl., Ex. D at 208. However, Officer Reynolds testified that Plaintiff was yelling and attempting to assault her with the knife before she fired. *Id.*

⁷ Officer Reynolds’ first two shots struck Plaintiff in the center mass area. Keith Decl., Ex. B. at 37.

Loebs Decl., Ex. B at 192.⁸ Officer Reynolds shot Plaintiff from a distance of about two to four feet. Nisembaum Decl., Ex. C at 211.

While on the ground, Plaintiff did not release the knife but instead extended the knife away from her body. Loebs Decl., Ex. D at 214-220. Plaintiff testified that she had no intention of dropping the knife even after she was shot. Loebs Decl., Ex. G at 106. Plaintiff admitted that she did not drop the knife when she fell to the ground and that the officers could have perceived her as still presenting a threat. *Id.* at 105. Later, another officer, Officer Zachos, arrived at the scene, rushed towards the Plaintiff and kicked the knife out of her hands, marking the end of the confrontation. Keith Decl., Ex. B at 63-64. Officer Zachos testified that when he arrived, Plaintiff was still gripping the knife and moving it within striking distance of the officers.⁹ Loebs Decl., Ex. E at 47-48. Plaintiff survived.

⁸ The Court notes that Officer Reynolds testified that Plaintiff was still standing when Officer Reynolds fired the last shot, Nisembaum Decl., Ex. C at 211, and that Plaintiff herself testified that she was “standing and then . . . fell against the wall” when the last shot was fired, Loebs Decl., Ex. G at 117, but will assume that Plaintiff was on the ground, as this is the version of the facts most favorable to Plaintiff.

⁹ Officer Zachos marked a photograph to illustrate how close Officer Holder, Officer Reynolds and Plaintiff were when he arrived at the scene. Loebs Decl., Ex. E-2 (photograph Ex. 124).

Subsequently, the San Francisco District Attorney prosecuted Plaintiff for assault with a deadly weapon, assault on a police officer with a deadly weapon and for making terrorist threats against Hodge. *See* Keith Decl., Ex. A. At trial, the jury acquitted Plaintiff of the terrorist threat charge but hung on the assault charges. *Id.* The District Attorney did not re-try the case.

On August 25, 2009, Plaintiff filed a complaint against Officer Reynolds, Officer Holder, San Francisco Police Chief Heather Fong, and the City and County of San Francisco, asserting causes of action under section 1983, the Americans with Disabilities Act (“ADA”), and California state law. *See generally* Compl. Defendants have moved for summary judgment as to all claims.

II. LEGAL STANDARD

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56© [sic]. A principal purpose of the summary judgment procedure is to isolate and dispose of factually unsupported claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The burden is on the moving party to demonstrate that there is no genuine dispute with respect to any material fact and that it is entitled to judgment as a

matter of law. *Id.* at 323. A genuine issue of fact is one that could reasonably be resolved in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is “material” only if it could affect the outcome of the suit under the governing law. *Id.* at 248-49.

If the moving party does not satisfy its initial burden, the nonmoving party has no obligation to produce anything and summary judgment must be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). If, on the other hand, the moving party has satisfied its initial burden of production, then the nonmoving party may not rest upon mere allegations or denials of the adverse party’s evidence, but instead must produce admissible evidence that shows there is a genuine issue of material fact for trial. *Id.* at 1103. The nonmoving party must “set out ‘specific facts showing a genuine issue for trial.’” *Celotex*, 477 U.S. at 324-25 (quoting Fed. R. Civ. P. 56© [sic]). If the nonmoving party fails to make this showing, the moving party is entitled to judgment as a matter of law. *Id.* at 323.

When deciding a summary judgment motion, a court must view the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences in its favor. *Anderson*, 477 U.S. at 255. However, it is not a court’s task “to scour the record in search of a genuine issue of triable fact.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (internal quotations omitted). Rather, a court is entitled to rely on the nonmoving party to identify with reasonable

particularity the evidence that precludes summary judgment. *See id.*

III. DISCUSSION

Defendants have moved for summary judgment as to all of Plaintiff's claims. Defendants' motion raises six issues: (1) whether collateral estoppel bars Plaintiff's arrest and malicious prosecution claims; (2) whether the officers' warrantless entry into Plaintiff's home falls within the Fourth Amendment's "emergency aid exception;" (3) whether the officers' use of deadly force against Plaintiff was lawful under the circumstances; (4) whether the officers' actions give rise to municipal liability; (5) whether the Defendants are liable under the ADA for arresting Plaintiff without first taking into account her mental disability; and (6) whether Plaintiff's state law claims are barred under a California immunity statute.

