No. 13-1412

In the Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, *ET AL.*,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case involves a near fatal tragedy in which police officers pepper sprayed and repeatedly shot Teresa Sheehan, a woman who they knew was mentally ill and in need of medical evaluation and treatment. The questions presented are:

1. Whether the Ninth Circuit correctly held – consistent with other circuits that have addressed the issue – that the reasonable accommodation requirement of Title II of the Americans with Disabilities Act applies to law enforcement activities, including arrests.

2. Whether the Ninth Circuit correctly held that fact issues preclude summary judgment regarding Ms. Sheehan's claim that Petitioners violated the reasonable accommodation requirement when police officers drew their guns and forced their way back into Ms. Sheehan's room without taking her mental illness into account and without employing tactics that would have been likely to resolve the situation without injuring her or others.

3. Whether the Ninth Circuit correctly held that fact issues preclude summary judgment regarding Petitioners' qualified immunity defense because there is evidence that it was unreasonable for police officers to draw their guns and force their way back into Ms. Sheehan's room without making any attempt to deescalate the situation.

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STATEMENT OF THE CASE

1. This case arose out of a social worker's nonemergency call to the San Francisco Police Department requesting assistance in transporting respondent Teresa Sheehan, a mentally ill woman, to a hospital. The social worker, Heath Hodge, believed that Ms. Sheehan needed to be transported to an emergency room for psychiatric evaluation and treatment. Ms. Sheehan suffered from schizoaffective disorder.

At the time of the call, Ms. Sheehan was in her mid-50s, had no criminal record, and lived in a group home for persons dealing with mental illness. She and the other residents of the home shared common areas, such as the kitchen and living room, but lived independently in private rooms. Mr. Hodge supervised the counseling staff who worked at the home.

On August 7, 2008, Mr. Hodge went to Ms. Sheehan's residence to perform a welfare check. He was concerned about Ms. Sheehan because he knew she had not been taking her medications and he had received reports of odd behavior. When she did not respond to his knock on her door, he used a key to open the door and enter her room.

Upon entering Ms. Sheehan's room, Mr. Hodge found her lying on her bed, staring, with a book resting on her face. Although she did not initially respond to his questions, after a while, she jumped out of bed and yelled at him to get out of her room

and leave her alone. She threatened him, stating that she had a knife.

Although Mr. Hodge did not see a knife, he cleared the building of the other residents and filled out an application under California Welfare & Institutions Code § 5150 for Ms. Sheehan's involuntary commitment. Section 5150 authorizes mental health professionals and certain others to initiate a temporary detention of persons who are a danger to themselves or others or are "gravely disabled." Cal. Welf. & Inst. Code § 5150(a).[1]

In the narrative portion of the Section 5150 application he prepared, Mr. Hodge wrote:

> 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

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[1] In 2008, Section 5150(a) stated 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 Mental Health as a facility for 72-hour treatment and evaluation." Cal. Welf. & Inst. Code § 5150(a) (West 2008). The statute also defined the phrase "gravely disabled" as "[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)(A) (West 2008).

> 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.

After the narrative, Mr. Hodge checked boxes indicating he believed that Ms. Sheehan was a danger to others and was gravely disabled. He did not check the box to indicate that Ms. Sheehan was a danger to herself.

After Mr. Hodge completed the Section 5150 application, he telephoned the police for assistance in transporting Ms. Sheehan to the hospital. He called the police department's nonemergency number because he did not believe there was any imminent risk that Ms. Sheehan would harm herself or that she would leave her room to harm anyone else.

Officer Katherine Holder responded to the call. She was soon joined by Sergeant Kimberly Reynolds. The automated radio dispatch system told the officers: "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/Eurasion, early 50's, wearing striped shirt/pants."

Officer Holder and Sergeant Reynolds talked with Mr. Hodge outside the group home. Mr. Hodge told them that Ms. Sheehan had been off her medication for about a year and a half, that she was not taking care of herself, and that she had threatened to stab him when he went into her room to check on her. He showed them his completed Section 5150 application and told them that there was no one else in the building. He did not tell them that Ms. Sheehan was suicidal or give them any reason to believe Ms. Sheehan was likely to injure herself.

