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**

## REPLY BRIEF

SAN FRANCISCO CITY ATTORNEY'S OFFICE
DENNIS J. HERRERA
City Attorney
CHRISTINE VAN AKEN
Chief of Appellate Litigation
PETER J. KEITH, *Counsel of Record*
Deputy City Attorney
1390 Market Street, 7th Floor
San Francisco, CA 94102
(415) 554-3908
peter.keith@sfgov.org

*Counsel for Petitioners*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued



STATUTES, REGULATIONS, AND RULES

TABLE OF AUTHORITIES – Continued



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California Department of Justice, Commission on Peace Officer Standards and Training, *Basic Course Workbook Series, Student Materials, Learning Domain 37, People with Disabilities, Version 5.1* (2013), https://www.post.ca.gov/student-workbooks.aspx ..... 10

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U.S. Dep't of Justice, *Commonly Asked Questions About the Americans with Disabilities Act & Law Enforcement* (Apr. 4, 2006) ..... 17

U.S. Dep't of Justice, *Communicating with People Who Are Deaf or Hard of Hearing: ADA Guide for Law Enforcement Officers* (Jan. 2006) ..... 17

A police officer facing an armed suspect has a paramount duty to protect public safety by preventing violence. If Teresa Sheehan were not mentally ill, there could be little doubt that the officers' actions here – in reentering her room to disarm and arrest her after she attacked them with a knife and threatened to kill them – would be beyond reproach. The result here turns, then, on whether the lawfulness of this police response changes because of Sheehan's mental illness under Title II of the Americans with Disabilities Act or the Fourth Amendment.

On the facts of this case, Sheehan's mental illness did not render the officers' response unlawful. Title II does not require police officers to accommodate an armed and violent mentally ill suspect where the suspect presents a significant risk of harm to others, in the objectively reasonable judgment of the officers, based on the facts known to them at the time. Sheehan presented such a risk here, because even after she shut her door the officers could not simply assume that she had no means of escape and no access to guns or other weapons she could use against them. Nor is the proposed accommodation Sheehan now argues for – delay in her arrest, coupled with use of crisis de-escalation techniques – a reasonable one because of the possibility that Sheehan, behind a closed door, could have used delay not to calm herself but for escape, attack, or fortification.

While Sheehan casts the undisputed facts differently, and contends that she was no longer a threat once she shut her door, her claim depends on facts

that were unknown and unknowable to the officers at that moment. In rapidly unfolding circumstances like these, the determination that a disabled person presents a direct threat, or that an accommodation is not reasonable, must be viewed from the perspective of the accommodations decisionmaker, in light of the information she has. To view the facts as Sheehan suggests would imbue the reasonableness inquiry with the same hindsight bias that this Court has repeatedly rejected in other police contexts, and would create new and far-reaching uncertainty for police – who encounter people with mental illness increasingly frequently in their daily duties. The Court should reject any outcome that would require police and the public to tolerate danger as an accommodation. Likewise, the Court should reject Sheehan's claim that Title II requires officers to use crisis de-escalation techniques whenever they respond to a mentally ill person. De-escalation techniques are sometimes appropriate, and the San Francisco Police Department trains officers to use them – but not before they have first addressed immediate threats to public safety. Title II similarly does not demand use of these techniques in all encounters but only those where their use is "reasonable." Delaying the arrest of an armed suspect who has just threatened violence, and may have other means to carry out her threats, is not reasonable.

Nor was it clearly established that the officers violated Sheehan's Fourth Amendment rights by reentering her room where they could foresee that

she might respond violently. Resistance creates no right to be free from a seizure. And while the role of mental illness in Fourth Amendment analysis has not yet been addressed by this Court, and may be better left for explication in a future case, at a minimum the Ninth Circuit erred in reading its own precedents, treating mental illness on very different facts, as clearly establishing a controlling rule here.

### A. Because the officers had a reasonable basis to believe that Sheehan posed a threat of serious harm to them or others, and modifications would not eliminate that significant risk, her mental illness did not require them to delay her arrest or use de-escalation techniques to arrest her

1. Title II of the ADA does not permit police officers to assume that erratic conduct caused by mental illness is dangerous. *See* 28 C.F.R. § 35.130(h). But neither does it require officers to ignore dangerous conduct because it may be caused by mental illness. Instead, Title II and its implementing regulations excuse a public entity from making accommodations, such as delaying an arrest or using special procedures to effect an arrest, to someone who "poses a direct threat to the . . . safety of others," 28 C.F.R. § 35.139(a), where a direct threat is "a significant risk . . . that cannot be eliminated" by modifying the government activity, *id.* § 35.104; *see also Bragdon v. Abbott*, 524 U.S. 624, 648-49 (1998); *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 287-88 (1987).