Defendants have also argued that qualified immunity applies to Plaintiff's section 1983 claims. Mot. (dkt.41) at 8. In determining whether qualified immunity applies, courts ask (1) whether the officer's conduct violated a constitutional right and (2), "if a violation occurred, whether the right was "clearly established in light of the specific context of the case.'" *See Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010). This Court will use as a threshold inquiry "whether the facts that . . . plaintiff has . . . shown . . . make out a violation of a constitutional right." *See Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808,

816 (2009).¹⁰ Because Defendants' actions did not violate the Constitution, the Court need not reach the question of whether a reasonable officer could have believed her conduct was lawful under the clearly established governing law. *See id.* at 815.¹¹

A. Whether Collateral Estoppel Bars Plaintiff's Section 1983 False Arrest and Malicious Prosecution Claims

Plaintiff claims that Defendants falsely arrested and maliciously prosecuted her, thereby violating her constitutional rights under the Fourth Amendment. A finding of probable cause is a complete defense to false arrest and malicious prosecution claims. *See Pierson v. Ray*, 386 U.S. 547, 555 (1967); *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995). A federal court must give a state-court judgment the same preclusive effect as the state of rendition. 12 U.S.C. § 1738. A judgment from a state criminal proceeding may have preclusive effect in a subsequent section 1983 suit. *See Allen v. McCurry*, 449 U.S. 90, 103-104 (1980) ("There is . . . no reason to

¹⁰ The Court recognizes that under *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 818 (2009), the rigid two-step procedure announced in *Saucier v. Katz*, 533 U.S. 194 (2001) is "no longer . . . mandatory," and the Court may use its discretion to decide which prong of qualified immunity analysis to address first.

¹¹ Of course, because the Court finds that no constitutional right was violated, the Court necessarily also finds that no clearly established right was violated.

believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.”). If state courts would preclude a party from relitigating the issue of probable cause, then he or she is also precluded in federal court provided that she had a “full and fair opportunity to litigate the issue in the prior proceeding.” See *Haupt v. Dillard*, 17 F.3d 285, 289 (9th Cir. 1994).

The Supreme Court of California requires that the following factors be met for collateral estoppel to apply:

First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, the issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Lucido v. Super. Ct., 51 Cal. 3d 335, 341 (1990). California criminal courts provide a full and fair opportunity to litigate the issue of probable cause at a preliminary hearing. See *McCutchen v. City of Montclair*, 73 Cal. App. 4th 1138, 1146-47 (1999) (noting that “a preliminary hearing is an adversary

judicial proceeding, designed to litigate the issue of probable cause to try the accused on criminal charges” and concluding that “absent a showing that evidence not available to the arresting officer was presented at the preliminary hearing, a finding of sufficiency of the evidence to require the defendant to stand trial is a finding of probable cause to arrest the defendant”).

Here, the factors to apply collateral estoppel as to the probable cause issue have been satisfied. First, the probable cause inquiry Plaintiff asks this Court to make would be identical to that already made by the state trial court at Plaintiff’s preliminary hearing. *See McCutchen*, 73 Cal. App. 4th at 1146. Second, Plaintiff does not dispute that probable cause was actually litigated and the trial record indicates that the magistrate judge made express probable cause findings. *See Keith Decl., Ex. A.* Third, probable cause was necessarily decided because, but for that determination, Plaintiff would not have stood trial. *See Haupt*, 17 F.3d at 289. Fourth, California courts, as a matter of California law, have ruled that “a finding of probable cause to hold [a] defendant over for trial is a final judgment on the merits for purposes of collateral estoppel.” *McCutchen*, 73 Cal. App. 4th at 1146. Fifth, Plaintiff was a party to the previous proceeding as the accused. Lastly, California courts presume that a preliminary hearing provides a defendant with a full and fair opportunity to litigate probable cause, *Id.* at 1146-47, and Plaintiff has not challenged the fairness of her preliminary hearing in any respect.

