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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

BRIEF OF *AMICI CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, MAJOR CITIES CHIEFS ASSOCIATION, and NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2500 members. The membership is comprised of local government entities, including cities, counties, and subdivision thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts.

IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the Unites States Courts of Appeals, and in state supreme and appellate courts.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief, and no person other than *amici curiae*, their members, or their counsels made a monetary contribution to its preparation or submission.

The parties' letters consenting to the filing of *amicus* briefs are on file with the Court.

The Major Cities Chiefs Association is a professional association of Chief police executives representing the largest cities in the United States, Canada and the UK. MCCA membership is comprised of Chiefs and Sheriffs of the 66 largest law enforcement agencies in the United States, 9 largest in Canada, and 2 in the United Kingdom. MCCA serves 89.9 million people with a sworn workforce of 239,063 officers and non-sworn personnel.

The National Sheriffs' Association (the "NSA") is a non-profit association organized under § 501(c)(4). Formed in 1940, the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States, and, in particular, to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members, and is the advocate for 3083 sheriffs throughout the United States.

The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in judicial processes where the vital interests of law enforcement and its members are affected.

SUMMARY OF THE ARGUMENT

The Americans with Disabilities Act ("ADA") was intended to address the discrimination that occurs

when policies and methods of service delivery are enacted by those who unthinkingly fail to consider the impact on people with disabilities. The ADA seeks to prevent this discrimination by requiring public entities to develop accommodations at the level of resource management and policy.

By comparison, this Court's jurisprudence with respect to law enforcement actions in arrests affords officers broad discretion in their good-faith, reasonable decision-making based on the facts available at the moment, even if the decision appears incorrect in hindsight. The best method of accommodating people with mental illnesses, and equipping law enforcement officers to handle confrontations with people with mental illnesses safely, is to provide specialized training calibrated to local resources and needs. However, once that training is provided, individual officers should not be required to perform an ADA accommodations analysis when they face urgent public safety risks posed by violent, armed individuals. Instead, they should operate with the broad discretion traditionally afforded under 42 U.S.C. § 1983.

ARGUMENT

I. TITLE II OF THE ADA REQUIRES CAREFUL ENTITY-LEVEL ANALYSIS OF APPROPRIATE ACCOMMODATIONS IN LIGHT OF AVAILABLE RESOURCES.

Congress enacted Title II of the ADA to eradicate discrimination against individuals with disabilities by requiring state and local governments to make reasonable accommodations for persons with disabilities and provide services in the most integrated setting appropriate. The evaluation of an entity's plan for providing services to mentally disabled individuals allows the entity to weigh such factors as the cost of treatment, the entity's budget, and the need for even-handed distribution of services to other disabled individuals. This analysis occurs at the level of policymaking, management and training, and is not suited for application to on-the-street decisionmaking when a law enforcement officer faces an active public safety threat by an armed, violent individual.

A. The ADA Was Passed to Address Policies Impacting People with Disabilities.

Seeing the limited effect of prior disability rights legislation in addressing discriminatory practices and policies, Congress expanded federal protection for individuals with disabilities by passing the ADA in 1990. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (2012). The ADA outlined several areas in which it sought to protect against discrimination, including employment, public accommodations, services operated by private entities, and public services. *Id.* at 2–3.

To recover damages in an ADA action, a plaintiff must prove intentional discrimination on the basis of a disability. *See State Dep't of Pub. Safety v. Sexton*, 748 So.2d 200 (Ala. Civ. App. 1998); *Tyler v. City of Manhattan*, 118 F.3d 1400 (10th Cir.1997); *Wilson v. Gayfers Montgomery Fair Co.*, 953 F.Supp. 1415 (M.D.Ala.1996). Under the ADA, discrimination includes failing to make accommodations for the known disabilities of an otherwise qualified individual who requests reasonable accommodations that would allow the plaintiff to perform under the program at issue. *See, e.g.*, *McElwee v. Cnty. of Orange*, 700 F.3d 635, 641 (2d Cir. 2012). As the Nebraska Supreme Court has explained, action taken in response to the plaintiff's conduct is not necessarily discriminatory as long as the "collateral

assessment of disability plays no role" in the action. *Doe v. Bd. of Regents of Univ. of Neb.*, 287 Neb. 990, 1022–23 (2014) (quoting *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998)).

B. ADA Claims Commonly Raised in the Context of Arrests Involve Agency Policies that Result in Discrimination.

Title II of the ADA applies to any department or instrumentality of State or local government. 42 U.S.C. §§ 12131–32 (2012). Under Title II, public entities cannot exclude from participation in, deny, or discriminate with regards to public benefits, programs, and activities on basis of disability. *Id.* This extends to law enforcement investigation and arrest.

