

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 *AMICUS CURIAE* OF THE AMERICAN
CIVIL LIBERTIES UNION, THE AMERICAN DIABETES
ASSOCIATION, THE EPILEPSY FOUNDATION, MENTAL
HEALTH AMERICA, THE NATIONAL DISABILITY
RIGHTS NETWORK, AND THE ARC, *ET AL.*,
IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are organizations that represent the interests of millions of Americans with disabilities. *Amici* and the people whose interests they represent are deeply committed to the proper interpretation and vigorous enforcement of the Americans with Disabilities Act (ADA), including the Act's requirement that public agencies provide safe and nondiscriminatory policing for people with disabilities. Full statements of interest from each of the *amici* are set forth in the Appendix to this brief.

SUMMARY OF ARGUMENT

It is critical to the lives of persons with many types of disabilities that police departments adopt and implement policies and practices that take disability into account during police interactions. Approximately half of all fatal police interactions involve persons with psychiatric disabilities.

As the City and County of San Francisco now acknowledge, Title II of the ADA requires nondiscrimination and reasonable modifications (also known as reasonable accommodations)² in policing

¹ The parties have lodged blanket letters of consent to the filing of *amicus curiae* briefs. No party has authored this brief in whole or in part, and no one other than *amici*, their members or their counsel has made a monetary contribution to the preparation or submission of this brief.

² See 42 U.S.C. § 12112(b)(5)(A) (2013) (defining disability discrimination in employment to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability” unless the accommodation would impose an undue

activities, including in the type of detention at the heart of this case. In the context of a person with a known psychiatric disability, who is in crisis and subject to involuntary mental health treatment, the ADA requires that police employ widely accepted policing practices that use containment, coordination, communication, and time to seek safe resolutions.

The application of the ADA to the arrest or detention of persons with disabilities does not leave police officers unprotected when they are endangered, or when they make good faith mistakes under difficult circumstances. The ADA provides a defense when officer actions are justified by a direct threat to officer safety or to the safety of the public. And proof of intentional discrimination is required for any award of damages under Title II, a standard that requires at least deliberate indifference.

The crisis intervention practices that take psychiatric disability into account are not “after the fact” recommendations proposed by Ms. Sheehan’s expert, as San Francisco argues, *see* Pet. Br. at 14, but are well-known strategies that have been taught

hardship); 28 C.F.R. § 35.130(b)(7) (2014) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability,” unless such modification would be a fundamental alteration); 42 U.S.C. § 12182(b)(2)(A)(ii) (defining disability discrimination in public accommodation to include “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities,” unless such modification would be a fundamental alteration).

to officers by policing experts for many years prior to the near-fatal shooting that occurred here. They are endorsed and taught by policing experts because they are safer for both officers and persons with disabilities. Nor are these practices inapplicable when a suspect with a disability appears to be dangerous. On the contrary, these practices were specifically designed for potentially dangerous situations. San Francisco's position—that the police should be free to forego these strategies in precisely the situation for which they were meant—makes no sense at all.

Whether a direct threat defense exists is measured by the objective factors accepted by this Court in *School Bd. of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273, 287–89 (1987), and adopted by the Department of Justice in its regulations implementing Title II of the Act. Here, considering the objective evidence, the probability of harm, and the effects of mitigation (that is, whether reasonable accommodation would have lessened any risk of harm), the undisputed facts do not establish San Francisco's direct threat defense as a matter of law.

This Court should affirm the Ninth Circuit's reversal of summary judgment for San Francisco on Teresa Sheehan's ADA claim. Ms. Sheehan is protected by the ADA and is entitled to pursue her claim.

ARGUMENT

I. THE ADA APPLIES TO THE ARREST AND DETENTION OF PEOPLE WITH DISABILITIES AND REQUIRES THAT THEIR DISABILITIES ORDINARILY BE TAKEN INTO ACCOUNT.

A. The ADA Plainly Applies to Arrests and Detentions.

The ADA is a landmark civil rights law.³ Title II of the ADA prohibits discrimination by any public agency, and it applies broadly to all of “the services, programs, or activities of a public entity.” 42 U.S.C. §§ 12131, 12132 (2013).⁴ Here, as in *Pennsylvania Dep’t of Corrections v. Yeskey*, 524 U.S. 206, 209–12 (1998), there is no basis in the statutory language for excluding arrests or detentions by police officers. Guidance documents issued by the U.S. Department of Justice confirm that that the Act applies to arrests

³ *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (“In the ADA, Congress provided [a] broad mandate. See 42 U.S.C. § 12101(b). In fact, one of the Act’s ‘most impressive strengths’ has been identified as its comprehensive character, . . . and accordingly the Act has been described as ‘a milestone on the path to a more decent, tolerant, progressive society[.]’ To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life”) (citations omitted).

⁴ *Pa. Dep’t of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (“As we have said before, the fact that a statute can be ‘applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.’”) (citations omitted).

and detentions.⁵ Committee reports on the ADA show Congress’s intent to cover all activities of public agencies, including police activities such as arrests.⁶

⁵ 28 C.F.R. pt. 35, app. B (2014) (“The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities.”); *id.* (“[T]itle II applies to anything a public entity does.”); U.S. Dep’t of Justice, Civil Rights Div., *The ADA and City Governments: Common Problems* (2008) (“When dealing with persons with disabilities, law enforcement agencies often fail to modify policies, practices, or procedures in a variety of law enforcement settings—including citizen interaction, detention, and arrest procedures. . . . When interacting with police and other law enforcement officers, people with disabilities are often placed in unsafe situations or are unable to communicate with officers because standard police practices and policies are not appropriately modified.”); U.S. Dep’t of Justice, Civil Rights Div., *Commonly Asked Questions About The Americans With Disabilities Act And Law Enforcement* (2006) (“The ADA affects virtually everything that officers and deputies do, for example: . . . arresting . . . suspects[.]”); U.S. Dep’t of Justice, Civil Rights Div., *Communicating with People Who Are Deaf or Hard of Hearing: ADA Guide for Law Enforcement Officers* (2006).

⁶ House Comm. Judiciary, H.R. Rep. No. 101-485, pt. 3, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473 (“In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures.”); House. Comm. Educ. & Labor, H.R. Rep. No. 101-485, pt. 2, at 39, 85 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 321, 367 (“[I]n one case in San Diego, California, a deaf woman died of a heart attack because the police did not respond when her husband tried to use his TDD to call 911[.]”); *accord* 136 Cong.

While the Fifth Circuit found an unwritten exception in the Act excluding arrests, the Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits, and possibly the Fifth Circuit in a different panel, have all applied the ADA to arrests and related police interactions.⁷ Indeed, even the City of San Francisco now

Rec. 11,461 (1990) (statement of Rep. Mel Levine) (“Regretfully, it is not rare for persons with disabilities to be mistreated by the police. Sometimes this is due to persistent myths and stereotypes about disabled people. At other times, it is actually due to mistaken conclusions drawn by the police officer witnessing a disabled person’s behavior. . . . Although I have no doubt that police officers in these circumstances are acting in good faith, these mistakes are avoidable and should be considered illegal under the Americans with Disabilities Act. . . . One way to cut down on these incidents is for police officers to receive training about various disabilities.”).