Although Sergeant Reynolds understood that Mr. Hodge was authorized to seek a detention under Section 5150, she believed it was her responsibility to assess Ms. Sheehan to confirm that the detention criteria were met. To do so, the officers entered the group home and climbed a flight of stairs to the second floor where Ms. Sheehan's room was at the end of a hall. Mr. Hodge accompanied the officers as they walked to Ms. Sheehan's room.

When they arrived at Ms. Sheehan's room, the officers knocked on the closed door and announced that the police were there to help her. Using the key supplied by Mr. Hodge, the officers opened the door. Ms. Sheehan rose up from her bed, grabbed a bread knife from a nearby plate, and started walking toward the officers. She told them she did not want their help and threatened to kill them if they came near her. She yelled at them to go away and leave her alone.

The officers drew their guns and retreated. Ms. Sheehan shut the door. Out in the hallway, the officers asked Mr. Hodge whether they could get into Ms. Sheehan's room from the back. Mr. Hodge informed the officers that other than the door to the hall, the only way into Ms. Sheehan's second-floor room was through a window, which would require a ladder.

The officers called for backup and told Mr. Hodge to go downstairs and open the front door to let the additional officers into the building. But then, without giving any thought to Ms. Sheehan's disability, and without waiting for the arrival of the less-than-lethal force unit that was en route or making any attempt to deescalate the situation, Sergeant Reynolds and Officer Holder decided to enter Ms. Sheehan's room.

With their guns drawn, and without any plan as to what they would do when they got into the room, the officers tried to break down the door. Officer Holder kicked it several times and then used her shoulder to try to force it open. Sergeant

Reynolds stood behind her with her pepper spray in one hand and her gun in the other.

As soon as the door opened, Ms. Sheehan stepped forward holding her bread knife. Sergeant Reynolds responded immediately by shooting pepper spray into her face. Ms. Sheehan screamed that the officers were blinding her and she could not see. It was approximately at this time that the less-than-lethal force unit arrived. One of those officers was about to pull his nonlethal weapon from the trunk of his car when Officer Holder and Sergeant Reynolds shot Ms. Sheehan five times, at point-blank range. With wounds in her torso and her left arm, Ms. Sheehan slid to the ground. Sergeant Reynolds then shot her in the face. She was on the floor when another officer arrived and kicked the knife out of her hand.

Remarkably, Ms. Sheehan survived the shooting. After she recovered, she was prosecuted 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 Mr. Hodge. The jury hung on all of the assault counts and acquitted her on the criminal threat count. The city chose not to retry her.

2. Ms. Sheehan filed suit 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 seizure and use of excessive force. She also alleged state law tort

claims, violation of California Civil Code § 52.1, and violation of her rights under the Americans with Disabilities Act ("ADA"). The last claim was based on her assertion that the police failed to reasonably accommodate her disability when they forced 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 her or others.

Petitioners subsequently filed a motion for summary judgment seeking to dismiss all of Ms. Sheehan's claims. In response, Ms. Sheehan submitted an expert witness report by Lou Reiter, a former deputy chief of the Los Angeles Police Department, disputing the reasonableness of the police officers' actions. Mr. 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.

Mr. Reiter deemed the officers' second entry into Sheehan's room tactically unreasonable under the foregoing 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." App. 27-28 (ellipsis in original). Mr. Reiter also stated that the officers knew "that other resources were en-route to their call for backup" and concluded that their "conduct exacerbated the

confrontation, rather than [sic] any effort to [defuse] the agitation." App. 28 (brackets in original). Despite that detailed report, the district court granted Petitioners' motion for summary judgment. App. 55-81.

3. The Ninth Circuit affirmed the judgment in part and vacated it in part in a divided opinion. App. 1-48. Relevant here, the panel majority (Judges John Noonan and Raymond Fisher) found triable issues of fact as to whether the officers' second entry into Ms. Sheehan's room violated the Fourth Amendment: "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." App. 28.

The panel majority similarly held that fact issues precluded summary judgment regarding Petitioners' qualified immunity defense. The panel majority noted: "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." App. 33. It then held: "The facts … 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." App. 36.