Determining whether a disabled person poses such a threat requires an "individualized assessment, based on reasonable judgment that relies 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 . . . services will mitigate the risk." 28 C.F.R. § 35.139(b). Applying these principles to arrests, it is clear that an armed mentally ill person who has made a credible, imminent threat to attack police or others is not entitled to an accommodation in her arrest until the threat she poses has abated.

The determination that a mentally ill person poses a significant risk to the safety of others must be an "objective[ly] reasonable[ ]" judgment, *Bragdon*, 524 U.S. at 650, free from stereotype or irrational fear. But its reasonableness must be assessed "from the standpoint of the person who refuses the . . . accommodation" in light of the "objective evidence" that is "available" to that decisionmaker. *Id.* at 649, 650. Here, this Court must assess the risk determination from the perspective of Reynolds and Holder, based only on the information they had at the time they determined how great a threat Sheehan posed, and what to do about it. Where a police officer must make a "split-second judgment[ ]" about risk "in circumstances that are tense, uncertain, and rapidly evolving," *Graham v. Connor*, 490 U.S. 386, 396, 397 (1989), long experience has taught courts not to

assess reasonableness "[w]ith the benefit of hindsight and calm deliberation" but instead from the viewpoint of an officer on the scene in that moment, *Ryburn v. Huff*, ___ U.S. ___, 132 S. Ct. 987, 992 (2012).

Respondent makes the wholly atextual claim that "the direct threat exception to the reasonable accommodation requirement does not apply" to situations "when an individual's mental illness . . . is the reason for a police officer's interaction with that person," especially where the service offered by the police is "involuntary." Resp. Br. 27 (emph. omitted). Nothing in the direct threat regulation carves out special services for the disabled from its reach, and respondent makes no argument that the regulation lacks the force of law. *See* 42 U.S.C. § 12134(a); *Bragdon*, 524 U.S. at 646. And this Court long ago concluded that the "voluntariness" of a government service has no bearing on whether the ADA applies to it. *Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 210-11 (1998) (ADA applies to prisons). But even if the direct threat regulation tacitly excluded government services provided exclusively to the disabled, like transport to a psychiatric facility, her argument would make no difference here, because at the time Reynolds and Holder reentered Sheehan's apartment to disarm and arrest her, they were no longer providing a special service to a disabled person. Instead they were making an arrest, as they would anyone who attacked officers or others with a deadly weapon. J.A. 174-75.

2. On the undisputed facts of this case, Sheehan posed a significant risk to the officers and others, a risk that could not be eliminated by a modification such as delaying her arrest or using crisis de-escalation techniques.

a. Sheehan's contrary argument about the danger she posed rests on hindsight bias and a significant distortion of the facts. She does not take issue with the officers' first entry into her apartment, where they knocked on her door, explained that they wanted to help her, and eventually entered with their weapons holstered when she did not respond to their queries, J.A. 27, 49, 217, 227.[1] Instead, Sheehan focuses exclusively on their second entry, arguing that she was no longer a threat after she shut her door. Resp. Br. 33. But when the officers decided to reenter Sheehan's room, they knew beyond question that Sheehan was violent and intended harm. *See* U.S. Br. 27 n.10. After all, Sheehan had just "yelled" that she was going to kill the officers and "charge[d]" or "rapidly walked" toward them bearing an eleven-inch

[1] *Amici* the American Psychiatric Association *et al.* (APA) do not take issue with the officers' second entry but claim Sheehan was denied a reasonable accommodation when officers attempted to transport her for psychiatric evaluation without "direct involvement of mental health professionals." Br. 27-28. That is not Sheehan's claim. Resp. Br. 33. But in any event, the claim lacks merit. A city-funded mental health professional, Heath Hodge, in fact made the first contact with Sheehan, and he accompanied the officers during their initial efforts to persuade Sheehan to accompany them to a treatment facility. J.A. 19, 21.

knife whose serrated fixed blade measured six inches. J.A. 37, 105, 225, 284, 405. Reynolds tried to brace Sheehan's door open with her foot, but as Sheehan closed the distance towards her, Reynolds saw she would be stabbed if she kept her foot in place. J.A. 226.