One type of claim for reasonable accommodation during arrest that the courts have addressed under the ADA—and the one primarily at issue in this case—is that, during arrest for a crime unrelated to disability, the police "failed to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees." *Gohier v. Enright*, 186 F. 3d 1216, 1220 (10th Cir. 1999); *see also Gorman v. Bartch*, 152 F.3d 907, 912–13 (8th Cir. 1998). This type of claim may arise, for example, when an individual is "unable to

communicate with officers because standard police practices and policies are not appropriately modified," or when the individual is placed at a safety risk because of the procedures. U.S. Dep't of Justice, Civil Rights Div., *The ADA and City Governments: Common Problems*, (http://www.ada.gov/comprob.htm). For instance, a deaf person may need to be handcuffed in a way that allows them to sign, or an epileptic person may need access to their medications. *Id.* The requirement for reasonable accommodation should not extend, however, to individual officers' safety decisions when the individual poses a risk, as opposed to ensuring standard department practices take into account the needs of individuals with disabilities while allowing officers to continue to make the safety judgments they have been afforded under § 1983.

Lack of proper training to quickly recognize a person's disability and adjust procedures in interacting with them can also lead to discrimination. Wrongful arrests of mentally ill individuals may occur because police "misperceived the effects of that disability as criminal activity" (for example, a person with a neurological disorder misidentified as drunk). *Gohier*, 186 F.3d at 1221. However, the federal courts have recognized that an arrest of a disabled suspect is not wrongful when the suspect's actions were unlawful at the time of the arrest. *Id.*; *see also Buchanan v. Maine*, 417 F.Supp.2d 45, 72

(D.Me. 2006) ("One can only reasonably conclude that the officers trained their weapons on plaintiff because he was carrying a high-powered rifle in a crowded shopping area—not because of misperceptions stemming from his disability.").

In this case, San Francisco had established a program intended to address the needs of individuals with mental illness, and trained its officers in recognizing and handling individuals with mental illness. The Plaintiff contends that each individual officer should be responsible for providing accommodations to every suspect, regardless of the threat to public safety, the officer, or the suspect herself. The plaintiff does not contend that San Francisco's training and policies in general were lacking.

C. Title II of the ADA Is Addressed Primarily to Public Entities' Policies and Procedures, Leaving Room for Individuals to Make Reasonable Safety Judgments.

Notably, the language of Title II focuses on the decisions and policies of the public entity: "[N]o qualified individual with a disability shall, by reason of such disability, be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The parties acknowledge that government officials may not be sued in their individual capacities under Title II of the ADA. *Id.* § 12131; *see also* Rehabilitation Act of

1973, 29 U.S.C.A. § 794. The structure of liability under the statute establishes that the primary purpose of Title II is to govern entities' management-level policies and procedures, with the ultimate effect of increasing individual agents' awareness of disability in their implementation of those policies.

The legislative history of the ADA also confirms the conclusion that Congress did not contemplate the implementation decisions of individual agents as primary accommodations under the ADA. The Senate Committee on Labor and Human Resources investigated the potential regulatory impact of the ADA and, "[a]lthough a Senate rule requires that such reports evaluate a bill's expected impact on individuals as well as businesses, the report did not mention any anticipated impact on individuals." *Alberte v. Anew Health Care Servs., Inc.*, 232 Wis.2d 587, 596 (2000) (citing S.Rep. No. 116, 101st Cong., 1st Sess. 88 (1989)). This silence underscores the notion that in rejecting individual liability for failure to provide accommodations, Congress was primarily concerned with the entity-level policies individuals would be tasked with implementing.

The analysis of reasonable accommodations focuses on an entity's management-level assessment, in light of an overall view of the entity's programs. This assessment does entail some individual decisionmaking during implementation, but this

Court has recognized that such decisionmaking must balance the need for accommodations with disability-neutral public concerns. This Court has recognized, for instance, that, while government agencies cannot avoid providing appropriate services to the mentally ill altogether based on budget concerns, they may demonstrate ADA compliance by establishing a carefully considered plan that might nonetheless fail to provide immediate appropriate treatment for everyone who qualifies. In *Olmstead*, when two developmentally disabled women with mental illness sought to be moved from Georgia's public psychiatric hospital into community care, for which they had been evaluated and determined to be qualified, the state argued that moving these women into community care was financially impracticable. *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 593–96 & n.7 (1999). In rejecting the state's defense, the Court held that once individuals with mental disabilities are found to be "qualified" for less restrictive care, failing to give them such is discrimination by reason of disability. *Id.* However, the Court recognized that an exception exists when, "in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Id.* at 604. Determining whether this defense applies requires

case-by-case assessment of the cost of the treatment against the state's overall mental health budget. *Id.*