Finally, the panel majority likewise rejected Petitioners' arguments regarding ADA liability. It

first held – consistent with other circuits that have addressed the issue – that the reasonable accommodation requirement of Title II of the ADA applies to law enforcement activities, including arrests. App. 43. It then recognized that "reasonableness of an accommodation is ordinarily a question of fact" and found such fact issues because "[a] reasonable jury … 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." App. 45.

Judge Susan Graber dissented with respect to the qualified immunity ruling on Ms. Sheehan's excessive force claim, but concurred with the remainder of the opinion. App. 48-54.

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit's ADA Rulings Do Not Warrant Review.

A. The Ninth Circuit Correctly Held – Consistent With Other Circuits That Have Addressed The Issue – That The Reasonable Accommodation Requirement Of Title II Of The ADA Applies To Law Enforcement Activities, Including Arrests.

The panel majority ruled, and Judge Graber agreed, that Title II of the ADA (42 U.S.C. § 12131,

et seq.) applies to arrests. App. 43, 48. Contrary to Petitioners' argument that the circuits are in conflict on this question, the court's unanimous holding is entirely consistent with the many circuit court decisions holding that Title II applies to law enforcement activities, including arrests. *See Folkerts v. City of Waverly, Iowa,* 707 F.3d 975, 983 (8th Cir. 2013) ("Title II of the ADA applies to an arrestee's post-*Miranda* interview."); *Roberts v. City of Omaha,* 723 F.3d 966, 973 (8th Cir. 2013) ("[T]he ADA … appl[ies] to law enforcement officers taking disabled suspects into custody."); *Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.,* 673 F.3d 333, 337 (4th Cir. 2012) (Title II applies to police investigations); *Bircoll v. Miami-Dade Cnty.,* 480 F.3d 1072, 1085-86 (11th Cir. 2007) (rejecting argument that Title II does not apply to DUI arrests); *Thompson v. Davis,* 295 F.3d 890, 894, 897 (9th Cir. 2002) (rejecting argument that Title II does not apply to parole decisions); *Gohier v. Enright,* 186 F.3d 1216, 1221 (10th Cir. 1999) ("[A] broad rule categorically excluding arrests from the scope of Title II … is not the law."); *Gorman v. Bartch,* 152 F.3d 907, 913 (8th Cir. 1998) (Title II applies to transportation of arrestees). The Ninth Circuit's holding also is consistent with this Court's holding that activities within state prisons fall within the ADA. *See Pa. Dep't of Corr. v. Yeskey,* 524 U.S. 206, 210-11 (1998).

The Fifth Circuit case cited by Petitioners, *Hainze v. Richards,* 207 F.3d 795 (5th Cir. 2000), does not establish an inter-circuit conflict. As an initial matter, the Fifth Circuit decided *Hainze* before almost all of the opinions cited above. Even

then, the court acknowledged that if the police were responding to an emergency call to transport a suicidal person to a hospital for mental health treatment, "[o]nce the area was secure and there was no threat to human safety," the ADA would require the police "to reasonably accommodate [the mentally ill person's] disability in handling and transporting him." *Id.* at 802 (citing *Yeskey*, 524 U.S. 206). In other words, the court did not hold that Title II of the ADA does not apply to law enforcement activities, including arrests; instead, it held that Title II *does apply* if the area is secure and there is no threat to human safety.

Applying that legal standard here, the Fifth Circuit would likely reach *the same result* as the Ninth Circuit did in this case. Although the facts in this case are disputed, a jury could find that after Ms. Sheehan told the police to leave her alone and barricaded herself in her room, the area was secure and there was no threat to human safety. Under that circumstance, the result is the same in the Fifth Circuit as it is in other circuits: consistent with *Folkerts*, *Roberts*, *Seremeth*, *Bircoll*, *Thompson*, *Gohier*, *Gorman*, and the unanimous opinion in this case, the ADA would apply. As a result, there is no conflict between or among the circuits that would warrant this Court's review.

