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* NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS, AND ASSOCIATION OF WASHINGTON CITIES IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association ("ICMA") is a nonprofit professional and

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief in letters filed with the Clerk of the Court.

educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The League of California Cities ("LCC") is an association of 473 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee ("Committee"), which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties ("CSAC") is a nonprofit corporation whose membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The Washington State Association of Municipal Attorneys ("WSAMA") is a nonprofit organization of municipal attorneys in Washington State. WSAMA members represent the 281 municipalities throughout Washington as both in-house counsel and as private, outside legal counsel. The Association of Washington Cities ("AWC") is a private, nonprofit corporation that represents Washington's cities and towns before the State Legislature, the State Executive branch and regulatory agencies. Its mission is to serve its members through advocacy, education and services. Often, WSAMA and AWC members represent police officers in lawsuits challenging the force employed, which increasingly involve encounters with the mentally ill.

Together, *amici curiae* NLC, UCSM, NACo, ICMA, LCC, CSAC, WSAMA, and AWC represent thousands of police agencies that employ hundreds of thousands of law enforcement personnel who will be directly impacted by the Court's decision in this case.

SUMMARY OF ARGUMENT

In this case, the Ninth Circuit held that police agencies may be held liable under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131 et seq. (2009), even when their officers use objectively reasonable force against a mentally ill suspect who is armed and violent. The Ninth Circuit further held that the defendant officers in this case

were not entitled to qualified immunity and could therefore be held liable under 42 U.S.C. § 1983 (1996). Both holdings ignore the practical reality faced by police officers who must routinely confront seriously mentally ill suspects who are armed and violent like Teresa Sheehan, the plaintiff in this case.

Police officers are not mental health professionals. Yet, they have become the de facto first responders to incidents involving the mentally ill as more mentally ill persons living in the community receive little or no treatment or do not comply with the treatment they do receive. Just like suspects who are not mentally ill, suspects who are mentally ill may engage in violent behavior that not only threatens the safety of officers and innocent bystanders, but also the suspects themselves.

Recognizing that encounters with mentally ill persons may require specialized responses, some local law enforcement agencies have developed new and innovative approaches for responding to mentally ill suspects. But there is no conclusive evidence that these specialized approaches reduce the rate or severity of injuries suffered during police encounters with mentally ill suspects. In fact, several studies suggest that these specialized approaches have *no* impact whatsoever on injuries or the use of force. This is not surprising. Situational factors – not the characteristics of the suspect – typically determine the outcome of a police encounter. Police officers also encounter a wide range of mental illnesses under very diverse circumstances, precluding any

one-size-fits-all approach. Finally, knowledge of a suspect's mental illness does not give officers any greater insight into whether a mentally ill suspect will act violently toward herself or others. Even psychiatrists with decades of special education, training, and experience in dealing with the mentally ill cannot predict with any reasonable degree of certainty whether an armed suspect with a serious mental illness will harm herself or others in an emergency situation.

Moreover, many law enforcement agencies, particularly those in smaller jurisdictions, lack the funds and access to mental health resources needed to implement the specialized approaches that have been developed for dealing with mentally ill suspects. These agencies may also have unique needs that may not be met by these approaches. As a result, law enforcement agencies that have adopted specialized approaches for dealing with mentally ill suspects are still the exception, rather than the norm.

Given this practical reality, it is not reasonable to expect a police officer to undertake special procedures to accommodate an armed and violent suspect's mental disability during an emergency situation. Nor can the officer be deemed plainly incompetent because he or she did not undertake those procedures. This Court should therefore hold that police agencies need not accommodate an armed and violent suspect's mental illness in an emergency situation under the ADA and that the officers in this case are entitled to qualified immunity.

A contrary holding will have serious consequences. Rather than risk liability for their use of reasonable force, police officers will likely hesitate or delay in confronting an armed and violent suspect who displays any sign of a mental illness. This not only places officers and innocent bystanders at risk of harm, it also places the suspects themselves at risk. The specter of liability will also stifle the new and innovative approaches needed to improve outcomes of police encounters with mentally ill suspects. Existing Fourth Amendment standards governing the use of force are more than sufficient to protect the rights of mentally ill suspects. Accordingly, this Court should reverse.

BACKGROUND

I. POLICE ENCOUNTERS WITH MENTALLY ILL PERSONS ARE INCREASING.

Over the past decades, the frequency of police encounters with the mentally ill has increased significantly. E. Fuller Torrey et al., *Justifiable Homicides by Law Enforcement Officers: What is the Role of Mental Illness* 4 (2013). This can been traced to the rising numbers of persons with mental disorders and the process of "deinstitutionalization" through which mentally ill persons who were formerly confined within locked institutions were released despite the limited availability of treatment services in the community. *See* Torrey et al., *supra*, at 7-8.

Jennifer Wood et al., *Police Interventions with Persons Affected by Mental Illness: A Critical Review of Global Thinking and Practice* 1 (2011) (citation omitted); Abigail S. Tucker et al., *Law Enforcement Response to the Mentally Ill: An Evaluative Review*, 8 Brief Treatment & Crisis Intervention 236, 237 (2008).

