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 FOR RESPONDENT

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QUESTIONS PRESENTED

This case arises from the near-fatal police shooting of Teresa Sheehan, a woman who the officers knew was mentally ill and in need of medical treatment. The questions presented are:

1. Whether Petitioners violated the reasonable accommodation requirement of Title II of the Americans with Disabilities Act when police officers forced a violent confrontation with Sheehan without taking her mental illness into account and without any meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual.

2. Whether it was clearly established that even if an exception to the warrant requirement applied, an entry into a residence may be unreasonable under the Fourth Amendment where officers force their way into the home of an emotionally disturbed individual with guns drawn, without any meaningful consideration of the individual's mental illness, and without any countervailing need.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Constitutional Provisions

Other Authorities

INTRODUCTION

The police officers in this case unnecessarily caused a violent and nearly deadly confrontation with Theresa Sheehan, a mentally ill woman who had only threatened individuals who entered her room without her permission. With guns drawn, Sergeant Kimberly Reynolds and Officer Katherine Holder forcibly opened the door to Sheehan's room and shot her four times in her torso and arm and then, as she was lying on the ground writhing in pain, shot her again in the face. If Reynolds and Holder had made a meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual, as law enforcement officers are trained to do, or even if they had complied with their department's policy regarding barricaded suspect incidents, this violent confrontation would have been avoided.

The Court can appropriately discourage discrimination against mentally ill individuals by law enforcement officials in two ways. First, it can adopt a rule—consistent with the plain language and non-discrimination mandate of the Americans with Disabilities Act ("ADA")—requiring police officers to consider and reasonably accommodate the mental disabilities of suspects with whom they interact. Such a rule is particularly appropriate where, as here, the very reason for a police officer's interactions with a mentally ill or emotionally disturbed individual relates specifically to the individual's disability. Second, the Court can continue to require that police officers carry out

searches and seizures in a reasonable manner. When an officer causes a violent and potentially deadly confrontation with a mentally ill person without any meaningful consideration of the individual's mental disability and without a countervailing need, there is no compelling basis to immunize such conduct from Fourth Amendment scrutiny.

STATEMENT

1. Sheehan is a mentally ill woman who suffers from schizoaffective disorder. J.A. 24, 166, 309. At the time of the events at issue in this case, Sheehan was in her mid-50s, had no criminal record, and lived in a group home for persons suffering from mental illness. J.A. 19-20, 309; Dist. Ct. Dkt. 1 (Compl. ¶ 10). She and other residents shared common areas, such as the kitchen, but lived independently in private rooms. J.A. 19-20, 91-92, 406.

Heath Hodge was the social worker who supervised the counseling staff at the home. J.A. 21, 84. On August 7, 2008, Hodge went to Sheehan's room to perform a welfare check. J.A. 22-24. When she did not respond to his knock on her door, he used a key to enter her room. J.A. 91-93. Hodge found Sheehan lying on her bed, staring, with a book resting on her face. J.A. 93-94. She did not initially respond to his questions but, after a while, jumped out of bed and told him to get out of her room. J.A. 94. She also threatened him and told him that she had a knife. *Id.*

Although Hodge did not see a knife, he spoke with the only other persons in the group home at the time—a property manager and another resident—and made sure that everyone had left or would soon leave. J.A. 25, 96. He then filled out an application under California Welfare & Institutions Code § 5150 to involuntarily commit Sheehan so that she would receive any necessary medical treatment. J.A. 26, 89, 98. Hodge checked boxes indicating he believed that Sheehan was a danger to others and was gravely disabled, but did not check the box to indicate that Sheehan was a danger to herself. J.A. 398. Hodge then telephoned the police for assistance in transporting Sheehan to the hospital. J.A. 26, 86, 97-98. He called the non-emergency number because he did not believe there was any imminent risk that Sheehan would harm herself or that she would leave her room to harm anyone else. J.A. 26, 97-98, 111-12.

Officer Holder responded to the call and decided that she needed her sergeant's assistance because she was unsure whether Hodge was authorized to seek a detention. J.A. 32-33, 172-73. She was soon joined by Sergeant Reynolds. J.A. 208. Hodge told Reynolds and Holder that Sheehan had schizophrenia and had been off her medication for about a year and a half, that she was not taking care of herself, and that she had threatened to stab him when he went into her room. J.A. 34, 166, 169, 208-09. He showed them his completed Section 5150 application and told them there was no one else in the building. J.A. 47, 99, 101, 114. Hodge had not checked the box on the application that would have indicated that Sheehan was a danger to

herself, and nothing else he said to the officers suggested that she was suicidal or a danger to herself. J.A. 113, 168, 211, 398.

