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 PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE POLICY COUNCIL ON LAW ENFORCEMENT AND THE MENTALLY ILL IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Policy Council on Law Enforcement and the Mentally Ill ("Policy Council") is an unincorporated association of individuals and organizations that share a common interest in improving the interface between law enforcement and the mentally ill. *Amicus* members are all persons or organizations that either suffer from, have family members who suffer from, or have dedicated themselves to providing care and improving life circumstances for those with mental illness.

Amicus includes family members who have lost loved ones in circumstances similar to those at issue in this case. Policy Council member Myrna Torres is the mother of the late Andrew Orval Torres, who died in his bedroom while Greenville City Police were attempting to take him into protective custody pursuant to a Probate Court Order which directed that Andrew be taken to the hospital for psychiatric assessment. Mr. Torres suffered from schizophrenia of the paranoid type (DSM-IV 295.30). The three uniformed officers knew of Mr. Torres' mental condition, but nevertheless appeared at his bedroom doorway, in spite of his sisters' specific requests that they remain in the living room so that his sisters could bring Mr. Torres out to the officers. On seeing the officers quickly

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[1] The parties have consented to the filing of *amicus curiae* briefs in support of either party in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

moving toward him, Mr. Torres attempted to barricade himself in his bedroom by closing the door. He died of positional asphyxia after a struggle in which he was repeatedly struck with a TASER® and hog-tied in a prone position.

As individuals, Policy Council members live under the weight of public indifference, prejudice, and stigma. As a group, its members have been able to move from being reactive to specific personal events to being proactive in the law enforcement policymaking realm. The Policy Council collectively advocates before appropriate public bodies to advance the most effective tactics and techniques for dealing with persons with mental illness, including offering programs for police regarding therapeutic alternatives to crisis training.

In large part, the Policy Council's purpose is to advocate for implementation of policies which result in reasonable accommodations for those suffering from mental illness, pursuant to the Americans with Disabilities Act, as codified at 42 U.S.C. § 12132. Any decision from this Court which undermines or limits that purpose, particularly with respect to law enforcement, would substantially undermine the Policy Council's effectiveness. Being intimately familiar with the civil commitment and arrest processes, as well as the importance of well-considered policies, the Council promotes the use of de-escalation tactics in arrest and civil commitment scenarios involving persons with mental illness.

Members of the Policy Council share a specific concern about an increase in the number of avoidable incidents of violence between law enforcement and persons with mental illness. Of particular concern to the Policy Council is the use of deadly force in circumstances, such as were present in Respondent's case, in which an individual's mental health conditions are known to law enforcement prior to their arrival, the individual presents no immediate risk to others, and the police are present not to arrest the individual but to transport them to a healthcare facility for assessment and possible treatment. *Amicus'* central concern in this case is to prevent any relaxation of the ADA's "reasonable accommodation" requirement to benefit law enforcement agencies at the expense of persons with mental illness.

SUMMARY OF THE ARGUMENT

It is critical to the safety and well-being of those suffering from mental illness, as well as their loved ones, that the Americans with Disabilities Act (ADA) apply vigorously to police encounters. As Congress and the courts have long recognized, people suffering with mental illness are acutely vulnerable and deserving of protection. The ADA is essential to, and was designed with the purpose of, protecting such persons. Under both the ADA and the Fourth Amendment, officers are required to account for mental illness when effectuating arrests or civil detention. The rule proposed by Petitioners would modify the existing rule with respect to the ADA and undercut important safeguards designed to protect the well-being of persons with mental illness.

The public needs assurance that the ADA will apply, and that police will not unnecessarily escalate the situation, when requests are made for law enforcement assistance in making an involuntary mental health commitment. Public policy concerns, rooted in the importance of encouraging people who need help to seek it, counsel for sustaining the ADA accommodation requirement's applicability. In barricade situations involving mentally ill individuals, there should rarely be a question as to the Act's applicability. Moreover, fairness and equity suggest that the ADA accommodation requirement should apply when officers are present for the sole purpose of assisting persons suffering from mental illness.