⁷ *Sheehan v. City & Cnty. of S.F.*, 743 F.3d 1211, 1231–33 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 702 (2014); *Roberts v. City of Omaha*, 723 F.3d 966, 973 (8th Cir. 2013) (“[T]he ADA and the Rehabilitation Act apply to law enforcement officers taking disabled suspects into custody.”); *Seremeth v. Bd. of Cnty. Comm’rs Frederick Cnty.*, 673 F.3d 333, 338 (4th Cir. 2012) (“[I]n light of *Yeskey*’s expansive interpretation, the ADA applies to police interrogations”); *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1084–85 (11th Cir. 2007) (noting that the final clause of Section 12132 “is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.”) (citation omitted); *Anthony v. City of New York*, 339 F.3d 129, 140–41 (2d Cir. 2003); *Delano-Pyle v. Victoria Cnty., Tex.*, 302 F.3d 567, 574–76 (5th Cir. 2002) (applying ADA to sobriety test of deaf driver suspected of intoxication); *Thompson v. Williamson Cnty., Tenn.*, 219 F.3d 555, 558 (6th Cir. 2000) (applying ADA to police response to 911 call); *Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999) (“[A] broad rule categorically excluding arrests from the scope of Title II . . . is not the law.”); *Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207, 1214–15 (D.C. Cir. 1997); *Chisolm v. McManimon*, 275 F.3d 315, 324–29 (3d Cir. 2001)

concedes that its actions in this case are covered by the ADA.⁸ The ADA applies to arrests and detentions.

B. The ADA Requires Police Agencies, Like All Others, to Take Disability into Account, with Due Regard for the Nature of Police Work.

Under the ADA, public agencies must ensure even-handed treatment and equal opportunity. To provide such equality, the ADA requires government agencies to take disability into account by making reasonable modifications of their policies and practices where needed. 42 U.S.C. § 12132, 28 C.F.R. § 35.130(b)(7) (2014). As Justice Ginsburg wrote in her concurring opinion in *Tennessee v. Lane*: “Including individuals with disabilities among people who count in composing ‘We the People,’ Congress understood . . . would sometimes require not blind-folded equality, but responsiveness to difference; not indifference, but accommodation.” *Lane*, 541 U.S.

(applying ADA to jail intake procedure). *But see Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) (“[W]e hold that Title II does not apply to an officer’s on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer’s securing the scene and ensuring that there is no threat to human life.”); and *see also Tucker v. Tennessee*, 539 F.3d 526, 531–36 (6th Cir. 2008) (questioning application of ADA to arrest but ruling that “even if the arrest were within the ambit of the ADA, the district court correctly found that the City Police did not intentionally discriminate against [plaintiffs] because of the their disabilities in violation of the ADA.”)

⁸ The absence of any dispute among the parties about whether the ADA applies suggests that Certiorari was improvidently granted on the first question. *See Point III.B, infra.*

509, 536 (2004). The regulations and guidance of the U.S. Department of Justice confirm that the requirement that practices be modified to take disability into account applies to arrest and detention.⁹

That requirement, however, does not prevent police agencies from safely and effectively doing their work. Modifications to take account of disability are not required where there is a direct threat to the safety of officers or to members of the public. *See Arline*, 480 U.S. at 288; 28 C.F.R. §§ 35.104, 35.139. Moreover, in challenges to the good faith acts of government agencies, including police departments, courts require a showing of intentional discrimination to support an award of damages.¹⁰ This means that at the least, a plaintiff must show deliberate indifference.¹¹ And individual police officers face no liability under the ADA.¹²

⁹ *See supra* note 5.

¹⁰ *Delano-Pyle v. Victoria Cnty., Texas*, 302 F.3d 567, 575 (5th Cir. 2002). *See also Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138-39 (9th Cir. 2001); *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 263 (3d Cir. 2013); *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 344-45 (11th Cir. 2012); *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011); *Nieves-Marques v. Puerto Rico*, 353 F.3d 108, 126 (1st Cir. 2003); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1152-53 (10th Cir. 1999); *Bartlett v. N.Y. State Bd. of Law Examiners*, 156 F.3d 321, 331 (2d Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999).

¹¹ *Durrell*, 729 F.3d at 263; *Liese*, 701 F.3d at 344-45; *Meagley*, 639 F.3d at 389; *Duvall*, 260 F.3d at 1138-39; *Powers*, 184 F.3d at 1153; *Bartlett*, 156 F.3d at 331.

¹² 42 U.S.C. §§ 12131(1), 12132.

As Point II below demonstrates, the kinds of modifications the ADA requires for arrests and detentions are in fact what sound police practice dictates for the safety of officers, people with disabilities and the public. By requiring that disability be taken into account in arrest and detention, but at the same time allowing an exception for direct threats as well as limiting damages liability, the ADA sensitively accounts for the needs of both police agencies and people with disabilities.

II. FAILING TO TAKE ACCOUNT OF DISABILITY IN ARREST AND DETENTION OFTEN LEADS TO TRAGIC CONSEQUENCES.

A. Persons with Many Types of Disabilities Face Dangerous and Sometimes Lethal Outcomes When Law Enforcement Officers Fail to Take Disability into Account.

Hundreds of Americans with disabilities die every year in police encounters, and many more are seriously injured. Many of these deaths and injuries are needless, the tragic result of police failing to use well-established and effective law enforcement practices that take disability into account. Such practices are widely understood and widely used in police encounters to protect officers, the public, and people with disabilities. What follows is a brief summary of the harms that occur when police do not use practices that take disability into account including, as in this case, psychiatric disability.

i. People who are deaf or hard of hearing.

Even when police officers know a person is deaf or hard of hearing, the officers often misperceive their actions and treat them as uncooperative. *See, e.g., McCray v. City of Dothan*, 169 F. Supp. 2d 1260, 1269–70, 1275–76 (M.D. Ala. 2001) (officers knew plaintiff was deaf and could not read lips, but perceived him as uncooperative; finding triable evidence on ADA claim where officers slammed plaintiff's head on a restaurant table hard enough to break it, used a painful chokehold on him, forcibly removed him from the restaurant, and arrested him), *aff'd in part, rev'd in part, on other grounds*, 67 F.App'x 582 (11th Cir. 2003), *available at* 2003 WL 23518420.¹³ Police officers often make it difficult for deaf or hard of hearing people to communicate, for example by handcuffing their hands behind their backs.¹⁴ Officers may mistake deaf individuals' use of

¹³ *See also Lewis v. Truitt*, 960 F. Supp. 175, 178–79 (S.D. Ind. 1997) (denying summary judgment for police department on ADA claim where officers visiting residence to transfer custody of minor child refused to believe that grandfather was deaf, and forcibly arrested him, causing contusions and severe internal injuries).