A. The Number Of Persons Suffering From An Untreated Mental Illness Has Steadily Grown.

One in 17 adults – i.e., about 13.6 million Americans – "live with a serious mental illness such as schizophrenia, major depression, or bipolar disorder." National Alliance on Mental Illness ("NAMI"), *Mental Illness Facts and Numbers* 1 (2013) (citation omitted). "[A]pproximately 6% of adults at any given time meet criteria for a serious mental illness that interferes with at least one important activity of daily living." Wood et al., *supra,* at 1 (citation omitted). And "nearly 30% of people with a mental illness also have an addiction disorder." *Id.* (citation omitted). Finally, "[a]pproximately 20 percent of state prisoners and 21 percent of local jail inmates have 'a recent history' of a mental-health condition." NAMI, *Mental Illness Facts and Numbers*, *supra*, at 1.

Despite the growing numbers of individuals with a serious mental disorder among the United States population, approximately 60 percent of adults with a mental illness "received no mental health services in the previous year." *Id.* Indeed, "most people with a

mental disorder do not receive treatment. . . ." Ronald C. Kessler et al., *Prevalence and Treatment of Mental Disorders, 1990 to 2003*, 352 New Engl. J. Med. 2515, 2522 (2005).

B. Since The 1960s, The Number Of Mentally Ill Persons Living In The Community Has Grown Dramatically Even Though Resources For Mental Health Services Have Not.

Changes in the treatment of mental illness since the 1960s have dramatically reduced the percentage of mentally ill persons in psychiatric facilities. In 1963, Congress passed the Community Mental Health Centers Construction Act, Pub. L. No. 88-164, 77 Stat. 282, which reduced the number of mentally ill persons in mental hospitals. As a result, the number of state psychiatric beds per 100,000 persons decreased from 339 in 1955 to 17 in 2005. Melissa Reuland et al., *Law Enforcement Responses to People with Mental Illnesses: A Guide to Research-Informed Policy and Practice* 4 (2009) (citation omitted). This process of deinstitutionalization resulted in the movement of thousands of persons with a severe mental illness from hospitals into the community. *Id.* As a result, "[p]ersons with ongoing, disabling psychiatric conditions now reside in every community." Wood et al., *supra*, at 1.

Although many persons with severe mental illness were released into the community, "adequate

community-based services to pick up the slack were never provided." Gary Cordner, *People with Mental Illness*, *in Problem Oriented Guides for Police Problem-Specific Guides Series* 7 (U.S. Dep't of Justice, Office of Community Oriented Policing Services, Ser. No. 40, 2006). "To this day, resources that were supposed to accompany deinstitutionalization have never materialized," IACP National Law Enforcement Policy Center ("IACP"), *Responding to Persons Affected by Mental Illness or in Crisis* 1, 1 (2014); *see also* Cordner, *supra*, at 7, and "[s]tudies show that most treatment for mental disorders falls below the minimum standards of quality," Kessler et al., *supra*, at 2520 (citation omitted). Even in communities that devote significant public resources to treating the mentally ill, there are mentally ill persons who do not receive adequate treatment or comply with their treatment regimens. *See, e.g.*, IACP, *Responding to Persons Affected by Mental Illness or in Crisis*, *supra*, at 4 ("Many persons who suffer from mental illness fail to use medication that has been prescribed for their diagnosed mental illness.").

The scarcity of mental health services has worsened in recent years as states have drastically cut their mental health budgets. From 2009 through 2012, states cut more than $1.6 billion in mental health services. California alone cut $764.8 million in mental health services. NAMI, *State Mental Health Cuts: The Continuing Crisis* 2 (2011).

These cuts have resulted in the "loss of services for the most vulnerable residents living with serious

mental illnesses." *Id.* at 3. "[B]oth inpatient and community services for children and adults living with serious mental illness have been downsized or eliminated. In some states, entire hospitals have been closed; in others, community mental health programs have been eliminated." *Id.* Due to these drastic cuts, a rapidly growing number of persons suffering from a serious mental illness who live in the community do not receive adequate treatment. As a result, "emergency rooms, homeless shelters, and jails are struggling with the effects of people falling through the cracks due to lack of needed mental health services and supports." *Id.* at 1.

II. LOCAL POLICE HAVE BECOME THE DE FACTO FIRST RESPONDERS FOR INCIDENTS INVOLVING THE MENTALLY ILL.

The dramatic rise in the number of persons with untreated mental illnesses living in the community has transformed local police into first responders for incidents involving the mentally ill. Torrey et al., *supra*, at 4; Reuland et al., *supra*, at 3. "During patrol duties, law enforcement officers, who often take on a mental health triage role, encounter many persons with serious mental illnesses (as well as alcohol and drug problems and developmental disabilities)." Michael T. Compton et al., *The Police-Based Crisis Intervention Team (CIT) Model: II. Effects on Level of Force and Resolution, Referral, and Arrest*, 65 Psychiatric Services 523, 523 (2014) ("Compton I"). These encounters often pose a serious risk of harm to

officers, suspects, and innocent bystanders. *See* Amy N. Kerr et al., *Police Encounters, Mental Illness and Injury: An Exploratory Investigation*, 10 J. Police Crisis Negot. 116, 117 (2010). Recognizing that dangerous behavior by mentally ill persons may pose a risk of violence and often necessitates a law enforcement response, every state has adopted legislation authorizing police to take into custody mentally ill persons who are a danger to themselves or others.[2]