DOJ regulations clearly state that safety concerns may be an important counter-consideration in the design of accommodations. The regulations permit public entities to "impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities," so long as they "are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities." 28 C.F.R. § 35.130(h) (2014). The ADA, as directed to both entity-level policymaking and individual implementation, primarily seeks to combat "speculation, stereotypes, or generalizations" that often result in intentional discrimination, not to require specific accommodations that directly threaten public safety.

Furthermore, the regulations do not require a public entity "to permit an individual to participate in or benefit from the services, programs, or activities when that individual poses a direct threat to the health or safety of others." 28 C.F.R. § 35.139(a) (2014). This exception underscores the preeminence of public safety in the accommodations process, especially as applied to armed, violent individuals. In promulgating the regulation, DOJ recognized the context-dependent and discretionary nature of the task facing an entity as it determines

whether an individual poses such a threat. *Id.* When a trained police officer makes a similar individualized assessment when deciding how to apply the department's protocol to an armed, violent individual, she must be afforded the discretion to respond to the dangerous situation she faces.

Title II of the ADA, and its implementing regulations, were aimed at eradicating public entities' policies and procedures that exclude individuals from their programs or discriminate on the basis of disability. While these policies and procedures require individual judgment as they are implemented, they are aimed at increasing individual agents' awareness of disability so as to prevent discrimination against disabled individuals, rather than at mandating that individual officers put the public at risk by analyzing a complex series of accommodations without regard to the exigencies of a particular context. An application of the ADA that would strip away the discretion afforded individual officers facing dangerous situations under the Fourth Amendment and § 1983 is found nowhere in the statute, its regulations, or the jurisprudence interpreting it, and would pose grave impediments to officers' ability to secure public safety.

II. THE NINTH CIRCUIT'S FOURTH AMENDMENT RULE WOULD UNACCEPTABLY CURTAIL OFFICERS' ABILITY TO RESPOND TO ACTIVE PUBLIC SAFETY THREATS.

This Court grounds its qualified immunity jurisprudence in the recognition that active executive decision-making is essential to the public interest. Fourth Amendment jurisprudence reiterates this principle by underscoring that police officers, in addition to receiving qualified immunity, are entitled to broad discretion in making an arrest, especially when the suspect is armed and poses a threat to the public. Application of the ADA's thoughtful, entity-wide analysis to an individual officer's split-second decisionmaking during an arrest is inconsistent with both the entity-focused analysis of the ADA and the broad discretion this Court has typically granted individual officers on the street.

A. This Court's Qualified Immunity Jurisprudence Recognizes That Officer Discretion in the Arrest Context Is Critical to Officers' Duty to Secure Public Safety.

This Court's grounds its qualified immunity jurisprudence in the recognition that "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer v. Rhodes*,

416 U.S. 232, 241 (1974). This recognition has given rise to a wide berth of discretion for official decisionmaking. In reaffirming the concept of qualified immunity in *Harlow v. Fitzgerald*, the Supreme Court stated that government officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818 (1982). Indeed, an officer is only held liable for his official actions when every "reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2078 (2011).

Deference to officers' discretion is particularly strong in the context of arrest. Not only are officers afforded qualified immunity when exercising discretionary duties relating to an arrest, but also the reasonableness of the arrest itself—the underlying Fourth Amendment claim—is judged "from the perspective of a reasonable officer on the scene," rather than that of an officer with perfect knowledge of all facts. *Graham v. O'Connor*, 490 U.S. 386, 396 (1989). The particular need to protect public safety when a suspect's actions present an imminent threat of violence, whether to the public, the officers, or the suspect herself, has given rise to the emergency aid and exigent circumstances exceptions

to the warrant requirement and influenced the scope of the reasonableness attributed to officers during the excessive force inquiry.

Uncertainty about the exact nature or likelihood of the risk at issue does not render an officer's response to a public safety threat unreasonable. In *Michigan v. Fisher*, the Court noted that "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception." 558 U.S. 45, 49 (2009). Instead, when the danger posed by the individual is uncertain, it is precisely this need to ascertain the threat to the public that triggers the officers' duty to intervene, even at risk to their own lives. This Court has stated that "so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering . . . to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur." *Georgia v. Randolph*, 547 U.S. 103, 118 (2006).