The Court therefore finds that collateral estoppel prohibits Plaintiff from relitigating whether probable cause existed for her arrest and subsequent prosecution. As such, Plaintiff's false arrest and malicious prosecution claims fail as a matter of law, and Defendants' motion is granted as to those claims.¹²

B. Whether Officers Reynolds and Holder Lawfully Entered Plaintiff's Home

Plaintiff claims that Defendants' warrantless entry into her home violated the Fourth Amendment. Compl. ¶¶ 37-54. "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (internal citations and quotations omitted). "Nevertheless, because the ultimate touchstone of the Fourth Amendment is reasonableness, the warrant requirement is subject to certain exceptions." *Id.* (internal citations and quotations omitted). "[W]arrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively

¹² Defendants also argue that the undisputed facts demonstrate that there was probable cause to both arrest and prosecute Plaintiff. Plaintiff's threats toward Hodge and the officers plainly demonstrate that probable cause existed to both arrest and prosecute her.

reasonable under the Fourth Amendment.” *Id.* (internal citations and quotations omitted).

One exception to the Fourth Amendment’s warrant requirement is the “emergency aid exception.” *Huff v. City of Burbank*, 632 F.3d 539, 548 (9th Cir. 2011); *Hopkins v. Bonvicino*, 573 F.3d 752, 763 (9th Cir. 2009). Under this exception, “law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” *Michigan v. Fisher*, ___ U.S. ___, ___, 130 S. Ct. 546, 548 (2009). This exception “does not depend on the officers’ subjective intent or seriousness of any crime they are investigating when the emergency arises.” *Id.* “It requires only an objectively reasonable basis for believing that a person within [the house] is in need of immediate aid.” *Id.* (internal citations and quotations omitted).

Here, Officers Reynolds and Holder had an objectively reasonable basis for believing that Plaintiff needed immediate medical assistance. Hodge, a mental health professional, requested police assistance to detain Plaintiff pursuant to California law. Officer Reynolds spoke directly with Hodge about Plaintiff’s condition and examined the 5150 form that he prepared. The 5150 form stated that Plaintiff: (1) stopped taking her psychotropic medication for over a year; (2) manifested symptoms of mental illness for the last few weeks; (3) had not been seen by her house counselor for the last two weeks; (4) told housemates that she no longer needed to eat; (5) reportedly was

wearing the same clothes for the last several days; and (6) threatened to kill Hodge with a knife at the last wellness check. Hodge also checked the “gravely disabled,” and “danger to herself and others” boxes on the 5150 form to indicate the basis for the detention. The officers entered Plaintiff’s home after gathering this information.

Because Hodge, a mental health professional, was a reliable source and the facts articulated by him in the 5150 form strongly suggested that Plaintiff was “gravely disabled,” the officers had an objectively reasonable basis for believing that Plaintiff was in need of immediate aid. *See U.S. v. Black*, 482 F.3d 1035, 1040 (9th Cir. 2007) (“[e]rring on the side of caution is exactly what we expect of conscientious police officers” during “a ‘welfare search’ where rescue is the objective, rather than a search for crime” [and] “[courts] should not second-guess the officers objectively reasonable decision in such a case”). As such, the officers’ warrantless entry into Plaintiff’s home did not offend the Fourth Amendment. *See Duarte v. Begrin*, 299 Fed. Appx. 711 (9th Cir. 2008) (officers’ warrantless entry into plaintiff’s home pursuant to section 5150 fell within the Fourth Amendment’s exigent circumstances exception).