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[2] *See* Ala. Code § 22-52-91 (1975); Alaska Stat. § 47.30.705 (1984); Ariz. Rev. Stat. § 36-525 (1989); Ark. Code Ann. § 20-47-210 (1989); Cal. Welf. & Inst. Code § 5150 (2014); Colo. Rev. Stat. § 27-65-105 (2011); Conn. Gen. Stat. § 17a-503 (2010); Del. Code Ann. tit. 16, § 5004 (2014); Fla. Stat. § 394.463 (2006); Ga. Code Ann. § 37-3-41 (1994); Haw. Rev. Stat. § 334-59 (2013); Idaho Code § 66-326 (2013); 405 Ill. Comp. Stat. 5/3-606 (2010); Ind. Code Ann. § 12-26-4-1 (2013); Iowa Code Ann. § 229.22 (2013); Kan. Stat. Ann. § 59-2953 (1998); Ky. Rev. Stat. Ann. § 202a.041 (1982); La. Rev. Stat. Ann. § 28:53 (2012); Me. Rev. Stat. tit. 34, § 3862 (2010); Md. Code Ann., Health-Gen. § 10-624 (2010); Mass. Gen. Laws Ann. ch. 123 § 12 (2010); Mich. Comp. Laws Ann. § 330.1427 (1995); Minn. Stat. Ann. § 253b.05 (2010); Miss. Code Ann. § 41-21-67 (2014); Mo. Ann. Stat. § 632.300 (1996); Mont. Code Ann. § 53-21-129 (2013); Neb. Rev. Stat. Ann. § 71-919 (2007); Nev. Rev. Stat. Ann. § 433a.160 (2007); N.H. Rev. Stat. Ann. § 135-C:29 (2014); N.J. Stat. Ann. § 30:4-27.6 (2009); N.M. Stat. Ann. § 43-1-10 (2013); N.Y. Mental Hyg. Law § 9.41 (1989); N.C. Gen. Stat. Ann. § 122c-262 (1997); N.D. Cent. Code Ann. § 25-03.1-25 (2013); Ohio Rev. Code Ann. § 5122.10 (2013); Oka. Stat. Ann. tit. 43a § 5-207 (2012); Or. Rev. Stat. Ann. § 426.228 (2013); 50 Pa. Cons. Stat. Ann. § 4405 (1966); R.I. Gen. Laws Ann. § 40.1-5-7 (1987); S.C. Code Ann. §§ 44-178-410, 44-178-430, 44-178-440 (1994); S.D. Codified Laws § 27a-10-3 (1991); Tenn. Code Ann. § 33-6-402 (2000); Tex. Health & Safety Code Ann. § 573.001 (2013); Utah Code Ann. § 62a-15-629

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As a result, local police officers have become the "first-line, around-the-clock, emergency responders, mediators, referral agents, counselors, youth mentors, crime prevention actors, and much more." Reuland et al., *supra*, at 3. "[C]alls to the police about crimes and disorder involving people with mental illness [have] increased," Cordner, *supra*, at 8, and "[p]olice today encounter persons with serious mental illnesses in a range of circumstances and settings – whether in a dangerous health crisis, an escalated domestic argument, a drug arrest, the scene of a minor public disturbance or a serious violent crime, in an urban encampment of the homeless, or in a hospital emergency department," Wood et al., *supra*, at 2. For example, in California, 28 counties reported more than 597,000 detentions of persons determined to be a danger to themselves, a danger to others, or gravely disabled from 2000 to 2007. Tim A. Bruckner et al., *Involuntary Civil Commitments After the Implementation of California's Mental Health Services Act*, 61 Psychiatric Services 1006, 1007-08 (2010) (analyzing California Department of Mental Health data).

In responding to calls for assistance, police must deal with many different mental illnesses – ranging from schizophrenia to major depression to bipolar

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(1953); Vt. Stat. Ann. tit. 18 § 7505 (1977); Va. Code Ann. § 37.1-67.01 (2013); Wash. Rev. Code § 71.05.153 (2011); W. Va. Code Ann. § 9-6-5 (1984); Wis. Stat. Ann. § 51.20 (1987); Wyo. Stat. Ann. § 25-10-109 (2013).

disorder to post-traumatic stress disorders. Cordner, *supra*, at 1. "[I]t is [also] crucial to appreciate that the vast majority of people with serious mental illness who become involved in the criminal justice system have co-occurring substance abuse disorders." John Monahan & Henry J. Steadman, *Extending Violence Reduction Principles to Justice-Involved Persons With Mental Illness*, *in Applying Social Science to Reduce Violent Offending* 245, 248 (J. Dvoskin et al. eds., 2012); *see also* Cordner, *supra*, at 7 ("[T]he people with mental illness the police encounter are likely to have substance abuse problems."); Peter H. Silverstone et al., *A Novel Approach to Training Police Officers to Interact with Individuals Who May Have a Psychiatric Disorder*, 41 J. Am. Acad. Psychiatry & L. 344, 344 (2013) ("Individuals with various psychiatric problems, including addictions, depression, and schizophrenia, have an increased probability of coming into contact with the police."). "In combination, psychopathology and abuse of alcohol and illicit drugs markedly increase the risk of violence and other criminal behavior." Wood et al., *supra*, at 2. Thus, police regularly receive "calls for service that involve people with mental illnesses whose violent behavior is at issue." Reuland et al., *supra*, at 6 (citations omitted). Many are "at risk of harming themselves." *Id.* at 5. "Members of the media, researchers, and police practitioners have stated repeatedly that police interactions with people with mental illness are among the most dangerous calls for service to which officers must respond." Kerr et al., *supra*, at 117.