Reynolds believed it was her responsibility to assess Sheehan herself to confirm that the detention criteria were met. J.A. 34, 210-11. Accompanied by Holder and Hodge, Reynolds climbed the steps to the front door and another flight of stairs to the second floor and walked down the hall to Sheehan's room. J.A. 34-35, 102, 173, 215, 400. The officers knocked on the closed door and told Sheehan that they were there to help her. J.A. 27, 217. Using Hodge's key, the officers opened the door. J.A. 28, 104, 212-13.

When the door opened, Sheehan rose from her bed, grabbed a small bread knife she had purchased at a supermarket, and started walking toward the officers. J.A. 60, 105, 178, 181-82, 221-23, 272. Hodge testified that Sheehan was not making stabbing motions with the knife and that she did not appear to be trying to stab the officers. J.A. 118. Holder similarly testified: "I don't remember her making jabbing motions or anything." J.A. 181. Sheehan told the officers she did not need their help and to leave her alone, threatened them verbally, and yelled at them to get out of her room. J.A. 177-78, 223, 283. According to Sheehan, while the door was open the officers "could see … that no one else was in the room with me." J.A. 279.

The officers drew their guns and retreated, and Sheehan shut the door. J.A. 37-39, 217-18,

226, 231. At that point, according to Hodge, Sheehan did not appear to be a further threat to the officers. J.A. 118-19. Out in the hallway, the officers asked Hodge whether they could get into Sheehan's room from the back. J.A. 116. Hodge informed them that other than the door to the hall, where the officers were standing, the only way into Sheehan's second-floor room was through a window. *Id.*

The officers called for backup, reporting there was a barricaded suspect with a knife and asking that additional officers cover the rear of the building. J.A. 14, 40, 184-85, 197. Backup arrived quickly: Reynolds testified she was "shocked at how quick the sirens were right there and it was fast, and the response time was very quick." J.A. 41. When Reynolds heard the sirens, she sent Hodge to the front door to let the other officers in. J.A. 29, 41, 107-09, 236.

According to the Computer-Aided Dispatch printout, Officer James Escobar arrived at the scene and was directed to the back of the building less than a minute after Holder called for backup. J.A. 407. At the same time, Officer Constantine Zachos was running up the front steps of the building. J.A. 130. Two additional officers—Officer E.R. Balinton and Sergeant Mitchell Campbell—also arrived on the scene. J.A. 324. Reynolds and Holder did not wait for Zachos or anyone else. Instead, even though backup officers had both the back and the front of the building covered, Reynolds and Holder, with guns drawn, forced open the door to Sheehan's room, where they knew they

would find a mentally ill woman confronting them with a knife. J.A. 12-13, 40-41, 50-51, 60-61, 232, 235.

As soon as the officers forced the door open, Sheehan stepped forward holding her bread knife and told the officers "to go away. Leave me alone." J.A. 278-80, 283. Reynolds responded by shooting pepper spray into Sheehan's face. J.A. 238, 280. Sheehan screamed that the officers were blinding her and she could not see. J.A. 280. Reynolds and Holder then shot Sheehan four times. J.A. 44, 287-88, 292. With wounds in her torso and right arm, Sheehan fell to the ground but the officers' attack continued. J.A. 15-16, 82, 253-54, 280-81, 292. According to Holder's statement on the day of the shooting and Sheehan's forensic science expert, Reynolds shot Sheehan in the face *after* she was lying on the ground. J.A. 15-16, 67-68, 293. Sheehan was on the floor screaming in pain when Zachos ran up and kicked the knife out of her hand. J.A. 131, 154, 254, 281-82.

Reynolds testified that she did *not* consider Sheehan's "psychiatric disability" when she instructed Holder to forcibly open the door to Sheehan's room. J.A. 266. Instead, according to Reynolds, "[a]t this point in my mind the disability, the mental illness, however you'd like to refer to it, became a secondary issue. And what I was faced with was a violent woman who had already threatened to kill her social worker." J.A. 235.

The officers' failure to take Sheehan's mental disability into account—and to enter her room

without any meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual—was in violation of their training for dealing with emotionally disturbed individuals. As detailed in the report and testimony of Lou Reiter, a former deputy chief of police in Los Angeles and consultant to police departments across the country and the Department of Justice, SFPD training materials instruct officers to (a) coordinate their approach and ensure that sufficient resources are brought to the scene, (b) contain the subject and respect the comfort zone of the subject, (c) use time to their advantage because the longer an encounter is allowed to occur, the better the chance of a successful and safe resolution, and (d) employ non-threatening verbal communication and open-ended questions to facilitate the subject's participation in communication. J.A. 301-58. These instructions are set forth in various SFPD training materials, cited by Reiter,[1] and other training materials and writers on police procedure agree with these instructions. *See infra* at 38-39.