Similarly, an imminent threat to public safety may exist even when the subject has not yet engaged in criminal behavior. In *Ryburn v. Huff*, the officers announced themselves at the home of a teenager rumored to have threatened to "shoot up" his high school. 132 S.Ct. 987, 988 (2012). When no one answered the door, the officers called the student's mother to ask whether there were guns in the house,

but the student's mother, who indicated she was in the house with the student, abruptly hung up the phone. *Id.* The mother then came out of the front door, refused to allow the officers to interview her son inside, and on being asked whether there were guns in the house, ran back into the house. *Id.* at 989. The officers entered the house behind her. *Id.* In rejecting the Ninth Circuit's determination that "the officers really had no reason to fear for their safety or that of anyone else," this Court noted that "[i]t should go without saying . . . that there are many circumstances in which lawful conduct may portend imminent violence," thus justifying the officers' belief that warrantless entry was lawful. *Id.* at 991.

The need for officers to maintain broad discretion in ascertaining and responding to threats to the public safety is particularly salient in encounters with mentally ill individuals, which often give rise to special exigencies. In *Fisher*, this Court recognized that officers must act swiftly in response to the unpredictable and potentially dangerous behavior of emotionally disturbed individuals. 558 U.S. at 49. The Court held that the officers were justified in responding forcibly to a disturbance call regarding a violent mentally ill man even before "ruling out innocuous explanations for ominous circumstances," because "[t]he role of a peace officer includes preventing violence and restoring order." *Id.*

(quoting *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006)).

Officers also bear a duty to intervene when mentally ill individuals pose a danger to themselves. Such justification may apply even where the individual has not explicitly expressed suicidal intent. In *Fisher*, this Court noted that given the individual's violent outbursts, "it would be objectively reasonable to believe that . . . [he] would hurt himself in the course of his rage." 558 U.S. at 48. Similarly, circuit courts of appeals have not required that officers observe clear evidence of suicidal intent before intervening. The Seventh Circuit found that "the absence of evidence of [the individual's] suicidal intent or ideation in [the officers'] presence" did not make warrantless entry unreasonable, because the officers based their belief that the individual was potentially suicidal on the dispatch call and "these observations were clearly not available to the officers at the moment of entry." *Fitzgerald v. Santoro*, 707 F.3d 725, 731 (7th Cir. 2013). Similarly, the Eleventh Circuit ruled that an officer was "acting pursuant to his official duty to protect life, and was within his authority in carrying out that duty," when he "briefly removed [an individual] from the house to speak with and observe her to ensure that she was not suicidal" even after observing that she was still alive and she requested

that he leave. *Roberts v. Spielman*, 643 F.3d 899, 904 (11th Cir. 2011).

B. An Individual's Anticipated Resistance Resulting from Mental Illness Is One of Many Factors in a Complex Split-Second Decision, and Should Be Reviewed with the Same Deference as Officer's Other Assessments.

Below, the Ninth Circuit ruled that the officers' decision "to force the second entry, without taking Sheehan's mental illness into account" was not reasonable as a matter of law. *Sheehan v. City & Cnty. of S.F.*, 743 F.3d 1211, 1225 (9th Cir. 2014). This ruling ignores qualified immunity's role in allowing officers to rely on their training and experience when making such decisions. In reaching its conclusion, the court noted that "if 'it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining . . . the reasonableness of the force employed.'" *Id.* at 1227 (quoting *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003)). It is true that officers must consider an individual's relevant characteristics in assessing their response; however, emotional disturbance, like any other aspect of the circumstances, should be weighed by the officer in light of her training and experience and reviewed with the same deference as other

calculations made during rapidly changing encounters with violent individuals.

The Fourth, Fifth and Sixth Circuits have held that when a mentally ill or disabled individual is armed and violent, consideration of her mental capacity does not render officers' otherwise reasonable actions unreasonable. Stating that mental disability operates "[j]ust like any other relevant personal characteristic" in the Fourth Amendment calculus, the Fourth Circuit concluded that "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 Cnty.*, 216 F.3d 367, 372–73 (4th Cir. 2000). Similarly, the Fifth Circuit, in finding reasonable officers' entry into the bedroom of a mentally ill man, rejected the plaintiff's suggestion "to examine the circumstances surrounding the forced entry, which may have led to the fatal shooting, in evaluating the reasonableness of the officers' use of deadly force," because he "was engaged in an armed struggle with the officers, and therefore each of the officers had a reasonable belief that [he] posed an imminent risk of serious harm to the officers." *Rockwell v. Brown*, 664 F.3d 985, 988 (5th Cir. 2011). The Sixth Circuit has held that officers must take into account individuals' diminished capacity in determining the amount of

force necessary to subdue them. *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004). However, the Sixth Circuit has declined to extend this rule to violent, armed mentally ill individuals, holding that a suspect's "diminished capacity [does] not make him any less of a serious threat to the deputies in light of" the threat he poses. *Summerland v. Cnty. of Livingston*, 240 F.App'x 70, 77 (6th Cir. 2007).

