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 Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF

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QUESTIONS PRESENTED

After respondent Teresa Sheehan threatened to kill a social worker at her group home for the mentally ill, the petitioner San Francisco police officers were called to detain her for psychiatric evaluation. When the officers entered her room, Sheehan attacked them with a knife, forcing them out of the room and slamming her door. The officers re-opened the door, and Sheehan attacked them again with the knife. Pepper spray did not stop Sheehan's advance, and to defend themselves, the officers shot Sheehan. She survived and sued the officers and petitioner City and County of San Francisco, contending that the officers' entry and use of force were unreasonable under the Fourth Amendment and that they failed to accommodate her mental illness by delaying her arrest.

The questions presented are:

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, Sergeant Kimberly Reynolds and Officer Kathrine Holder. Petitioners were defendants-appellees below. Police Chief Heather Fong was a defendant-appellee below but is not a petitioner here because the judgment in her favor was affirmed by the court of appeals.

Respondent is Teresa Sheehan, an individual, who was plaintiff-appellant below.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1, is reported at 743 F.3d 1211. The order of the district court, Pet. 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 petition for a writ of certiorari was filed on May 22, 2014. The petition was granted on November 25, 2014. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The pertinent constitutional, statutory, and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a.

STATEMENT

I. Factual Background

Respondent Teresa Sheehan resided in a San Francisco group home for individuals with mental illness and substance abuse problems. The home was operated by Conard House, a nonprofit cooperative

apartment program that provides housing and support services in a community setting. J.A. 19-22.

On August 7, 2008, a Conard House program supervisor, Heath Hodge, attempted to conduct a welfare check on Sheehan. Hodge was concerned because Sheehan was diagnosed with schizo-affective disorder, but she had cut off contact with her psychiatrist and had been off her medication for months. Other residents reported that she was behaving erratically, had not changed her clothes for weeks, and was not coming to house meetings. Sheehan's case manager had reported that Sheehan was hostile toward her. J.A. 22-24. Hodge also knew that Sheehan had previously made violent threats and behaved aggressively. J.A. 84-85.

Hodge went to Sheehan's bedroom door and knocked several times, but there was no answer. Per Conard House protocol, Hodge used his key to unlock and open her door. Sheehan was lying on her bed. Hodge repeatedly tried to speak with Sheehan. At first she would not respond – but then she suddenly jumped out of bed and yelled at Hodge to get out of her room. She threatened, "I have a knife, and I'll kill you if I have to!" J.A. 398. Hodge did not wait to see if Sheehan would act on her threat, or to see a knife. He quickly backed out of the room, and she slammed the door behind him. J.A. 91-96.

Hodge "took what [Sheehan] said seriously." J.A. 97. He "knew at that point . . . it wasn't going to go over well and that I needed to do some sort of

intervention." J.A. 96. Hodge asked one of Sheehan's housemates to leave the flat, and checked and saw that two other housemates were not in their bedrooms. Hodge then left the flat and went to his car to get a "5150 form" – the paperwork necessary for Sheehan to be taken to a secure psychiatric facility. *Id.*

Hodge was acting under section 5150 of the California Welfare and Institutions Code. That provision authorizes a 72-hour detention of an individual who, as a result of a mental health disorder, is a danger to others, a danger to oneself, or "gravely disabled" – unable to care for her basic needs. Cal. Welf. & Inst. Code § 5150 (West Supp. 2014). A 5150 detention may be made by law enforcement officers or by other designated professionals like Hodge. *Id.* Once the detained individual is in custody and at a secure facility, medical personnel can diagnose and treat the patient and decide whether she needs to remain hospitalized. *Id.* § 5152; J.A. 88-89.

Outside the group home, Hodge completed a 5150 form for Sheehan. In addition to checking off boxes indicating that she was a "threat to others" and "gravely disabled," Hodge wrote down information about Sheehan's psychiatric history and her threat against him. J.A. 86-88, 397-398 (form). After filling out the 5150 form, Hodge called the San Francisco Police Department. He asked the dispatcher for police assistance in transporting Sheehan to a secure facility. Hodge mentioned Sheehan's history of aggressive behavior and making violent threats; he gave this

additional information to "make sure that the police did come and that they came in a timely manner." J.A. 84-85. After Hodge called the police, he went to the corner store to get a bottle of water. J.A. 98.

The dispatcher broadcast Hodge's request for police assistance, and advised officers that Sheehan was "known to make violent threats." J.A. 407. San Francisco Police Officer Kathrine Holder responded to the call. J.A. 161. Holder met Hodge outside the residence, as he was returning from the corner store. J.A. 26. Hodge told her about Sheehan's history and behavior, and showed her his 5150 form. J.A. 168-171. Holder was not familiar with the procedure for civilians authorizing a section 5150 detention, so she called Sergeant Kimberly Reynolds. J.A. 172-173. Reynolds came to the scene, where Hodge told her about Sheehan's history and went over the 5150 form. J.A. 33-34, 100-102. Reynolds called her lieutenant, who authorized the officers to assist Hodge. J.A. 219-220. Then, Reynolds and Hodge discussed whether the psychiatric emergency services unit at San Francisco General Hospital would be able to admit Sheehan. Hodge telephoned the triage nurse there, who agreed to accept Sheehan. Hodge, Tr. at 13, Dist. Ct. Dkt. 48-9.

The officers then went in to the flat with Hodge to confirm his assessment of Sheehan. J.A. 34, 210-211. Reynolds thought Hodge's presence would be helpful in communicating with Sheehan, if it was safe for him to do so. J.A. 34-35, 216. They would go to her

room together, knock on the door, and let her know the police were there. J.A. 35, 102.

Hodge directed the officers to Sheehan's room, which was the last door at the end of a long hallway. To the left of her door, the hallway ended in an alcove, so that the hallway was laid out in the shape of a "7." J.A. 35-36, 403, 406. The doors along the hallway were closed. J.A. 215.

When the officers reached Sheehan's door, their weapons were holstered. J.A. 38-39, 227. Reynolds knew that Sheehan was mentally ill and chose her approach with that in mind. J.A. 49. She knocked and spoke through the closed door, saying "Teresa, San Francisco Police Department, we're here to help you, we're just going to talk to you," and "we're here to help you, we're concerned about you. . . . Heath here says that, you know, you're not doing okay." J.A. 49, 58-59, 103, 177, 217. Sheehan did not answer, and Reynolds used Hodge's key to open her door. J.A. 213, 217.

Sheehan was lying on her bed. Next to her bed, there was a plate with several knives on it. Immediately, Sheehan got up and grabbed a knife. J.A. 36, 179-180, 221-222. The knife was 11 inches long with a 6-inch fixed blade. J.A. 39, 106, 150, 399, 404-405. Sheehan came at the officers with her knife, yelling that she was going to kill them and that they had to leave because they did not have a warrant. J.A. 36-37, 59-60, 105-107, 177-182, 222-225, 283-284. Sheehan told the officers that she already made a

police report, and the officers responded that they were the police and they were there to help her. J.A. 59-60. Sheehan screamed that she didn't need their help. J.A. 223. The officers asked Sheehan to "please drop the knife." J.A. 179. Sheehan kept screaming. J.A. 223. She came toward the doorway with her knife. Reynolds initially used her foot to brace open Sheehan's door, but she backed out when "it became clear that I had to move my foot, or I was going to get stabbed. And once I pulled my foot out of the threshold, she was able to close the door on me." J.A. 226; J.A. 37.

After Sheehan forced the door closed, the officers knew they were dealing with someone who was armed and violent. They started "doing multiple things all at once," and "everything happened and unfolded very quickly." J.A. 38-40, 53, 232.

Reynolds attempted to keep talking to Sheehan, "telling her we're the police department, we're here to help her, we need to talk to her, put the knife down." J.A. 39, 61. Reynolds explained why she kept trying to speak with Sheehan even after her violent outburst: "I had hoped that I could verbally communicate with her. Once the door was closed, that took it to a completely different level because she had just tried to stab us. And at that point it was clear that she probably wasn't going to comply with any verbal commands. But you always hope that as an officer that you can talk your way out of a situation and be respectful and compassionate. So I didn't throw those tools out the door. . . ." J.A. 263.

Meanwhile, Holder radioed for backup to cover the rear of the building, but the dispatcher broadcast the wrong location. J.A. 61, 185. Holder worked to correct the dispatching error, but even up to the end of their encounter with Sheehan, Holder and Reynolds had no confirmation that backup officers were covering the back of the building. J.A. 61, 197-198, 218-219, 232.