Although they had been told that Sheehan was acting irrationally because of a mental disability, Reynolds and Holder concluded that Sheehan was a

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[1] *See* J.A. 305-06, 311-14 (citing chapter of Learning Domain 37 on Mental Illness, the training session "Communications Techniques and Non-Violent Crisis Intervention," and the SFPD Roll Call Training Lesson "Psychological Evaluation of Adults Part 1-3").

violent criminal and decided to forcibly reenter her room to arrest her. J.A. 12-13, 174-75, 227. In doing so, they violated SFPD's policy regarding "barricaded suspect incidents," which states:

> In the event that a suspect resists arrest by barricading himself, and normal police procedures fail to bring about his arrest, it is the policy of the San Francisco Police Department to use hostage negotiators to attempt a negotiated surrender.

San Francisco Police Department General Order 8.02, at II.B (Aug. 3, 1994), *available at* http://sf-police.org/Modules/ShowDocument.aspx?documentid=14748; *see also* J.A. 321 (summarizing policy). The same policy also requires officers to establish a perimeter around the location, identify a command post, and notify "Communications Division" of the situation. *Id.* at III.A; J.A. 321. Reynolds and Holder did not do any of these things.

The shooting left Sheehan permanently disabled. Dist. Ct. Dkt. 1 (Compl. ¶ 26). Sheehan was then prosecuted for assault with a deadly weapon and making criminal threats. *Id.* (Compl. ¶ 27). The jury hung on the assault counts and acquitted her on the criminal threat count. *Id.* The city did not retry her. Dist. Ct. Dkt. 48-8 (Superior Ct. of Cal., County of San Francisco - Minutes, p. 7).

2. Sheehan filed suit against Petitioners alleging, in relevant part, a Section 1983 claim

against Reynolds and Holder based on the officers' violation of her Fourth Amendment rights and an ADA claim against the City and County of San Francisco based on Petitioners' violation of the statute's reasonable accommodation requirement. Dist. Ct. Dkt. 1 (Compl.). Petitioners filed a motion for summary judgment on all of Sheehan's claims. Dist. Ct. Dkt. 37. In response, Sheehan submitted Reiter's expert witness report disputing the reasonableness of the officers' actions. J.A. 301-58. In addition to describing general police practices for dealing with persons who are mentally ill or emotionally disturbed (*see supra* at 7), Reiter opined that the officers' second entry into Sheehan's room was contrary to reasonable and generally accepted police practices. J.A. 309-21, 325-26. Despite that detailed report, the district court granted summary judgment to Petitioners. Pet. App. 55-81.

3. The court of appeals affirmed the judgment in part and vacated it in part in a divided opinion. Pet. App. 1-48. Relevant here, the court (Judges John Noonan and Raymond Fisher in the panel majority) found triable issues of fact as to whether the officers' second entry into Sheehan's room violated the Fourth Amendment "when they decided to force the second entry, without taking Sheehan's mental illness into account and in an apparent departure from their police officer training." Pet. App. 26. The court likewise held that fact issues precluded summary judgment regarding Petitioners' qualified immunity defense. Pet. App. 36.

The court also rejected Petitioners' arguments regarding Sheehan's ADA claim. It first held—consistent with other circuits—that the reasonable accommodation requirement of Title II of the ADA applies to law enforcement activities, including arrests. Pet. App. 43. It then held that Petitioners were not entitled to summary judgment on the ADA claim because "[a] reasonable jury … could find that the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary." Pet. App. 45.

Judge Susan Graber dissented from the qualified immunity ruling, but concurred with the remainder of the opinion. Pet. App. 48-54.

SUMMARY OF ARGUMENT

I. There are, at the very least, fact issues regarding whether Petitioners violated the reasonable accommodation requirement of Title II of the ADA when Reynolds and Holder forced a violent confrontation with Sheehan without taking her mental illness into account.

A. Disavowing any categorical rule that the ADA does not apply to arrests (contrary to their original argument in their petition for a writ of certiorari), Petitioners' lead argument regarding Sheehan's ADA claim is that Sheehan is not a "qualified individual with a disability" under Title II of the ADA because she allegedly posed a "direct

threat" to the safety of others. Legally, it makes no sense to apply this exception to Title II's reasonable accommodation requirement where, as here, an individual's mental illness is the reason for a police officer's interaction with that person. Factually, Petitioners cannot satisfy the direct threat exception because (a) the officers and Hodge were protected by the door and no one else was in the building, (b) Sheehan was not a flight risk, and (c) throughout the encounter, Sheehan had only threatened individuals who had entered her room without her permission. For these reasons and others, the record, viewed favorably to Sheehan, shows that Sheehan did not present a direct threat to others.

B. Even if Petitioners could show that Sheehan presented a direct threat to others, they also must establish, as a matter of law, that the proposed modifications would not have eliminated any threat and were not reasonable. Far from being unreasonable, the proposed modifications are consistent with applicable training materials and universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual. Had the officers reasonably accommodated Sheehan's disability using these established police practices, they could have eliminated any risk that Sheehan posed to others and avoided a violent confrontation.