The ADA's implementing regulations are already clear that police are not required to accommodate the disability of someone who poses a direct and immediate threat to the safety of others. This objective test should continue to apply, and this standard is sufficient to protect the public and police officers alike.

ARGUMENT

I. THE ADA MUST APPLY VIGOROUSLY TO POLICE ENCOUNTERS WITH PEOPLE WITH MENTAL ILLNESSES BECAUSE THEY ARE PARTICULARLY VULNERABLE.

Of all groups with impairments, those with mental illness are among the most vulnerable and in need of ADA protection. Persons with mental illness are, first, least able to communicate and understand others' efforts at communication—particularly if the mental illness has manifested into a full-scale psychotic episode. Second, it is the seriously mentally compromised individual who is most likely to be confronted by police. Other persons with disabilities, such as those who use a wheelchair or those who are blind, are less likely to require law enforcement interventions when needing medical or other assistance. Being in a psychotic state, on the other hand, is sure to provoke public reaction and result in police interaction.

A. The ADA Is Essential To, And Was Designed With The Purpose of, Protecting Persons With Mental Illness.

"The legitimacy of the State's . . . interests in ensuring that 'dangerous' mentally ill persons not harm themselves or others is beyond dispute." *McCabe v. Life-Line Ambulance Serv., Inc.*, 77 F.3d 540, 547 (1st Cir. 1996) (citations omitted). "[P]ublic policy . . . favors protecting the mentally ill and developmentally disabled from abuse or

mistreatment, to which they are particularly vulnerable, often being without the knowledge, ability, or resources to protect or vindicate their civil rights." *Fees v. Trow*, 521 A.2d 824, 828 (N.J. 1987); *see also Walton v. Spherion Staffing LLC*, No. CIV.A. 13-6896, 2015 WL 171805, at *1 (E.D. Pa. Jan. 13, 2015). Congress sought to further this legitimate interest when it passed the accommodation requirement of the ADA.

The legislative history of the Act makes clear that Congress fully intended the ADA to provide legal protections to individuals, such as Ms. Sheehan, who suffer from schizoaffective disorders. *See* 135 CONG. REC. S10779 (daily ed. Sept. 7, 1989) (remarks of Sen. Domenici) (advocating on behalf of individuals with schizophrenia and manic-depression and suggesting President Lincoln suffered from such disturbances). Following efforts from Sen. Helms to exclude them from the ADA's coverage, Congress specifically "expanded the bill's coverage to mentally ill persons." Michael L. Perlin, *The ADA and Persons with Mental Disabilities*, 8 J.L. & HEALTH 15, 19 n.23 (1994). The regulations presently promulgated pursuant to the ADA define "disability" to include "mental impairment[s] that substantially limit[] one or more . . . major life activities," 29 C.F.R. § 1630.2(g) (2012), and list "organic brain syndrome" and "mental illness" among the covered class of mental impairments, § 1630.2(h)(2).

B. Both the Fourth Amendment and the ADA Rightly Require Officers to Account for the Purpose of the Interaction as Well as for Mental Illness When Effectuating Arrests or Civil Detention.

Although all police interactions contain some level of inherent risk, it is important with respect to both the Fourth Amendment and the ADA that officers not lose sight of what it is they are trying to accomplish. Assessing the reasonableness of an officer's use of force "requires careful attention to the . . . severity of the crime at issue[.]" *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotations and citations omitted). Similarly, "mental illness must be reflected in any assessment of the government's interest in the use of force[.]" *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003). In situations where "a mentally disturbed individual [is] not wanted for any crime, [and is] being taken into custody to prevent injury to himself," it is clear that "[d]irectly causing him grievous injury does not serve that objective in any respect." *Id.* at 1059.