Covering the back of the building was important because the officers were concerned Sheehan could escape and hurt someone. J.A. 175, 197, 227, 229, 233. Hodge had told the officers that the only other way out of Sheehan's room was her back window. J.A. 116. The officers knew Sheehan's flat was on the second floor, but that did not dispel their concerns about escape because "[i]n many of the buildings in San Francisco, there are fire escapes," and they didn't "know if there's a hill graded up so it wouldn't be a full story" up from the backyard. J.A. 199, 218, 234.

Hodge did not give the officers any more information about the back window. Contrary to the suggestion of the court of appeals, Pet. App. 9 & 25 n.8, Hodge never testified that he told the officers that the back window was inaccessible or could be reached only with a ladder. J.A. 116-117. In fact, Hodge testified that during the seconds when this was happening, the officers did not ask for certain details about the window, including whether there actually was a fire escape. *Id.* If they had, Hodge's answer would have heightened their concern, not eliminated it; like the officers, Hodge believed "there's

probably a fire escape, but I don't know for sure." J.A. 117.

Escape was not the only risk that concerned the officers. Reynolds explained that because Sheehan had "displayed obvious signs of violence and wanting to kill Officer Holder and I, officer safety [was] an important factor." J.A. 229; J.A. 38. Tactically, the officers were at a disadvantage because with the door closed they could not see what Sheehan was doing. J.A. 198, 233. "[A]s soon as that door was closed, the threat became more scary for us and [there was] more uncertainty about what we were dealing with." J.A. 227. Sheehan could be gathering more weapons to use against the officers: There were the knives they saw near Sheehan's bed, and other weapons could have been hidden in her cluttered room. J.A. 198, 227-228.

The officers were also concerned that they did not know whether Sheehan was the only person present in her room. When the door was briefly open, they were focused on Sheehan and her knife, and Reynolds "wasn't able to canvass the entire room." J.A. 38, 51, 228. Also, Hodge had left the group home for a time after he had sent other residents out of the building, and Reynolds did not feel the officers could rely fully on his report that no one else was present. J.A. 47, 234. As Holder explained, "[w]e have to assume that there are others that might be in harm's way until we know for sure that they are not." J.A. 183.

Given these risks, Reynolds decided she needed to get the door open and take Sheehan into custody

right away. She explained why: "I was attempting to see more of what Ms. Sheehan was doing. Because the uncertainty of not knowing what she was doing posed a tremendous fear for me and my officer. And then the possibility of the escape is also extremely frightful because had she been able to injure somebody else, then it would have been our responsibility." J.A. 233; *see* J.A. 174-175, 198-199 (Holder's similar view). Reynolds knew that Sheehan was mentally ill. But, as she explained, "[a]t this point in my mind, the disability, the mental illness, . . . became a secondary issue. And what I was faced with was a violent woman who had already threatened to kill her social worker. Said she would do it with a knife. And now I've witnessed her attempting to do that to two uniformed police officers and have the ability to do that by using the weapon." J.A. 235; J.A. 51.

So Reynolds decided "to open the door, pepper spray her, and take her into custody." J.A. 51. Reynolds told Holder, "if the door opens I want you to spray her and douse her with pepper spray." J.A. 40. Holder took out her pepper spray, and the officers also drew their firearms as a backup measure. J.A. 40, 51, 61. Reynolds "was continuing to talk to Miss Sheehan, telling her that we wanted to help her, we were not going to hurt her." J.A. 40. Reynolds kicked the door once or twice, without success. J.A. 52. Holder suggested switching positions, because she was a little bigger. J.A. 40, 61. Holder handed Reynolds her pepper spray. She twisted the knob and shouldered the door, and met resistance from the

other side. J.A. 53, 62-63. At this point, Reynolds heard sirens, looked back at Hodge, and told him to go downstairs to open the door for backup officers. J.A. 41. When Reynolds turned back around, Holder had gotten the door open. J.A. 52, 55, 64.

When the door opened, Sheehan went at the officers with her knife, yelling that she was going to kill them. J.A. 42-43, 65. Reynolds discharged a stream of pepper spray into Sheehan's face. J.A. 42-43. The pepper spray had no apparent effect. J.A. 43, 65. Sheehan crossed the threshold of her room and turned toward Holder. Holder was in the alcove next to Sheehan's room, cornered. J.A. 43-44, 66. With her back literally against the wall, Holder fired twice at Sheehan. J.A. 66. Sheehan was three feet from Holder – so close that Holder had to fire from the hip so Sheehan would not slash her arm. J.A. 75-76. After Holder shot Sheehan twice, Sheehan did not drop her knife or fall to the floor. J.A. 66. Instead, she turned and stepped toward Reynolds with her knife. J.A. 44, 67, 77. Reynolds fired three times at Sheehan. J.A. 44. Sheehan stabbed toward Holder's leg as she went down to the ground, and Reynolds' last shot struck Sheehan when she was on the ground. J.A. 67-68, 80-81. Even on the ground, Sheehan continued to flail her knife at Holder. J.A. 138, 254. Holder remained cornered in the alcove, until a backup officer ran down the hall and finally kicked the knife out of Sheehan's hand. J.A. 81, 144, 257. Sheehan survived.

Sheehan does not materially dispute what happened during this encounter. She testified that the pepper spray blinded her, but she does not dispute that after she was sprayed, she continued out her door into the hallway with her knife upraised, that she refused to drop her knife, or that it was ultimately kicked out of her hand. J.A. 278-290.[1]

The District Attorney charged Sheehan criminally. Following a contested preliminary hearing, the state court held probable cause existed to prosecute Sheehan for several violent felonies: threats against Hodge (Cal. Penal Code § 422), assault with a deadly weapon (*id.* § 245(a)), and assault on a peace officer with a deadly weapon (*id.* § 245(c)). A trial was held, and the jury hung on the assault charges and acquitted Sheehan for her threats against Hodge. The District Attorney dismissed the charges rather than re-try the case. Superior Court of California Minutes, Dist. Ct. Dkt. 48-8.

II. Proceedings Below

A. Sheehan filed suit in the United States District Court for the Northern District of California

[1] Sheehan recalled the opening of the door somewhat differently from the other witnesses. She recalls her door opening only once, and she testified that she opened her door rather than that Officer Holder pushed it open. J.A. 271-277. Throughout this case, however, Sheehan has accepted the other witnesses' testimony on these issues as more favorable to her than her own testimony.

(C. 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. Sheehan 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, 42 U.S.C. §§ 12131 *et seq.*, and state law torts. Pet. App. 15.

After discovery, petitioners and Chief Fong moved for summary judgment on all of Sheehan's claims. Sheehan conceded that probable cause existed to arrest her after she assaulted the officers with a knife. Sheehan's MSJ Brief at 17-18, Dist. Ct. Dkt. 42. But she contended the officers violated the Fourth Amendment and Title II of the ADA by entering her room and then using deadly force. Sheehan submitted a declaration regarding police tactics from a former deputy police chief, Lou Reiter. J.A. 301-327. Reiter opined that after Sheehan forced the officers out of her room, the officers should have backed up, formed a perimeter to confine Sheehan in her residence and waited for backup, and that "the officers should have respected Sheehan's comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation." Pet. App. 45.

The district court granted the motion for summary judgment. Pet. App. 55-82. As to Sheehan's ADA claim, the district court relied on the Fifth Circuit's decision in *Hainze v. Richards*, 207 F.3d 795 (5th

Cir. 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." Pet. 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. Pet. App. 65. The district court held the officers' initial entry into Sheehan's room satisfied the emergency aid exception to the warrant requirement. Pet. App. 69-70. As to the officers' decision to re-open the door, the district court held that lawful for three separate reasons: (1) the same emergency still existed, (2) the officers were simply continuing a valid search and needed no additional justification under the "continuous search" doctrine of *Michigan v. Tyler*, 436 U.S. 499, 511 (1978), and (3) the officers had another justification anyway – to arrest Sheehan for attacking them with a knife. Pet. 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." Pet. App. 71. Finally, the district court held that the officers' deadly force was a reasonable response to Sheehan's second knife attack. Pet. App. 72-77.

B. A panel of the Ninth Circuit Court of Appeals affirmed in part and vacated in part, Pet. App. 1-48, with one judge dissenting as to the Fourth Amendment issues, Pet. App. 48-54.

1. The court of appeals remanded Sheehan's ADA claim against the City and County of San Francisco for trial. Pet. App. 41-45. Acknowledging a disagreement with the Fifth Circuit's decision in *Hainze*, the court of appeals held that a jury should decide whether the accommodations proposed after the fact by Reiter were reasonable. 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." Pet. App. 45.

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

3. Over Judge Graber's dissent, the panel majority (Fisher, J., joined by Noonan, J.) vacated the judgment as to two of Sheehan's § 1983 claims against Holder and Reynolds. Pet. App. 16-39. The majority remanded for trial Sheehan's claims that the officers violated the Fourth Amendment (and had no qualified immunity) when they (a) re-opened her door and (b) used deadly force in response to her knife attack.

a. 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 Sheehan's condition and her threats against him. Pet. App. 20-22. As to the officers' decision to get

her door back open, 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 *Tyler* "continuous search" rule applied. Pet. App. 23-25.