¹⁴ Scott Sandlin, *APD, Jail Change Handling of Deaf*, Albuquerque J., Sept. 2, 1995, at A1 (“Officers, who thought he was a patron being ejected from a nearby restaurant for disturbing the peace, forced him to the ground and handcuffed him. That rendered him unable to communicate using American Sign Language, his primary means of communication, even though he tried to let the officers know he couldn't hear and etched the initials ADA into the dirt near his bus bench.”); *see also* 136 Cong. Rec. 11,461 (1990) (statement of Rep. Mel Levine) (“Many times, deaf persons who are arrested are put in handcuffs. But many deaf persons use their hands to

sign language for aggressive behavior.¹⁵ When a deaf individual reaches for a pen and paper to pass notes with a police officer, or a printed card stating that he or she is deaf, officers sometimes assume that the person is reaching for a weapon and respond with lethal force.¹⁶

ii. Persons with disabilities such as epilepsy, diabetes, stroke, or cerebral palsy.

Persons with disabilities such as epilepsy,¹⁷

communicate, either through sign language or by writing a note to a nondisabled person who does not know sign language. The deaf person thus treated is completely unable to communicate.”).

¹⁵ Hetty Chang, *Hawthorne Police Accused of Beating Deaf Man*, NBC L.A. (Feb. 18, 2014, 3:43 pm), <http://www.nbclosangeles.com/news/local/lawsuit-hawthorne-police-allegedly-beat-deaf-man-245916161.html> (describing allegation that Hawthorne police assaulted and tasered deaf man, who was trying to free his hands from the officer’s grip to gesture that he could not hear); *Meister v. City of Hawthorne*, No. CV-14-1096-MWF (SHx), 2014 WL 3040175, at **1, 6 (C.D. Cal. May 13, 2014) (denying Hawthorne’s motion to dismiss); Julie Scharper, *Eroding a Wall Between Police, the Deaf*, Balt. Sun, Mar. 9, 2009, at 1A (noting that, in emergency or emotional situations, deaf people “sign with larger and more dramatic gestures . . .”).

¹⁶ Burt Herman, *Hearing Impaired Present Special Problems, Opportunities for Police*, Miami Herald, Dec. 14, 1997, at 5B (describing how a deaf individual who “was reaching for a card that would have explained he was deaf” was fatally shot by police because police mistook his action as a threat of force).

¹⁷ Ebony Walmsley, *Epileptic Man Files Suit Against Hamden Police Over Use of Taser*, New Haven Reg., Jan. 26, 2014, at A1 (describing how a man was tasered by two officers while experiencing a seizure in his car, despite a passenger explaining that the man had epilepsy); *Fera v. City of Albany*, 568 F. Supp. 2d 248, 259 (N.D.N.Y. 2008) (finding a triable issue on

diabetes,¹⁸ cerebral palsy,¹⁹ and disabilities resulting

plaintiff's Title II ADA claim as to whether police officers had knowledge of plaintiff's epilepsy and that she was about to have a seizure when they placed her alone in the back of a van after arresting her); *accord* H.R. Rep. No. 101-485, pt. 3, *supra* note 6, at 50; *see also* 136 Cong. Rec. 11,461 (1990) (statement of Rep. Mel Levine) ("Persons with epilepsy who are having seizures are often inappropriately dealt with by the police."); *accord* 136 Cong. Rec. 11,471 (1990) (statement of Rep. Steny Hoyer) ("[P]ersons who have epilepsy are sometimes inappropriately arrested because police officers have not received proper training to recognize seizures and to respond to them. In many situations, appropriate training of officials will avert discriminatory actions.").

¹⁸ *Graham v. Connor*, 490 U.S. 386, 388–89, 397 (1989) (vacating directed verdict for law enforcement officers in section 1983 claim brought by diabetic individual who sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder when arrested by police who misperceived his behavior during an insulin reaction); Gina Damron & Tammy Stables Battaglia, *Cops Beat Diabetic, Suit Alleges; Man's Low Blood Sugar was Mistaken for Drunkenness*, Detroit Free Press, Sept. 22, 2008 (describing how a man with diabetes who experienced a hypoglycemic episode while driving was allegedly thrown headfirst into the ground, resulting in brain injury leaving him comatose, despite the officers seeing his insulin pump and diabetes equipment in the vehicle).

¹⁹ Natalie Neysa Alund, *Man Alleges False Arrest Lenoir City Resident with Cerebral Palsy Sues Sheriff, 4 Others*, Knoxville News-Sentinel, June 6, 2011, at A1 (describing how a man with cerebral palsy accidentally hit a dog while driving, and subsequently tried to report the incident but was arrested for drunk driving despite efforts to reassure the officers that he was disabled); *Bermudez v. Ahrens*, No. 00 C 50365, 2002 WL 1803741, at *1 (N.D. Ill. Aug. 6, 2002) (denying defendants' motion for summary judgment on Section 1983 excessive force claim where officer repeatedly tried to pull the left arm of a woman with cerebral palsy behind her back, despite encountering resistance and being told by the woman that it

from a stroke are sometimes mistakenly thought by police to be intoxicated or using drugs. It is all too common that individuals with these disabilities are subjected to significant and unnecessary force by officers even where the condition is known or knowable and the situation can be safely resolved through a simple accommodation. *See, e.g., Schreiner v. City of Gresham*, 681 F. Supp. 2d 1270, 1279 (D. Or. 2010) (denying summary judgment where police tasered a woman with known diabetes multiple times in situation where medical personnel was on the scene and where plaintiff, as a result of a dangerously low blood sugar, was incoherent and unable to respond to orders); *McAllister v. Price*, 615 F. 3d 877, 886 (7th Cir. 2010) (denying summary judgment where plaintiff with diabetes and wearing a medical alert necklace, in a severe hypoglycemic state and unresponsive to officer's order, was thrown and kned to the ground, and handcuffed, resulting in broken hip and bruised lung); *Jackson v. Inhabitants of Town of Sanford*, Civ. No. 94-12-P-H, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994) (denying defendant's motion for summary judgment where plaintiff, who had a physical disability resulting from a stroke, was pulled over and arrested by police officers because they perceived his disability-related conduct to be the result of drug or alcohol abuse, and noting that: "Title II of the ADA clearly applies to acts of discrimination by a public

was her bad arm and could not go behind her back (due to her cerebral palsy)); *see also* 136 Cong. Rec. 11,461 (1990) (statement of Rep. Mel Levine) ("[I]t is not unusual for a person with cerebral palsy, who might walk in a staggering manner, to be mistaken for someone who is drunk.").

entity against a disabled individual.”).

iii. *Autistic persons.*

Persons with autism spectrum disorder (ASD) also face physical injury and death when their behavior is misinterpreted during encounters with law enforcement. An autistic person may take longer to process and understand information, and may be unable to follow instructions promptly.²⁰ An autistic person may take instructions very literally, or be unable to maintain eye contact. Some autistic persons may repeat words or imitate officers.²¹ These behaviors can be misunderstood as being rude, evasive, or suspicious. Some autistic persons, unable to tolerate the sensory overload of a police interaction, such as lights, sirens, uniforms, and loud voices, may scream or try to flee the situation.²² Often the police response aggravates the individual’s distress, further impairing the ability to

²⁰ In 2003, a 15-year-old autistic boy named Paul Childs was shot and killed at his home by Denver police within 32 seconds of their arrival when he did not drop a knife as ordered. Elizabeth Hervey Osborn, Comment, *What Happened To “Paul’s Law”?: Insights on Advocating for Better Training and Better Outcomes in Encounters Between Law Enforcement and Persons with Autism Spectrum Disorders*, 79 U. Colo. L. Rev. 333, 335–37 (2008).