III. KNOWLEDGE OF A SUSPECT'S MENTAL ILLNESS DOES NOT GIVE POLICE OFFICERS THE ABILITY TO PREDICT WITH ANY DEGREE OF CERTAINTY WHETHER THE SUSPECT WILL ACT VIOLENTLY IN AN EMERGENCY SETTING.

"[T]he goal of synthesizing the evidence into a coherent, comprehensive explanation of violence risk in people with serious mental illnesses . . . remains elusive." Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, Annals of Epidemiology 1, 5 (2014). Indeed, "psychiatrists' predictions of which [male] patients would be violent, *based on their clinical assessments in the emergency setting*, turned out to be only slightly more accurate than flipping a coin; and *they were no better than chance at predicting violence in female patients*." *Id.* at 6 (emphasis added). Thus, it is impossible for police officers – who are *not* mental health professionals – to predict with any reasonable degree of certainty whether a particular suspect will act violently in an emergency situation based on their knowledge of the suspect's mental illness.

This may be because the proportion of violent behavior caused by mental illness is "surprisingly small," Monahan & Steadman, *supra*, at 246, and because people with serious mental illnesses "represent highly heterogeneous clinical populations," Swanson et al., *supra*, at 5, and "often" behave violently "for the same reasons that non-mentally ill people engage

in violent behavior," *id.* at 3. Indeed, "[e]vidence from studies in criminology and developmental epidemiology has shown that risk factors for crime and violence are similar in persons with mental illness and in the general population. . . ." *Id.* at 4.

Of course, "the large majority [of people with serious mental illnesses] are *not* violent toward others." *Id.* at 3. But they are "more likely to commit violent acts than people who are not mentally ill." *Id.*, *see also* 2 David L. Faigman et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony*, *in Social & Behavioral Science* 141 (2013-2014 ed.). And the risk of violent behavior is far greater if the mentally ill person also suffers from a substance abuse disorder. *See* Swanson et al., *supra*, at 3, 4; Wood et al., *supra*, at 2.

"[M]any studies have [also] shown that suicide risk is substantially increased in persons with mental disorders." Swanson et al., *supra*, at 5. "Population attributable risk proportions for suicide associated with mental disorders are in the range of 47%-74%." *Id.* These "high rates of suicide in people with mental disorders extend to all diagnostic groups. . . ." Urara Hiroeh et al., *Death by Homicide, Suicide, and Other Unnatural Causes in People with Mental Illness: A Population-Based Study*, 358 The Lancet 2110, 2112 (2001). In addition, "the availability of lethal means such as firearms" or knives is a substantial environmental factor that contributes to the risk of suicide by mentally ill persons. Swanson et al., *supra*, at 5.

IV. ALTHOUGH LOCAL LAW ENFORCEMENT AGENCIES ARE DEVELOPING SPECIALIZED PROGRAMS FOR DEALING WITH THE MENTALLY ILL, THE IMPACT OF THESE PROGRAMS ON THE RATE AND SEVERITY OF INJURY IS UNCLEAR.

To address the challenges created by persons with mental illness, some local law enforcement agencies have collaborated "with mental health providers and advocates to design specialized responses to people with mental illnesses." Reuland et al., *supra*, at 9. Two primary models have been developed.

The first, known as the Crisis Intervention Team ("CIT") model, was pioneered by the City of Memphis and "trains sworn officers to provide crisis intervention services and act as liaisons to the formal mental health system. . . ." *Id.* "A fundamental aspect of the CIT model is a 40-hour training that provides officers with knowledge and techniques essential to identifying signs and symptoms of mental illnesses, de-escalating crisis situations, and making appropriate dispositions." Compton I, *supra*, at 524. CIT is the most popular model. Michael T. Compton et al., *A Comprehensive Review of Extant Research on Crisis Intervention Team (CIT) Programs*, 36 J. Am. Acad. Psychiatry & L. 47, 47 (2008) ("Compton II").

The second, known as the "co-responder model," "partners mental health professionals with law enforcement at the scene to provide consultation on mental-health related issues and assist individuals in accessing treatments and supports." Reuland et al.,

supra, at 9. This model may include "police-based mental health responses, in which the police department hires mental health consultants to assist with mental health crisis calls, and mental-health based specialized responses, which are typified by mobile crisis units." Compton II, *supra*, at 47.

Research indicates that these specialized law enforcement programs for responding to the mentally ill "may be an effective component in connecting individuals with mental illnesses who come to the attention of police officers with appropriate psychiatric services." *Id.* at 52. In addition to reducing the future risk of violence by those individuals, these programs achieve important "public health goals" regardless of how the treatment "relates to violence," Monahan & Steadman, *supra*, at 246, and "cost savings," Wood et al., *supra*, at 17.

But the impact of these specialized programs on the use of force and injury is "unclear." Kerr et al., *supra*, at 120. "[S]cant empirical evidence of [their] effectiveness is available," Melissa S. Morabito et al., *Crisis Intervention Teams and People with Mental Illness: Exploring the Factors that Influence the Use of Force*, 58 Crime & Delinquency 57, 58 (2012), and "no published studies have examined [their] impact on injuries," Kerr et al., *supra*, at 120 (citation omitted). In fact, "there has been very little research about the best training approaches." Silverstone et al., *supra*, at 344. Thus, "there are no currently accepted models that appear to have reproducibly positive outcomes." *Id.* at 345.