That, however, did not end the panel majority's Fourth Amendment analysis of the officers' re-entry. Instead, the majority separately examined whether, notwithstanding an exception to the warrant requirement, the officers acted reasonably in entering Sheehan's room immediately rather than delaying or trying other tactics. Pet. App. 26 & n.9. While the panel majority allowed that a jury might agree that "the officers had reason to fear Sheehan's escape" or "that Sheehan was not contained," Pet. App. 32, 36, it opined that a jury could conclude that the officers acted unreasonably by not "taking Sheehan's mental illness into account" and "forc[ing] a confrontation" when there was "no immediate need to subdue her and take her into custody." Pet. App. 28-29.

On the second prong of immunity analysis, the majority held that 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. Pet. App. 32-36.

b. As to Sheehan's deadly force claim, the full panel held that both officers' "use of deadly force – *viewed from the standpoint of the moment of the shooting* – was reasonable as a matter of law." Pet. App. 37. Nonetheless, the panel majority denied

qualified immunity on this claim because, in its view, a jury could find the entry violated the Fourth Amendment as discussed above. In the majority's view, that would render the officers liable for the deadly force they used to defend themselves against Sheehan. The majority invoked a line of Ninth Circuit decisions holding that when police officers have identified themselves but make an entry held to violate the Fourth Amendment, they have "provoked" any subsequent attack on them and therefore cannot use force in self-defense without violating the Fourth Amendment. Pet. App. 37-38.

4. Judge Graber dissented from the disposition of the Fourth Amendment claims against the officers. Pet. App. 48-54. Judge Graber would have held that Sheehan could not create a Fourth Amendment question by relying on a litigation expert who criticized the officers' decision to make an otherwise lawful entry as "imprudent or inappropriate." Pet. App. 50. Judge Graber also would have held that a reasonable officer could have concluded that the second entry was lawful under exceptions to the warrant requirement. Like the district court, Judge Graber noted "the need to resolve an ongoing emergency that involved a deadly weapon" and the prohibition on using 20/20 hindsight to judge the reasonableness of an officer's actions. Pet. App. 52-53. As to whether the law was clearly established, Judge Graber believed the majority erroneously applied a new rule for police officers dealing with the mentally ill: "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." Pet. App. 53.

SUMMARY OF ARGUMENT

I. Title II of the Americans with Disabilities Act did not require the two San Francisco police officers here to provide accommodations to Sheehan.

A. First, the danger Sheehan posed to these officers – and potentially to the public – at the time the officers re-opened her door meant that she was not "qualified," 42 U.S.C. § 12132, to invoke a public entity's duty to modify its activities to accommodate her. Under this Court's past decisions as well as the Attorney General's implementing regulations, a person who poses a direct threat or significant risk to the safety of others is not qualified for accommodations under the ADA. Whether a significant risk exists must be based on a reasonable judgment made from the standpoint of the person from whom an accommodation is demanded – here, the two officers on the scene. The judgment that Sergeant Reynolds and Officer Holder made in this case – that Sheehan posed a significant risk to them and to the public, requiring her to be disarmed and detained immediately – was

an objectively reasonable one in light of the information they had and the time pressures they faced.

This rule – that an armed and dangerous individual is not qualified for accommodations in public services and activities, and that police officers need not provide accommodations to someone who poses a direct threat to safety in their reasonable judgment – is consistent with other court decisions and regulations construing the disability laws. Any other rule that would require police officers to determine whether violent conduct is caused by mental illness before responding to immediate safety risks is not tenable.

B. Delaying Sheehan's arrest – the accommodation proposed here, after the fact – was not reasonable. The officers at the scene made a reasonable judgment that this proposed accommodation would not have eliminated the significant risk Sheehan posed so long as she was out of custody. Separately, it was not reasonable to expect the officers to delay Sheehan's arrest to accommodate her, given the danger the officers faced, the risks delay would have created, and the officers' duties toward the public at large.

II. The two officers have qualified immunity from Sheehan's Fourth Amendment claims. The divided panel incorrectly held it was clearly established that even where an exception to the Fourth Amendment warrant requirement applies, police officers are required to desist from entering the residence of an armed and violent suspect who is mentally ill, by

reason of the suspect's anticipated resistance, unless they can demonstrate some "immediate need" to enter – and if the officers do enter, the Fourth Amendment prohibits them from using force to defend themselves against the suspect's "provoked" attack. This rule contradicts this Court's precedents, it was not clearly established by Ninth Circuit precedents, and there is no robust consensus of authority in favor of the Ninth Circuit's rule. To the contrary, there is a deep conflict between the panel's rule – particularly its "provocation" rule – and the decisional law of the courts of appeals and State statutes. Finally, even if there were an "immediate need" test, a reasonable officer in petitioners' position could have concluded that test was met here.

ARGUMENT

I. Sheehan Was Not Entitled To Receive Accommodations In Her Arrest Under Title II Of The Americans With Disabilities Act

The Americans with Disabilities Act requires many adjustments to the activities of public and private entities alike, to ensure full access for people with disabilities. But pervasive in the ADA is the recognition that conduct posing a threat to the safety of others need not be accommodated. Whether applied to employers, businesses serving the public, or government agencies, the ADA does not create a duty to accommodate people with disabilities where doing so risks the safety of others. That is why Sheehan

cannot make out an ADA claim here. Sheehan first threatened to kill her social worker, then actually attacked the petitioner police officers who responded to her residence. Brandishing a knife, Sheehan forced the officers back and slammed her door on them. With her door closed, the officers could not know whether she would attempt to escape, attack them, or fortify herself to fight her inevitable arrest. What was certain, however, was that Sheehan was armed and violent and the officers could not know what she was doing behind a closed door. Given these risks, the officers made a reasonable judgment, as the ADA permits, that Sheehan posed a significant risk to safety – and that delaying her arrest was an unacceptable option because it would not eliminate the significant risk she posed. Given that reasonable judgment, Sheehan was not entitled to any deviation from what officers do when anyone – disabled or not – assaults them with a deadly weapon.

A. Because Sheehan's Armed Violence Posed A Direct Threat In The Reasonable Judgment Of The Officers, She Was Not Entitled To Accommodations In Her Arrest

1. Title II of the ADA forbids public entities from discriminating against a "qualified individual with a disability." 42 U.S.C. § 12132. The duty of nondiscrimination extends to requiring public entities to make "reasonable modifications" to their services and

activities to enable full participation by a qualified disabled individual. 28 C.F.R. § 35.130(b)(7) (2014);[2] *see Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 606 n.16 (1999) (Title II's "reasonable modification" requirement imposes same duties as "reasonable accommodation" requirement of the Rehabilitation Act of 1973, 29 U.S.C. § 794). In general, whether an individual is "qualified" depends on whether he or she 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. § 12131(2) (defining "qualified individual with a disability").

2. But there is one overarching eligibility requirement for invoking the protections of the ADA: an individual cannot pose a significant risk to the safety of others. That principle originated in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), where this Court construed the "qualified" requirement of the Rehabilitation Act not to require the hiring of a person "who posed a significant risk of communicating an infectious disease to others." *Id.* at 287,

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[2] The Attorney General has the statutory charge of issuing regulations and technical guidance to public entities for most activities subject to Title II. 42 U.S.C. §§ 12134, 12206(c)(1); *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998). *See* 28 C.F.R. pt. 35. In interpreting Title III of the ADA, this Court has noted that the Attorney General's regulations are entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *Bragdon*, 524 U.S. at 646. All C.F.R. references are to the 2014 compilation.

n.16. Congress later incorporated this safety principle into the Rehabilitation Act and other disability laws, including the ADA. *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998).

a. The Attorney General's Title II regulations now provide that "[a] public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities." 28 C.F.R. § 35.130(h). 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); *see also* United States Department of Justice, *Americans with Disabilities Act Title II Technical Assistance Manual*, at II-2.8000, Qualified individual with a disability (1993) ("An individual who poses a direct threat to the health or safety of others will not be 'qualified.'"). 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. A public entity must make an "individualized assessment, based on reasonable judgment" whether a significant risk exists, relying 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. § 35.139(b).[3] Consistent with this regulation, this Court has explained that whether a significant risk exists "must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence." *Bragdon*, 524 U.S. at 649 (construing analogous Title III regulation).

b. What is a "reasonable" judgment about safety means different things in different situations, depending on "the standpoint of the person who refuses the treatment or accommodation," *id.* For example, under *Bragdon*, a "health care professional" evaluating the risk of transmitting an infectious disease during an elective, non-emergency procedure has a "duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession." *Id.* The standpoint of a medical professional allows for time and research to ensure that a risk assessment is based on the best scientific knowledge available. *Cf.* 56 Fed. Reg. 35694, 35701 (1991), reprinted in 28 C.F.R. pt. 35, App. B, § 35.104 (listing public health authorities that can provide guidance in assessing risk).