In the ADA context, an officer's decision whether to accommodate an individual's mental illness for ADA purposes "depends on all of the factual circumstances of the case, including . . . 'the nature of the criminal activity involved[.]' " *Bahl v. Cnty. of Ramsey*, 695 F.3d 778, 785 (8th Cir. 2012) (quoting *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1087 (11th Cir. 2007)). "In the context of arrests, courts have recognized . . . Title II claims . . . [for] reasonable accommodation, where police properly

arrest a suspect but fail to reasonably accommodate his disability during the . . . arrest, causing him to suffer greater injury or indignity than other arrestees." *Waller ex rel. Estate of Hunt v. Danville, VA*, 556 F.3d 171, 174 (4th Cir. 2009) (citing *Gohier v. Enright*, 186 F.3d 1216, 1220–21 (10th Cir. 1999); *Gorman v. Bartch*, 152 F.3d 907, 912–13 (8th Cir. 1998)); *see also 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."). Among other things, the ADA accommodation inquiry looks to whether the challenged "decision was based on . . . an individualized inquiry as to the plaintiff's conditions," *Buchanan v. Maine*, 469 F.3d 158, 176 (1st Cir. 2006) (citing *Kiman v. New Hampshire Dep't of Corr.*, 451 F.3d 274, 284–85 (1st Cir. 2006)), and whether officers "acted . . . in a manner that escalated tensions" or "attempted to calm the situation[.]" *Waller*, 556 F.3d at 177.

If sustained, Petitioner's request that the Court hold that Ms. Sheehan's conduct while barricaded behind a closed door posed a "direct threat" sufficient to remove her from the ambit of the ADA's accommodation requirement would endanger persons with mental illness. As representatives of the impacted class, *Amicus'* principal concern is that such a holding would have the effect of excusing officers from having to take into account known mental illness in situations where "the constraints of time" do not impinge upon their ability to give individualized consideration to the individual engaging in the threatening behavior. *Waller*, 556 F.3d at 175. This is a dangerous

proposition when already "at least half" of fatal police encounters involve persons with psychiatric disabilities. *See* Kelley Bouchard, *Across Nation, Unsettling Acceptance when Mentally Ill in Crisis are Killed*, PORTLAND PRESS HERALD (Dec. 9, 2012), http://www.pressherald.com/2012/12/09/shoot-across-nation-a-grim-acceptance-when-mentally-ill-shot-down/. Such a finding is also unnecessary, since, as the Fourth Circuit has explained, "it is clear that exigency is not irrelevant. Reasonableness in law is generally assessed in light of the totality of the circumstances, and exigency is one circumstance that bears materially on the inquiry into reasonableness under the ADA." *Waller*, 556 F.3d at 175; *see also De Boise v. Taser Int'l, Inc.*, 760 F.3d 892, 899 (8th Cir. 2014) ("[W]hether officers reasonably accommodated the individual is 'highly fact-specific and varies depending on the circumstances of each case, including . . . exigent circumstances[.]").

An officer's use of excessive force should have some bearing on whether the officer's failure to accommodate an arrestee under the ADA was reasonable. Under the Fourth Amendment, the nature of Ms. Sheehan's seizure was unreasonable when viewed through the prism of all four *Graham* factors. *See Graham v. Connor*, 490 U.S. 386 (1989). The "severity of the crime at issue" was non-existent. *Id.* at 396. Officers first arrived on the scene to help her get an in-patient mental health assessment. Prior to their decision to force entry, Ms. Sheehan did not "pose[] an immediate threat to the safety of the officers or others." *Id.* As she was not under arrest, she could not fairly be said to have been

"resisting arrest," nor could it be argued that she was in any position to "evad[e] arrest by flight." *Id.* The failure to account for Ms. Sheehan's disability and the level of force used—5 gunshots, including one to the face—was unreasonable, given the totality of the circumstances.