Indeed, consistent with studies suggesting that "specific training on de-escalation techniques may not decrease the number or severity of physical interactions between individuals with mental illness and health care providers," *id.* at 344, some studies suggest that "CIT training appears to have no effect on injuries in police encounters with people with mental illness," Kerr et al., *supra*, at 129; *see also* Wood et al., *supra*, at 22 (discussing Australian study finding that CIT-like program resulted in "no difference in the use of force" or "the degree to which police were injured during encounters"). Even studies suggesting that CIT training may have "an impact on officers' actions and use-of-force decisions" are, at best, inconclusive. Compton I, *supra*, at 527; *see also* Morabito et al., *supra*, at 71. For example, one study finding that CIT-trained officers were more likely to use "verbal engagement or negotiation" also found that "there was no difference in use of force between officers with CIT training and those without it." Compton I, *supra*, at 527. Another study finding that "a CIT officer is likely to respond with less force for an increasingly resistant demeanor in comparison with non-CIT officers" also presented evidence suggesting that "CIT officers are more likely to use higher levels of force." Morabito et al., *supra*, at 71. That study also concluded that "in a situation involving a physically resistant subject, *all* officers may find force necessary to control the situation and maintain safety of all involved." *Id.* (emphasis added).

The lack of evidence that CIT training reduces the risk or severity of injury is consistent with the fact that the rate of injury in police encounters with people with mental illnesses "is similar to their rate of occurrence in police encounters with members of the general population." Kerr et al., *supra*, at 129. "[T]he type of injuries [experienced in police encounters with mentally ill persons also] mirror those experienced in the general population." *Id.* Indeed, "the criminal justice literature overwhelmingly suggests that *situational factors* are the most predictive of the outcomes of these encounters *rather than characteristics of the individual*." *Id.* at 119 (citation omitted) (emphasis added); *see also* Morabito et al., *supra*, at 60. These situational factors include "demeanor, hostility, [ ] impairment," and "the type of and seriousness of the crime." Morabito et al., *supra*, at 60 (citations omitted). Thus, specialized programs designed to improve police encounters with the mentally ill – which may be beneficial for other reasons – may not reduce the risk or severity of injury.

V. WIDELY DIFFERING LOCAL LAW ENFORCEMENT RESOURCES AND NEEDS PRECLUDE A STANDARDIZED, ONE-SIZE-FITS-ALL APPROACH TO DEALING WITH THE MENTALLY ILL.

Although more and more local law enforcement agencies are creating specialized programs for dealing with persons with mental illnesses, Reuland et al., *supra*, at 9; Tucker et al., *supra*, at 245, they are

still the exception. "Few law enforcement agencies or their training programs will have the internal capacity or expertise to teach the entire range of topics that first responders require when working with people with mental illnesses." Melissa Reuland & Matt Schwarzfeld, *Improving Responses to People with Mental Illnesses: Strategies for Effective Law Enforcement Training* 9 (2008). Moreover, many communities do not have "an adequate pool of local experts who can provide aspects of this training to officers" or "the funds to coordinate a training initiative, including expenses related to contracting with trainers." *Id.*

This is especially so for smaller communities where neither model may be feasible or effective. *See* Cordner, *supra*, at 26-27. Many local law enforcement agencies have limited personnel and resources. In 2004, "there were 2,202 [law enforcement] agencies with one or two full-time personnel and over 3,200 with only two to four full-time personnel." Wood et al., *supra*, at 15. And "the bulk of police organizations at state and local levels employ[ed] 99 or less full-time personnel (16,777 out of 17,876)." *Id.* at 15-16 (citation omitted). Mental health providers also may not be available in the communities that these smaller agencies serve. Cordner, *supra*, at 27; *see also* Wood et al., *supra*, at 19. Indeed, "sufficient social work/mental health resources are rarely available to provide prompt mobile response to a majority of incidents." Cordner, *supra*, at 28. Thus, "a standardized procedure or 'model' for police response to the

mentally ill is problematic." Tucker et al., *supra*, at 245. Even in communities that have adopted specialized models, "the types of training vary widely in nature, design, duration, and timing. . . ." Silverstone et al., *supra*, at 344.

ARGUMENT

I. HOLDING POLICE AGENCIES OR OFFICERS LIABLE BECAUSE THEY FAILED TO ACCOMMODATE THE MENTAL DISABILITY OF AN ARMED SUSPECT IN AN EMERGENCY SITUATION VIOLATES FUNDAMENTAL PRINCIPLES UNDERLYING THE ADA AND QUALIFIED IMMUNITY.

A. It Is Unreasonable To Require Police Officers To Accommodate The Mental Illness Of An Armed Suspect In An Emergency Situation.

Application of Title II of the ADA, 42 U.S.C. §§ 12131 et seq., to police encounters with armed and violent suspects suffering from a mental illness assumes that a *reasonable* accommodation of the suspect's disability is possible in an emergency situation requiring split-second decisions. That assumption is wrong.

Any encounter with an armed suspect who suffers from a serious mental illness presents a significant risk of suicide as well as an elevated risk of violence to others. *See* Swanson et al., *supra*, at 3-5.