B. The Ninth Circuit Correctly Found That Fact Issues Preclude Summary Judgment Regarding Ms. Sheehan's Claim That Petitioners Violated The ADA When Police Officers Drew Their Guns And Forced Their Way Back Into Ms. Sheehan's Room Without Taking Her Mental Illness Into Account And Without Employing Tactics That Would Have Been Likely To Resolve The Situation Without Injuring Her Or Others.

Moving from "whether" Title II of the ADA applies to law enforcement activities to "how" the ADA applies (Pet. 18), case law confirms that the precise manner in which the ADA applies is intensely factual. Preliminarily, Title II imposes a reasonable accommodation requirement. *See* 28 C.F.R. § 35.130(b)(7); *Tennessee v. Lane,* 541 U.S. 509, 531-32 (2004); *Olmstead v. L.C. ex rel. Zimring,* 527 U.S. 581, 591-92 (1999). Consistent with the nature of that requirement, courts have examined the *factual* circumstances of an arrest to determine whether the accommodations provided by law enforcement officers, or demanded by disabled plaintiffs, were reasonable. As discussed briefly below, each case turns on its unique facts.

In *Bahl v. County of Ramsey,* 695 F.3d 778, 784-85 (8th Cir. 2012), for example, the Eighth Circuit held that under the circumstances of the traffic stop, which occurred because the driver ran a red light during rush hour, it was not

unreasonable for the police officer to use gestures to communicate with the driver, who was deaf, instead of returning to the squad car for a pen and paper after the driver resisted the officer's efforts to identify him. Presented with similar circumstances, *i.e.,* a traffic stop and a deaf driver, the Eleventh Circuit concluded that waiting for an interpreter to arrive before administering field sobriety tests was not a reasonable modification of police procedures given the exigent circumstances of a DUI stop on the side of a highway and the serious public safety concerns raised by DUI activity. *Bircoll,* 480 F.3d at 1085-86.

Similarly, in *Tucker v. Tennessee,* 539 F.3d 526, 536 (6th Cir. 2008), after discussing the Eleventh Circuit's decision in *Bircoll,* the Sixth Circuit held that "it would be unreasonable to require" that a sign language interpreter be provided during the domestic disturbance call that resulted in plaintiffs' arrest. The court refused to impose "a stringent requirement" of providing an interpreter when there was no time to do so, and when plaintiffs, who were deaf, conceded that the officers effectively communicated with them using a pen and paper. *Id.* It did not, as Petitioners argue, adopt a "categorical prohibition" on requiring reasonable accommodations when officers are presented with "violent circumstances." Pet. 18. Rather, it ruled that plaintiffs' "generalized claims that they were arrested because of a miscommunication" went "to the merits of the arrest and not the reasonableness of the accommodations made by the officers." *Tucker,* 539 F.3d at 536 (footnote omitted).

In another case involving violent circumstances, the Fourth Circuit performed a detailed examination of law enforcement's response to a hostage situation and concluded that any duty of reasonable accommodation was satisfied. *See Waller ex rel. Estate of Hunt v. City of Danville, Va.,* 556 F.3d 171, 172 (4th Cir. 2009). The police there spent two hours attempting to negotiate with a mentally ill man who was holding his girlfriend hostage in their apartment. Attempts were made by the responding officers, their supervisor, and a qualified hostage negotiator to allow the police to confirm the woman's safety, but the man repeatedly refused to let his girlfriend out or allow anyone else in. The police ran the man's criminal history and learned he had prior arrests for public drunkenness, disorderly conduct, and assault on the girlfriend. They also learned that the man had a history of mental illness. Negotiations ended when the man threatened to blow off the head of the negotiator. The emergency response team forced their way into the apartment and shot the man when he came toward the officers swinging and brandishing what appeared to be weapons.

Describing the efforts the police had made to resolve the standoff peacefully, the Fourth Circuit held that any duty of reasonable accommodation "was satisfied in several ways." *Id.* at 176. The court refused to adopt an "exigent circumstances" exception to the ADA, explaining that exigency is merely "one circumstance that bears materially on the inquiry into reasonableness under the ADA." *Id.* at 175; *accord Seremeth,* 673 F.3d at 339 (finding that "while there is no separate exigent-

circumstances inquiry, the consideration of exigent circumstances is included in the determination of the reasonableness of the accommodation").