II. THE PUBLIC NEEDS ASSURANCE THAT THE ADA WILL APPLY, AND THAT POLICE WILL NOT UNNECESSARILY ESCALATE THE SITUATION, WHEN REQUESTS ARE MADE FOR LAW ENFORCEMENT ASSISTANCE IN MAKING AN INVOLUNTARY MENTAL HEALTH COMMITMENT.

As Respondent explains, "The central thrust of [the] ADA claim is that [the police] were required to consider her mental disability *before* they reopened her door and forced a violent confrontation." Resp. Br. 33. There is a strong public policy reason for sustaining this accommodation requirement, as it provides an important assurance to families seeking police assistance in making mental health commitments. Families of persons experiencing mental health crises need to know that officers will not deliberately engage in behavior that is reasonably likely to provoke a violent response from the person in need of help. The applicability of the accommodation requirement increases the likelihood that families of people who need help will in fact seek it.

A. Public Policy Concerns Counsel for Sustaining the ADA Accommodation Requirement's Applicability.

Lower courts have correctly recognized that, as a matter of public policy, it is important that police departments avoid practices that might "dissuade [those] who need treatment from seeking help." *Whyte v. Connecticut Mut. Life Ins. Co.*, 818 F.2d 1005, 1010 n.13 (1st Cir. 1987). Congress, likewise, has explicitly recognized the danger of adopting policies that "discourage [people] from seeking the treatment they must have . . . ." H.R. REP. NO. 92-920 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 2062, 2072 (discussing necessity of maintaining patient confidentiality in drug treatment programs). The nation already faces a significant problem with respect to persons suffering from mental illness who, for a variety of reasons, are not receiving treatment. *See*, *e.g.*, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 608 (1999) (Kennedy, J., concurring) (" 'During the course of a year, about 5.6 million Americans will suffer from severe mental illness.' Some 2.2. million of these persons receive no treatment." (quoting E. TORREY, OUT OF THE SHADOWS 4, 6 (1997))).

The public has a clear interest in seeing that people suffering from debilitating mental illness seek treatment. The courts and Congress have often thus taken this specific public interest into account when evaluating the contours of policies that might dissuade people from seeking medical help. *See*, *e.g.*, *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 958 n.1 (3d Cir. 1984) (discussing 42 U.S.C.

§ 2000aa–11(a)(3)'s "special concern" for criminal laws that "would intrude upon a known confidential relationship such as that which may exist between . . . doctor and patient"); *Hicks v. Talbott Recovery Sys., Inc.*, 196 F.3d 1226, 1236 n.22 (11th Cir. 1999) (discussing Georgia statute protecting "the communications of the patient who seeks treatment for mental disorders" (internal citations omitted)).

B. The ADA Accommodation Requirement Should Apply Where Mentally Ill Persons Are Barricaded and Not Posing an Immediate Threat.

In a barricade situation involving a person with mental illness, there should rarely be any question as to the ADA's applicability. As Ms. Sheehan's case illustrates, knocking the door down and forcing an armed confrontation is unlikely to lead to a safe resolution of such a situation. "Saving lives remains job number one for every law enforcement agency, and it is imperative that they have . . . procedures in place to deal with those persons who are . . . mentally ill, or [who are] otherwise likely to react poorly in already volatile situations." *Elizondo v. Green*, 671 F.3d 506, 511–12 (5th Cir. 2012) (DeMoss, J., specially concurring).