Yet, knowledge of the suspect's mental condition provides police officers with little or no additional insights into whether that suspect will act violently toward herself or others. *See id.* at 6. There is also no standardized approach for dealing with mentally ill suspects, Silverstone et al., *supra*, at 345, 354, and there is no conclusive evidence that any particular approach will, in fact, reduce the risk or severity of injuries, *see id.* at 345; Wood et al., *supra*, at 22; Kerr et al., *supra*, at 129.

Thus, no matter what they know about a suspect's mental condition, police officers cannot predict with any reasonable degree of certainty whether that suspect will act violently toward herself or others in an emergency situation or whether any particular approach will reduce the risk or severity of injury. As a result, there is no standard pursuant to which an officer can determine what accommodation, if any, he or she should employ in any given scenario. Exposing police agencies to ADA liability for their officers' reasonable exercise of force against an armed suspect who is mentally disabled therefore places these agencies in a no-win situation. The facts here provide a case in point. The Ninth Circuit concluded that the City and County of San Francisco could be held liable under the ADA because its officers did not "delay in entering" Sheehan's home. *Sheehan v. City and County of San Francisco*, 743 F.3d 1211, 1226 (9th Cir. 2014). But that delay could just as easily have subjected the agency to ADA (or tort) liability if Sheehan had committed suicide or harmed an

innocent bystander who may have been in her home or if she had escaped.

This is why Department of Justice regulations promulgated under the ADA do not require a public entity to permit an individual to participate in or benefit from its services, programs, or activities if the individual poses a "direct threat" to the health or safety of others. 28 C.F.R. §§ 35.139(a), 35.104 (defining "direct threat"). This is also why other circuits have held that it is *not* reasonable to expect police officers to accommodate an armed suspect's mental illness in a crisis situation that requires split-second decisions. *See De Boise v. Taser Intern., Inc.*, 760 F.3d 892, 899 (8th Cir. 2014); *Tucker v. Tennessee*, 539 F.3d 526, 536 (6th Cir. 2008), *cert. denied*, 558 U.S. 816 (2009); *Hainze v. Richards*, 207 F.3d 795, 801-02 (5th Cir. 2000), *cert. denied*, 531 U.S. 959 (2000). And this is why this Court should hold the same.

B. Because The Officers Could Not Predict Whether Sheehan Would Harm Herself Or Others If They Did Not Enter Her Room, They Are Entitled To Qualified Immunity.

For the same reasons articulated above, the officers in this case should have been accorded qualified immunity. "'Qualified immunity gives [police officers] breathing room to make reasonable but mistaken judgments,' and 'protects all but the plainly incompetent or those who knowingly violate the law.'"

Stanton v. Sims, 134 S. Ct. 3, 5 (2013) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011)). Thus, officers "will not be [held] liable for mere mistakes in judgment, whether the mistake is one of fact or one of law." *Butz v. Economou*, 438 U.S. 478, 507 (1978). If the lawfulness of an officer's actions is debatable, immunity attaches and bars liability for damages. *al-Kidd*, 131 S. Ct. at 2083; *see also Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("[I]f officers of reasonable competence could disagree on [whether the conduct was lawful], immunity should be recognized."). For "the statutory or constitutional question [to] be beyond debate," there must be controlling authority or "a robust 'consensus of cases of persuasive authority.'" *al-Kidd*, 131 S. Ct. at 2083, 2084 (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). And the constitutional or statutory right "must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Police officers cannot predict with any reasonable degree of certainty whether an armed suspect who is mentally ill will act violently, *see* Swanson et al., *supra*, at 6, or whether a particular approach will avoid injury, Silverstone et al., *supra*, at 345; Kerr et al., *supra*, at 129; Wood et al., *supra*, at 22. Thus, the actions of the officers in this case – which were made during a crisis situation requiring split-second judgments – cannot be deemed plainly incompetent, much less unreasonable. Under well-established precedents of this Court, these officers are entitled to qualified

immunity. *See Stanton*, 134 S. Ct. at 5; *Ryburn v. Huff*, 132 S. Ct. 987, 991-92 (2012).

II. HOLDING POLICE OFFICERS AND AGENCIES LIABLE WHERE THE USE OF FORCE WAS REASONABLE PUTS OFFICERS, SUSPECTS, AND THE PUBLIC AT RISK.

When dealing with armed and violent individuals, police officers "are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving" to protect themselves, the suspect, or innocent bystanders. *Graham v. Connor*, 490 U.S. 386, 397 (1989). In these exigent circumstances, hesitancy and delay often have serious consequences. This is true regardless of whether the suspect has a mental illness.

Exposing police officers to liability under the ADA or § 1983 for their reasonable use of force during encounters with armed and violent suspects who are mentally ill will likely induce hesitancy or delay by the officers. There are no standardized procedures for dealing with the wide spectrum of mentally ill suspects and exigent circumstances that have proven to be practical or effective in reducing injury. *See* Silverstone et al., *supra*, at 345; Tucker et al., *supra*, at 245; Cordner, *supra*, at 26-27. Nor do officers have any way of predicting the behavior of unpredictable suspects under unpredictable circumstances. *See* Swanson et al., *supra*, at 6. Left with no good options, police officers may be paralyzed into inaction.