²¹ Sarah Burge, *Mother Files Suit over Son’s Death*, Press-Enter. (Riverside, Cal.), May 28, 2007, at B1 (“[A person with ASD] may simply imitate the [police] officers, which can spell trouble if officers are loud and aggressive.”).

²² Osborn, *supra* note 15, at 343 (“[T]he presence of police—lights and sirens, uniforms, loud and unfamiliar voices, barking dogs—often makes a difficult situation worse by contributing to the individual’s sensory overload.”).

communicate or comply.²³ The result can be death.²⁴

iv. Persons with intellectual disability.

Individuals with intellectual disability may “not understand commands [or] instructions ... be overwhelmed by police pressure[,] ... [or] act upset at being detained and/or try to run away[.]”²⁵ In a

²³ *Id.* at 343–44 (“Traditional law enforcement techniques for controlling and containing such a situation are ineffective and may provoke further escalation or a violent physical outburst by the person with ASD. Such outbursts do not result from ‘meanness or acts of purposeful injury to others,’ but rather they are a reaction to the overwhelming environmental stimuli. Paradoxically, the more force a police officer applies to gain control over the situation, the more dangerous and out of control the situation likely becomes.”).

²⁴ *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 900–09 (6th Cir. 2004) (upholding jury verdict against officers whose forceful restraint caused death of Calvin Champion, a nonverbal, nonresponsive autistic person); Douglas Quan, Meghan Lewit & Kimberly Trone, *Sheriff: Deadly Fight Provoked*, Press-Enter. (Riverside, Cal.), July 22, 2006, at B1 (describing July 2006 arrest-related death of 21-year-old autistic man Raymond Mitchell who hid in his mother’s bedroom closet).

²⁵ Leigh Ann Davis, *People with Intellectual Disability in the Criminal Justice System: Victims & Suspects*, The Arc, www.thearc.org/what-we-do/resources/fact-sheets/criminal-justice (last updated Feb. 2015); *see also* Michelle Bradford, *Few Answers Offered for Springdale Family in Son’s Fatal Shooting*, Ark. Democrat-Gazette, Mar. 10, 2006 (describing fatal shooting of 21-year-old man with an intellectual disability and cerebral palsy after, according to police, he failed to follow instructions); *Fonseca v. City of Fresno*, No. 1:10-cv-00147 LJO DLB, 2012 WL 44041, at **1, 8, 12 (E.D. Cal. Jan. 9, 2012) (describing violent encounter with police that occurred after man with an intellectual disability did not follow verbal commands, and denying summary judgment on constitutional claims); Tim

recent case, Ethan Saylor, a 26-year-old man with Down Syndrome, died during an altercation with off-duty Maryland police officers who were working as security guards at a movie theater in January 2013. Although Mr. Saylor's full-time aide explained his disability to the officers, stated that his mother was coming to help, and requested that the officers wait for Mr. Saylor to calm down, the officers refused, and forcibly dragged him from his seat, causing fatal injuries. *Estate of Saylor v. Regal Cinemas, Inc.*, Civ. Action No. WMN-13-3089, 2014 WL 5320663, at **1–2 (D. Md. Oct. 16, 2014).²⁶

Sturrock, *Lawsuit: Officer Attacked Retarded Male*, Macon Telegraph (Ga.), Sept. 19, 2006 (describing lawsuit arising from 2004 incident in which officer assaulted individual with intellectual disability who did not comply with officer's verbal commands); *Redding v. Chesnut*, No. 5:06-CV-321 (CDL), 2008 WL 4831741, at *8 (M.D. Ga. Nov. 3, 2008) (dismissing ADA claim where officer "did not know or have reason to know that Plaintiff was developmentally disabled when [he] knocked Plaintiff to the ground and attempted to restrain him.").

²⁶ As detailed in a federal lawsuit filed by his estate, Mr. Saylor had paid for and watched a movie, accompanied by his full-time aide, as he had done hundreds of times before. This time, he wanted to see the movie a second time without purchasing a second ticket, and sat quietly in his seat, refusing to leave. Although his aide explained that Mr. Saylor had Down Syndrome, that he would react negatively if touched, that he needed time to calm down, and that his mother was on her way, the officers refused to wait. They entered the theater and dragged Mr. Saylor to the back, handcuffed him, and forced him to the ground, causing the injuries that killed him. *Estate of Saylor*, 2014 WL 5320663 at **1–2.

v. *Persons with psychiatric disabilities.*

Persons with significant psychiatric disabilities face the greatest risk of injury or death during their encounters with law enforcement. During mental health crises, individuals with psychiatric disabilities are often shot or beaten when they cannot follow the orders of police officers.²⁷ While complete data are not available,²⁸ it is estimated that about half of fatal police encounters involve persons with psychiatric disabilities.²⁹ This

²⁷ Rachel Aviv, *Letter from Albuquerque: Your Son is Deceased*, New Yorker, Feb. 2, 2015; Alex Emslie & Rachael Bale, *More Than Half of Those Killed by San Francisco Police are Mentally Ill*, KQED News (Sept. 30, 2014), <http://ww2.kqed.org/news/2014/09/30/half-of-those-killed-by-san-francisco-police-are-mentally-ill>; Kelley Bouchard, *Across Nation, Unsettling Acceptance When Mentally Ill in Crisis are Killed*, Portland Press Herald (Dec. 9, 2012); Tux Turkel, *When Police Pull the Trigger in Crisis, the Mentally Ill Often are the Ones Being Shot*, Portland Press Herald (Dec. 8, 2012).

²⁸ The Death in Custody Reporting Act of 2000, Pub. L. No. 106-297, 114 Stat. 1045, expired in 2006, although the Bureau of Justice Statistics (BJS) continues to collect data on a voluntary basis. *Data Collection: Arrest-Related Deaths*, Bureau of Justice Statistics, <https://www.bjsard.org/AboutARD.aspx> (last visited Jan. 29, 2015). The BJS describes arrest-related deaths as “under-reported,” and notes that states may use any methodology for measuring arrest-related deaths. Andrea M. Burch, Bureau of Justice Statistics, Dep’t of Justice, *Arrest-Related Deaths, 2003–2009 - Statistical Tables* (2011). The BJS does not report any disability-related data.