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[3] These regulations allow that a reasonable modification might mitigate or eliminate a significant risk to safety. For the reasons discussed *infra* in Section I.B.1., that provision does not assist Sheehan here.

But not everyone who must make a safety judgment enjoys the time and resources of a medical professional – and the reasonable judgment standard reflects that reality. Indeed, when an individual employee of a covered entity must make an on-the-spot judgment about safety, a wide range of decisions will be considered reasonable. For example, an individual selling ferry tickets makes a reasonable safety judgment, when she must make a snap decision not to sell a first-class ticket to a visually impaired individual with a guide dog, because the first-class area has been designated animal-free to protect those with severe allergies. *Lockett v. Catalina Channel Express, Inc.*, 496 F.3d 1061, 1065 (9th Cir. 2007) (construing Title III "direct threat" regulation, 28 C.F.R. § 36.208). An individual's circumstantial decision may be "reasonable" even if it would not be reasonable for the entity itself, after deliberation, to maintain the same policy over the long term. *Id.* at 1066; *cf. Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921, 925-926 (6th Cir. 2000) (reasonable judgment for school to prohibit hepatitis-B-positive hemophiliac student from participating on basketball team for a three-week period while evaluating safety threat, even though school ultimately concluded threat was not significant and allowed student to participate).

And when a police officer in the field is confronted with an armed and violent individual, what is a "reasonable" judgment is considered from the officer's standpoint. The officer must make a quick decision about whether there is a significant risk to

safety. Not only that, the risk at issue is not abstract, potential, or future; the officer has no choice but to assess the risk now, as she faces it. The challenge of assessing risk in this situation bears more than passing resemblance to the challenge of determining how much force to use to effect an arrest under the Fourth Amendment. As this Court observed in *Graham v. Connor*, 490 U.S. 386 (1989), "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 397. Under those circumstances, whether an officer has made a reasonable judgment about a significant risk is properly judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," just as under *Graham*, 490 U.S. at 396. The Fourth Circuit has correctly noted that *Graham*'s rationale for respecting the officer's perspective should apply equally to ADA claims: "[A]s in the criminal procedure context, we are reluctant to question the snap judgments of law enforcement officials in situations in which a reasonable officer would fear for his safety and for the safety of those he is charged to protect." *Seremeth v. Bd. of County Commissioners, Frederick County*, 673 F.3d 333, 340 (4th Cir. 2012) (denying Title II reasonable accommodation claim as a matter of law). "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." *Waller v. City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009). Both tests call for respecting judgments about risk made by the officers on the scene who must "instantaneously identify,

assess, and react to potentially life-threatening situations." *Hainze*, 207 F.3d at 801.

Like the *Graham* test, whether there was a "reasonable judgment" under the ADA turns on "objective evidence," not good-faith belief. *Bragdon*, 524 U.S. at 649. The purpose of this requirement is to ensure that ADA safety judgments are based on evidence about the individual, not stereotypes about disability. *Cf. Arline*, 480 U.S. at 284-85. Thus, no one may conclude that someone is dangerous based on the mere existence of mental illness. It is entirely proper under the statute, however, to make safety judgments when a particular mentally ill individual has recently committed violent acts or directly threatened harm. *Cf.* H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 45-46 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 468-469 (stating, with reference to Title I: "The purpose of creating the 'direct threat' standard is to eliminate exclusions which are not based on objective evidence about the individual involved. Thus, in the case of a person with mental illness there must be objective evidence from the person's behavior that the person has a recent history of committing overt acts or making threats which caused harm or which directly threatened harm.").

c. The "reasonable judgment" standard not only involves consideration of what is "reasonable" – it also recognizes room for "judgment."

Allowing room for judgment does not require deference to an officer's subjective beliefs, but it does

require respect for the range of reasonable judgments that an officer on the scene could make, based on the objective facts. The court of appeals below did not do that. But other courts have. *See Seremeth*, 673 F.3d at 340; *Waller*, 556 F.3d at 175. Some degree of deference to professional judgments is normal in other disability law contexts, when it comes to safety and other essential eligibility requirements. *See, e.g.*, *Arline*, 480 U.S. at 288 ("[C]ourts normally should defer to the reasonable medical judgments of public health officials."); *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 147 (1st Cir. 1997) (stating, in a Title I case involving safety risks, "where no evidence of differential treatment, discrimination or stereotyping is proffered, the employer's judgment is entitled to some weight"); *cf. Olmstead*, 527 U.S. at 602 ("[T]he State may generally rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program.") (dictum); *Halpern v. Wake Forest Univ. Health Sciences*, 669 F.3d 454, 463 (4th Cir. 2012) (deference to academic judgments); *Peters v. City of Mauston*, 311 F.3d 835, 845 (7th Cir. 2002) (stating "we do not second-guess the employer's judgment as to the essential functions" of a job).

Moreover, the concept of "judgment" necessarily recognizes that different judgments about safety can be made from the same set of available facts. A safety judgment can still be reasonable even if it is not the only reasonable conclusion the decisionmaker could

reach. For example, in *Bragdon*, this Court explained that "[a] health care professional who disagrees with the prevailing medical consensus" regarding safety risks "may refute it by citing a credible scientific basis for deviating from the accepted norm." 524 U.S. at 650. And a safety judgment can still be reasonable even if there is some evidence indicating the risk was less than significant. *Theriault v. Flynn*, 162 F.3d 46, 50 (1st Cir. 1998) (reasonable judgment by driver's license officer to require road test before renewing license of motorist with cerebral palsy, even though driver had spotless record).

3. Applied to this case, this test requires asking whether Reynolds and Holder made a reasonable judgment, based on the objective, available information, that Sheehan posed a significant risk to the safety of others. They did.

As required by 28 C.F.R. § 35.139(b), their judgment was individualized and was not based on generalizations or stereotypes about Sheehan's disability. Instead, the objective evidence abundantly supported their conclusion that Sheehan was a dangerous individual. The officers not only knew about Sheehan's threat against Hodge, they also had Hodge's determination – supported by his familiarity with Sheehan's history – that she needed to be hospitalized because she posed a danger to others. And then Sheehan actually threatened to kill the officers and forced them out of her room with a knife.

The officers' conclusion that Sheehan was dangerous even after she closed her door on them was also a reasonable judgment. At that point, Sheehan's violence was escalating, and the officers did not know what her next move would be or whether anyone else was in danger. Sheehan could be trying to escape out the back window and down a fire escape, at a time when backup officers were not yet covering the rear of the building. Or Sheehan could be gathering up her other knives – or weapons the officers hadn't seen – to mount a new attack or fortify herself against Reynolds and Holder or any other officers who would, sooner or later, have to come in to arrest her. Whatever Sheehan was going to do next, the door was closed, and the officers could not respond to what they could not see. And these risks would persist until Sheehan was disarmed and taken into custody. 28 C.F.R. § 35.139(b) ("duration" of risk relevant). An officer could make a reasonable judgment that the "probability" and "severity" of harm made the risk "significant." *Id.*; *cf. Hutton v. Elf Atochem N. Am., Inc.*, 273 F.3d 884, 894 (9th Cir. 2001) (finding "significant risk" where chemical plant worker could have diabetic seizure and cause chemical spill, even though "the likelihood that the potential harm will occur is small").

Given the undisputed facts about Sheehan's conduct and the uncertainty faced by the officers, the court of appeals erred in finding a question for trial. The court of appeals stated there was a triable issue about the safety risk posed by Sheehan once she was behind her door, because "all of the information

known to the officers suggested that Sheehan wanted only to be left alone in her home," and "[s]he had shown no desire to leave the room." Pet. App. 30. But that analysis is inconsistent with *Bragdon*: no scientific or medical opinion supported this judicial assessment of Sheehan's psyche. And evidentiary problems aside, the court of appeals asked the wrong question under the ADA. The court of appeals asked whether a "reasonable jury" could conclude the officers should have proceeded differently, not whether the officers made a "reasonable judgment" that a "significant risk" existed. On the facts known to them, the officers' judgment was reasonable and there is no triable issue of fact on this claim.