This paralysis jeopardizes public safety. When confronted with armed and violent persons, officers often experience "perceptual and memory distortions . . . such as tunnel vision, time dilation, and auditory blunting." J. Pete Blair et al., *Reasonableness and Reaction Time*, 14 Police Q. 323, 328 (2011). As a result, even well-trained officers often cannot react and fire their weapons before a suspect can use deadly force against the officers or innocent bystanders – even if the officer has his gun aimed at the suspect. *Id.* at 335-36. Consistent with the results of this scientific research, this Court has long held that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn*, 132 S. Ct. at 991-92. Yet, exposing the police officers or the police agency in this case to liability under § 1983 or the ADA does just that. In doing so, the Ninth Circuit's decision places the health and safety of all police officers, suspects, and bystanders at risk.

The risk of officer hesitancy or delay to the mentally ill suspect may be especially great. If the Ninth Circuit's decision is affirmed, police officers may be better off avoiding or delaying encounters with armed and violent persons with mental illnesses rather than attempting to neutralize the threat they pose. But mentally ill persons present a heightened risk of suicide, Swanson et al., *supra*, at 5, and many police encounters with the mentally ill involve threats of suicide. Delays in engaging those persons under the

auspices of offering an accommodation may increase the likelihood that they will harm themselves.

The risk of harm to police officers, mentally ill suspects, and innocent bystanders will only increase as the number of police encounters with the mentally ill continues to rise. Courts should not supplant the judgment of police officers in the field with a prescribed approach to encounters with violent, mentally ill suspects. This is especially so given the dearth of evidence that any particular approach will provide greater protection from injury to officers, suspects, or innocent bystanders. *See* Silverstone et al., *supra*, at 345; Wood et al., *supra*, at 22; Kerr et al., *supra*, at 129. To protect public safety, officers must be able to take any necessary actions, including actions that will inevitably, with 20/20 hindsight, be alleged to have further agitated the mentally ill individual.

III. HOLDING POLICE OFFICERS AND AGENCIES LIABLE FOR THE USE OF REASONABLE FORCE WILL STIFLE INNOVATIVE APPROACHES TO DEALING WITH THE MENTALLY ILL AND DEPRIVE LOCAL GOVERNMENTS OF MUCH-NEEDED RESOURCES.

Recognizing that police officers often function as "armed social workers," local law enforcement agencies have developed specialized programs that train officers to recognize the signs of mental illness and identify strategies for dealing with mentally ill persons. Torrey et al., *supra*, at 9. But current research

on these programs is limited, and "the best methods for educating the police force remain uncertain." Silverstone et al., *supra*, at 344. Indeed, "there are no currently accepted models that appear to have reproducibly positive outcomes." *Id.* at 345. Moreover, studies suggest that specialized programs may have no effect on injuries experienced during police encounters with the mentally ill. *See, e.g.*, Kerr et al., *supra*, at 129; Wood et al., *supra*, at 22.

Despite this, the Ninth Circuit held that police agencies or officers may be held liable under the ADA or Fourth Amendment for the officers' reasonable use of force when the officers fail to take "reasonable" steps to de-escalate encounters with mentally ill persons. *Sheehan,* 743 F.3d at 1216-17. Specifically, the Ninth Circuit suggested that the officers "should have respected [Sheehan's] comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation." *Id.* at 1233. In doing so, the Ninth Circuit implies that this one-size-fits-all approach – developed with the benefit of 20/20 hindsight – will reduce the risk of injury during police encounters with mentally ill persons who are armed and violent.

But there are currently no evidence-based models for reducing injury during police encounters with mentally ill persons. *See* Silverstone et al., *supra*, at 345; Kerr et al., *supra*, at 129. Moreover, the diverse spectrum of mental illnesses that police encounter combined with the wide range of crisis situations that

may arise make a standardized approach ineffective and impractical. *See* Tucker et al., *supra*, at 245. As a result, exposing police officers and their government employers to liability in this case will likely result in the adoption of practices based on litigation risk, rather than empirical evidence. Those practices will likely include rigid approaches designed to avoid liability rather than reduce injury and improve outcomes.

As a result, the Ninth Circuit's decision, if affirmed, will likely discourage innovative approaches to police encounters with the mentally ill. Because the use of unproven approaches may expose law enforcement agencies to liability, these agencies will be reluctant to try new approaches for dealing with the mentally ill. Yet, new and innovative approaches are the key to improving outcomes. Indeed, "the need to design and tailor interventions suited to community contexts is essential." Wood et al., *supra*, at 36.

Even more troubling, the creation of new grounds for police liability will deprive local governments of the funds they need to develop and adopt better programs for dealing with the mentally ill. Cities and counties already "spend large sums of money to defend themselves against lawsuits when the officer is ultimately exonerated and the shooting is ruled justifiable." Blair et al., *supra*, at 325. Exposing cities and counties to liability when the use of force is reasonable will only increase the amount of money that they must devote to defending lawsuits, rather than

treating the mentally ill or improving police procedures for dealing with the mentally ill.

The harm to jurisdictions with small police forces is especially pernicious. Many lack the capacity, expertise, and funds to train their police officers and do not have access to the mental health resources needed to deal effectively with the mentally ill. Reuland & Schwarzfeld, *supra*, at 9. Moreover, many of the more accepted approaches to dealing with the mentally ill like CIT may not be suitable or effective for small jurisdictions. Cordner, *supra*, at 26-27. These jurisdictions have the greatest need for innovative approaches and for the resources needed to implement those approaches. Affirming the Ninth Circuit's decision will therefore have a disproportionate impact on the jurisdictions that can least afford it.