The Court notes that in her Opposition and at the motion hearing, Plaintiff’s counsel appeared to argue that the [sic] it was the second entry into Plaintiff’s room that violated the Fourth Amendment. *See Opp’n* at 17. Such a contention is without merit. Because the initial entry into the home was lawful,

the second entry, on these facts, was also lawful. The emergency that justified the initial entry did not evaporate simply because the officers stepped out of the room. *See, e.g., Michigan v. Tyler*, 436 U.S. 499, 510-12 (1978); *Fisher v. City of San Jose*, 558 F.3d 1069, 1082 (9th Cir. 2009). Moreover, Plaintiff's threats against the officers and her advancing toward them with a raised knife gave rise to an additional basis for their entry. Re-entry after an officer's retreat to secure her own safety does not create a new constitutional violation. *See People v. Hamilton*, 105 Cal. App. 3d 113, 118 (1980). In addition, as in *Black*, 482 F.3d at 1040, "[t]his is a case where the police would be harshly criticized had they not investigated." When Plaintiff closed the door on the officers, they had no way of knowing whether she might escape through a back window or fire escape, whether she might hurt herself, or whether there was anyone else in her room whom she might hurt. Though, at the motion hearing, Plaintiff's counsel was dismissive of the notion that Plaintiff posed any danger once she was behind a closed door, Hodge had checked the "gravely disabled" and "danger to herself or others" boxes to indicate the basis for the 5150 detention. Loeb's Decl., Ex. C at 22. It was objectively reasonable to believe that Plaintiff needed immediate medical assistance.

Accordingly, the Court grants summary judgment in favor of Defendants as to all of Plaintiff's unlawful entry claims.

C. Whether Officers Reynolds and Holder Used Excessive Force When They Shot Plaintiff

Plaintiff claims that Officer Reynolds's and Officer Holder's use of force was excessive. It is axiomatic "that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical [force]." *Graham v. Connor*, 490 U.S. 386, 396 (1989). "[A]ll claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Id.* (emphasis in original). Because the reasonableness inquiry "under the Fourth Amendment is not capable of precise definition or mechanical application," a court must pay "careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting or attempting to evade arrest by flight." *Id.* at 396 (internal citations omitted).

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." *Id.* (citations omitted). "The calculus of reasonableness must embody allowance for the fact that police 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.” *Id.* at 396-97 (citations omitted).

Here, the officers’ use of force was objectively reasonable under the Fourth Amendment for two reasons.

First, it is undisputed that Plaintiff threatened to kill the officers with a knife. This threat gave the officers the right to arrest Plaintiff and to use some degree of force, even though she was mentally ill. *See Gregory v. County of Maui*, 523 F.3d 1103, 1106-07 (9th Cir. 2008) (use of force on man who “acted in a bizarre manner throughout the confrontation,” armed only with a pen, was reasonable even though use of force resulted in death); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1168 (9th Cir. 1996) (deadly force was reasonable where a suspect, who had been behaving erratically, swung knife at an officer), *overruled on other grounds by Acri v. Varian Assoc., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997).

Second, the totality of circumstances demonstrate that it was reasonable for the officers to shoot Plaintiff multiple times. Plaintiff threatened to kill the officers, a severe crime. *See* Cal. P.C. § 245; *Graham*, 490 U.S. at 396. After threatening to kill them, Plaintiff advanced toward the officers in a tight hallway with a large knife raised. It is undisputed that Plaintiff was close enough to strike either officer with a knife. In such circumstances, it was objectively reasonable for the officers to believe that Plaintiff

posed an immediate risk to their safety. *See Graham*, 490 U.S. at 396; *Smith v. City of Hemet*, 394, F.3d 689, 702 (9th Cir. 2005) (“most important single element” is “whether the suspect poses an immediate threat to the safety of the officers or others”). It is also undisputed that Plaintiff actively resisted arrest. *See Graham*, 490 U.S. at 396. Plaintiff testified that she had no intention of dropping the knife even after she was shot. Loeb Decl., Ex. G at 106.

There are not “two [separate] tracks of excessive force analysis, one for the mentally ill and one for serious criminals,” *see Bryan*, 630 F.3d 829, but a court must consider an individual’s mental illness in determining the reasonableness of the force employed, *see Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 n.6 (9th Cir. 2003). Here, that Plaintiff was mentally ill, was acting irrationally (in threatening to kill the officers and advancing toward them with a raised knife), and was not subdued by the less forceful use of pepper spray, made the situation all the more uncertain and dangerous to the officers. *See Robbins v. City of Hanford*, No. CIV F 04-6672 AWI SMS, 2006 WL 1716220, at *15 (E.D. Cal. June 19, 2006) (distinguishing cases involving use of force against mentally ill suspects who were compliant or not threatening others).