C. On the facts presented, there is no basis to adopt a "special circumstances" test in Title II cases as the United States suggests. Unlike the circumstances in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)—the case cited by the United

States in support of this argument—there is no substantial conflict between the proposed modifications and prescribed police practices that would warrant such a test. As a result, courts can continue to apply established Title II principles as set forth in points A and B above. Applying those principles here, the court of appeals correctly concluded that Sheehan's ADA claim cannot be dismissed as a matter of law.

II. Nor are Reynolds and Holder entitled to qualified immunity. The officers violated Sheehan's Fourth Amendment rights when, contrary to their training, SFPD's barricaded suspect policy, and universally accepted police practices, they forcibly reopened the door to Sheehan's room with guns drawn and shot her five times (a) without taking her mental illness into account and (b) without a countervailing need. The officers' conduct was not objectively reasonable, and Sheehan's constitutional rights in this regard are clearly established, at the appropriate level of specificity, by the three principal cases that the court of appeals cited in support of its holding: *Graham v. Connor,* 490 U.S. 386 (1989); *Alexander v. City & Cnty. of San Francisco*, 29 F.3d 1355 (9th Cir. 1994); and *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001). As the court of appeals correctly held, the officers' conduct should not be immunized from Fourth Amendment scrutiny.

ARGUMENT

I. It Was Not Objectively Reasonable For Police Officers To Forcibly Reopen The Door to Sheehan's Room With Guns Drawn Without Any Meaningful Attempt To Employ Universally Accepted Police Practices Designed To Minimize The Risk Of A Violent Confrontation With A Mentally Ill Individual.

Focusing on the officers' decision to forcibly reopen the door to her room with guns drawn, Sheehan asserts that even if the officers could lawfully enter her residence they violated her Fourth Amendment rights when they failed to carry out the search or seizure in a reasonable manner. The court of appeals ruled in favor of Sheehan on this claim: it found issues of fact, vacated the district court's summary judgment ruling in Petitioners' favor, and remanded the matter for trial. Pet. App. 25-32.

The reasonableness of the officers' actions is a significant threshold issue in this case for two reasons. First, as Petitioners have acknowledged, reasonableness is a central element of both the accommodation requirement of Title II of the ADA and the Fourth Amendment's limitations on searches and seizures. Pet. Br. 25. Second, the qualified immunity issue also turns on the reasonableness of the officers' actions. The reasonableness of the officers' actions is therefore addressed first below.

A. As Petitioners acknowledge in both their ADA discussion (Pet. Br. 25) and their qualified immunity discussion (Pet. Br. 45), the Fourth Amendment requires that searches be reasonable in their execution. Addressing that issue, the Court has emphasized that "[t]he touchstone of the Fourth Amendment is reasonableness …." *United States v. Knights*, 534 U.S. 112, 118 (2001); *see also Illinois v. McArthur*, 531 U.S. 326, 330 (2001) ("central requirement" of Fourth Amendment "is one of reasonableness" (internal quotation marks and citation omitted)); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) ("As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'").

Searches and seizures may be challenged as unreasonable in their execution whether or not they are conducted pursuant to a warrant, permitted by an exception to the warrant requirement, or justified at their inception by probable cause or reasonable suspicion. The Court recognized that legal principle in *Terry v. Ohio*, 392 U.S. 1, 28 (1968): "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." Based on this well-established and repeatedly confirmed legal principle,[2] lower

[2] *See, e.g., Wilson v. Layne*, 526 U.S. 603, 614 (1999) (allowing media observers into a residence during execution of a warrant was unreasonable); *United States v. Ramirez*, 523 U.S. 65, 71 (1998) ("The general touchstone of reasonableness which governs Fourth Amendment analysis governs the (continued . . .)

courts have entertained numerous claims based on searches or seizures that were unreasonable in their execution.[3]

The Court explained in *Terry* that "to assess … reasonableness … as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the

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(. . . continued)
method of execution of the warrant. Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful...." (citation omitted)); *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) ("[W]e have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure.").

[3] *See, e.g., Avina v. United States*, 681 F.3d 1127, 1132-33 (9th Cir. 2012) (forcing children to lie on ground with hands cuffed behind backs during drug search); *Mlodzinski v. Lewis*, 648 F.3d 24, 37-39 (1st Cir. 2011) (shoving 15-year-old girl to floor and detaining her with assault rifle to her head longer than necessary to secure premises; pointing assault rifle at head of suspect's mother for half an hour while she was handcuffed and lying partially nude in bed); *Binay v. Bettendorf*, 601 F.3d 640, 648-50 (6th Cir. 2010) (holding plaintiffs at gunpoint and handcuffed during and after drug search); *Baird v. Renbarger*, 576 F.3d 340, 344-45 (7th Cir. 2009) (using 9 mm submachine gun to detain persons present at site of search for evidence regarding crime of altering a vehicle identification number); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1188, 1192-94 (10th Cir. 2001) (holding children at gunpoint and using expletives during search); *Leveto v. Lapina,* 258 F.3d 156, 165-66, 171-72 (3d Cir. 2001) (improperly patting plaintiffs down and detaining them for eight hours).

private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Id.* at 20-21 (brackets in original) (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 534-35, 536-37 (1967)). In *Vernonia*, the Court similarly explained that "whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." 515 U.S. at 652-53 (internal quotation marks and citations omitted).