The officers had a reasonable basis to believe that Sheehan continued to pose a significant risk even after she shut the door. She could easily have reopened the door and attempted to stab them again. They could not be certain that no one else was in the room with her; they were unable to canvass the "cluttered" room completely when they first opened her door. J.A. 37, 95, 409. While Hodge had told the officers he had cleared the building of occupants after Sheehan initially threatened him, J.A. 96, they knew that Hodge had left the building to go to a corner store after that, J.A. 26. They could not be sure no one had entered while he was gone. J.A. 47. Nor could the officers know whether Sheehan had secreted guns or other weapons in the cluttered room in addition to the plate of knives. J.A. 198. They did not know whether she "would barricade herself in her room, making their ultimate entry more dangerous." U.S. Br. 26-27 n.9. And they did not know whether Sheehan could escape. J.A. 199. Hodge had given the officers some information about access into the room; exactly what he said is not clear from the record. He believed the officers would need a ladder to get *into* Sheehan's room, but he also thought there was a fire escape, J.A. 116-17, which would allow Sheehan to

get *out*. Taking time to investigate these possibilities further was time Sheehan could spend escaping or arming herself. J.A. 234-35.

Sheehan says that "backup officers had both the back and the front of the building covered" when Reynolds and Holder reentered her room. Resp. Br. 5. That is not a fair reading of the record. Instead, after Sheehan closed her door, the officers simultaneously called for backup and immediately began attempting to reopen the door. J.A. 40. Initially, Reynolds tried to force the door, but then Holder, who was bigger than her sergeant, stepped in to try to open it by kicking and shoving it. J.A. 40-41. While Holder was working on the door, Reynolds heard the sirens of the backup officers, who arrived faster than she expected, and she turned to tell Hodge to open the front door for them. J.A. 41. When Reynolds turned back toward Holder, she saw that Holder had just gotten the door open – and Sheehan was already coming out of the door with the knife in her hand. J.A. 41, 52, 55. Sheehan's claim that the *back* of the building was covered at that moment – a claim she makes for the first time to this Court – finds no support in any of her record citations. Resp. Br. 5-6 (citing J.A. 12-13, 40-41, 50-51, 60-61, 232, 235, 407). In fact, the record of police calls shows that the calls the dispatcher relayed for "unit to back" and "send [unit] 70 to the back of the building," J.A. 407, came not from a backup unit confirming its presence, as Sheehan mistakenly suggests, Resp. Br. 5 (citing J.A. 407), but from *Holder herself*, continuing to ask for assistance.

*See* J.A. 407 at 11:27:31 (call sign for "Holder Kathrine E" is 3D5A); *id.* at 11:52:39 & 11:52:45 (references to "back" by call sign 3D5A). This record demonstrates not a cavalier confrontation but the officers' grave concerns about Sheehan's next steps, reflected in their actions to take all possible steps to abate the danger.

Although the officers could not be *certain* any of the scenarios they were concerned about would come to pass, they did not need certainty to be justified in treating Sheehan as posing a significant risk. "If [a] threatened harm is grievous . . . even a small risk may be 'significant.'" *Donahue v. Consol. Rail Corp.*, 224 F.3d 226, 231 (3d Cir. 2000). Because under these circumstances "a reasonable officer could have believed that there was an imminent threat of violence," U.S. Br. 27 n.9, the officers' risk judgment had a reasonable basis. That is all that is required for the direct threat regulation to excuse any requirement of accommodation here.

b. The officers' decision to reenter Sheehan's room did not violate their training or generally accepted police practices. Under California law, police officer training is standardized, and the California Department of Justice's Commission on Peace Officer Standards and Training (POST) develops training curricula for officers statewide, including training for encounters with the mentally ill. *See* Cal. Penal Code §§ 13500, 13510(a), 13515.25. Its curriculum for field contacts with people with mental illness states that "[o]fficers should never compromise or jeopardize

their own safety or the safety of others" in an encounter with someone with a mental illness. App. 2a.[2] "Once the scene is stabilized and there is no threat to life then the officer has a duty to reasonably accommodate the person's disability, but not before." *Id.* POST's curriculum also instructs officers in how to identify danger from someone who is mentally ill, by looking to factors such as "[t]he availability of any weapons to the person," "[s]tatements made by the person that suggest[ ] that he or she is prepared to commit a violent or dangerous act," and "[s]igns of violence at the scene." *Id.* at 2a-3a. Sheehan satisfied these criteria, and the officers acted in keeping with POST's guidance by treating Sheehan as dangerous and disarming her immediately rather than using de-escalation techniques.[3]

The officers' reentry also did not violate San Francisco Police Department General Order 8.02, requiring the use of hostage negotiators to deal with

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[2] The section of POST's curriculum concerning field contacts with people with mental illness is set out in the Appendix to this brief as regulatory material. The curriculum is available in full for online purchase at https://www.post.ca.gov/student-workbooks.aspx.