²⁹ Emslie & Bale, *supra* note 27 (“A KQED review of 51 San Francisco officer-involved shootings between 2005 and 2013 found that 58 percent—or 11 people—of the 19 individuals killed by police had a mental illness that was a contributing factor in the incident.”); Bouchard, *supra* note 27 (“A review of

translates to hundreds of deaths annually.³⁰

available reports indicates that at least half of the estimated 375 to 500 people shot and killed by police each year in this country have mental health problems.”); *id.* (noting that, in New Hampshire, seven of nine people (78 percent) shot and killed by police between 2007 and 2012 had mental health issues, according to state attorney general reports; in Syracuse, N.Y., three of five people (60 percent) shot by police in 2011 were mentally ill, according to news reports; in Santa Clara County, officials reported that nine of 22 people (41 percent) shot during a recent five-year period were mentally ill); Turkel, *supra* note 22 (finding that 42 percent of 57 police shootings in Maine since 2000 involved persons with mental health problems, and that 19 of 33 fatalities (58 percent) were persons with mental health problems); Linda Goldston, *Former Cops Changing Way Santa Clara County Deals with Mentally Ill in Crisis*, San Jose Mercury News, Nov. 4, 2010 (of 22 officer-involved shootings from 2004 to 2009, 10 involved persons with mental illness); Police Exec. Research Forum, *Review of Use of Force in the Albuquerque Police Department* 13 (2011) (finding that 54 percent of people “whose actions led APD officers to use deadly force” had a confirmed history of mental illness); State of New Mexico, Pub. Defender Dep’t, *2012 Annual Report* 6 (2012) (reporting that that 75 percent of police shootings in the last two years had a “mental health context”); Memorandum from Christopher Pedrini, S.F. Police Department Risk Management, on Regarding Officer-Involved Shootings to John Crudo, S.F. Police Department Internal Affairs 9 (Jan. 16, 2014) [hereinafter *S.F.P.D. Memo*], available at <https://www.scribd.com/doc/242229894/San-Francisco-Police-Department-Officer-Involved-Shootings-Summary-2000-2014>.

³⁰ Between 2003 and 2009, law enforcement agencies reported 4,813 arrest-related deaths, with most—2,931—attributed to homicide by law enforcement personnel. Burch, *supra* note 28. In 2008, the year Ms. Sheehan was shot, there were 404 arrest-related deaths attributed to homicide by law enforcement. *Id.*

B. Experience Shows and Many Experts and Police Departments Recognize That Public Safety is Enhanced When Police Modify Their Tactics When Arresting or Detaining Persons with Disabilities.

Many tragic deaths and injuries of people with disabilities are avoidable. As experts and law enforcement have recognized, there are safe and effective ways for police officers to do their jobs *and* take disability into account. Across the country, law enforcement agencies are adopting practices that improve safety when police encounter persons with disabilities. Often these practices are implemented to help police departments comply with the ADA. For example, for deaf and hard of hearing individuals, police departments are contracting with agencies to provide on-call interpreters, handcuffing individuals in front when safe, and using pictograms in the field.³¹ Similarly, communication cards are being

³¹ See Press Release, U.S. Dep't of Justice, *Justice Department Reaches Settlement with the City of Henderson, Nev. to Improve Law Enforcement Communications with People Who Are Deaf or Hard of Hearing* (Aug. 5, 2013), available at <http://www.justice.gov/opa/pr/justice-department-reaches-settlement-city-henderson-nev-improve-law-enforcement>; Press Release, U.S. Dep't of Justice, *Justice Department Reaches Settlement with Two Colorado Law Enforcement Agencies to Improve Communication with People Who Are Deaf or Hard of Hearing* (Mar. 21, 2013), available at <http://www.justice.gov/opa/pr/justice-department-reaches-settlement-two-colorado-law-enforcement-agencies-improve>; Settlement Agreement Between the United States of America and the City of New Haven, Connecticut, Dep't of Justice Complaint Nos. 204-14-143/204-14-144 (May 20, 2013), available at <http://www.ada.gov/new->

used to facilitate communication between officers and persons with autism spectrum disorder or intellectual disability.³² Training helps prepare officers to deal with individuals with diabetes.³³

To ensure safe and nondiscriminatory interactions with persons with mental disabilities such as autism, intellectual disability, or mental illnesses, police departments are using crisis intervention and de-escalation strategies. These strategies rely on the use of time, containment, communication with the individual, and coordination with trained staff, to reach non-lethal and safe resolutions. For example, in response to the death of Ethan Saylor, the Governor of Maryland created a special commission to develop better practices for interactions between first responders and individuals with intellectual and developmental disabilities; the commission has urged the adoption of crisis

haven/new-haven-sa.htm; Settlement Agreement Between the Elk Grove Village Police Department and the United States of America, Dep't of Justice Complaint No. 204-23-228 (Oct. 28, 2008), *available at* http://www.ada.gov/elk_grove.htm; Settlement Agreement Between the United States of America and the New York City Police Department (Nov. 18, 2009), *available at* <http://www.ada.gov/nypd.htm> .

³² Monique O. Madan, *Coral Gables Police Department Introduces Tool for Autistic Residents*, Miami Herald, Jan. 29, 2015.

³³ See, e.g., Lindsey Wahowiak, *Helping First Responders Spot Lows: Police Get Training to Distinguish Hypoglycemia from Intoxication*, Diabetes Forecast, Jan. 2014 (describing law enforcement trainings in Pennsylvania, Indiana, Mississippi, and New Mexico on recognizing and responding to diabetes-related emergencies).

intervention de-escalation strategies.³⁴

Crisis intervention and de-escalation practices have been adopted across the country.³⁵ These

³⁴ See, e.g., Md. Governor O'Malley, Exec. Order No. 01.01.2013.04, 40 Md. Reg. 1613 (Oct. 4, 2013) (in response to death of Ethan Saylor, establishing commission to develop recommendations about the types of policies, guidelines, or practices that Maryland should adopt regarding law enforcement officials, paramedics, and other first responders' behavior in situations involving individuals with intellectual and developmental disabilities); Comm'n for Effective Cmty. Inclusion of Individuals with Intellectual and Developmental Disabilities, *Initial Report of the Commission* (2014) (noting that required training for first responders should include communication techniques, recognition indicators for assessing whether an individual may have an intellectual or developmental disability, intervention strategies such as disengagement and de-escalation, and alternatives to the use of lethal force and prone restraints); Comm'n for Effective Cmty. Inclusion of Individuals with Intellectual and Developmental Disabilities, *Annual Report of the Commission* app. B (2014) (detailing state-wide police training objectives, including "the procedures an officer should follow to ensure the safety and calmness of an individual that has an intellectual/developmental disability," the "communication techniques required to effectively interact with a person who has an intellectual/developmental disability," "conflict resolution and de-escalation techniques that will lead to effective communications with a person who has an I/DD," "interaction techniques to employ with a person with an I/DD, and "the procedures an officer uses to ensure compliance with the Americans with Disabilities Act when encountering a person with an Intellectual, Developmental, or Physical disability.").

³⁵ Osborn, *supra* note 20, at 344; see also *id.* at 368–70 (describing changes made to Denver's use of force policy and training following death of Childs); Press Release, U.S. Dep't of Justice, *Court Approves Police Reform Agreement in Portland*,

policing tactics are widely accepted,³⁶ and have been shown to be safer for both police officers and persons with disabilities.³⁷ See, e.g., Katharine Ball, *Public*

Oregon (Aug. 29, 2014), available at <http://www.justice.gov/opa/pr/court-approves-police-reform-agreement-portland-oregon>; Settlement Agreement and Stipulated [Proposed] Order of Resolution at ¶¶ 130–37, *United States v. City of Seattle*, Civil Action No. 12-CV-1282 (W.D. Wash. July 27, 2012) (“SPD will continue to provide Crisis Intervention training as needed to ensure that CI trained officers are available on all shifts to respond to incidents or calls involving individuals known or suspected to have a mental illness, substance abuse, or a behavioral crisis (‘individuals in crisis’). . . . SPD’s CI training will continue to address field evaluation, suicide intervention, community mental health resources, crisis de-escalation, and scenario exercises,” available at http://www.justice.gov/crt/about/spl/documents/spd_consentdecree_7-27-12.pdf).