In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court stated that "[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed." 533 U.S. at 205. Thus, a suspect's likely resistance is one factor in the complex calculus of an officers' discretionary decisionmaking, to which substantial deference should be afforded. Instead of providing any deference to the officers' on-the-spot decisionmaking, the Ninth Circuit's ruling effectively results in a *per se* rule that officers cannot maintain qualified immunity when entering the residence of an armed mentally ill individual over their objections, because the entry cannot be reasonable as a matter of law in light of the individual's anticipated resistance.

Such a rule would allow an individual to choose to terminate a search at any time by merely opting to object through violence rather than verbal

statements. The purpose of allowing exceptions to the warrant requirement is to allow police to intervene in emergency situations over the objections of the individual. To allow an individual to successfully thwart a lawful search through illegal conduct would contravene the purpose of the exception and undercut its application in the most critical circumstances. The exigent circumstances exception is most frequently applicable, and necessary, in those cases where an individual in the home is armed and violent—the very cases to which the Ninth Circuit rule would prevent officers from responding.

Secondly, the Ninth Circuit's rule would expose officers to second-guessing that would hamper their ability to protect the public from real threats. The fact that Sheehan's door was temporarily closed did not terminate the public safety threat she posed. Had the officers chosen not to intervene, Ms. Sheehan could have continued to pose danger to her social worker, other residents, or any member of the public who approached her dwelling, and the officers reasonably believed that she might be able to escape through her window.

The decision not to intervene in such a circumstance may itself give rise to potential tort liability, as well as intense public criticism for failure to respond to a known risk. For example, when the

public learned that police had received a safety complaint about Aurora theater shooter James Holmes one month prior to the shooting, many were outraged. *See, e.g.*, *Questions Mount over Actions of School Psychiatrist, Officer; Missed Warnings Anger Victims' Kin in Theater Rampage*, BALT. SUN, April 6, 2013, at 12A. To require officers to guess the outcome in advance and hope to be on the right side of uncertain facts in a dangerous situation involving an armed individual is the exact gamble that qualified immunity was intended to circumvent. As the Court observed in *Fisher*, "[i]t does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation" in which a violent mentally ill individual poses a threat to all those she might encounter. 558 U.S. at 49.

C. The Officers' Second Entry into Ms. Sheehan's Residence Was Not Unreasonable, Because Ms. Sheehan's Behavior Supported a Reasonable Belief That Violence Was Imminent.

In finding the officers' second entry unreasonable as a matter of law, the Ninth Circuit determined that the decision to breach the door was "a decision to cause a violent—and potentially deadly—confrontation with a mentally ill person without a countervailing need." It thus treated the second

entry as an independent encounter in which the officers provoked contact with Ms. Sheehan. While some circuits have found that a use of force immediately following a reasonable use of force may be unreasonable, they have found the second use of force unreasonable only when the suspect no longer poses a public safety threat, which was not the situation here. Furthermore, this Court has never applied such an analysis to the case of an armed individual actively threatening the officers or bystanders.

The deference afforded to officers in excessive force cases is especially clear when the suspect possesses a weapon or has harmed another individual. As this Court has pointed out, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm," deadly force is authorized. *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985). When a suspect is endangering the lives of others, officers are not obligated to select the "safe" option of inaction over an action that is potentially deadly to the suspect, but certain to end the danger to bystanders. *See Scott v. Harris*, 550 U.S. 372, 385 (2007) ("We think the police need not have taken that chance [that the suspect would have stopped driving recklessly if the pursuit ended] and hoped for the best.").