[3] That de-escalation protocols do not supplant ordinary police practices for dealing with dangerous suspects should be no surprise. While these methods have proven helpful in connecting mentally ill people with services, they have not been consistently shown to reduce force incidents, or to reduce the severity of injuries when officers must resort to force, as *amici* on both sides of this case agree. *See* Nat'l League of Cities Br. 17-19; APA Br. 32.

barricaded suspects. A barricaded suspect is one who is armed, "takes up a defensive position" against the police, and "presents a deadly hazard to arresting officers." *Id.*[4] But contrary to Sheehan's assertion, Resp. Br. 34-35, while Holder called Sheehan a barricaded suspect in police radio communications, Holder clarified in a post-shooting interview her belief that Sheehan "wasn't barricaded." J.A. 14. Sheehan was not contained, and had not yet fortified herself or taken up a defensive position – but the prospect that she might do so, and become a deadly threat to the officers who would eventually have to extract her, was one reason that the officers decided to reenter the room immediately. *See* J.A. 198-99. In any event, the barricaded suspect policy is "meant to safeguard the police and other innocent parties, not the suspect," and so it is "irrelevant" as to whether the officers' conduct towards Sheehan was reasonable. *Scott v. Henrich*, 39 F.3d 912, 916 (9th Cir. 1994).

c. There is no triable issue whether the officers made a reasonable judgment that Sheehan presented a significant risk. Sheehan asserts that a jury could find that use of delay or crisis de-escalation techniques would have avoided a violent confrontation. But under the direct threat regulation, the proposed modifications must, as Sheehan concedes, "eliminate" any significant risk she posed. Resp. Br. 37; *see also* 28 C.F.R. §§ 35.104, 35.139(b). No reasonable jury

[4] The order is available at http://www.sf-police.org/modules/ShowDocument.aspx?documentid=14748.

could find that Sheehan's evidence satisfies that standard. Her police practices expert, Lou Reiter, opined that had Reynolds and Holder used de-escalation techniques and followed the SFPD's barricaded-suspect protocol, "the necessity to resort to the use of deadly force would likely not have occurred." J.A. 322. But Reiter has admitted that had Reynolds and Holder done what he claims was required by the policies – with one of them retreating from Sheehan's door to the bottom of the stairs, and the other going around to the back of the apartment building until additional units arrived – then they would have been unable to see Sheehan's door, unable to prevent her from attacking anyone who might have been upstairs, unable to prevent her from escaping in the time it took one of them to run to back of the building, and vulnerable if Sheehan shot at them from the top of the stairs. J.A. 364-66. That is not "eliminat[ion]" of the significant risks Sheehan posed.[5]

In employment cases, courts have not hesitated to decide that a potentially devastating risk that is

[5] Sheehan's own testimony accords with the officers' assessment of the risks, and the extent to which no modification would have eliminated them. Even years after the event, she testified not that her actions were the result of a temporary crisis but that she would not drop her knife because "[t]hey didn't drop their guns," J.A. 282, and she "planned to resist arrest," J.A. 284. The officers, of course, were not aware of these statements at the time and did not consider them as part of their risk assessment.

unlikely or hard to quantify is a significant risk as a matter of law, not a jury question. *See, e.g.*, *Donahue*, 224 F.3d at 230-31 (prospect that train dispatcher could pass out on the job at a time when other dispatchers were not present was significant risk); *EEOC v. Amego*, 110 F.3d 135, 141-42, 144-47 (1st Cir. 1997) (depressive employee who had previously attempted suicide with prescription drugs, at residence for disabled where drugs were dispensed, presented significant risk despite a letter from her psychiatrist that she could perform her duties). The same principle should apply here.

3. Regardless of whether Sheehan's dangerous conduct excused the officers from accommodating her under the direct threat regulation, delaying Sheehan's arrest or using special arrest protocols was not a reasonable accommodation here, and there is no need to remand for further consideration of this question.