This case, too, turns on its facts. As noted previously, Ms. Sheehan submitted in the district court a detailed expert witness report by a former deputy chief of the Los Angeles Police Department (Lou Reiter) disputing the reasonableness of the police officers' actions. Mr. Reiter explained, among other things, that officers are trained not to unreasonably agitate or excite a disabled individual, to contain the individual, to respect the individual's comfort zone, to use nonthreatening communications, and to employ the passage of time to their advantage. Mr. Reiter also concluded that the officers' second entry into Ms. Sheehan's room was tactically unreasonable in light of the foregoing practices and procedures. 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." App. 27-28 (ellipsis in original). Mr. Reiter also stated that the officers "knew that other resources were en-route to their call for backup" and concluded that their "continued conduct exacerbated the confrontation, rather than [sic] any effort to [defuse] the agitation." App. 28 (brackets in original).

The panel majority, joined by Judge Graber (App. 48), appropriately described and recounted Mr. Reiter's report in its opinion (App. 26-28). Given that report, the officers' training, and "the totality of the circumstances," and viewing the facts favorably to Ms. Sheehan as required by federal

law, the Ninth Circuit concluded "that a reasonable jury could find that the officers' decision to force a confrontation with Sheehan was objectively unreasonable." App. 28. The Ninth Circuit also noted that, according to the social worker who called for assistance, "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." App. 29. These facts, the court noted, "distinguish this case from those in which officers' more confrontational tactics were held to be reasonable based on the need to protect others." *Id.* The court therefore remanded the issue for further proceedings. Such an intensely factual interlocutory decision hardly merits this Court's review.

II. The Ninth Circuit's Qualified Immunity Ruling Also Does Not Warrant Review.

Lastly, Petitioners argue that the panel majority's qualified immunity ruling also warrants review. Pet. 28-40. When considering questions of qualified immunity at summary judgment, "courts engage in a two-pronged inquiry." *Tolan v. Cotton,* 134 S. Ct. 1861, 1865 (2014). Under the first prong, the court determines "whether the facts, '[t]aken in the light most favorable to the party asserting the injury, … show the officer's conduct violated a [federal] right.'" *Id.* (brackets and ellipsis in original) (quoting *Saucier v. Katz,* 533 U.S. 194, 201 (2001)). Under the second prong, the court asks whether the right in question was "clearly established" at the time of the violation. *Id.* at 1866.

Here, where excessive force during an arrest is alleged, "the federal right at issue is the Fourth Amendment right against unreasonable seizures." *Id.* at 1865. Determining whether this right has been violated "requires a balancing of '"the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."'" *Id.* at 1866 (quoting *Tennessee v. Garner,* 471 U.S. 1, 8 (1985)); *accord Graham v. Connor,* 490 U.S. 386, 396 (1989). Under this Court's precedent, the balancing "requires analyzing the totality of the circumstances." *Plumhoff v. Rickard,* 134 S. Ct. 2012, 2020 (2014).

Even if error review were a proper basis to grant certiorari (which it is not), the panel majority below correctly applied the foregoing legal principles. The panel majority expressly recognized that the Fourth Amendment analysis 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." App. 33. It then performed that balancing as follows:

> 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.

Id. Lastly, addressing the reasonableness of the officers' actions, the panel majority added: "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." *Id.*

Petitioners nevertheless argue that the officers are entitled to qualified immunity because it was not clearly established that they "must delay making an entry into a residence, based on the expected armed resistance of a suspect within – mentally ill or otherwise." Pet. 30. But the panel majority did not hold that Petitioners cannot assert this argument in the district court on remand. Instead, the panel majority explained that it would be "premature" to address this issue at this time because the facts are disputed:

> 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

App. 36. As was true regarding Petitioners' reasonable accommodation arguments, such an interlocutory decision hardly merits this Court's review.