The proper approach to police encounters with mentally ill persons who are armed and violent should not be determined through litigation. By subjecting police officers and their municipal employers to liability when the use of force is reasonable, the Ninth Circuit's decision does just that. Accordingly, this Court should reverse.

IV. ASKING POLICE OFFICERS TO EXERCISE BETTER JUDGMENT IN CONFRONTING MENTALLY ILL PERSONS THAN MENTAL HEALTH PROFESSIONALS IS GROSSLY UNFAIR.

The primary job of police officers is to safeguard the public and keep the peace. They are not mental health professionals, and they are not trained to provide mental health treatment. Yet, police officers have been forced to play the role of social workers, psychiatrists, and psychologists. *See* Reuland et al., *supra*, at 3; Wood et al., *supra*, at 2. Forcing police officers to shoulder the burden of the limitations or shortfalls in our mental health system when injuries occur is grossly unfair.

Indeed, the successful treatment of mentally ill persons depends on many factors, including adherence to treatment regimens; effective case management; the availability of inpatient and outpatient treatment; provision of structured housing; and support from family and community members. When police officers are called to a crisis situation involving an armed and violent suspect with a mental illness, that suspect may be untreated or the suspect's treatment has failed. Police officers "commonly determine that a subject has a mental illness only when they arrive on the scene," Compton I, *supra*, at 528, and usually have limited information about the subject's mental illness and current state of deterioration, *see* Tucker et al., *supra*, at 241. Officers also often have limited options for handling the situation. *See id*. In

police encounters where injuries occur, the use of force that gave rise to the injuries may be justified based on an objective assessment of the circumstances. Blair et al., *supra*, at 325. Exposing officers to liability based on their objectively reasonable use of force in exigent circumstances places these officers in an untenable situation.

It is especially unfair to those police officers because they cannot predict with any reasonable degree of certainty whether an armed suspect with a mental illness will act violently toward herself or others in exigent circumstances. Even psychiatrists cannot make those predictions with any degree of accuracy "in an emergency setting." *See* Swanson et al., *supra*, at 6. It is also unfair because there is no conclusive evidence that any particular approach for dealing with an armed and violent person who suffers from a serious mental illness will avoid injury. *See* Silverstone et al., *supra*, at 345; Wood et al., *supra*, at 22; Kerr et al., *supra*, at 129. Holding police officers or agencies liable for the officers' use of reasonable force because the officers failed to make a prediction that trained mental health professionals could not make or because the officer failed to take an approach that no research has shown to reduce injury is not just unfair, it makes no sense.

V. EXISTING FOURTH AMENDMENT LIMITS ON THE USE OF FORCE SUFFICIENTLY PROTECT MENTALLY ILL SUSPECTS FROM INJURY DURING POLICE ENCOUNTERS.

Under the Fourth Amendment, an officer may only use any force that is reasonable. *Graham*, 490 U.S. at 396. Reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id*. (citation omitted). This standard ensures that police officers may only use force that is objectively reasonable under the circumstances. When those circumstances justify deadly force, officers need not use non-deadly alternatives[3] or halt their use of deadly force until the threat is over. *See Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014) ("[I]f lethal force is justified, officers are taught to keep shooting until the threat is over." (Quotation omitted)). Any other

[3] Officers have no duty to retreat under California law. Cal. Penal Code § 835a (peace officers need not retreat by reason of the resistance or threatened resistance of the arrestee); *accord State v. Allery*, 682 P.2d 312, 316 (Wash. 1984) (Washington law does not require retreat when "one is feloniously assaulted in a place where she has a right to be"). An en banc panel of the Ninth Circuit has also "reject[ed] th[e] premise" that "in an armed standoff, once a suspect is seized by virtue of being surrounded and ordered to surrender, the passage of time may operate to liberate that suspect, re-kindle the arrest warrant requirement, and require police to assess with each passing minute whether the circumstances remain exigent." *Fisher v. City of San Jose*, 558 F.3d 1069, 1076 (9th Cir. 2009) (en banc).

standard would require officers to exercise "superhuman judgment":

> In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.

Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994).

Existing Fourth Amendment standards are already sufficient to protect the rights of mentally ill suspects who are subjected to force by police in an exigent circumstance. Neither the ADA – which only requires reasonable accommodation – nor the Fourth Amendment – which only prohibits an unreasonable search or seizure – should impose additional protections for the mentally ill.

CONCLUSION

When confronting armed and violent suspects who are mentally ill, police officers have an incredibly

difficult job. They must not only protect themselves and any innocent bystanders, they must also protect the suspects themselves. To accomplish this, officers must make split-second decisions in tense, uncertain, and rapidly changing circumstances. Because police officers cannot predict with any reasonable degree of certainty whether mentally ill suspects will act violently or whether any particular approach will reduce the risk or severity of injury, holding officers liable for their reasonable use of force is not only unfair, it also places officers, innocent bystanders, and the suspects themselves at greater risk of harm. This is not what the ADA or § 1983 requires.

Accordingly, this Court should reverse the decision of the Ninth Circuit.

Respectfully submitted,

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