a. Sheehan was not entitled to demand the officers' use of crisis de-escalation techniques in lieu of arresting her immediately. The government has a "paramount . . . interest in ensuring public safety." *Scott v. Harris,* 550 U.S. 372, 383 (2007). When confronted with the possibility that violence is about to occur, police officers are not required to wait and "hope[ ] for the best." *Id.* at 385. Instead they are charged with "preventing violence and restoring order." *Brigham City, Utah v. Stuart,* 547 U.S. 398, 406 (2008). The accommodation that Sheehan seeks runs counter to these fundamentals of police conduct and amounts to a claim that the officers should

simply have assumed that she would calm down before she escaped or hurt someone. Because her proposed accommodation "takes no account of the legitimate governmental interest," *Washington v. Harper*, 494 U.S. 210, 226 (1990), in eliminating the danger she posed by taking her into custody immediately, it was not a reasonable accommodation. "A rule that is in no way responsive to the State's legitimate interests is not a proper accommodation, and can be rejected out of hand." *Id*. (considering mentally ill prisoner's due process right not to be forcibly medicated); *see also De Boise v. Taser Int'l, Inc.*, 760 F.3d 892, 899 (8th Cir. 2014) (unarmed mentally ill suspect, who had previously assaulted his mother and was behaving aggressively, was not entitled to any accommodation because of the "rapidly evolving circumstances" of his encounter with police); *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085-86 (11th Cir. 2007) (exigency of DUI stop at 3 a.m., where "time is of the essence," rendered modification to deaf suspect's arrest unreasonable). Indeed, delay in the arrest of an armed and violent suspect who is not fully contained "alter[s] such an essential aspect" of police activity that it amounts to a fundamental alteration of that activity. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682 (2001); *see also* 28 C.F.R. § 35.130(b)(7).

b. The United States correctly notes that modifying arrest procedures for armed and violent suspects who are mentally ill "will not be reasonable in the run of cases" because "[a]rrests are a particularly

'dangerous and difficult' law enforcement activity," and because the exigencies surrounding such arrests will often mean that accommodations increase safety concerns. U.S. Br. 18-19 (quoting *Maryland v. Garrison*, 480 U.S. 79, 87 (1987)). The United States accordingly contends the Court should hold there is a presumption that no accommodation would be reasonable but permit a plaintiff to overcome the presumption by showing special circumstances. U.S. Br. 19-21; *see U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002). Petitioners agree that this presumption is appropriate and would reduce uncertainty for police officers operating under dangerous circumstances.

There is no reason, however, to remand this case for application of a new burden-shifting regime. Sheehan does not seek a remand. Resp. Br. 48-49. Instead, she contends she has carried any burden of showing special circumstances because, in her view, there are at least triable issues of fact that the exigency had abated when she closed her door on the officers, and that the officers did not follow their training in reentering the room. Resp. Br. 48-49. The Ninth Circuit has already considered both of these factors, *see* Pet. App. 27, 45, and it reached the wrong conclusions, *see supra* 6-11. Nothing in its opinion suggests that the allocation of burdens mattered to its analysis. Nor is this case like *Bragdon*, where the Court did not have the benefit of full briefing on the record question it identified for remand, 524 U.S. at 654, or like *Barnett*, where the Court identified new

factors for the parties' attention, 535 U.S. at 406; *id.* at 407-08 (Stevens, J., concurring) (noting gaps in the limited record before the Court).

c. Sheehan appears to argue for a dispositive rule that police officers who do not follow "generally accepted police practices" or department policies for encounters with the mentally ill have failed to offer reasonable accommodations. Resp. Br. 40-42. Petitioners agree that specialized training will often be relevant to questions about reasonable accommodations under Title II. Where a mentally ill person's behavior is erratic but not threatening, for example, an officer's failure to follow her training in recognizing and adapting her approach to the person's mental illness will likely be a proper factor in the reasonableness analysis.

But this Court has never held that the reasonableness of a proposed accommodation pivots on a single factor. *See, e.g., Martin*, 532 U.S. at 688 ("individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances"). It makes no sense to single out de-escalation protocols for dispositive treatment here, where the U.S. Department of Justice "has repeatedly issued guidance to assist law enforcement entities in complying with the ADA, including in the context of arrests," U.S. Br. 13, but has not issued guidance in

the techniques Sheehan or her expert endorses,[6] and where empirical analysis about the efficacy of these protocols is inconclusive, *see supra* n.3. Declining to adopt crisis de-escalation protocols as the standard for reasonableness for police encounters with people who are mentally ill will not, as some *amici* suggest, *see* ACLU Br. 29, impede the wider adoption of these beneficial policies among departments. Indeed, the contrary could be true. If the Court creates a presumption that officers have failed to reasonably accommodate disabled persons whenever they do not follow specialized training, departments may be less likely to offer extensive training for fear it will raise the standard for ADA compliance.