4. The rule petitioners advocate here – that when an officer makes a reasonable judgment that a resisting suspect poses a significant risk of harm, the ADA does not require the officer to provide accommodations – is consistent with the statutory scheme and sound policy.

a. Dangerous behavior, regardless whether it is caused by disability, does not create an occasion for police officers to provide accommodations under Title II. As the Fifth Circuit explained, "[w]hile 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. When officers are responding to violent and "objectively verifiable misconduct," even conduct related to a mental illness,

"[s]uch reasonable police behavior is not discrimination." *Bates v. Chesterfield County*, 216 F.3d 367, 373 (4th Cir. 2000); *accord De Boise v. Taser Intern., Inc.*, 760 F.3d 892, 899 (8th Cir. 2014) (no Title II violation where officers responded with force to assault by mentally ill individual); *Gohier v. Enright*, 186 F.3d 1216, 1222 (10th Cir. 1999) (same); *cf. Tucker v. Tennessee*, 539 F.3d 526, 536 (6th Cir. 2008) (no Title II violation where officers forcibly arrested deaf individual for assault). The Attorney General's guidance similarly acknowledges that "[p]olice officers may, of course, respond appropriately to real threats to health or safety, even if an individual's actions are a result of her or his disability." United States Department of Justice, *Commonly Asked Questions About the Americans with Disabilities Act and Law Enforcement* (Rev. Apr. 4, 2006). This Title II principle is not limited to police officers; public employees generally are not required to accommodate misconduct, even where it stems from disability. *See McElwee v. County of Orange*, 700 F.3d 635, 643 (2d Cir. 2012) (mentally ill individual's sexual harassment of public employees, even though related to disability, disqualified him from program).

b. The principle that violent conduct does not provide an occasion for accommodation is not unique to Title II of the ADA; indeed, it pervades the disability laws. An individual who poses a significant risk to others cannot make demands of an employer under Title I, 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.2(r), or of a business offering a public accommodation under

Title III, 42 U.S.C. § 12182(b)(3); 28 C.F.R. § 36.208. Title I of "the ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if the behavior stems from a mental disability. Such an employee is not qualified." *Calef v. Gillette Co.*, 322 F.3d 75, 87 (1st Cir. 2003) (citing cases); *see also, e.g., Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351, 352 (7th Cir. 1997) ("The Act protects only 'qualified' employees . . . and threatening other employees disqualifies one."). And a public accommodation subject to Title III is allowed to adopt an "eligibility standard precluding violent or disruptive behavior," "without inquiry into the underlying reason for [a disabled individual's] inability to comply." 56 Fed. Reg. 35544, 35560-61 (1991), reprinted in 28 C.F.R. pt. 36, App. C, § 36.208; *cf.* 56 Fed. Reg. 35694, 35701 (1991), reprinted in 28 C.F.R. pt. 35, App. B, § 35.104 (explaining that Title III principles regarding "questions of safety" apply to "essential eligibility requirements" for participation under Title II). Similarly, private and public transit agencies subject to the U.S. Department of Transportation's regulations may "refuse to provide service to an individual with disabilities because that individual engages in violent, severely disruptive, or illegal conduct." 49 C.F.R. § 37.5(h).

c. Any rule requiring police officers to accommodate a dangerous suspect whose violent conduct is caused by disability would work particular mischief in light of the uncertainty officers face in determining who is disabled and whether it is the disability that

causes violence. Officers "in the midst of a rapidly escalating situation . . . cannot be faulted for failing to diagnose" a mental illness. *Bates*, 216 F.3d at 372. And even when mental illness is present *and* officers know about it, that does not necessarily clarify matters. Mental illness is not always the obvious cause of violence. *Cf. id.* at 369-370 (officers were initially not aware of plaintiff's autism and suspected violent plaintiff was on drugs). The mentally ill and non-mentally ill alike can engage in violence as a result of emotional disturbance or substance abuse, or from personal motives. As the dissenting judge observed, "[p]olice officers often interact with individuals who have a wide variety of specific needs." Pet. App. 53. Indeed, studies suggest that even when seriously mentally ill individuals are violent, the proportion of cases in which the violent behavior was *caused* by mental illness "may be surprisingly small." John Monahan & Henry J. Steadman, *Extending Violence Reduction Principles to Justice-Involved Persons with Mental Illness*, in Dvoskin *et al.* (eds.)*, Applying Social Science to Reduce Violent Offending* 245, 246 (2012). Further complicating matters, at least one common cause of violence is excluded from the scope of the ADA: the statute *permits* discrimination against an individual who is "currently engaging in the illegal use of drugs." 42 U.S.C. § 12210(a). Given these difficulties, the proper rule permits officers to address dangerous conduct when it occurs, regardless of the cause.

d. Of course, petitioners do not assert that the actions of individual police officers are never subject to scrutiny under Title II. There is no claim that an arrest is not one of the "services, programs, or activities" of a public entity under 42 U.S.C. § 12132. Nor is there a claim about what reasonable accommodations might be required after an officer "secur[es] the scene and ensur[es] that there is no threat to human life." *Hainze*, 207 F.3d at 801. The only ADA issue here is what Title II requires of individual officers who are facing an armed and dangerous suspect.

B. Modifications To Sheehan's Arrest Would Not Have Eliminated The Significant Risk She Posed, And Were Not Reasonable

1. Assuming a disabled individual's conduct does not pose a direct threat, Title II requires public agencies to "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). Sheehan's ADA claim is that reasonable modifications of her arrest were required here to minimize the risk of harm to her, and the court of appeals agreed that she was entitled to pursue this claim. Pet. App. 44-45.

But before reaching the question whether the proposed accommodations were reasonable – which is addressed below, *infra* Section I.B.2. – the threshold question remains: did Sheehan pose a significant risk? And Sheehan's proposed modifications are relevant to that threshold question. As discussed above, *supra* Section I.A.2., part of the "reasonable judgment" whether an individual poses a significant risk is "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. Where a significant risk to safety exists, a plaintiff's proposed modification must "eliminate[ ]" that "significant risk," 28 C.F.R. § 35.104, or "mitigate" it into insignificance, 28 C.F.R. § 35.139(b). *Accord Bragdon*, 524 U.S. at 624 ("Because few, if any, activities in life are risk free, *Arline* and the ADA do not ask whether a risk exists, but whether it is significant."); *Arline*, 480 U.S. at 287 n.16 ("reasonable accommodation" must "eliminate" the "significant risk"); *see also McElwee*, 700 F.3d at 642 (Title II plaintiff must show existence of accommodation).

Sheehan's retained police practices expert, Lou Reiter, has opined that the officers should have delayed Sheehan's arrest – and specifically that the officers should have waited for backup, "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." Pet. App. 45.

But the officers' judgment that these measures would not have eliminated the significant risk Sheehan posed to them and others was reasonable. With regard to "non-threatening communications," the officers had already used calm tones when they first approached Sheehan – and she reacted by attacking them. Given that reaction, and Sheehan's earlier hostility toward Hodge, a person she knew, there was no reason for the officers to expect that using calm tones again would render the scene safe. And all of Reiter's remaining proposals involved delaying Sheehan's arrest, in a situation where she would need only seconds to escape down a fire escape, gather more weapons to prepare for an attack, or fortify herself. Based on these facts, an officer on the scene could make a reasonable judgment that delay would not reduce the risk posed by Sheehan to an insignificant level. Indeed, Reiter did not even opine that Sheehan was not a risk; to the contrary, he asserted she was a "barricaded suspect" who presented "a deadly hazard to arresting officers." J.A. 320-321.[4]

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[4] Reiter also claims that his proposed tactics to deal with the risk Sheehan posed would have been likely to lead to an outcome that did not involve the use of deadly force. J.A. 322. As appealing as that prospect is, that opinion simply blends 20/20 hindsight with speculation. "Scientific evidence and expert testimony must have a traceable, analytical basis in objective fact before it may be considered on summary judgment." *Bragdon*, 524 U.S. at 653; *Waller*, 556 F.3d at 176 (rejecting Title II claim that officers should have tried different tactics during armed standoff).

2. Independently, even if Sheehan were qualified to invoke Title II's requirement that her disability be accommodated with reasonable modifications, her claims fail because the modifications she proposes to her arrest are not "reasonable." *See* 28 C.F.R. § 35.130(b)(7). A proposed modification is unreasonable if it does not "seem[ ] reasonable on its face, *i.e.*, ordinarily or in the run of cases," or if it imposes an undue hardship on the covered entity or anyone else. *U.S. Airways v. Barnett*, 535 U.S. 391, 402 (2002) (Title I decision); *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 783 (7th Cir. 2002) (applying *U.S. Airways* in a Title II case).