³⁶ Janet R. Oliva, et al., *A Practical Overview of De-Escalation Skills in Law Enforcement: Helping Individuals in Crisis While Reducing Police Liability and Injury*, 10 *J. Police Crisis Negotiations* 15, 26 (2010) (describing crisis intervention training as a standard procedure); Michael T. 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 *Schizophrenia Bull.* 737, 742 (2009) (noting that CIT training and the CIT model is being swiftly and broadly disseminated in law enforcement agencies across the country).

³⁷ Oliva, *supra* note 36 (describing crisis intervention as a valuable tool in reducing casualties to both police and subjects in crisis situations); Melissa Reuland & Jason Cheney, Police Exec. Research Forum, *Enhancing Success of Police-Based Diversion Programs for People with Mental Illness* (2005) (finding that for several agencies, CIT implementation has decreased police shootings, assaults and batteries, and “problematic use of force issues”); Betsy Vickers, *Memphis*,

Safety Digest; Salinas Police, Californian (Salinas), June 3, 2014, at A3 (“Salinas police wrapped up a 90-minute standoff with a man said to be suicidal Monday morning by convincing him to toss aside his knife and surrender[.] . . . Members of the Hostage Negotiation Team and the Crisis Intervention Team also arrived on the scene. Both teams are specially trained to deal with people suffering from mental illnesses or developmental disabilities. A Crisis Team supervisor from Monterey County Behavioral Health Division also assisted. . . . Uninjured, the man was taken to a local hospital for psychiatric evaluation.”).

C. Police Officers Detaining or Arresting People with Psychiatric Disabilities Should Be Prepared to Take the Disability into Account.

Police departments and police officers should be prepared to use practices designed to improve safety in police encounters with people with psychiatric disability. This is especially true when officers detain individuals for the purpose of involuntary mental health treatment. As the City itself notes, there are tens of thousands of

Tennessee, Police Department’s Crisis Intervention Team 10 (U.S. Dep’t of Justice, Bureau of Justice Assistance, Practitioner Perspectives Ser. No. NCJ 182501, 2000) (crisis intervention in Memphis has led to the reduced use of deadly force, and fewer injuries to officers); Deborah L. Bower, et al., *The Albuquerque Police Department’s Crisis Intervention Team: A Report Card*, FBI Law Enforcement Bulletin 2 (Feb. 2001) (reporting that police shootings declined in Albuquerque after introduction of CIT); see also Compton, *supra* note 36, at 742 (in study, CIT-trained officers selected actions characterized by a lower use of physical force than non-CIT-trained officers).

involuntary psychiatric detentions annually in California alone. Pet. for Cert. at 22–23. It is common for these detentions to involve sending officers into people's homes.³⁸ Because the psychiatric detention is involuntary, police may reasonably expect to encounter resistance. That an individual may be resisting detention, even with a weapon, does not make crisis intervention and de-escalation irrelevant or unreasonable. To the contrary, these strategies are designed for the very situation.³⁹

³⁸ See Cal. Health & Human Servs. Agency, Dep't Health Care Servs., *DHCS 1801, Application for Assessment, Evaluation, and Crisis Intervention or Placement for Evaluation and Treatment* (2014), available at http://www.dhcs.ca.gov/formsandpubs/forms/Forms/Mental_Health/DHCS1801_04012014.pdf (“DETAINMENT ADVISEMENT: . . . *If taken into custody at his or her residence, the person shall also be told the following information[:]* . . . You may bring a few personal items with you, which I will have to approve. Please inform me if you need assistance turning off any appliance or water. You may make a phone call and leave a note to tell your friends or family where you have been taken.”) (emphasis in original).

³⁹ See, e.g., Vickers, *supra* note 37, at 4 (describing Memphis CIT model as response to September 1987 shooting of young African American man with mental illness armed with a knife), 7–8 (describing CIT approaches for persons with psychiatric conditions who have weapons); Paul Davis, *Crisis Intervention. Law Enforcement*, Providence Journal, Jan. 18, 2015, at 1 (describing CIT training using hypotheticals of persons with weapons); Jennifer Skeem & Lynne Bibeau, *How Does Violence Potential Relate to Crisis Intervention Team Responses to Emergencies?*, Psychiatric Services (Feb. 2008) at 203 (CIT officers used force conservatively, even with subjects who posed an extreme risk of violence, including with armed subjects); Seminole County Sheriff's Office, General Order No. G-52 (Mar. 20, 2006) at 8 and Hillsborough County Sheriff's Office,

The legal obligation the ADA places on public agencies has helped speed the creation and use of police practices that are saving lives and preventing the injury of people with disabilities. *Cf., Bd. of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring) (“One of the undoubted achievements of statutes designed to assist those with impairments is that citizens have an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for accepting persons with impairments or disabilities into the larger society.”) Creating a special exception to the ADA for arrest or detention would relieve much of that pressure, to the likely long-term detriment of all.

Standard Operating Procedure, Gen. 522.01 (Feb. 8, 2007) at 2 (describing assessment and collection of weapons information as part of CIT response), both available at <http://www.cit.memphis.edu/policies.php?page=1>; Evan Sernoffsky, *Deadly-Force Situation with a Better End*, S.F. Chron., Sept. 25, 2014, at D1 (“A responding officer . . . found Laffey crouched in the apartment with a 12-inch serrated knife, yelling, I have the knife and don’t come near me, Banayat said. Rather than confronting Laffey . . . the officer called for backup,” retreated to a covered position, and resolved the crisis without deadly force); Ball, *supra*, at II.B.

III. THERE ARE TRIABLE FACT QUESTIONS ON WHETHER THE CITY SHOULD HAVE TAKEN MS. SHEEHAN'S DISABILITY INTO ACCOUNT WHEN DETAINING HER.

A. San Francisco's Position That it is Entitled to Summary Judgment is Inconsistent with the *Arline* Factors That Govern the Direct Threat Analysis.

In this Court, the City of San Francisco relies on the “direct threat” defense to Ms. Sheehan’s ADA claim, arguing that it should be relieved of liability as a matter of law. That defense provides that a government agency need not take disability into account if the individual in question “poses a direct threat to the health or safety of others.” 28 C.F.R. § 35.139(a). A “direct threat” does not mean *any* risk, but rather a “significant risk” that cannot be eliminated by a modification in approach. 28 C.F.R. § 35.104. The factors used to decide if a direct threat exists were announced by this Court in *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987). Regulations promulgated by the U.S. Department of Justice set out the *Arline* standard:

In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that

the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

28 C.F.R. § 35.139(b).

To prevail on its motion for summary judgment the City would have to show, not that Ms. Sheehan was “dangerous,” Pet. Br. at 28, 29, but rather that its officers made a reasonable judgment, based on the best available objective evidence, that she posed a significant risk to the health and safety of others, given the nature, duration and severity of the risk, the probability that injury would occur, and whether reasonable changes to their approach might have reduced the risk. 28 C.F.R. §§ 35.104, 35.139. In arguing that there is no dispute that Ms. Sheehan posed a significant risk of harm to others, the City largely ignores the last *Arline* factor, whether reasonable modifications to its practices would have mitigated the risk of harm. But that is the issue at the heart of the case: whether officers failed to comply with the ADA when they attempted to detain a woman they knew was in mental health crisis and in need of hospitalization, without using crisis intervention strategies. A jury could certainly conclude that they did.