Some courts impose liability on police officers whose response to situations unnecessarily exacerbates the danger faced by members of the public. Numerous courts have recognized "a right to state protection where 'the state affirmatively places [an] individual in a position of danger the individual would not have otherwise faced.' " *Perez v. Town of*

Cicero, No. 06 C 4981, 2011 WL 4626034, at *7 (N.D. Ill. Sept. 30, 2011) (quoting *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169, 1174 (7th Cir. 1997)). Many circuits explicitly recognize this "state-created danger" theory of liability for "acts committed by the state or state actors using their peculiar positions as a state actors . . . [to] leav[e] a discrete plaintiff vulnerable to foreseeable injury." *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996) (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 (3d Cir. 1995)); *see also McClendon v. City of Columbia*, 305 F.3d 314, 330 (5th Cir. 2002) (noting that at least "six circuits" had recognized "the existence of a right to be free from state-created danger" as of 1993). The ADA's requirement that officers take known disabilities into account helps mitigate this same kind of danger by requiring that officers consider the impact their actions may have on discretely vulnerable individuals—those whom it is foreseeable are likely to react in a manner that, for reasons beyond their control, leaves them acutely vulnerable to the use of deadly force.

C. Fairness and Equity Suggest the ADA Accommodation Requirement Should Apply When Officers are Present for the Sole Purpose of Assisting Persons Suffering from Mental Illness.

Recognizing the complexities of modern policing, courts in the "majority of states have acknowledged [a] community safety and welfare role of police officers and have adopted in some form or another a 'community caretaker' exception to the general warrant requirement[.]" *Ullom v. Miller*, 705

S.E.2d 111, 120 (W. Va. 2010). This exception, rooted in the Court's decision in *Cady v. Dombrowski*, 413 U.S. 433 (1973), "acknowledge[s] a non-investigatory, community role for law enforcement personnel apart from traditional law enforcement duties." *Ullom*, 705 S.E.2d at 121. Among these non-investigatory roles is the responsibility "to take into custody mentally ill individuals who are a danger to themselves or others," a task authorized by statute in all fifty States. *See* Pet. Br. 38 n.5.

The caretaker exception accommodates police officers who engage in certain conduct (e.g., warrantless searches) that might otherwise violate the Constitution if engaged in for traditional criminal law enforcement purposes. It is rooted, at least in part, in a recognition that it would be inequitable to penalize officers who, acting in a good faith community caretaking role, are simply fulfilling the "expect[ation] to 'aid individuals who are in danger of physical harm,' [and] 'assist those who cannot care for themselves[.]' " *Ullom*, 705 S.E.2d at 121 (quoting *Wagner v. Hedrick*, 383 S.E.2d 286, 293 n.9 (W. Va. 1989) (quoting 2 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 5.4(c) at 525 (2d ed. 1987) (footnotes omitted)). The exception, in effect, permits conduct that society otherwise disfavors if it is engaged in for some kind of caretaking, as opposed to criminal law enforcement, function.

In the instant case, officers who were on the scene to assist a woman who could not care for herself instead "affirmatively place[d] [her] in a

position of danger [she] would not have otherwise faced." *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169, 1174 (7th Cir. 1997). Had the officers searched, instead of shot, Ms. Sheehan, there would be little question as to whether they could avail themselves of the caretaker exception. As such, to hold that the officers bore no responsibility to take account of Ms. Sheehan's disability, given their decision to needlessly and immediately escalate the situation, would be "offensive to fairness and equity." *Escobedo v. State of Ill.*, 378 U.S. 478, 490 n.13 (1964) (noting that the "survival of our system . . . and the values which it advances depends upon a constant, searching, and creative questioning of official decisions" (internal citations omitted)).

In this case, Officer Reynolds "testified that she did *not* consider Sheehan's 'psychiatric disability' when she instructed Holder to forcibly open the door to Sheehan's room." Resp. Br. 6. (quoting J.A. 266). This order was given despite the presence of immediately available "reasonable alternatives." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 453–54 (1990). This decision, and the avoidable confrontation that it provoked, ultimately had life-altering consequences for Ms. Sheehan for reasons that were largely beyond her ability to control. This is the very scenario that the ADA was designed to safeguard against. *See* 42 U.S.C. § 12132 (prohibiting discrimination "by reason of . . . disability").