4. Sheehan also argues that the officers violated Title II because Reynolds decided to reenter her room "without taking her mental illness into account." Resp. Br. 24. As did the Ninth Circuit, Pet. App. 12, Sheehan infers disregard from the sergeant's testimony that, when she decided to reopen the door, "the disability . . . became a secondary issue" because

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[6] Indeed, the Department's existing guidance is in conspicuous tension with Sheehan's techniques when it informs officers that an accommodation for communicating with a deaf person may be delayed where the person is "threatening," U.S. Dep't of Justice, *Communicating with People Who Are Deaf or Hard of Hearing: ADA Guide for Law Enforcement Officers* (Jan. 2006), or where the officer has not yet "stabilize[d] the situation," U.S. Dep't of Justice, *Commonly Asked Questions About the Americans with Disabilities Act & Law Enforcement* § III (Apr. 4, 2006).

Sheehan had just attempted to kill two police officers, J.A. 235. But Reynolds's description aptly summarizes the direct threat defense, where disability becomes a secondary issue in a moment where significant danger cannot be neutralized, and her testimony cannot plausibly be read as expressing discriminatory animus.

5. Sheehan argues that the Court should dismiss the first question presented as improvidently granted because petitioners do not argue that Title II never applies to arrests. Resp. Br. 25. But the question petitioners presented for review is whether Title II requires accommodations for an armed, violent, mentally ill suspect. Pet. i. Petitioners' argument about that issue in *certiorari*-stage briefs turned on the direct threat regulation and the reasonableness of an accommodation for a violent suspect, Pet. 25-28, Pet. Reply 1, not on claims about the reach of Title II. Those issues continue to warrant this Court's review.

### B. Reynolds and Holder are entitled to qualified immunity because they did not violate Sheehan's clearly established Fourth Amendment rights by reentering her room to arrest her

Sheehan argues that the officers' conduct in reentering her room violated the Fourth Amendment. Relying on the familiar Fourth Amendment balancing test, which weighs the government's interest against

an individual's interests to determine objective reasonableness, she contends that reentry was unlawful because the officers (1) lacked sufficient justification to reenter, and because the intrusion on her rights was too great in light of (2) the fact that they knew she would likely attack, and that they in turn might have to respond with deadly force, (3) their failure to use de-escalation techniques, and (4) their failure to account for her mental illness. Resp. Br. 18-19, 51-52. She further argues that the unlawfulness of their conduct was clearly established.

Her view of the Fourth Amendment is wrong under this Court's cases, which give weight only to *legitimate* personal interests in the Fourth Amendment balancing test, and do not treat police practices – however widely accepted – as the sole standard for reasonableness. As for Sheehan's mental illness, this Court has not yet addressed whether the presence of a suspect's mental illness alters the reasonableness balancing – such as, for example, by changing the culpability of her resistance. *See Graham*, 490 U.S. at 396 (reasonableness of force depends in part on "the severity of the crime at issue"). But regardless of the answer to that question, the Ninth Circuit erred in mistaking its isolated precedents, holding generally that "mental illness must be reflected in any assessment of the government's interest in the use of force," *Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003) (quotation marks omitted), for a clearly established and specific rule that officers may

not take otherwise reasonable action against someone who is mentally ill and may resist.

1. The officers had ample justification to reenter Sheehan's room after their attempt to transport Sheehan for psychiatric treatment was thwarted by her attack. The emergency that undergirded their initial entry continued, and a brief interruption in an officer's lawful search does not require a new justification for reentry. *Michigan v. Tyler*, 436 U.S. 499, 511 (1978). Sheehan argues that the continuous-search exception did not apply here because the officers' subjective motivation for entry had changed; "the officers did not [re]enter to provide aid" but rather to arrest her. Resp. Br. 19 n.4. That argument runs headlong into this Court's recent admonition that "even if [officers'] subjective motives could be so neatly unraveled," it does not matter for purposes of the Fourth Amendment "whether the officers entered . . . to arrest respondents . . . or to assist the injured," so long as their entry was objectively reasonable. *Stuart*, 547 U.S. at 404-05; *see also Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). Moreover, after Sheehan's attack, the officers could lawfully enter for the additional reason that they now had a reasonable basis to believe that Sheehan might commit further violence. *See Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 299 (1967); *see also* Petrs. Br. 43-46.

2. The fact that a suspect is foreseeably likely to use force to resist a lawful entry is entitled to

no weight in the Fourth Amendment balancing test. The Fourth Amendment weighs legitimate government interests against an individual's interests in "privacy, dignity, and security of [her] person[ ]." *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 613-14 (1989). But, as petitioners explained in their opening brief, this Court has rejected giving any weight to *illegitimate* personal interests. Petrs. Br. 44-45, 50-54. Instead, the Fourth Amendment accords weight only to private interests that "society has . . . recognized as reasonable." *Skinner*, 489 U.S. at 617; *see also Georgia v. Randolph*, 547 U.S. 103, 111 (2006). There is no reasonable personal interest in thwarting or evading legitimate police activity, and accordingly this Court has never held a Fourth Amendment intrusion unreasonable in light of such interests. *See* Petrs. Br. 44-45; U.S. Br. 29-30. Sheehan offers no response to this argument.