But even putting aside the interlocutory nature of the panel majority's analysis, Petitioners' arguments easily fail on both factual and legal grounds. Factually, Petitioners fail to consider the totality of the circumstances and likewise fail to construe the facts in the light most favorable to Ms. Sheehan. Instead, they focus on their characterization of Ms. Sheehan as an "armed … suspect" without acknowledging that the officers were called to render assistance to a mentally ill person – not to arrest an armed and dangerous "suspect." They likewise ignore the many other facts that the panel majority recounted in its analysis: that Ms. Sheehan was fully contained, that she did not present any danger to the safety of the officers or others, that backup was on the way, that trained negotiators could defuse the crisis, and that there was no pressing need to rush in. App. 33. Petitioners ignore these facts and repeatedly fail to view the record in the light most favorable to Ms. Sheehan as required by this Court's precedent. *See Tolan,* 134 S. Ct. at 1866 ("[U]nder either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment.").

Legally, the cases cited by Petitioners do not support their argument. In *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294 (1967), for example, the police entered a residence in search of a suspect who had just committed an armed robbery, while in *Scott v. Harris,* 550 U.S. 372 (2007), the police seized a fleeing motorist by ramming his vehicle from behind as he was leading the police on a high-speed chase down public roads. In both cases, the Court held that the unique facts established that there was a need for immediate action by the police. *Warden,* 387 U.S. at 298 ("Under the circumstances of this case, the exigencies of the situation made that course imperative." (internal quotation marks and citation omitted)); *Scott,* 550 U.S. at 384 ("[I]t is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase."). In this case, in contrast, the facts – viewed in the light most favorable to Ms. Sheehan – do not establish any comparable need for immediate action.

Similarly, neither *Stanton v. Sims,* 134 S. Ct. 3 (2013) (per curiam), nor *Ryburn v. Huff,* 132 S. Ct. 987 (2012) (per curiam), provides support for Petitioners' argument. At issue in *Stanton* was whether it was "clearly established" that an officer with probable cause to arrest a suspect for a misdemeanor could enter a home without a warrant while in hot pursuit of that suspect. 134 S. Ct. at 5. In *Ryburn,* the police confronted a juvenile who was suspected of threatening to "shoot up" his

school and was known to have been the victim of bullying and the juvenile's mother who, when asked if there were any guns in the house, "immediately turned around and ran into the house." 132 S. Ct. at 988-89. The Court considered "the string of events that unfolded at the [plaintiffs'] residence" and concluded that reasonable police officers in the defendants' position could read the Court's precedent as acknowledging that the Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence. *Id.* at 991. There was no fleeing suspect in this case, as there was in *Stanton,* and there was no bench trial with factual findings that reasonable officers could have believed there were guns in the house and that family members or the police were in danger, as there was in *Ryburn*. Neither opinion is controlling here.

Just as the *Warden, Scott, Stanton,* and *Ryburn* cases all involved circumstances that were factually far different from this case, so does the state law authority cited by Petitioners. Pet. 35. In *Hernandez v. City of Pomona*, 207 P.3d 506 (Cal. 2009), the police officers pursued a suspect who led them on a high-speed chase and then fled on foot after he crashed his car. Under these circumstances, the court held that California law authorized the police "to pursue Hernandez and to use reasonable force to make an arrest." *Id.* at 519. As argued above, this case is far different. Plaintiffs also cite California Penal Code § 835a, which provides that a law enforcement officer with

reasonable cause to make an arrest "may use reasonable force to effect the arrest" and "need not retreat or desist from his efforts [to make an arrest] by reason of the resistance or threatened resistance of the person being arrested." Neither *Hernandez* nor the statute relieves the police officers in this case from their constitutional obligation to carry out searches and seizures in a reasonable manner. *See Garner,* 471 U.S. at 22 (holding state statute governing use of force during arrest unconstitutional insofar as it authorized use of deadly force against unarmed, nondangerous suspects).

Rather than hide behind state authorities that do not apply here, the police officers were required to comply with federal law. The panel majority cited several cases that are plainly instructive here. In *Alexander v. City & County of San Francisco,* 29 F.3d 1355, 1366 (9th Cir. 1994), the court held that it was unreasonable for police 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." In accordance with this Court's opinion in *Graham*, 490 U.S. at 390, the court described such conduct as "a classic Fourth Amendment violation under *Graham*." *Id.* Likewise, in *Deorle v. Rutherford,* 272 F.3d 1272, 1283 (9th Cir. 2001), the court emphasized "that where 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."