III. EXISTING RULES ARE SUFFICIENT TO PROTECT OFFICER SAFETY, AND THE COURT SHOULD NOT MAKE IT MORE DIFFICULT FOR PERSONS WITH MENTAL ILLNESS TO MAKE A REASONABLE ACCOMMODATION CLAIM UNDER THE ADA.

This case, and this record, does not provide an appropriate vehicle to fashion a new test for reasonable accommodation claims involving arrests under the ADA, as proposed by the United States.

A. Existing ADA Rules, Which Require Individualized Inquiry Into the Nature of the Danger, Are Sufficient to Protect the Important Safety Interests of Police Officers Who Might Be Endangered By the Accommodation of an Armed Mentally Ill Individual.

Existing ADA regulations are sufficient to protect the important safety interests of police officers who might be endangered by the accommodation of an armed mentally ill individual. Federal regulations currently exempt officers from providing ADA accommodations to persons posing a "direct threat" to the safety of others. "Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139." 28 C.F.R. § 35.104. As the Court has explained, "The ADA's direct threat provision, § 12182(b)(3) . . . [is aimed at] reconcil[ing] competing interests in

prohibiting discrimination and preventing . . . 'a significant risk . . . to others[.]' The existence of a significant risk is determined from the standpoint of the . . . professional who refuses . . . accommodation, and the risk assessment is based on . . . evidence available to him and his profession . . . ." *Bragdon v. Abbott*, 524 U.S. 624, 626–27 (1998) (quoting *Sch. Bd. of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273, 287 n.16 (1987) (internal citations omitted)).

Critically, whether an individual in fact poses a "significant risk" sufficient to take them outside the realm of the ADA's protection is a determination that is "not simply [based] on [an officer's] good-faith belief that a significant risk existed." *Id.* Rather, it requires an "individualized inquiry" into the nature, duration, and severity of the danger, as well as consideration of the probability that the danger will cause additional harm. *See Estate of Mauro By & Through Mauro v. Borgess Med. Ctr.*, 137 F.3d 398, 409 (6th Cir. 1998) (internal citations omitted). Any contrary rule for persons with mental illness would be "discriminatory on its face, because it [would] rest[] on stereotypes of the disabled rather than an individualized inquiry into the [individual]'s condition—and hence [would be] 'unreasonable' in that sense." *Lesley v. Hee Man Chie*, 250 F.3d 47, 55 (1st Cir. 2001).

B. Because an Attempt at Negotiation—Not Violent Confrontation—Is the Reasonable Policy Under the Facts of This Case, the Imposition of a 'Special Circumstances' Test is Inappropriate.

The nature of the officers' conduct in this case was patently unreasonable and should not give rise to a new rule adding to the burden that persons with mental illness face in demonstrating that they were owed a reasonable accommodation under the ADA.

In its brief to the Court, the United States argues

> To defeat a motion for summary judgment, a plaintiff raising a failure-to-accommodate claim must "show that an 'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." Because a deviation from ordinary police procedures in this type of arrest situation generally will involve a significant threat to the officers or others on the scene, an accommodation will not be reasonable in the run of cases. . . . [As such], the ADA plaintiff bears the burden of "show[ing] that special circumstances warrant a finding that * * * the requested accommodation is 'reasonable' on the particular facts."

Brief for United States as *Amicus Curiae* Supporting Vacatur in Part and Reversal in Part at 17–18, *City and County of San Francisco, et al. v. Teresa*

Sheehan, No. 13-1412 (2015) (quoting *United Airways, Inc. v. Barnett*, 535 U.S. 391, 401, 405 (2002)). The Ninth Circuit did not address this argument because it was not raised below, and there is no inter-circuit conflict regarding this test because no other courts have addressed it either.