The Court applied this balancing test to an excessive force claim in *Graham* and held that "[d]etermining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." 490 U.S. at 396 (internal quotation marks and citations omitted). The Court also explained that the test is an "objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them." *Id.* at 397 (internal quotation marks omitted).

Of paramount importance here, the Court also has repeatedly considered the "efficacy" of the government's conduct in assessing the "nature and immediacy of the governmental concern at issue." *Vernonia*, 515 U.S. at 660; *see also McArthur*, 531

U.S. at 331 (where search without a warrant is justified by exigent circumstances it must be "tailored to th[e] need" that created the exigency); *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000) ("constitutionality of … checkpoint programs … depends on a balancing of the competing interests at stake and the effectiveness of the program"); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 629-32 (1989) (assessing effectiveness of blood and urine tests of railroad employees); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (courts consider whether "the measures adopted are reasonably related to the objectives of the search"). While this does not require the government to choose the most effective means to achieve its goal, it does require officers to choose from among "reasonable alternative law enforcement techniques." *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 453 (1990).

B. There is ample evidence to support Sheehan's claim that when Reynolds and Holder forcibly reopened the door to her room with guns drawn and without any meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual, they violated her Fourth Amendment rights by failing to carry out their search and seizure in a reasonable manner. That is especially so when the evidence is viewed in the light most favorable to Sheehan as required by this Court's precedent. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his

favor"); *see also Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (*per curiam*) ("Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard.").

1. Starting with the governmental interest at issue, Hodge asked the police for assistance in transporting Sheehan to a hospital for psychiatric evaluation and treatment. *See* 66 Ops. Cal. Atty. Gen. 142 (1983) (Section 5150 imposes a duty on a police officer to transport a gravely disabled person to a mental health facility). Accordingly, at the outset, the governmental interest was to provide *safe transport*. That is hardly the sort of governmental interest that would justify a violent intrusion of constitutional rights. Moreover, as discussed below (*infra* at 21-22, 30-32), there was no compelling need to immediately take Sheehan into custody. And even if there were, "[a] desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." *Deorle*, 272 F.3d at 1281; *accord Phillips v. Community Ins. Corp.*, 678 F.3d 513, 525 (7th Cir. 2012) (quoting *Deorle*).

2. The officers' intrusion on Sheehan's Fourth Amendment rights was profound. In *Payton v. New York*, 445 U.S. 573 (1980), the Court recognized that the Fourth Amendment "unequivocally establishes the proposition that 'at the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from

unreasonable governmental intrusion.'" *Id.* at 589-90 (alterations and citation omitted). The officers here decided to force their way into "the unambiguous physical dimensions" of Sheehan's room. *Id.* at 589. Making matters worse, they did so without a warrant,[4] without warning, and with guns drawn—conditions that, as the court of appeals noted, "were likely to result in [Sheehan's] death." Pet. App. 33.

The officers then pepper sprayed and shot Sheehan five times. As Petitioners admit, Sheehan had fallen and "was on the ground" when Reynolds fired her final shot. Pet. Br. 10. Even if it were necessary and objectively reasonable to shoot Sheehan after having just incapacitated her with pepper spray, it was neither reasonable nor

[4] Although the Court need not reach the issue, no exception to the warrant requirement applied to the second entry. The emergency aid exception did not apply because the officers did not enter to provide aid. Instead, as Reynolds testified, "[a]t this point in my mind the disability … became a secondary issue. And what I was faced with was a violent woman who had already threatened to kill her social worker." J.A. 235. Because the officers were at that point focused on arresting rather than helping Sheehan, the continuous entry exception also did not apply. *See Michigan v. Tyler*, 436 U.S. 499, 512 (1978) (continuous entry exception ceases to apply when "investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution"). Lastly, because there was no imminent threat (*see infra* at 30-32), the exigent circumstances exception also did not apply. But even if one of these legal theories justified the second entry, it nonetheless violated the Fourth Amendment because it was not reasonable.

necessary to shoot her in the face after she fell to the floor. By any measure, the officers' intrusion on Sheehan's Fourth Amendment rights was immense. *See Tennessee v. Garner*, 471 U.S. 1, 9 (1985) ("The intrusiveness of a seizure by means of deadly force is unmatched.").