Summarizing this body of law, the panel majority concluded:

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

App. 35-36. Sergeant Reynolds and Officer Holder ignored this body of law. Given the disputed facts at issue, the panel majority correctly held that the police officers are not entitled to qualified immunity as a matter of law. App. 36. This ruling, like the Ninth Circuit's ADA rulings, does not warrant this Court's review.

III. This Case Is A Poor Vehicle For Reviewing The Claimed ADA And Qualified Immunity Issues.

Even if Petitioners could establish that an inter-circuit conflict exists regarding the claimed ADA and qualified immunity issues that would otherwise warrant this Court's review (which they cannot), the petition for a writ of certiorari should be denied because this case is a poor vehicle for reviewing the claimed ADA and qualified immunity issues. That is so for at least the following reasons:

1. The case does not squarely present the first Question Presented. That question asks the Court

to decide "[w]hether 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*." Pet. i (emphasis added). But police were not summoned to Ms. Sheehan's home to bring a "suspect into custody." The police were called, instead, on a nonemergency basis, to assist in the transportation of Ms. Sheehan to a hospital for mental evaluation and treatment. Ms. Sheehan was not holding a hostage, was not threatening to leave her room so that she could injure some third party, and was not threatening to harm herself. Nor did the social worker check the box on the Section 5150 application to indicate that Ms. Sheehan was a danger to herself. Instead, the law enforcement officers were called to assist a disabled individual in need of treatment, not arrest an armed and violent suspect. For this reason alone, the case is a poor vehicle to address Petitioners' proposed ADA issue.

2. In addition, rather than presenting a clear legal issue for the Court's consideration, Petitioners are merely rearguing their version of the facts. Petitioners admit, as they must, that "for purposes of evaluating the defendants' motion for summary judgment we view the evidence in the light most favorable to Sheehan, the nonmoving party." Pet. 9 n.1. Yet they repeatedly present the facts in the light most favorable to their own arguments, asserting (for example) that it was "necessary" to reenter Ms. Sheehan's room "to ensure officer safety and prevent escape and potential harm to others" and that upon such reentry Ms. Sheehan

"charged at the officers with a knife." Pet. 11. These facts are not only contrary to the district court record (as discussed above) but are material to the formulation and resolution of the Questions Presented in their petition. Such factual disputes do not remotely warrant this Court's review.

3. The panel majority's decision is manifestly correct. Viewed in the light most favorable to Ms. Sheehan, the record shows that (a) Ms. Sheehan did not present a danger to others (the residence, after all, had been vacated), (b) Ms. Sheehan was barricaded in her room and there was no risk that she would flee (other than the door to the hall, the only way out of Ms. Sheehan's second-floor room was through a window, which would require a ladder), (c) the less-than-lethal force unit was en route and would arrive shortly (indeed, those officers had arrived and one of the officers was about to pull his nonlethal weapon from the trunk of his car when shots were fired), (d) even after the police officers forced their way back into Ms. Sheehan's room, she did not violently attack them, and (e) in all events, it was neither reasonable nor necessary to shoot Ms. Sheehan five times, at point-blank range, having just incapacitated her with pepper spray. On this record, the panel majority correctly concluded that "[a] reasonable jury … 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." App. 45. There is no compelling reason to disturb that analysis.

4. The panel majority did not issue a decision that is conducive to further review, nor did it intend to do so. Rather than squarely decide the ADA and qualified immunity issues, the panel majority concluded that fact issues preclude summary judgment as to both issues and therefore remanded those issues for further proceedings. App. 48. As discussed above, the panel majority's ruling does not present a conflict among the circuits, nor does it present any discrete legal issues. Instead, the claimed ADA and qualified immunity issues are intensely factual. In accordance with the panel majority's opinion, those fact issues will be resolved on remand. At that point, there will presumably be another appeal from the district court's final judgment. Even if the Ninth Circuit's opinion presents issues that may warrant this Court's review (which it does not), the Court should await the Ninth Circuit's decision on appeal from a final judgment, after further fact-finding and legal analysis, before granting certiorari.