Here, the officers made a reasonable judgment that they could not delay Sheehan's arrest without risking their own safety or that of the public. *Supra* Section I.A.3. Given these "overriding public safety concerns," *Tucker*, 539 F.3d at 536, it was unreasonable to demand delay. Even in cases involving far less serious threats to public safety, courts hold it unreasonable as a matter of law to make accommodations that would delay an investigation or arrest. *Seremeth*, 673 F.3d at 340 (investigation of domestic violence complaint involving deaf individual); *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1086 (11th Cir. 2007) (roadside DUI test involving deaf individual). The Attorney General's guidance acknowledges that officers need not provide accommodations in "urgent situations – such as responding to a violent crime in progress." United States Department of Justice, *Communicating with People Who Are Deaf or Hard of*

Hearing, ADA Guide for Law Enforcement Officers (Jan. 2006). In addition, the officers had the duty here not merely to protect public safety but to arrest Sheehan. Officers are charged with arresting violent felons, and here it is undisputed the officers had probable cause to arrest Sheehan for the violent felony of assault, Pet. App. 65-68 & n.12. And the very reason the officers encountered Sheehan in the first place was to fulfill their duty to take into custody individuals who are mentally ill and judged to pose a threat to others – a duty imposed on law enforcement officers throughout the nation.[5] Given all of these public

[5] All fifty States have statutes authorizing police officers to take into custody mentally ill individuals who are a danger to themselves or others. Thirty-nine States authorize police officers to make such a determination themselves. Alaska Stat. Ann. § 47.30.705; Ark. Code Ann. § 20-47-210; Cal. Welf. & Inst. Code § 5150; Colo. Rev. Stat. Ann. § 27-65-105; Conn. Gen. Stat. Ann. § 17a-503; Del. Code Ann. tit. 16, § 5004; Fla. Stat. Ann. § 394.463; Idaho Code Ann. § 66-326; 405 Ill. Comp. Stat. Ann. 5/3-606; Ind. Code Ann. § 12-26-4-1; Iowa Code Ann. § 229.22; Kan. Stat. Ann. § 59-2953; Ky. Rev. Stat. Ann. § 202a.041; La. Rev. Stat. Ann. § 28:53; Md. Code Ann., Health-Gen. § 10-624; Mass. Gen. Laws Ann. ch. 123 § 12; Mich. Comp. Laws Ann. § 330.1427; Minn. Stat. Ann. § 253b.05; Mont. Code Ann. § 53-21-129; Neb. Rev. Stat. Ann. § 71-919; Nev. Rev. Stat. Ann. § 433a.160; N.J. Stat. Ann. § 30:4-27.6; N.M. Stat. Ann. § 43-1-10; N.Y. Mental Hyg. Law § 9.41; N.C. Gen. Stat. Ann. § 122c-262; N.D. Cent. Code Ann. § 25-03.1-25; Ohio Rev. Code Ann. § 5122.10; Okla. Stat. Ann. tit. 43a, § 5-207; Or. Rev. Stat. Ann. § 426.228; 50 Pa. Cons. Stat. Ann. § 4405; S.D. Codified Laws § 27a-10-3; Tenn. Code Ann. § 33-6-402; Tex. Health & Safety Code Ann. § 573.001; Utah Code Ann. § 62a-15-629; Va. Code Ann. § 37.1-67.01; Wash. Rev. Code Ann. § 71.05.153; W. Va. Code Ann. § 9-6-5; Wis. Stat. Ann. § 51.20; Wyo. Stat. Ann. § 25-10-109. Three States allow officers to make that determination

(Continued on following page)

safety duties, the demanded accommodation of delay was not reasonable.

The unreasonableness of the accommodation demanded here was only aggravated by the rapidly unfolding circumstances, which did not permit any of the process that typically occurs when a covered entity considers an accommodation. Although the accommodation process normally begins with an actual request for accommodation, there was none here. *See, e.g.*, *Tsombanidis v. W. Haven Fire Dep't*, 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."). There was no "interactive process" here either; that cannot happen when an individual is threatening and attacking public employees. *See Barber ex rel. Barber v. Colorado Dept. of Revenue*, 562 F.3d 1222, 1231 (10th Cir. 2009) (Rehabilitation Act) ("[B]oth parties have an obligation to proceed in a reasonably interactive manner to

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themselves in emergency situations, but otherwise require officers to act at the direction of a court or a mental health professional. Me. Rev. Stat. tit. 34, § 3862; R.I. Gen. Laws Ann. § 40.1-5-7; Vt. Stat. Ann. tit. 18, § 7505. Eight States allow police officers to take mentally ill individuals into custody at the direction of a court or a mental health professional. Ala. Code § 22-52-91; Ariz. Rev. Stat. Ann. § 36-525; Ga. Code Ann. § 37-3-41; Haw. Rev. Stat. § 334-59; Miss. Code Ann. § 41-21-67; Mo. Ann. Stat. § 632.300; N.H. Rev. Stat. Ann. § 135-C:29; S.C. Code Ann. §§ 44-17-410, 44-17-430, 44-17-440.

ascertain a reasonable accommodation.") (internal quotation marks omitted); *cf.* 29 C.F.R. § 1630.2(o)(3) ("informal interactive process" for employment accommodation). And covered entities normally have some opportunity to weigh safety risks. *See Doe*, 213 F.3d at 926 (no violation of ADA when school assessed safety risk during a three-week hold on hemophiliac, hepatitis-B-positive student's participation on basketball team). This is not to say that a public entity has no duty to accommodate people with disabilities under circumstances where the accommodations dialogue cannot occur. But the fact that the officers here had so little information about what Sheehan would or could do, and so little time to prevent any escape or attack she might have attempted, underscores that their decisionmaking should not be subjected to the same standards as a deliberative decision reached after the interactive process – a perspective that fits comfortably with an application of the "reasonable judgment" test that respects the constraints faced by the accommodations decisionmaker.

3. Finally, a modification is also not required under Title II if it "would fundamentally alter the nature of the service, program, or activity," 28 C.F.R. § 35.130(b)(7); *cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682-683 (2001) (Title III). Requiring public employees to accommodate a direct threat to their safety is a fundamental alteration of any activity subject to Title II, because 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). Moreover, because the intrinsic nature of the officers' duty here was to take Sheehan into custody as quickly as possible to protect public safety, as they reasonably concluded they must, any requirement that they delay performing their duty would amount to a fundamental alteration.

II. The Officers Have Qualified Immunity, Because It Was Not 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

Under the Ninth Circuit's Fourth Amendment rule, an officer deciding whether to enter a residence can no longer rely on the existence of an established exception to the warrant requirement, or the *Tyler* "continuous search" rule. Rather, in cases involving armed and violent suspects, an officer cannot enter *even under an established exception to the warrant requirement* when it would "force a confrontation" with a violent suspect and there is "no immediate need to subdue [the suspect] and take [the suspect] into custody." Pet. App. 29. As a consequence, if the officer enters, she is constitutionally prohibited from defending herself against the suspect – even if, as the Ninth Circuit found here, deadly force is otherwise

a reasonable response to an armed attack. Pet. App. 36-39.

But this Fourth Amendment rule was not clearly established in 2008, when the officers relied on established exceptions to the warrant requirement and the *Tyler* "continuous search" rule to re-enter Sheehan's room to arrest her. 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) (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.* The standard "gives ample room for mistaken judgments." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). Unless only a "plainly incompetent" official could have considered her actions lawful in light of existing precedent, qualified immunity protects the officer. *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (per curiam). Here, the law was not clearly established – not merely because the cases the Ninth Circuit relied on did not establish its purported rule beyond doubt, but because decisions of this Court and other circuits cast significant doubt on whether the Ninth Circuit's understanding of the Fourth Amendment was correct. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (courts have discretion in qualified immunity cases whether to address underlying constitutional question).

A. Federal Cases Did Not Clearly Establish The Need For Officers To Desist From Entering When They Can Anticipate Resistance

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, where they can expect armed resistance by a suspect. In imposing that duty here, the Ninth Circuit 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. Pet. App. 18. But as to the "manner of entry," *Stuart* required nothing more than compliance with "the Fourth Amendment's knock-and-announce rule," 547 U.S. at 407 – which the officers did here, Pet. App. 22. And this Court has never held that the *Tyler* "continuous search" rule is suspended when, as here, a suspect's armed resistance is what interrupts a lawful search. Nor does any other decision of this Court hold 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 Ninth Circuit here.

To the contrary, the premise of the Ninth Circuit'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 – conflicts with this Court's decision in *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967). In

Hayden, this Court held that when a resisting suspect has access to weapons in a home, that is an exigent circumstance that justifies an immediate entry, not delay. A reasonable officer could conclude *Hayden* applies here: "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." *Id.* at 299; *cf. Hudson v. Michigan*, 547 U.S. 586, 595 (2006) (observing that undue delay in making an entry can "produc[e] preventable violence against officers").