The undisputed facts with respect to each shooting further reveal the reasonableness of the officers’ use of force. Officer Holder shot Plaintiff while she had her back against a wall with Plaintiff closing in on her with a knife in hand. Trapped and faced with

an armed individual in close quarters, Officer Holder had no choice but to shoot Plaintiff in order to protect herself. *See Barber v. City of Santa Rosa*, No. C 08-5649 MMC, 2010 WL 5069868, at *5-6 (N.D. Cal. Dec. 7, 2010) (holding that shooting a mentally ill man armed with a knife who threatened to kill the officers was not unreasonable); *Robbins*, 2006 WL 1716220, at *15-16 (E.D. Cal. June 19, 2006) (officer shooting mentally ill person who cornered him in a room with a knife while trying to effectuate a 5150 detention was reasonable). That Officer Holder applied deadly force only after the use of pepper spray on Plaintiff was ineffective further demonstrates the reasonableness of her actions.

It [sic] also undisputed that Plaintiff did not fall to the ground after being shot by Officer Holder, but instead moved, with a knife still in her hand, toward Officer Reynolds. Officer Reynolds, perceiving Plaintiff as a threat to herself and Officer Holder, also shot Plaintiff two to three times. Assuming that Officer Reynolds fired her last shot at Plaintiff while she was on the ground, Officer Reynolds' actions were still objectively reasonable. Officer Reynolds fired at Plaintiff in rapid succession at close quarters in a tense, uncertain and rapidly evolving set of circumstances, making it difficult to discern when to stop shooting. In the context of an excessive force claim, the First Circuit stated:

It may well be true that [the officer] continued to fire as [plaintiff] fell to or lay on the ground. But it is clear from the very brief

time that elapsed that she made a split-second judgment in responding to an imminent threat and fired a fusillade in an emergency situation. [The officer's] action cannot be found unreasonable because she may have failed to perfectly calibrate the amount of force required to protect herself.

Berube v. Conley, 506 F.3d 79, 85 (1st Cir. 2007). Plaintiff admits that she was still clutching the knife as she laid on the ground and that she had no intention of releasing it. While on the ground, Plaintiff continued to extend the knife away from her body and within striking distance of the officers.

Even in hindsight, no argument can be made that Officer Reynolds used excessive force by shooting Plaintiff after she had already been shot by Officer Holder. Officer Reynolds's actions were objectively reasonable given the situation she faced: a mentally ill person wielding a knife, threatening to kill her and her partner, advancing on her in the confines of a small hallway to the point of being within striking distance. Officer Reynolds made a split-second judgment, the likes of which the Supreme Court has instructed lower [sic] courts not to second-guess. *See Graham*, 490 U.S. at 397 ("The calculus of reasonableness must embody allowance for the fact that police 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."). Officer Reynolds used deadly force only after she found that

pepper spray was not enough force to contain the situation, and that there remained a continuing and credible threat to the officers' safety. That threat is not undermined by the use of hindsight. Indeed, the testimony of the officers and of Plaintiff, and the photographs attached hereto, confirm the officers' perception of a dire and escalating threat, and *no evidence* refutes the reasonableness of the officers' conduct.

Accordingly, the Court finds that the officers' use of force was objectively reasonable under the circumstances. As such, Defendants' motion for summary judgment as to Plaintiff's excessive force claims is granted.

D. Municipal Liability

Plaintiff asserts that the City of San Francisco and Police Chief Fong¹³ violated her constitutional rights by failing to properly train the City's police officers. Though a municipality may face liability for failure to adequately train its officers under section 1983, that liability "is contingent on a violation of constitutional rights" by an individual officer. *Scott v. Henrich*, 39 F.3d 912, 916 (9th Cir. 1994). "If there was no constitutional violation of [the plaintiff's] rights, there is no basis for finding the officers inadequately trained." *Long v. City and Cnty. of Honolulu*,

¹³ There is no allegation that Fong participated personally in this incident.