The City says it is beyond dispute that the officers reasonably concluded that Ms. Sheehan posed a significant risk to others, and sought to detain her without employing crisis intervention strategies, on the basis of the following two judgments: (1) Ms. Sheehan could have been trying to escape out the back window of her second floor

apartment; and (2) Ms. Sheehan could have been gathering up “other knives” or weapons the officers hadn’t seen to “mount a new attack” or fortify herself against the officers. Pet. Br. at 29. As to the first judgment, Ms. Sheehan’s social worker told the officers that Ms. Sheehan could not get out the back window without a ladder. *Sheehan v. City & Cnty. of S.F.* 743 F.3d 1211, 1218, 1224 n. 8 (9th Cir. 2014).⁴⁰

The second judgment also raises factual questions, most importantly why the officers did not employ crisis intervention techniques. The evidence shows that, when the officers first arrived at the premises, Ms. Sheehan was quiet and contained in her room.⁴¹ A jury could conclude that the officers had the time and the opportunity to implement crisis intervention techniques designed for interaction with a person with a psychiatric disability in crisis. Moreover, the officers could have used the City’s own policy for dealing with barricaded suspects in detaining Ms. Sheehan.⁴²

The direct threat analysis set forth in this Court’s *Airline* decision and adopted by the Department of Justice is the appropriate analysis in

⁴⁰ Further, as the officers were entering Ms. Sheehan’s room the second time, they heard the sirens of backup units en route, moments away, who could have covered the back of the premises, mitigating this stated risk. J.A. Vol. 1 at p. 236 (Dep. Sergeant Kimberly Reynolds).

⁴¹ J.A. Vol. 1 at p. 216 (Dep. Sergeant Kimberly Reynolds).

⁴² S.F. Police Dep’t, General Order 8.02, Hostage and Barricaded Suspect Incidents (1994); *accord Sheehan*, 743 F.3d at 1224 n. 8 (“the officers could have avoided harm to themselves by retreating a safe distance from the door”).

this case. Nevertheless, the United States suggests that this Court carve out an exception in which crisis intervention and related techniques are assumed to not be reasonable if the person with the disability is armed or violent. Br. of the United States at 17–21. But crisis intervention and the other techniques described in this brief have been specifically designed to reduce the dangers involved in the arrest or detention of a person with a psychiatric disability, even if armed and violent.⁴³ Moreover, the *Airline* analysis already takes into account any particular dangers or exigencies. This Court should not create a presumption that taking disability into account in such situations is *de facto* unreasonable. Such a presumption would only serve to discourage the use of these life-saving techniques.

B. The Writ of Certiorari On the First Question May Have Been Improvidently Granted.

In its Petition, the City asked this Court to resolve a possible Circuit split. Without precisely taking a stand on how that split should be resolved, the City highlighted the Fifth Circuit’s analysis in *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000), which held that the ADA does not apply to an officer’s “on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer’s securing the scene and ensuring that there is no threat to human life.” Pet. for Cert. at 19, 25–28. The suggestion was

⁴³ See *supra* note 39.

apparently that the Ninth Circuit's holding that the ADA applied to the detention involved here was erroneous. The City's opening brief changed course, and explicitly conceded that, as the Ninth Circuit held, the ADA applies to arrests and detention. Pet. Br. at 34. Thus, the parties are now united in the view that the Ninth Circuit was on the right side of any possible split. That makes this case at this point an unsuitable vehicle for exploring a split. Moreover, having conceded that the ADA applies and placing its reliance now on the "direct threat" defense, the case largely turns on whether the particular facts here establish the defense. That of course is not the sort of question this Court ordinarily decides. See *N.L.R.B. v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n. 8 (1981) (“[W]e are presented primarily with a question of fact, which does not merit Court review. The writ of certiorari . . . is therefore dismissed as improvidently granted.”). For both of these reasons, the grant of certiorari on the City's first question may well have been improvident.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed, or, in the alternative, the Writ should be dismissed as to the first question.

Respectfully submitted,

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Dated: February 12, 2015

APPENDIX

INTEREST OF *AMICI CURIAE*

The **Arc of the United States**, founded in 1950, is the nation's largest community-based organization of and for people with intellectual and developmental disabilities. The Arc promotes and protects the human and civil rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes. Through its National Center for Criminal Justice and Disability, The Arc serves as a national clearinghouse for information, training, and advocacy on the topic of people with intellectual and developmental disabilities as victims, witnesses and suspects or offenders of crime. The Arc has appeared as amicus curiae in this Court in a variety of cases involving intellectual and developmental disabilities and has a vital interest in ensuring that all such individuals receive the appropriate protections and supports provided by law and that courts and administrative agencies employ commonly accepted scientific principles for the diagnosis of intellectual and developmental disabilities.

The **American Civil Liberties Union** (ACLU) is a nationwide, non-partisan organization of approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU's Disability Rights Program envisions a society in which discrimination against people with disabilities no longer exists, and in which people understand that disability is a normal part of life. This means a country in which people with disabilities are valued, integrated members of the

community; where people with disabilities have jobs, homes, education, healthcare, and families. This means a country in which people with disabilities are no longer segregated into, and over-represented in, civil and criminal institutions such as nursing homes, psychiatric hospitals, jails and prisons.

The **American Association of People with Disabilities** (AAPD), founded in 1995 and headquartered in Washington, D.C., is the largest national nonprofit disability rights organization in the United States. AAPD promotes equal opportunity, economic power, independent living, and political participation for people with disabilities. Its members, including people with disabilities and family, friends, and supporters, represent a powerful force for change. AAPD advocates for the full implementation of the Americans with Disabilities Act (ADA), the landmark civil rights bill for Americans with disabilities, that supports Americans with disabilities to live and thrive in their communities. AAPD and its members benefit from the protection provided by the ADA against discrimination in the services, programs, and activities provided by state and local government entities, and thus have a direct interest in the outcome of this litigation.

The **American Diabetes Association** is a nationwide nonprofit, voluntary health organization founded in 1940, and has over 485,000 general members, 15,000 health professional members, and 1,000,000 volunteers. The mission of the Association is to prevent and cure diabetes and to improve the lives of all people affected by diabetes. As of 2012, there were 29.1 million Americans with diabetes. The

Association is the largest, most prominent nongovernmental organization that deals with the treatment and impact of diabetes. The Association establishes and maintains the most authoritative and widely followed clinical practice recommendations, guidelines, and standards for the treatment of diabetes. The Association publishes the most authoritative professional journals concerning diabetes research and treatment.

The **Autistic Self Advocacy Network** (“ASAN”) is a national, private, nonprofit organization, run by and for individuals on the autism spectrum. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN’s advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals to participate fully in community life and enjoy the same rights as others without disabilities.