The Ninth Circuit's new rule is inconsistent with another key principle of this Court's Fourth Amendment decisions: that when a person responds unlawfully to lawful police activity, she does not *expand* her Fourth Amendment rights. A suspect who is about to be lawfully arrested cannot "retreat into her house" and thereby "thwart an otherwise proper arrest." *United States v. Santana*, 427 U.S. 38, 42 (1976). To require officers to change their tactics because of a suspect's unlawful resistance could amount, for some suspects, to "impunity-earned-by-recklessness." *Scott v. Harris*, 550 U.S. 372, 386 (2007). Moreover, it is not practical for well-established Fourth Amendment rules – like the exigent circumstances exception – to switch on and off depending on a prediction about who might respond unlawfully and who might not. That "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) (holding that officers do not "manufacture" exigent circumstances when they attempt a "knock-and-talk," and someone inside starts to destroy evidence in response, even if that response is predictable).

Further complicating the "clearly established law" analysis, there are few hard-and-fast rules about the "manner of searching." *United States v. Banks*, 540 U.S. 31, 35 (2003). Rather, this Court has construed the Fourth Amendment reasonableness requirement "case by case, largely avoiding categories and protocols for searches. Instead, we have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case. . . ." *Id.* at 36. That approach, though faithful to the Fourth Amendment, has not produced a clearly established rule that would control here.

The court of appeals did not discuss any of this authority. Instead, it simply invoked *Stuart*'s general requirement that a search be conducted in a "reasonable manner." Pet. App. 18. In doing so, the Ninth Circuit failed to heed this Court's repeated admonition "not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *Al-Kidd*, 131 S. Ct. at 2084.

2. Not only did the Ninth Circuit selectively rely on "equivocal" statements from this Court's past

decisions, it also mistakenly found clearly established law based on its own "readily distinguishable" precedents. *Stanton*, 134 S. Ct. at 7.

To begin with, no past Ninth Circuit decision had construed *Stuart*'s "manner of entry" discussion to require anything beyond (1) complying with the knock-and-announce rule, and (2) limiting an emergency search to those areas associated with the particular emergency. *United States v. Snipe*, 515 F.3d 947, 954 (9th Cir. 2008). The Ninth Circuit cited two other "manner of search" decisions in its Fourth Amendment analysis, Pet. App. 18-19, but neither case provided a clear rule for petitioners here. *See Boyd v. Benton County*, 374 F.3d 773, 779 (9th Cir. 2004) (whether it was excessive force to use flash-bang grenades to execute a warrant search when innocents were present); *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994) (whether officers conducting a search unnecessarily prolonged the detention of a gravely ill, elderly man who was semi-naked).

Similarly, none of the "continuous search" decisions in the Ninth Circuit's Fourth Amendment analysis clearly established the rule the Ninth Circuit imposed on Reynolds and Holder. Pet. App. 24 (discussing *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); and *United States v. Echegoyen*, 799 F.2d 1271, 1280 (9th Cir. 1986)). Indeed, the panel's rule – treating armed resistance as a reason to enhance Fourth Amendment protections – is inconsistent with the Ninth Circuit's 2009

en banc decision in *Fisher v. City of San Jose*: "We reject the notion that trained officers, who put themselves in harm's way when handling a dangerous armed standoff, essentially increase the constitutional 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 divided 2014 panel embraced a notion that an en banc court expressly rejected in 2009, the rule was not clearly established for police officers in 2008.

And the three decisions the Ninth Circuit discussed in its qualified immunity analysis, Pet. App. 32-36, fare no better. None of these decisions clearly established that the timing or tactics of an otherwise lawful entry could render it unlawful, and none of them involved the *Tyler* "continuous search" rule. First, the Ninth Circuit relied on *Graham v. Connor* to clearly establish the law here, treating *Graham*'s general "reasonableness" principle as if it established "the legal constraints on [the] particular police conduct" at issue here – and thereby repeating the error this Court corrected in *Saucier v. Katz*, 533 U.S. 194, 205 (2001). Second, the Ninth Circuit cited *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), another force decision that had nothing to do with entries, but did involve a mentally disturbed person who – unlike Sheehan – was unarmed, posed no threat, and had assaulted no one. *Id.* at 1285. And the third case, *Alexander v. City and County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), did not clearly establish the Ninth Circuit's rule either. Admittedly, *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. But on those facts, *Alexander* 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," *Stanton*, 134 S. Ct. at 7. 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.") (emphasis added). Moreover, as the dissenting judge observed, Pet. 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 the Ninth Circuit's "important limitations on *Alexander*," *Billington*, 292 F.3d at 1188, it was not beyond debate in 2008 that these officers could not proceed under an established exception to the warrant requirement. *Compare* Pet. App. 49-51 (dissent), *with* Pet. App. 35 n.11 (majority opinion, acknowledging that "*Alexander* has been limited by subsequent circuit precedent" but concluding that precedent did not apply here).

In denying qualified immunity, the Ninth Circuit also faulted Reynolds and Holder for not giving more consideration to Sheehan's mental illness. Pet. App. 35. But several past Ninth Circuit decisions held that even when an armed individual appears mentally disturbed, officers may take action to secure a deadly weapon. *Long v. City and County of Honolulu*, 511 F.3d 901, 906 (9th Cir. 2007) (armed suspect's "agitated" behavior contributed to reasonableness of force); *Blanford v. Sacramento County*, 406 F.3d 1110, 1117-18 (9th Cir. 2005); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1168 (9th Cir. 1996) (holding deadly force proper when suspect was reported to be behaving in a "strange" and "erratic" manner and suddenly picked up his knife), *overruled on other grounds, Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997). By contrast, the majority here relied on two past decisions involving mentally ill subjects who were not assaultive. *Cf. Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003); *Deorle*, 272 F.3d at 1283. But a *different* Ninth Circuit panel distinguished those two cases on that very ground, in a decision upholding the use of force against a mentally ill individual that was issued shortly *before* the incident here. *See Gregory v. County of Maui*, 523 F.3d 1103, 1108-09 (9th Cir. 2008). Thus, the best that could be said here is that "this area is one in which the result depends very much on the facts of each case." *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004). Under those circumstances, immunity applies.

Thus, the Ninth Circuit's own cases did not clearly establish the rule here. Indeed, there was not even a consensus for the majority's new rule on the part of the judges in this case. 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. "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." *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

3. "Absent controlling authority," "a robust consensus of cases of persuasive authority" is necessary to clearly establish the law. *Al-Kidd*, 131 S. Ct. at 2084; *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014). There is no out-of-circuit consensus for the majority's rule here.

a. 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 Rice v. ReliaStar Life Ins. Co.*, 770 F.3d 1122, 1131-33 (5th Cir. 2014); *Harris v. Serpas*, 745 F.3d 767, 773 (5th Cir. 2014); *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, 161, 169-170, 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). Similarly, other courts have rejected the notion that officers cannot respond to violent conduct from a mentally ill individual in the same way they can respond to violent conduct by other individuals. "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." *Bates v. Chesterfield County*, 216 F.3d 367, 372 (4th Cir. 2000); *see also, e.g.*, *Sanders v. City of Minneapolis*, 474 F.3d 523, 527 (8th Cir. 2007) ("The fact that Alfred may have been experiencing a bipolar episode does not change the fact that he posed a deadly threat against the police officers."); *Menuel*, 25 F.3d at 997 ("No responsible officer could disregard the palpable indications of imminent violence. . . .").

b. Separate from the issue of mental illness, several other circuits refuse to hold that police officers are constitutionally at fault for "causing" an arrestee to respond violently when they make an otherwise lawful arrest. Not only does such a rule excuse violence against law enforcement officers, it ignores that "police must pursue crime and constrain

violence, even if the undertaking itself causes violence from time to time." *Id.* As the Seventh Circuit explained, every Fourth Amendment force case "begin[s] with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble." *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994). So long as the force ultimately used is reasonable at the moment it is used – as the Ninth Circuit found here, Pet. App. 37-39 – "[t]he reasonableness of the officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis." *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005); *see also, e.g.*, *Harris*, 745 F.3d at 772 (stating "any of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in this [Fifth] Circuit"); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) ("Officer Proulx's actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force."); *Schulz v. Long*, 44 F.3d 643, 648-49 & n.3 (8th Cir. 1995).