3. The severity of Sheehan's alleged crime did not justify such an intrusion. Although threatening another person with a knife can be considered a serious crime, Sheehan threatened Reynolds and Holder because she "was mentally ill and acting in an irrational manner" after the officers indicated they were going to enter her room without her permission. J.A. 321. When asked at her deposition why she did not drop the knife, Sheehan testified: "Because I have the right to bear arms." J.A. 283. She further explained: "I was emotionally upset. I saw the guns and I saw there was two against one and I knew this was just a bread cutting knife. I knew it wasn't a lethal weapon." J.A. 284.

Reynolds and Holder knew that Sheehan was a person of diminished capacity and her conduct was not purposeful. Hodge informed the officers that Sheehan had not been taking her psychotropic medications and was presenting with increased symptoms. J.A. 101, 397-98. SFPD training materials describe the sorts of behaviors associated with mental illness, including "fearfulness," "excitability," "inflexibility," "direct threats," and "begging to be left alone." J.A. 313. Courts, too, have recognized that threats and increasing use of force against an emotionally distraught individual,

which is how Sheehan would have perceived the officers' actions, can "exacerbate the situation." *Deorle*, 272 F.3d at 1283. A reasonable officer on the scene would have known that Sheehan's conduct was a symptom of her illness. *See Farmer v. Brennan*, 511 U.S. 825, 842 (1994) ("[A] factfinder may conclude that a [defendant] knew of a substantial risk from the very fact that the risk was obvious.").

Even ignoring Sheehan's mental disability, Hodge testified that Sheehan did not make stabbing motions with the knife and did not appear to be trying to stab the officers. J.A. 118. Holder likewise testified that she did not "remember [Sheehan] making jabbing motions or anything." J.A. 181. Under the circumstances here, Sheehan's alleged crime did not warrant the immediate use of deadly force. And while Sheehan was prosecuted on several counts, the jury acquitted or hung and the City did not retry her. *See supra* at 8.

4. Nor did Sheehan pose a direct threat to the safety of others. Viewing the facts in the light most favorable to Sheehan, the record shows that (a) Sheehan did not present a danger to anyone in the group home because the officers and Hodge were protected by the door and no one else was in the building, (b) Sheehan was in her room and did not want to leave, (c) even if Sheehan had wanted to leave her room (and she gave no indication of any such desire), the officers were outside her door and the only other way out of her room was through a second-story window, (d) the less-than-lethal-force unit had arrived and could quickly establish a perimeter around the location, and

(e) throughout the encounter, Sheehan had only threatened individuals who had entered her room without her permission. *See supra* at 2-6. Although Petitioners take issue with this assessment, they rely on speculation, contradict the considered views of other professionals, and ignore the rule that the evidence must be viewed in the light most favorable to Sheehan. *See infra* at 30-32.

5. The officers' conduct also was unreasonable because the means by which the search or seizure was conducted was not reasonably likely to achieve the governmental interests pursued. As noted previously, even when a search is justified by exigent circumstances, it must be efficacious, "tailored to the need" that created the exigency, and consistent with "reasonable alternative law enforcement techniques." *See supra* at 16-17. Far from being reasonable law enforcement techniques, the officers' actions were directly contrary to applicable training materials and SFPD's barricaded suspect policy. As Reiter explained, San Francisco police officers are trained not to unreasonably agitate or excite a mentally disabled individual, to contain the person, to respect the person's comfort zone, to use non-threatening communications, and to employ the passage of time to their advantage. J.A. 311-13. SFPD's barricaded suspect policy similarly requires officers to "use hostage negotiators to attempt a negotiated surrender." *See* General Order 8.02, at II.A-B (discussed *supra* at 8).

These materials are directly relevant to Sheehan's claims. In *Garner*, 471 U.S. at 18, the Court relied on similar policy statements in deciding an excessive force claim, and in *United States v. Arvizu*, 534 U.S. 266, 273 (2002), the Court held that "specialized training" of border patrol agents can be considered in determining whether a detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing. Lower courts have likewise recognized that such "training materials are relevant not only to whether the force employed in [a given] case was objectively unreasonable ... but also to whether reasonable officers would have been on notice that the force employed was objectively unreasonable." *Drummond v. City of Anaheim*, 343 F.3d 1052, 1062 (9th Cir. 2003) (emphasis omitted).[5] Reynolds and Holder did not act in accordance with their training or SFPD's barricaded suspect policy. Instead, as the court of appeals concluded, the officers decided to "force the second entry, without taking Sheehan's mental illness into account and in an apparent departure from their police officer training," and "cause a violent—and potentially deadly—confrontation with a mentally ill person without a countervailing need." Pet. App. 26, 31. Even if an exception to the warrant requirement

[5] *See also Weigel v. Broad,* 544 F.3d 1143, 1152 (10th Cir. 2008) (law enforcement training materials considered in excessive force analysis); *Champion v. Outlook Nashville, Inc.,* 380 F.3d 893, 903-04 (6th Cir. 2004) (same); *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995) (police department guidelines are "relevant to the analysis of constitutionally excessive force").

applied to the second entry, the officers' conduct was manifestly unreasonable.