The **Depression and Bipolar Support Alliance** (DBSA), as the leading national peer-directed organization for individuals living with depression and bipolar disorder, joins the amicus brief to be filed in the U.S. Supreme Court in the case of *Sheehan v City and County of San Francisco*. DBSA advocates with peers at the forefront in determining needs and best practices that advance mental health, personal choice and wellness. We

strongly support the application of evidence-based crisis intervention as a critical tool for police and law enforcement when complying with and enforcing the Americans with Disabilities Act.

Disability Rights Advocates (DRA) is a non-profit public interest legal center that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, employment, technology and housing. DRA's clients, staff and board of directors include people with various types of disabilities. With offices in Berkeley, California and New York City, DRA strives to protect the civil rights of people with all types of disabilities.

Disability Rights Education and Defense Fund, Inc., (DREDF) is a national disability civil rights law and policy organization dedicated to securing equal citizenship for people with disabilities. Since its founding in 1979, DREDF has pursued its mission through education, advocacy and law reform efforts. Nationally recognized for its expertise in the interpretation of federal disability civil rights laws, DREDF has consistently worked to promote the full integration of citizens with disabilities into the American mainstream, and to ensure that the civil rights of persons with disabilities are protected and advanced.

The **Epilepsy Foundation** is a nonprofit corporation founded in 1968 to advance the interests the over 2.8 million Americans with epilepsy and seizure disorders. With its affiliates throughout the

nation, the Epilepsy Foundation maintains and disseminates information about epilepsy and seizures; provides training to law enforcement personnel on how to recognize seizure related behavior and the proper steps to take to ensure everyone's safety. Because a person experiencing a seizure may be perceived as being aggressive or purposefully unresponsive by law enforcement, the Epilepsy Foundation has taken a stance to educate law enforcement officers and first responders on seizure related behavior and advocate for proper policing techniques that do not subject people with disabilities to unreasonable arrests and excessive force. Our organization supports practices and laws, including the Americans with Disabilities Act, that provide safe and nondiscriminatory policing practices for people with disabilities. These policing practices not only protect individuals with disabilities, they also foster and maintain the public's trust in law enforcement officers to protect and serve their communities.

Helping Educate to Advance the Rights of the Deaf (HEARD) is an all-volunteer nonprofit organization that works to identify and remove barriers that prevent deaf people from participating in and having equal access to the justice system. HEARD developed and leads a national campaign to curtail police brutality against deaf individuals; tracks incidences of police brutality against deaf people; and created a national database of deaf detainees and prisoners. HEARD is the only organization in the nation that works to correct and prevent deaf wrongful convictions and end abuse of deaf incarcerated individuals.

Mental Health America (MHA), formerly the National Mental Health Association, is a national membership organization composed of individuals with lived experience of mental illnesses and their family members and advocates. The nation's oldest and largest nonprofit mental health organization, MHA has over 200 affiliates who are dedicated to improving the mental health of all Americans, especially the 54 million people who have severe mental disorders. Through advocacy, education, research, and service, MHA helps to ensure that people with mental illnesses are accorded respect, dignity, and the opportunity to achieve their full potential. MHA is particularly concerned that careful crisis intervention procedures be used in taking a person in acute emotional distress into custody and that a remedy be available when police fail to do so.

The **National Association of the Deaf** (NAD), founded in 1880, is the oldest civil rights organization in the United States, and is the nation's premier organization of, by and for deaf and hard of hearing individuals. The mission of the NAD is to preserve, protect, and promote the civil, human and linguistic rights of 48 million deaf and hard of hearing individuals in the country. The NAD endeavors to achieve true equality for its constituents in all aspects of society including but not limited to education, employment, and ensuring full access to programs and services. Serving all parts of the USA, the NAD is based in Silver Spring, MD and more information is available at: www.nad.org

The mission of the **National Coalition for Mental Health Recovery** (NCMHR) is to “ensure that consumer/survivors have a major voice in the development and implementation of health care, mental health, and social policies at the state and national levels, empowering people to recover and lead a full life in the community.” As people with psychiatric disabilities who are disproportionately affected when law enforcement fails to take disability into account when responding, we have a keen interest in ensuring that Title II of the Americans with Disabilities Act (ADA) is upheld, requiring reasonable modifications of police practices and requiring that police use proven crisis intervention and de-escalation practices in interaction with persons with disabilities or anyone suspected of having a disability.

The **National Council for Behavioral Healthcare** represents 2,250 behavioral healthcare organizations that serve our nation’s most vulnerable individuals—more than 8 million adults and children with mental illnesses. The National Council promotes public policies that improve and strengthen mental health and addictions treatment by promoting access to high-quality, cost-effective community-based treatment and supports. The National Council also works to improve the police response to people with mental illness. The National Council believes that police departments should adopt crisis intervention and de-escalation practices that enhance the safety of people with disabilities, police officers, and the public.

The **National Council for Independent** (NCIL) is America's oldest cross-disability, grassroots organization run by and for people with disabilities. Founded in 1982, NCIL represents more than 700 organizations and individuals from every state and territory, including Centers for Independent Living (CILs), Statewide Independent Living Councils (SILCs), individuals with disabilities, and other organizations that advocate for the rights of people with disabilities throughout the United States. NCIL envisions a world in which people with disabilities are valued equally and participate fully. NCIL is vitally interested in protecting rights gained in the Americans with Disabilities Act and in advancing safe and effective police practices affecting people with disabilities.

The **National Disability Rights Network** ("NDRN"), is the non-profit membership association of protection and advocacy ("P&A") agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. There is also a federally mandated Native American P&A System. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination.

The **National Down Syndrome Congress** represents families and friends of individuals with Down syndrome. Our membership is comprised of 200 affiliates in 50 states. The mission of the NDSC is to create a national climate in which all people will recognize and embrace the value and dignity of people with Down syndrome so that individuals with DS will live in a world with equal rights and opportunities. The NDSC has worked tirelessly to improve the police response for people with DS and all disabilities following the tragic death of Ethan Saylor at the hands of Frederick County police officers in 2013. NDSC has promoted and participated in efforts throughout the country to educate affiliates and the public at large to change the present culture of police practices to recognize the needs and rights of individuals with disabilities.

The **National Federation of Families for Children's Mental Health** is a nonprofit, advocacy organization that bridges the voices of families raising children and youth with mental health challenges. Unfortunately, our families are not foreign to experiences of police misconduct when it comes to individuals living with mental health disorders. We would like to see effective crisis intervention and de-escalation practices applied when responding to individuals who may be experiencing a mental health crisis. It is our duty to protect our children and other individuals living with disabilities from harmful, fatal practices.

The National Federation of the Blind (“NFB”) is the largest organization of blind and low-vision people in the United States. Founded in 1940, the NFB has grown to over fifty-thousand members. The organization consists of affiliates and local chapters in every state, the District of Columbia, and Puerto Rico. The NFB devotes significant resources toward advocacy, education, research, and development of programs to integrate the blind into society on terms of equality and independence, and to remove barriers and change social attitudes, stereotypes and mistaken beliefs about blindness that result in the denial of opportunity to blind people. The NFB actively engages in litigation and advocacy to protect the civil rights of the blind under our nation’s laws.