Relatedly, several courts disagree with the Ninth Circuit's Fourth Amendment "provocation" rule. Under that rule, if a police officer properly identifies herself but makes an unlawful entry, the Fourth Amendment prohibits her from using force to defend herself against a later attack, on the theory that she "provoked" it. *See, e.g.*, *Espinosa v. City and County of*

San Francisco, 598 F.3d 528, 538-39 (9th Cir. 2010). Here, the majority held that the officers' unlawful entry would trigger the provocation rule, rendering their otherwise reasonable force in self-defense, unreasonable under the Fourth Amendment. Pet. App. 36-38. Other circuits sensibly reject this "provocation" rule, which treats officers' lives as disposable. *See Hogan v. Cunningham*, 722 F.3d 725, 733 (5th Cir. 2013) (holding officers' force reasonable after plaintiff resisted unlawful entry); *Livermore v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007) (noting disagreement with Ninth Circuit's rule); *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2001) ("[I]f the officers' use of force was reasonable given the plaintiff 's acts, then despite the illegal entry, the plaintiff 's own conduct would be an intervening cause that limited the officers' liability."); *Dickerson v. McClellan*, 101 F.3d 1151, 1162 (6th Cir. 1996); *Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995) (Alito, J.) ("Is the . . . officer necessarily liable for the harm caused to the suspect on the theory that the illegal entry without knocking and announcing rendered any subsequent use of force unlawful? The obvious answer is 'no.' "). Indeed, criminal decisions reject this "provocation" rule, and treat a suspect's resistance to an *unlawful* detention, arrest, or search, as a *lawful* basis for a Fourth Amendment seizure. *See, e.g.*, *United States v. Sledge*, 460 F.3d 963, 966 (8th Cir. 2006) (collecting cases); *United States v. Sprinkle*, 106 F.3d 613, 619 n.4 (4th Cir. 1997) (collecting cases); *see also United States v. Pryor*, 32 F.3d 1192, 1196 (7th Cir. 1994); *United States v. Waupekenay*, 973 F.2d 1533, 1537 (10th Cir.

1992); *United States v. King*, 724 F.2d 253, 256 (1st Cir. 1984); *United States v. Bailey*, 691 F.2d 1009, 1016-17 (11th Cir. 1982).

The Ninth Circuit's Fourth Amendment rule was not clearly established in 2008, and it is contrary to the great weight of Fourth Amendment authority.

B. California Law Authorized Officers To Persist In Making An Arrest In The Face Of Resistance

Police officers have qualified immunity when they rely on existing state law that authorizes their conduct. *Stanton*, 134 S. Ct. at 7. Contrary to the Ninth Circuit's rule, California law 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." Cal. Penal Code § 835a.[6] As the State's

[6] Indeed, officers have analogous statutory authority in other States – further calling into question the correctness of the Ninth Circuit's Fourth Amendment rule. Thirteen States including California have statutes expressly authorizing officers to press forward to make an arrest in the face of resistance. Cal. Penal Code § 835a; Del. Code Ann. tit. 11, § 464; Fla. Stat. Ann. § 776.05; Haw. Rev. Stat. § 803-7; 720 Ill. Comp. Stat. Ann. 5/7-5; Kan. Stat. Ann. § 21-5227; La. Code Crim. Proc. Ann. art. 220; Mo. Ann. Stat. § 563.046; Neb. Rev. Stat. Ann. § 28-1409(4)(b)(ii); N.J. Stat. Ann. § 2C:3-4(b)(2)(b)(ii); Okla. Stat. Ann. tit. 22, § 193; 18 Pa. Cons. Stat. Ann. § 508; Wash. Rev. Code Ann. § 10.31.050. Sixteen other States' courts have construed their statutes to confer similar authority to press forward in the face of resistance. *Union Indem. Co. v. Webster*, 118 So. 794, 802 (Ala.

(Continued on following page)

highest court explained, "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). Given that probable cause existed to arrest Sheehan for her

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1928); *People v. Toler*, 9 P.3d 341, 350-51 (Colo. 2000); *Klinkel v. Saddler*, 233 N.W. 538, 541 (Iowa 1930); *Connelly v. American Bonding & Trust Co.*, 69 S.W. 959, 961 (Ky. 1902); *People v. Doss*, 276 N.W.2d 9, 14 (Mich. 1979); *State v. Prlja*, 189 P. 64, 66 (Mont. 1920); *State v. Acosta*, 242 P. 316, 318 (Nev. 1926); *State v. Vargas*, 74 P.2d 62, 66 (N.M. 1937); *Myrick v. Cooley*, 371 S.E.2d 492, 496 (N.C. 1988); *State v. Washington*, 737 N.W.2d 382, 389 (N.D. 2007); *Fields v. Dailey*, 587 N.E.2d 400, 406 (Ohio Ct. App. 1990); *State v. Castle*, 616 P.2d 510, 512 (Or. 1980); *Sheppard v. State*, 594 S.E.2d 462, 473 (S.C. 2004); *Morgan v. State*, 262 S.W.2d 713, 714 (Tex. Crim. App. 1953); *Mercer v. Commonwealth*, 142 S.E. 369, 372 (Va. 1928); *State v. Reppert*, 52 S.E.2d 820, 830 (W. Va. 1949); *Krueger v. State*, 177 N.W. 917, 923 (Wis. 1920). The statutes of several other States expressly provide that police may use force to overcome resistance to an arrest and prevent escape. Conn. Gen. Stat. Ann. § 53a-22; Idaho Code Ann. § 19-610; Me. Rev. Stat. tit. 17-A, § 107; Minn. Stat. Ann. § 609.06; N.H. Rev. Stat. Ann. § 627:5; Tenn. Code Ann. § 40-7-108; Utah Code Ann. § 77-7-7; *see also* Ariz. Rev. Stat. Ann. § 13-410 (use of deadly force); Miss. Code Ann. § 97-3-15 (same); Vt. Stat. Ann. tit. 13, § 2305 (same). The statutes and common law of every State recognize that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396.

threats and for assaulting Reynolds and Holder with a deadly weapon, it cannot be said that only a plainly incompetent officer could conclude that they had lawful authority to persist in arresting her.

C. A Reasonable Officer Could Have Concluded That The Threat Posed By Sheehan Justified Re-Opening Her Door

For the law to be clearly established, it must "be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Here, 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 – it was not clear that this "immediate need" standard was not satisfied here. "It is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Id.* at 205. Consequently, qualified immunity would extend to the decision whether an "immediate need" existed on these facts. "The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson*, 555 U.S. at 231 (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)); *Butz v. Economou*, 438 U.S. 478, 507 (1978). Here, the majority did not give appropriate respect to the assessment of officers on the scene that there was an

"immediate need" to enter, and qualified immunity applies.

1. If there is any room for debate on that question, immunity would apply. But the majority mistakenly treated the possibility of a debate about the risk as a reason to deny summary judgment, rather than grant it. Faced with some undisputed facts from which it could be argued that the officers acted reasonably, and other undisputed facts from which it could be argued that they did not, the Ninth Circuit concluded that this was a factual dispute for the jury – not a legal question for the court. Pet. App. 26-32. That approach is not consistent with this Court's precedents, which hold that arguments about Fourth Amendment reasonableness and qualified immunity are legal disputes for courts to decide. *Plumhoff*, 134 S. Ct. at 2019. Here, the majority confused the "fact-bound" nature of Fourth Amendment arguments with the existence of a factual dispute. *Scott*, 550 U.S. at 383.

2. As a matter of immunity law, this Court's immunity decisions allow significant latitude for officer judgments about possible threats to officer safety or public safety – including whether a public safety emergency justifies an entry. "[J]udges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation," when they are "far removed from the scene and with the opportunity to dissect the elements of the situation." *Ryburn v. Huff*, 132 S. Ct. 987, 991-92 (2012) (per curiam). 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). That principle applies equally at summary judgment: so long as "a reasonable officer" in the same position "*could have believed*" that his or her response "was *within the bounds* of appropriate police responses," the officer is immune. *Saucier*, 533 U.S. at 208 (emphasis added). And where an officer does "not know the full extent of the threat" posed by an individual, that uncertainty weighs in favor of immunity, not against it. *Id.* A court accepts conclusions about dangerousness that an officer on the scene could make, so long as those conclusions are not so unreasonable that they fall outside the range of judgments that immunity permits. *Id.*; *cf. Brosseau*, 543 U.S. at 200 (at summary judgment, accepting officer's assessment that "persons in the immediate area [were] at risk from the flight"). If the worst that could be said about an officer's decision is that reasonable minds could differ, then immunity applies.

3. Under this law, these officers' risk assessment would have satisfied the majority's "immediate need" standard, because "a reasonable officer *could have come to such a conclusion* based on the facts." *Ryburn*, 132 S. Ct. at 992 (emphasis added). Here, there was a plausible factual and legal basis for the officers to conclude that the need to disarm a violent and irrational person in her home posed a risk justifying immediate action. *See 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"); *cf. Maryland v. Buie*, 494 U.S. 325, 333 (1990) ("An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings."). Both the dissenting Ninth Circuit judge and the district court judge so found. Pet. App. 49, 71. "[I]t is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618. Qualified immunity applies.

CONCLUSION

This Court should reverse the judgment of the court of appeals as to the ADA claim against the City and County of San Francisco, and the section 1983 claims against Kimberly Reynolds and Kathrine Holder.

Respectfully submitted,

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APPENDIX

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.

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.