5. Granting review would delay needed training and reforms regarding the manner in which police officers interact with disabled citizens. Confirming that police officers have long known that the ADA's reasonable accommodation requirement applies to law enforcement activities, including arrests, the United States Department of Justice ("DOJ") in 2006 offered 25,000 police departments, sheriff's offices, highway patrols, and other state and local law enforcement agencies a

variety of free ADA publications and videotapes addressing law enforcement activities involving people who have mental and other disabilities.[2] In response, a leading law enforcement publication confirmed that "Title II of the ADA applies to law enforcement agencies" and urged readers: "If you have been the recipient of this recent DOJ mailing, take advantage of the resources it provides."[3] Granting review in this matter may interfere with these important efforts to educate law enforcement officers regarding the rights of disabled individuals and thereby decrease the use of force in situations involving such individuals. For that reason too, the petition should be denied.

IV. There Is No Reason To Hold The Petition For *Plumhoff v. Rickard* Because The Court's Opinion In *Plumhoff* Is Not Controlling Here.

Lastly, Petitioners assert that "[t]he Court should hold this petition for *Plumhoff v. Rickard*." Pet. 41. There is no need to do so because the Court has since decided *Plumhoff*. The Court there held that the defendant police officers did not

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[2] Disability Rights Online News, Department Undertakes Major Initiative to Educate State and Local Law Enforcement Agencies About the ADA (June 2006), *available at* http://www.ada.gov/newsltr0606.htm.

[3] The Police Chief – the Professional Voice of Law Enforcement, Title II of the Americans with Disabilities Act: The Potential for Police Liability and Ways to Avoid It (Sept. 2006), *available at* http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1004&issue_id=92006.

violate the Fourth Amendment when they shot a driver to end a dangerous car chase (134 S. Ct. at 2017) and that the officers were in any event entitled to qualified immunity because "no clearly established law precluded [the officers'] conduct at the time in question" (*id.* at 2023). In deciding the qualified immunity issue, the Court followed its earlier opinion in *Brosseau v. Haugen,* 543 U.S. 194 (2004) (per curiam), which held that a police officer did not violate clearly established law when she fired at a fleeing vehicle to prevent harm to officers, occupants of other vehicles, and citizens in the area. *Plumhoff,* 134 S. Ct. at 2023. This case does not involve a fleeing vehicle, and, as discussed at length above, the facts (viewed in the light most favorable to Ms. Sheehan) do not establish any similar risk of harm to others. As such, *Plumhoff* is inapposite.[4]

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[4] On January 26, 2014, two amici briefs were filed on behalf of various state associations of counties, cities, municipal attorneys, and law enforcement officers (Amici States Br.) and international and national associations of municipal attorneys and sheriffs (Amici Int'l Br.). The Amici States' arguments largely echo Petitioners' and fail for the same reasons. They claim, for example, that Officer Holder and Sergeant Reynolds would have put themselves and the public at risk had they not immediately reentered Ms. Sheehan's room without awaiting assistance or attempting first to deescalate the situation. Amici States Br. 2, 15-18. As discussed in the text above, that assertion is intensely factual and – as the panel majority correctly found (App. 36) – the corresponding fact disputes cannot properly be resolved at this stage of the proceeding. *See Tolan,* 134 S. Ct. at 1866-68. The Amici Int'l brief, in turn, asserts that the ADA should not be applied to law enforcement activities (Amici Int'l Br. 5-10, 15-22) – a

(continued . . .)

CONCLUSION

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

Respectfully submitted,

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position that is contrary to controlling precedent, DOJ's guidance materials, and a leading law enforcement publication as discussed in the text above. The DOJ materials also allay any concerns regarding "the availability of local resources" and "careful consideration at the agency level." Amici Int'l Br. 16. Finally, the Amici Int'l brief also emphasizes that law enforcement officers should be afforded "maximum discretion in arrest settings." Amici Int'l Br. 10. But this lawsuit did not involve an "arrest setting," and any arguments regarding "maximum discretion" of police officers are best made after further fact-finding and legal analysis as the panel majority decreed.