Ms. Sheehan's behavior falls squarely within the public safety risks that renders officers' use of force reasonable under this Court's jurisprudence. In *Ryburn*, the Court found that a mother's suspicious behavior after "refusing to answer a question about guns" was sufficient to create "an objectively reasonable basis for fearing that violence was imminent," although the officers had not confirmed the presence of a weapon and no one in the house had made threats during the encounter. 132 S.Ct. at 992. As in *Ryburn*, Ms. Sheehan's actions gave rise to an objectively reasonable basis for the officers to believe that violence was imminent. The officers knew that Ms. Sheehan had not taken her medication, had been acting strangely and had not eaten or slept, and had threatened her social worker, who determined that she needed to be involuntarily committed. *Sheehan*, 743 F.3d 1215–16. More importantly, in contrast to *Ryburn*, at the time the officers decided to breach Ms. Sheehan's door, she had assaulted the officers and threatened to kill them, and they had confirmed the presence of a weapon in the residence. *Id.*

The officers' decision to reenter Ms. Sheehan's residence is not analogous to those cases in which courts have determined that renewed force was unreasonable because the suspect did not continue to pose a threat to the officers or the public. In *Waterman v. Batton*, the Fourth Circuit analyzed

officers' shots into a moving car while the car accelerated toward them separately from shots fired after the vehicle passed, because only before the car had passed could the officers "have interpreted the acceleration in the face of their show of force as . . . [an attempt] to avoid capture by using his vehicle as a weapon." 393 F.3d 471, 479 (4th Cir. 2005). Similarly, in *Lamont v. New Jersey*, the Third Circuit held that officers were reasonable in opening fire as the suspect "yanked his right hand out of his waistband," because "[a]t that point, the troopers reasonably believed that [he] was pulling a gun on them." 637 F.3d 177, 184 (3d Cir. 2011). The court held that just moments later, continued fire was not reasonable, because the suspect's "weaponless right hand was fully visible." *Id.* In contrast, the officers here knew that Ms. Sheehan was armed and was still capable of effectuating assault, despite the fact that the door was closed at the moment.

The Fifth Circuit recently resolved a more analogous case involving police response to a disturbance call about a violent, schizophrenic, potentially suicidal individual. In that case, in assessing the reasonableness of the officers' decision to breach the door, the court noted that the individual, much like Ms. Sheehan, "was armed with two eight-inch knives; the officers knew that he suffered from mental-health problems, had previously exhibited violent behavior, and was

pounding on the walls of his room and yelling obscenities at the officers; and when he was shot, [he] was not fleeing from the officers, but running toward them." *Rockwell*, 664 F.3d at 988. In determining that the individual's misdemeanor assault by threat was sufficient to justify the officers' entry, the court observed that "the Supreme Court . . . [has never] held that all of the *Graham* factors must be present for an officer's actions to be reasonable; indeed, in the typical case, it is sufficient that the officer reasonably believed that the suspect posed a threat to the safety of the officer or others." *Id.*

This Court has declined to find a subsequent use of force unreasonable where a suspect presents an active and continuing public safety threat. In *Plumhoff v. Rickard*, the Court held that officers' use of deadly force was reasonable when the suspect's "outrageously reckless driving posed a grave public safety risk," despite the fact that the car had temporarily come to a stop, because "a reasonable police officer could have concluded . . . that [he] was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road." 134 S.Ct. 2012, 2021–22 (2014). Similarly, Officers Holder and Reynolds reasonably concluded that Ms. Sheehan remained a threat to herself, them, and the public, even though the door to her room was temporarily closed. She

remained emotionally agitated, threatening, and armed with a knife; furthermore, she could have exited her room, either through the door in order to confront the officers or, as the officers reasonably believed, through a potential fire escape. Joint App'x at 117 (quoting the deposition of Ms. Sheehan's social worker: "[T]here probably [is] a fire escape, but I don't know for sure"). As in *Plumhoff*, a reasonable officer could have concluded that had Ms. Sheehan been left alone, she would "once again pose a deadly threat for others." 132 S.Ct. at 2022.

Here, Officers Reynolds and Holder relied on their training and experience in determining that Ms. Sheehan continued to present an acute safety threat, based on the fact that she was armed and had assaulted them. Deference to such judgments is crucial for enabling officers to act based on the information available to them in the moment, without fear of liability constraining their willingness to make difficult decisions, including the use of potentially deadly force. Just as importantly, a fair reading of the Ninth Circuit's rule would require police to lay siege on dwellings where they find a dangerous, mentally disabled person, but without a concomitant rule telling them to lift that siege if the person does not voluntarily submit to arrest.

III. APPLICATION OF THE ADA IN THE CONTEXT OF ARRESTS OF VIOLENT, ARMED INDIVIDUALS UNDULY RESTRICTS THE ESTABLISHED DISCRETION OF POLICE OFFICERS.