3. Similarly, Sheehan's allegation that the officers used tactics contrary to generally accepted police practices does not compel the conclusion that the officers' reentry was unlawful under the Fourth Amendment. *See Kentucky v. King*, ___ U.S. ___, 131 S. Ct. 1849, 1859 (2011). Sheehan also casts the use of generally accepted police practices as a matter of "efficacy," making the roundabout argument that generally accepted police practices establish what is effective, and what is not effective cannot be reasonable. Resp. Br. 16-17. But there is no empirical evidence in the record that these practices are effective,

much less so effective that any other practice is unreasonable. *See supra* n.3. In any event, it was not so clearly established as to be "beyond debate" that police officers must use crisis de-escalation techniques in encounters like this one in order to avoid liability for Fourth Amendment violations. *See Ashcroft v. al-Kidd*, ___ U.S. ___, 131 S. Ct. 2074, 2083 (2011).

4. Sheehan finally argues that the officers' conduct was unreasonable because, despite knowing that she was mentally ill, they did not take into account her illness in deciding to reenter her room immediately. This Court's cases do not directly address this question, and Sheehan cites none. Instead, she relies on three Ninth Circuit cases that, as petitioners noted in their opening brief, address mental illness in easily distinguished factual contexts. Petrs. Br. 49. The only Ninth Circuit case that bears even remote resemblance to this one is *Alexander v. City & County of San Francisco*, where the court held that officers who had an administrative warrant to search a home violated the Fourth Amendment when they made a warrantless entry to arrest the occupant, and that they were consequently liable for the foreseeable use of deadly force against the mentally ill occupant, who responded violently to the entry. 29 F.3d 1355, 1358, 1360, 1363-67 (9th Cir. 1994). That case involved no exigent circumstances, *id.* at 1365 n.11, in contrast to this case, and *Alexander*'s provocation holding has been expressly limited by the Ninth Circuit to cases where the officers' entry independently

violated the Fourth Amendment, *see Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002). Here, the officers' entry was lawful under exceptions to the warrant requirement. Pet. App. 23-25.[7]

5. The United States contends that because the role of mental illness in Fourth Amendment analysis presents a novel question, this Court should decide the second question presented solely on the basis of the "clearly established" prong of qualified immunity analysis rather than with a decision on whether Reynolds and Holder violated Sheehan's Fourth Amendment right. U.S. Br. 32-34. Here, the danger Sheehan presented was so clear and imminent that, just as the officers were not required by the Americans with Disabilities Act to desist from arresting her, neither were they so required by the Fourth Amendment. But petitioners agree with the United States that a complete account of the role of mental illness in Fourth Amendment analysis – which may be at issue in a variety of police encounters in widely differing factual contexts – is a novel question, and the Court may wish further development of the law here before providing guidance to lower courts on this issue.[8] The remaining errors in the Ninth

[7] Sheehan also argues that the officers used unreasonable force in the moment of the shooting. Resp. Br. 19-20. The Ninth Circuit decided that issue against her, Pet. App. 37, and she did not seek further review.

[8] Petitioners disagree, however, that the second question presented does not "fairly include[ ]" the issue of whether the officers violated Sheehan's Fourth Amendment rights. *See* S. Ct.

(Continued on following page)

Circuit's analysis – such as aspects of its opinion that appear to countenance foreseeable resistance as a reason to desist from entry even where a suspect is not mentally ill, *see, e.g.,* Pet. App. 37-38 – are so plain that there is no benefit to refraining from addressing those errors as a matter of Fourth Amendment law. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

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Rule 14.1(a). That question is "easily subsumed" within the question presented, because a Fourth Amendment right cannot be clearly established if it is not a right at all – and the parties' briefs reflect that the two issues are "intimately bound up" together. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 540 (1999) (question of what circumstances allowed an award of punitive damages for employment discrimination included the proper legal standard for imputing vicarious liability to employer).

For the foregoing reasons and those stated in petitioners' opening brief, the judgment of the court of appeals against petitioners as to the Title II and Fourth Amendment claims should be reversed.