There also is a clear irony in this position. Officers Holder and Reynolds "deviat[ed] from ordinary police procedures," and in doing so, created a "significant threat" to the safety of all parties involved. The threat was especially great to Ms. Sheehan, a woman who they were on the scene to help and knew to be mentally ill. The United States nevertheless argues that Ms. Sheehan must "bear[] the burden of 'show[ing] that special circumstances warrant a finding' " that she was owed an accommodation for her disability. Yet the accommodation Ms. Sheehan was owed was itself the "ordinary police procedure[]" of the San Francisco Police Department for barricade situations. *See* J.A. 305–06, 311–14 (describing San Francisco Police Department training regarding interactions with mentally ill individuals); *see also* S.F. Police Dept. Gen. Order 8.02 (Aug. 3, 1994), at IIB (directing officers "to attempt a negotiated surrender").

Rather than attempt negotiation and de-escalation tactics, as required by their training, the policy regarding barricaded suspect incidents, and the ADA, the officers instead forced open her door and shot her—an outcome as foreseeable as it was avoidable. It is difficult to conclude that the officers acted reasonably when the use of this kind of tactic in such a situation was actively discouraged by the

department. *See generally Gutierrez v. City of San Antonio*, 139 F.3d 441, 448–49 (5th Cir. 1998).

Photo: Teresa Sheehan's building in San Francisco. The window to Ms. Sheehan's room, where she had barricaded herself, is pictured third from the left and second down from the roof.

The decision to force entry seems especially ill-informed when one takes into account the location of the room in which Ms. Sheehan had barricaded herself. The room was not on the ground level, and escape via the window was not a viable option, as the picture above makes clear. In other words, she was alone, trapped, and surrounded.

The United States' argument that "a deviation from ordinary police procedures in this type of arrest

situation generally will involve a significant threat to the officers or others" is true, although not in the way it is intended. If "ordinary police procedure" is taken to mean "attempt a negotiated surrender" (the policy of SFPD), and "this type of arrest situation" is taken to refer to situations in which a known mentally ill person is barricaded alone in a room with no means of escape, then the government is correct: a deviation from a negotiation protocol "generally will involve a significant threat to the officers or others" by unnecessarily injecting violence into what is otherwise a tense but non-violent barricade situation.

Here, Ms. Sheehan's act of barricading herself in her bedroom "afforded [officers] a reasonable opportunity to deliberate various alternatives prior to electing a course of action." *Terrell v. Larson*, 396 F.3d 975, 983 (8th Cir. 2005) (quoting *Neal v. St. Louis Co. Bd. of Police Comm'rs*, 217 F.3d 955, 958 (8th Cir. 2000)). Despite the fact that back-up officers were in the process of surrounding the building and making their way up the stairs, J.A. 130, 324, 407, the officers outside Ms. Sheehan's bedroom door decided to force entry when there was no immediate need to do so.

Amicus represents, as well as counts amongst its membership, persons who suffer with mental illness and face the prospect of involuntary civil commitment effectuated by the police. As individuals directly impacted by determinations regarding the ADA's applicability in civil commitment and arrest situations, members of the Council are particularly concerned about the United

States' argument that Ms. Sheehan "bears the burden of 'show[ing] that special circumstances warrant a finding that * * * the requested accommodation is 'reasonable' on the[se] particular facts." Because an attempt at negotiation—not violent confrontation—is the reasonable policy under the facts of this case, the imposition of a "special circumstances" test is inappropriate.

This was not an "on-the-street . . . disturbance[]" where officers were struggling to "secur[e] the scene," as was the case in *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000)—a case the district court improperly relied upon earlier in this litigation. *See* Pet. App. 79. This case does not give cause for the Court to consider a new Title II "special circumstances" test, as was the case in *Barnett*, 535 U.S. at 405, since here there is no evidence that the "requested accommodation conflicts with the rules" of engagement for dealing with barricaded persons, *id.* at 394. Instead, the simple, objective test that the law has traditionally required should be applied. This standard is sufficient to protect the interests of arrestees, the police, and the public alike.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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