Application of the ADA to law enforcement agencies at the policy and training level, but not to the situation-specific decisions of individual officers, provides for accommodations tailored to an agency's practices and resources while preserving the discretion of individual officers facing public safety risks. This discretion is consistent with the principles undergirding municipal liability and provides the type of considered accommodation required by the ADA. An individual officer's failure, in the moment, to comply with training or policies provided by the department may be evidence of the inadequacy of the officer's training, but consistent with the ADA's focus on entity-level decisionmaking, it should not be an independent basis for liability when the applicable training and policies reasonably accommodate the needs of individuals with disabilities.

Even when an officer is trained properly, entity-developed policies and procedures are not guaranteed to be successful in a dangerous, unpredictable, rapidly changing situation. Municipalities provide accommodations by

successfully developing and implementing mental health crisis response programs, but the nature of these programs is largely dependent on other locally available resources beyond a law enforcement agency's control. Entity-wide accommodations may be adopted in the form of policies tailored to provide all field officers strategies to respond to mentally ill individuals' behavior; however, these policies are most successful when deployed to ensure that an encounter with a mentally ill individual does not *become* violent. No protocol can infallibly calm a hostile, aggressive individual who has already threatened violence.

While application of the ADA in the law enforcement context is appropriate at the policy and training level, it should not extend to individual officers' decisions in confrontations with a violent, armed mentally ill individual. Application of the ADA to the arrest context would strip officers of the discretion afforded them under this Court's Fourth Amendment jurisprudence.

A. Successful Mental Health Crisis Intervention Models Rely Heavily on the Availability of Local Resources and May Not Resolve Every Situation Individual Officers Must Face.

Law enforcement agencies have been sensitive to the needs of individuals with mental illness by

providing training of officers and collaboration with mental health providers, in large part because it enhances the safety of their officers and the public. As the respondent conceded, San Francisco had a crisis intervention program in place and properly trained its officers. *See Sheehan*, 743 F.3d at 1216-17.

The successful implementation of mental health crisis intervention models, however, rests on more than just training programs for officers. The success of mental health interventions is limited by both the community resources required for the infrastructure of a full-scale intervention program and the upredictable, high-risk situations officers face in the field, some of which defy even the solutions offered by extensive, high-quality training.

A successful program requires crisis response sites equipped to respond to psychiatric, substance abuse, and medical emergencies; police must also secure no refusal policies and streamlined emergency intake. Henry J. Steadman et al., *A Specialized Crisis Response Site as a Core Element of Police-Based Diversion Programs*, 52(2) PSYCHIATRIC SERVS. 219 (2001). Developing the infrastructure of a full-scale intervention program is simply infeasible for rural communities, where mental health facilities are remote, officers respond to calls alone, and backup may be dozens of miles away.

Therefore, even if a municipality has instituted an appropriate training program, individual officers responding to calls in rural or disadvantaged communities with scant mental health resources may be unable to fully implement their training. A study of the Chicago Crisis Intervention Team ("CIT") program found that CIT officers in districts with dense mental health facilities resolved more encounters through referrals or without taking action than non-CIT officers, while CIT officers responding to calls in low-resource districts resolved disputes in the same manner as non-CIT officers. Amy C. Watson et al., *CIT in Context: The Impact of Mental Health Resource Availability and District Saturation on Call Dispositions*, 34(4) INT'L J. L. PSYCHIATRY 287 (2011).

Furthermore, even the best training cannot ensure a perfect resolution to every situation officers must face. While CIT training is often successful in preventing the escalation of an encounter from non-violent to violent, officers must also respond to situations in which a mentally ill individual has already exhibited violent behavior. Research on officers' perceptions of the effectiveness of physical and non-physical force in response to vignettes of encounters with increasingly agitated individuals suggests that while "CIT training may slow the advance toward forceful measures," the suspect's use of force remained "the most salient predictor of the

officer's use of force." Michael Compton et al., *Use of Force Preferences and Perceived Effectiveness of Actions Among Crisis Intervention Team (CIT) Police Officers and Non-CIT Officers in An Escalating Psychiatric Crisis Involving a Subject with Schizophrenia*, 37(4) SCHIZOPHRENIA BULL. 737 (2011).

In light of the disparities between the resources available in various localities, determination of what the appropriate mental health crisis intervention model might be is both complicated and dependent on multiple factors. An ADA analysis at the policy and training level would support the assessment of the program selected by the agency in light of the overall resources available to the agency, and under *Olmstead*, offer the agency discretion as to its policies in implementing that program. However, imposing ADA analysis on the moment of arrest would both ignore the contextual factors that shape outcomes of mental health crisis intervention and place the burden of achieving the benefits of a community-wide program on a single officer's decisions based on incomplete information and made under exigent circumstances.