II. Petitioners Violated The Reasonable Accommodation Requirement Of Title II Of The ADA When The Police Officers Forced A Violent Confrontation With Sheehan Without Taking Her Mental Illness Into Account.

In addition to asserting a Section 1983 claim against Reynolds and Holder, Sheehan asserted an ADA claim against the City and County of San Francisco based on Petitioners' violation of the statute's reasonable accommodation requirement. Dist. Ct. Dkt. 1 (Compl.). Addressing this issue, the court of appeals first held—consistent with other circuits that have addressed the issue—that the "reasonable accommodation" requirement of Title II of the ADA applies to law enforcement activities, including arrests. Pet. App. 43. It then vacated the district court's summary judgment ruling in Petitioners' favor and remanded the claim because "[a] reasonable jury … could find that the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary." Pet. App. 45.

Petitioners asked the Court to review the court of appeals' ADA ruling because, according to their petition, the court "adopted a rule in direct conflict with the categorical prohibition on such claims

adopted by" other circuits. Pet. 18. Now that review has been granted, Petitioners "do not assert that the actions of individual police officers are never subject to scrutiny under Title II," and they further represent that "[t]here is no claim that an arrest is not one of the 'services, programs, or activities' of a public entity under 42 U.S.C. § 12132." Pet. Br. 34. As a result, it may be appropriate to dismiss Petitioners' first Question Presented as improvidently granted. That aside, Petitioners' decision to disavow a categorical rule that the ADA does not apply to arrests comports with the plain language of the ADA, Title II's legislative history, the Justice Department's implementing regulations, and applicable case law—all of which establish that all operations of a police department, including arrests, are subject to Title II of the ADA.[6] That result also is consistent with this Court's holding that activities in state

[6] *See* 42 U.S.C. § 12132 ("no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, *programs, or activities* of a public entity, *or be subjected to discrimination by any such entity*" (emphasis added)); 42 U.S.C. § 12131(1)(A)-(B) (defining "public entity" to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government"); *Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.*, 673 F.3d 333, 337-40 (4th Cir. 2012) (discussing plain language of ADA, implementing regulations, and case law); *Gorman v. Bartch*, 152 F.3d 907, 911-13 (8th Cir. 1998) (discussing plain language of ADA, implementing regulations, and case law); *Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1158-59 (W.D. Wash. 1999) (discussing plain language of ADA, legislative history, and case law).

prisons are governed by the ADA. *See Pa. Dep't of Corr. v. Yeskey,* 524 U.S. 206, 210-11 (1998). The United States, too, correctly argues that Title II "applies to all governmental entities, including law enforcement activities" and "requires law enforcement entities to make reasonable modifications when arresting an individual with a disability." U.S. Br. 10, 14. Petitioners' supporting amici do not seriously argue otherwise.

Rather than assert that the ADA does not apply to arrests, Petitioners argue that Sheehan's ADA claim fails for two reasons: (1) Sheehan was not a "qualified individual with a disability" because she allegedly posed a direct threat to the safety of others (Pet. Br. 20-33); and (2) the modifications proposed by Sheehan would not have eliminated the significant risk she posed and were not reasonable (Pet. Br. 34-41). The United States, in contrast, claims that the Court should adopt a "special circumstances" test and remand for application of that test. U.S. Br. 17-22. As set forth below, these arguments fail.

A. The "Direct Threat" Exception To The Reasonable Accommodation Requirement Does Not Apply Here.

Petitioners' direct threat argument is based on the ADA's so-called "safety principle." Pet. Br. 22. As Petitioners note, Congress expressly incorporated this principle into the Rehabilitation Act and into both Title I and Title III of the ADA. *Id.* (citing *Bragdon v. Abbott*, 524 U.S. 624, 649-50 (1998) (citing Title I and Title III provisions)).

Although Congress *did not* expressly incorporate this principle into Title II of the ADA, the Justice Department's implementing regulations provide that Title II "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others." 28 C.F.R. § 35.139(a). This regulation is the lynchpin of Petitioners' public safety argument. Pet. Br. 22. But the direct threat exception to the reasonable accommodation requirement does not apply here, legally or factually.

1. Legally, it makes no sense to apply the direct threat exception when an individual's mental illness or emotional state is the reason for a police officer's interaction with that person. This is not a case where a disabled individual wanted to ride a city bus or attend a public meeting for reasons unrelated to the individual's disability and was told she could not do so based on the direct threat exception to the ADA. To the contrary, the service, program, or activity was *involuntary* and the *very reason* for providing the service relates *specifically* to the individual's disability. *See* Pet. Br. 38 n.5 ("All fifty States have statutes authorizing police officers to take into custody mentally ill individuals who are a danger to themselves or others."). It makes no sense to provide this service to mentally disabled individuals *because they are disabled* but then conclude that the same illness that causes them to be disabled—whether dementia, Alzheimer's, epilepsy, schizophrenia, autism, depression, diabetic hypoglycemia, or any other

illness that can sometimes cause erratic, irrational, or seemingly uncooperative behavior—also triggers an exception to the ADA's non-discrimination mandate.