511 F.3d 901, 907 (9th Cir. 2007) (internal citations and quotations omitted). Because, as discussed above, the officers' conduct did not offend the Constitution, Plaintiff's municipal liability claims necessarily fail.¹⁴

Accordingly, the Court grants summary judgment in favor of Defendants as to Plaintiff's municipal liability claims.

E. Americans with Disabilities Act Claim

Plaintiff alleges that Defendants discriminated against her, in violation of the ADA, by arresting her in a manner that did not take into account her mental disability. Compl. ¶¶ 55-59. Furthermore, Plaintiff alleges that Defendants' conduct excluded her from participating in City programs and denied her access to public benefits. *Id.* The ADA prohibits a public entity from discriminating against an individual on the basis of a qualified disability. *See* 42 U.S.C § 12132. The Ninth Circuit has ruled that section 12132 does not permit suits against private individuals. *See Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002). Plaintiff cannot circumvent this restriction by bringing her claims under section 1983. *Id.*

Under the ADA, a disabled plaintiff can state a claim if he can show that, because of his disability, he was either "excluded from participation in or denied

¹⁴ Nor has Plaintiff pointed to evidence of a policy of deliberate indifference.

benefits of the services, programs, or activities of a public entity,” or “was otherwise subjected to discrimination by any such entity.” *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000) (internal quotations omitted). In *Hainze*, the court held that section 12132 does not permit a cause of action based on an “officer’s on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve 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 court went on to note:

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 general public.

Id.

The Firth [sic] Circuit’s reasoning is persuasive.¹⁵ Here, the officers attempted to detain a violent,

¹⁵ The parties do not cite to any Ninth Circuit authority on this issue, and the Court has found none. *But see Schreiner v. City of Gresham*, 681 F. Supp. 2d 1270, 1279 (D. Or. 2010) (allowing ADA claim to go forward where “the situation was

(Continued on following page)

mentally disabled individual under exigent circumstances. It would be unreasonable to ask officers, in such a situation, to first determine whether their actions would comply with the ADA before protecting themselves and others.

Plaintiff has asserted claims against all Defendants under the ADA. Because section 12132 does not permit claims against individuals, the claims against the officers fail as a matter of law. Furthermore, because Plaintiff cannot state a claim against the City for actions taken by the officers prior to her arrest, the claim against the City also fails.

Accordingly, the Court grants summary judgment in favor of the Defendants as to Plaintiff's ADA claims.

F. State Law Claims

Plaintiff has also asserted various state law claims based on the same facts that make up her federal claims. Compl. ¶¶ 60-74. Under California law, an individual authorized to detain a person under section 5150 shall not be held criminally or civilly liable for exercising this authority in accordance with the law. Cal. Welf. & Inst. Code § 5278.

under control and rather than inflicting pain upon her, [the officer] should have consulted with paramedics and administered medical treatment"). The Court finds that unlike in *Schreiner*, the situation here was not "under control" when the shots were fired.

Because, as discussed above, the officers – individuals authorized to detain a person under section 5150 – lawfully arrested, searched and used reasonable force under the circumstances, section 5278 bars all of Plaintiff’s state law claims. *See Bias v. Moynihan*, 508 F.3d 1212, 1221 (9th Cir. 2007).

Accordingly, the Court grants summary judgment in favor of Defendants as to all of Plaintiff’s state law claims.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS summary judgment in favor of Defendants as to all of Plaintiff’s claims. As a matter of law, Plaintiff’s false arrest and malicious prosecution claims fail under principles of collateral estoppel. The officers’ warrantless entry into Plaintiff’s home falls within the emergency aid exception to the Fourth Amendment’s warrant requirement. Plaintiff threatened to kill the officers, while advancing on them, with a knife in her hand; the officers’ use of force was reasonable under the circumstances. Plaintiff’s municipal liability claims fail because the officers did not violate any of her constitutional rights. Plaintiff’s ADA claim fails, as a matter of law, because section 12132 does not expose police officers to liability under the ADA in these circumstances. Lastly, Plaintiff’s state law claims fail because California law

immunizes individuals from all claims arising out of the lawful detention of a person under section 5150.

IT IS SO ORDERED.

Dated: May 6, 2011

/s/

CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE
