No. 13-1412

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

PETITIONERS' REPLY BRIEF

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I. Certiorari should be granted to resolve whether and how the Americans With Disabilities Act applies to arrests of armed and violent suspects who are disabled

There is a genuine conflict among the circuits whether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect while bringing the suspect into custody. Indeed, in the months since the petition was filed, that conflict has only deepened. This case is an appropriate vehicle for this Court to resolve the circuit conflict concerning an important question of federal law.

1. As the petition demonstrated, the Fifth and Sixth Circuits do not require police officers to provide reasonable accommodations to disabled suspects when exigent circumstances or public safety concerns are present. By contrast, the Fourth, Ninth, and Eleventh Circuits consider exigency as one aspect of the inquiry into whether proposed accommodations are reasonable. Pet. 18-21. Respondent insists that there is no conflict among the circuits on the question whether "Title II [of the ADA] applies to law enforcement activities, including arrests." BIO 10. But that is not the question presented by this case. On the issue whether Title II requires officers to provide accommodations for *violent* and *dangerous* mentally ill individuals, there can be no doubt a conflict exists; the Ninth Circuit acknowledged its disagreement with the Fifth Circuit's decision in *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000). Pet. App. 42.

2. Indeed, since the petition was filed, this conflict has deepened – a development that respondent ignores. The Eighth Circuit recently joined the Fifth and Sixth Circuits in construing Title II to bar accommodation claims by violent and dangerous individuals. In *De Boise v. Taser Int'l, Inc.*, 760 F.3d 892 (8th Cir. July 28, 2014), that court rejected a reasonable accommodation claim against police officers who – like petitioners here – were responding to a schizophrenic individual's "aggressive and irrational behavior and his continued noncompliance with their demands." *Id.* at 899. Like respondent here, the plaintiffs in *De Boise* urged that the officers violated the ADA reasonable accommodation requirement when they did not follow their departmental training for dealing with mentally disturbed persons. *Id.* at 898-99. The Eighth Circuit rejected the claim, holding that Title II does not require police officers to accommodate disabilities in the midst of a violent encounter: "Due to the unexpected and rapidly evolving circumstances, the officers were not required 'to hesitate to consider other possible actions in the course of making such split-second decisions.'" *Id.* at 899 (quoting *Hainze*, 207 F.3d at 801-02). In so holding, the Eighth Circuit relied on both the Fifth Circuit's decision in *Hainze* and the Sixth Circuit's decision in *Tucker v. Tennessee*, 539 F.3d 526 (6th Cir. 2008). *De Boise*, 760 F.3d at 899 (quoting *Tucker*, 539 F.3d at 536: "[W]e 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.").[1]

3. This is a proper case for resolving the ADA question. Resolution of the question presented does not require a fact-intensive "reasonable accommodation" inquiry. *But see* BIO 12-16. Rather, it is undisputed here that the respondent was armed and violent. Thus, the only question for this Court to resolve is whether any accommodation of an armed and violent individual is reasonable or required under Title II of the ADA.

4. This question remains vitally important for local governments, law enforcement agencies, and disabled persons alike – as amici have urged – and respondent does not argue otherwise. This Court should grant the petition to address this important question.

[1] The Fifth, Sixth, and Eighth Circuits construe Title II consistently with the United States Department of Justice, which has explained that anyone who poses a direct threat to safety is not "qualified" to participate in public services, programs or activities. Pet. 25-27. Respondent is silent about the conflict between the Ninth Circuit's ruling and the USDOJ's administrative construction of Title II, which is entitled to deference, *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998).

II. Certiorari should be granted to review the Ninth Circuit's qualified immunity and Fourth Amendment rulings

The majority also announced a new Fourth Amendment search rule: Even when an established exception to the warrant requirement applies, 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. Pet. App. 28-29. The majority further held this rule to be clearly established in 2008. This Court should grant certiorari on the second question presented, either to review these rulings or to vacate and remand the case for the Ninth Circuit's further consideration in light of *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014).

1. Respondent is wrong to suggest that the second question presented seeks mere error correction. BIO 17. To the contrary, the Ninth Circuit's Fourth Amendment decision creates both a circuit conflict and a conflict with several States' statutes. The Ninth Circuit's new Fourth Amendment rule is at odds with the rule that the First, Fifth, and Eleventh Circuits have applied in similar situations involving police entries into the homes of violent individuals who are mentally disturbed. Unlike the Ninth Circuit, those circuits ask simply whether an exception to the warrant requirement applies. Those circuits do not second-guess officers' tactical decisions regarding the timing of the entry, and they do not construe the

Fourth Amendment to require officers to delay entering due to the prospect of violent resistance. Pet. 36-37. Similarly, several States have enacted statutes that expressly authorize law enforcement officers to press forward to make an arrest in the face of resistance. Pet. 35-36, 40. The ruling here would preempt the application of those States' statutes.