B. Application of the ADA in the Arrest Context Is Inconsistent with the Discretion Traditionally Afforded Law Enforcement Officers.

Even the most sophisticated training and mental health partnership model cannot eradicate dangerous confrontations with mentally ill individuals, and in those situations, once officers have been properly trained, the policies underlying the broad discretion this Court has given law enforcement officers in the arrest context still apply. An analysis of officers' actions on the street, as opposed to at the policy and training level, would hold officers to impossible standards in emergency situations, in contradiction to the discretion afforded them under the Court's Fourth Amendment jurisprudence.

The volatile circumstances surrounding the arrest of a violent, armed individual defy the elements of ADA analysis, standing in sharp contrast to cases involving law enforcement encounters that courts have found require accommodations under the ADA. For example, courts have applied the ADA to the detainment and interrogation of individuals with hearing impairments to require predictable, standardized accommodations, such as the use of a qualified interpreter or an assistive communication device. *See*, *e.g.*, *Bahl v. Cnty. of Ramsey*, 695 F.3d

778 (8th Cir. 2012). The requirement for a sign interpreter, however, is distinct from providing a "comfort zone" to mentally ill individuals who pose a threat to public safety, because the accommodations that will resolve an accessibility problem for a hearing-impaired individual are predictable and implementable by the law enforcement agency as an entity.

Contrastingly, when an officer faces an encounter with a violent, armed mentally ill individual, it is often unclear, even in hindsight, which accommodations would have been successful. In January 2014, the International Association of Chiefs of Police ("IACP") developed and released a model policy designed to equip officers to "make difficult judgments about the mental state and intent of the individual . . . [and] use . . . special police skills, techniques, and abilities to effectively and appropriately resolve the situation." Int'l Ass'n of Chiefs of Police Nat'l Law Enf't Pol'y Ctr., *Responding to Persons Affected by Mental Illness or in Crisis* (Jan. 2014), at 1. The IACP model policy warns officers that they "should be prepared at all times for a rapid change in behavior." *Id.* at 2. The policy reminds officers that they "are not expected to diagnose mental or emotional conditions, but rather to recognize behaviors that are indicative of persons affected by mental illness or in crisis, with special

emphasis on those that suggest potential violence and/or danger." *Id.*

Policies like IACP's model ensure that officers are trained to enact de-escalation tactics and provide a "comfort zone" only when it is safe to do so, thus preserving their discretion to respond to public safety threats. The considerations that IACP included in its policy reflect the type of accommodations provided to mentally ill suspects through mental health crisis response programs nationwide. The IACP model policy contains a full array of procedures for identifying and responding to mentally ill individuals, including behavioral indicators of emotional disturbance and potential danger to self and others. Throughout its recommendations, the policy instructs officers to avail themselves of entity-wide resources designed to provide accommodations for individuals with mental illness: specifically, to request a backup officer in order to implement best practices for approaching and dealing with mentally ill persons, call for officers with specialized training in dealing with mental illness or crisis situations, and summon an immediate supervisor or officer-in-charge prior to taking custody of a potentially dangerous individual.

While the specific tactics recommended by an entity-wide policy are valuable for increasing the expertise and responsiveness of officers in the field,

officers must retain the discretion to apply these tactics in the "tense, uncertain, and rapidly evolving" situations in which officers have traditionally been afforded discretion in the civil rights arena. *Graham*, 490 U.S. at 397. Officers must rely on their training and the individual's objective behavior to assess an individual's risk of harm to themselves or the public based on factors such as statements made by the individual, the amount of self-control displayed by the individual, and the volatility of the environment. *Id.* Moreover, the risk of harm constantly changes: the IACP model policy recommends that "[a]ssessment of the individual and the situation must be ongoing throughout the contact beginning with the receipt of basic information about the individual and continuing until the contact is over." *Responding to Persons Affected by Mental Illness or in Crisis,* at 4.

It is in the context of confrontations with people with mental illness that the need for discretion in handling the situation is at its height. If officers are forced to make complex legal calculations assessing the reasonableness of each individual accommodation based on a multitude of factors, rather than simply relying on their training, hesitation and doubt will lead to more officer, civilian, and aggressor injuries and fatalities.

The question of whether a law enforcement agency has properly accommodated mentally ill individuals who pose a public safety risk should be analyzed with respect to the department's policies and training only. The broad discretion afforded to individual law enforcement officers under § 1983 in arrest settings should remain in place with respect to arrests of violent, armed mentally ill individuals .

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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