Respectfully submitted,

SAN FRANCISCO CITY
ATTORNEY'S OFFICE
DENNIS J. HERRERA
City Attorney
CHRISTINE VAN AKEN
Chief of Appellate Litigation
PETER J. KEITH, *Counsel of Record*
Deputy City Attorney
1390 Market Street, 7th Floor
San Francisco, CA 94102
(415) 554-3908
peter.keith@sfgov.org

*Counsel for Petitioners*

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LD 37: Chapter 4 – Persons with Mental Illness

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[4-14] **Persons with Mental Illness – Field Contacts**

[37.04.EO14, 37.04.EO15]

**Introduction** Officers must make difficult judgments and decisions about the behaviors and intent of any individual they think may be affected by a mental illness. This requires special considerations to avoid unnecessary violence or civil liability.

**Officer safety**

People affected by mental illness can be unpredictable and sometimes violent. Officers should never compromise or jeopardize their own safety or the safety of others when dealing with individuals who display symptoms of a mental illness.

Once the scene is stabilized and there is no threat to life then the officer has a duty to reasonably accommodate the person's disability, but not before.

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**Indicators**

Not all people with mental illness are dangerous, while some may represent danger only under certain circumstances or conditions. Some may be capable of going very quickly from a state of calm to being extremely agitated.

There are many indicators that officers may use to help determine if people who appear to be affected by mental illness are dangerous to others or themselves.

- The availability of any weapons to the person
- Statements made by the person that suggests that he or she is prepared to commit a violent or dangerous act. These could range

from subtle innuendos to direct threats

- A personal history of prior violent acts under similar or related conditions. Information may come from a previous law enforcement contact or others familiar with that person
- Signs of violence at the scene prior to the officer arriving
- Officers shall consider statements made by a credible third party indicating that the subject may be prepared to commit a violent or dangerous act

[4-15]

- The amount of self-control the person is able to demonstrate. This can include signs of rage, anger, fright or agitation. Signs of lack of control can include an inability to sit or stand still, wide eyes, rambling speech, etc.
- Begging to be left alone or offering frantic assurances that one is fine may also suggest that a person is close to losing control.

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**Suicide awareness**

There are several factors that may help officers determine how serious a threat is. Officers should ask:

- if the person has the intent, a plan, or the means to carry out the act of attempting suicide
- if he or she has made previous attempts to commit suicide
- the method used in a previous attempt
- about knowledge and/or history of someone who has completed suicide
- individuals close to the person about the person's history and mental state

NOTE: Excessive use of alcohol and/or other drugs can markedly increase the danger of a person successfully attempting suicide.

NOTE: Officers are responsible for knowing and complying with specific policies and guidelines regarding contacts with individuals who may be suicidal.

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[4-16]
**Field contacts**

The following table identifies appropriate tactical actions officers should be aware of.

| Action | Additional Information |
|---|---|
| **Request Backup** | • Situation can be unpredictable and escalate quickly |
| **Stabilize the scene** | • Once the scene is stabilized and there is no threat to life then the officer has a duty to reasonably accommodate the person's disability, but not before |
| **Calm the Situation** | • Take time to assess the situation<br>• Provide reassurance that officers are there to help<br>• If possible give the person time to calm down<br>• Move slowly<br>• When possible, eliminate emergency lights and sirens and disperse any crowd that may have gathered<br>• Reduce environmental distractions such as radio or television noise |

| | | |
|---|---|---|
| | | • Assume a quiet non-threatening manner when approaching and conversing with the individual<br>• If possible, avoid physical contact if no violence or destructive acts have taken place<br>• If possible, explain intended actions before taking action |
| [4-17] | **Communicate** | • Keep sentences short<br>• Determine if the person is taking medication<br>• Talk with the individual in an attempt to determine what is bothering that person<br>• Acknowledge the person's feelings<br>• Ask the person if he or she is hearing voices and, if so, what they are saying<br>• Avoid topics that may agitate the person |

| | |
|---|---|
| | • Guide the conversation toward subjects that will bring the individual back to reality (e.g., where are you?, day of the week?)<br>• Allow time for the person to consider questions and be prepared to repeat them<br>• Do not mock the person or belittle his or her behavior<br>• Do not agree or disagree with the delusions or hallucinations, but validate the feelings (i.e. "It must be frustrating for you to feel this way.") |
| **Do Not Make Threats** | • Do not threaten the individual with arrest or in any other manner<br>• Threats may create additional fright, stress, or potential aggression |

| | |
|---|---|
| **Be Truthful** | • If the individual becomes aware of deception, that person may:<br>– withdraw from any contact in distrust<br>– become hypersensitive<br>– retaliate in anger |

* * *