2. Contrary to respondent, there are no disputed fact questions that would preclude this Court from resolving the second question presented. Respondent urges that here there is a dispute whether petitioners were called to "render assistance" to respondent, or respondent was an "armed and dangerous 'suspect.'" BIO 19. But here, *both* of those facts are true: when petitioners lawfully entered respondent's home to involuntarily hospitalize her, she assaulted them with a knife while threatening to kill them. Pet. App. 11. Thus, the legal issues squarely presented are whether a mentally ill person may terminate a lawful search by violently assaulting police officers – and whether that legal rule was clearly established for petitioners in 2008.

For similar reasons, respondent is wrong to argue for delay based on *Tolan v. Cotton*, 134 S. Ct. 1861 (2014). BIO 19, 28. In *Tolan*, there were factual disputes at summary judgment about what really happened. Unlike *Tolan*, however, this case involves no undisputed facts about what really happened. Granted, the undisputed facts here give rise to competing arguments about reasonableness and about the state of clearly established law in 2008. But those

are legal questions, not factual disputes. As this Court explained in *Scott v. Harris*, 550 U.S. 372 (2007), it is a "pure question of law" whether conduct under the Fourth Amendment was reasonable, "once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record." *Id.* at 381 n.8. Likewise, it is a legal question whether qualified immunity applies on a given summary judgment record. *Plumhoff*, 134 S. Ct. at 2019.

3. Respondent's defense of the majority's Fourth Amendment rule, BIO 16-22, gives little attention to the question actually presented: whether that rule was clearly established in 2008. Moreover, respondent ignores that four Article III judges have already weighed in on this Fourth Amendment question, with two judges coming down on the side of the officers and two against. Under those circumstances, there can be no question that qualified immunity applies. *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.").

4. For all of these reasons, it would be proper to grant the petition for full briefing and argument on the second (Fourth Amendment) question presented as well as the first (ADA) question. Indeed, as amici have urged, granting the petition as to both questions presented would permit this Court to provide crucial guidance about what obligations federal law imposes on law enforcement officers when they come into

contact with mentally ill persons who are armed and violent.

5. Even if the Court decides not to grant the petition for purposes of full briefing or a summary reversal, *see* Pet. 38, the Court should grant the petition in order to remand the case for further consideration in light of *Plumhoff v. Rickard*. That recent decision explained important principles governing Fourth Amendment and qualified immunity analysis – principles that, if applied properly, would likely lead to a different decision below.

a. This Court confirmed in *Plumhoff* that on a given summary judgment record, disputes about Fourth Amendment reasonableness and qualified immunity are legal disputes for courts to decide. *Plumhoff*, 134 S. Ct. at 2019. Here, however, the majority did not follow this principle. Instead, faced with some undisputed facts from which it could be argued that petitioners acted reasonably, and other undisputed facts from which it could be argued that petitioners acted unreasonably, the court of appeals concluded that this constituted a factual dispute for the jury – not a legal question for the court. Pet. App. 26-32. But when advocates advance competing arguments about reasonableness by arguing the relative importance of different undisputed facts, that does not mean the facts are disputed. Rather, that simply reflects the reality that to resolve a Fourth Amendment legal question, a court "must still slosh our way through the factbound morass of 'reasonableness.'" *Scott*, 550 U.S. at 383.

b. Also in *Plumhoff*, this Court outlined the essential principles that must guide qualified immunity analysis. Among other things, this Court explained in *Plumhoff* that because the reasonableness standard in *Graham v. Connor*, 490 U.S. 386 (1989), is "cast at a high level of generality," *Graham* did not clearly establish what Fourth Amendment rule controls in a given specific situation. *Plumhoff*, 134 S. Ct. at 2023. Contrary to this principle, the majority relied on *Graham* to clearly establish the law for petitioners. Pet. App. 35. This Court also explained in *Plumhoff* that for the law to be clearly established there must be "a controlling case or a robust consensus of cases . . . that could be said to have clearly established the unconstitutionality" of officers' conduct. *Plumhoff*, 134 S. Ct. at 2024. But the majority here identified neither a controlling case nor a robust consensus of existing cases supporting its rule. Indeed, the majority ignored a robust consensus of out-of-circuit cases that reached the *opposite* conclusion: nothing more than an established exception to the warrant requirement is necessary for officers to lawfully enter the home of an armed and violent mentally ill individual. Pet. 32-37.

Thus, it would also be proper to grant the petition and remand this case for further consideration in light of *Plumhoff*.

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For the reasons in the original petition as well as the reasons stated above, the Court should grant the petition.

Respectfully submitted,

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