Petitioners' contrary argument lacks merit. Quoting the Fifth Circuit's opinion in *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000), Petitioners claim that Congress could not have intended that the non-discrimination mandate of the ADA would "be attained at the expense of the safety of the general public." Pet. Br. 30 (internal quotation marks and citation omitted). But unlike in Title I and Title III, Congress did not include a public safety exception in Title II of the ADA. The regulations do that. *See supra* at 26-27. And because Title II unambiguously covers all instrumentalities of state or local government *without* any exception that could cast the coverage of arrests into doubt, the congressional purpose identified by Petitioners—expressed nowhere in the statute or legislative history—is "irrelevant." *Yeskey*, 524 U.S. at 212.

If the Court considers the statute's legislative history, it shows that Congress expressly intended to make unlawful the discriminatory treatment of persons with disabilities by law enforcement officials. During legislative debate, Congressman Mel Levine stated: "Regretfully, it is not rare for persons with disabilities to be mistreated by police." 136 Cong. Rec. H2599, H2633 (May 22, 1990). He then cited examples of mistreatment of persons with cerebral palsy, epilepsy, and hearing loss by law enforcement officials and concluded

that, even when conducted in good faith, "[t]hey constitute discrimination, as surely as forbidding entrance to a store or restaurant is discrimination." *Id*.

For all these reasons, the Court should hold that the direct threat exception to the reasonable accommodation requirement does not apply where, as here, the very reason for a police officer's interaction with a mentally ill or emotionally disturbed individual relates specifically to the individual's disability. As discussed below (*infra* at 35), the "reasonableness" requirement appropriately recognizes the concerns of law enforcement officers in such circumstances without unnecessarily abandoning the rights of disabled individuals and the non-discrimination purpose of the ADA.

2. Even if the public risk exception *could* apply here, Petitioners must still show, *factually*, that Sheehan posed "a direct threat to the health or safety of others." 28 C.F.R. § 35.139(a). To defeat Sheehan's ADA claim on this basis, Petitioners must do more than demonstrate that a threat existed: "Because few, if any, activities in life are risk free, *Arline* and the ADA do not ask whether a risk exists, but whether it is significant." *Bragdon*, 524 U.S. at 649 (citing *School Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 287 & n.16 (1987), and 42 U.S.C. § 12182(b)(3)); *see also* 28 C.F.R. § 35.104 (defining "direct threat" as "a *significant risk* to the health or safety of others" (emphasis added)).

As discussed above with regard to the reasonableness inquiry (*supra* at 21-22), the record shows that Sheehan did not pose a significant threat to the safety of others. Addressing this issue, Petitioners emphasize that Sheehan had acted in a threatening manner and there were "other knives" in her room. Pet. Br. 29. But throughout the encounter, Sheehan had repeatedly demanded to be left alone and had only threatened individuals who had entered her room without her permission. There was no reason to believe that she had any desire to attack the officers or anyone else outside her room. Further, the bread knife was not a viable threat after the officers retreated and the door to the room was closed. J.A. 118-19.[7]

In arguing that a threat remained, Petitioners resort to speculation and conjecture. Petitioners claim, for example, that even though "Hodge had told the officers that the only other way out of Sheehan's room was her back window" and "[t]he officers knew Sheehan's flat was on the second floor" (Pet. Br. 7), the officers "didn't know" if the

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[7] Holder attempted to deflect this point by testifying that the knife could stab her through the door (J.A. 189), but as the court of appeals correctly noted: "Arguably, the officers could have avoided harm to themselves by retreating a safe distance from the door." Pet. App. 25 n.8. Common sense confirms that observation, and other courts have recognized the same point. *See, e.g., Morais v. City of Philadelphia*, No. 06-582, 2007 WL 853811, at *5 (E.D. Pa. Mar. 19, 2007) ("Although Decedent was armed with a knife, he did not have the ability to harm any individual outside of his apartment ….").

backyard was graded up to the window (*id.*), "did not ask" for details about the window (*id.*), "could not see" what Sheehan was doing (Pet. Br. 8), "did not know" whether Sheehan was the only person in the room (*id.*), and were concerned about what Sheehan "could be" doing, including "gathering up … weapons the officer hadn't seen" (Pet. Br. 8, 29). These post hoc rationalizations based on what Sheehan "could be" doing and what the officers "didn't know" are the exact opposite of the *objective evidence* required to establish a significant threat under the ADA. *See Bragdon*, 524 U.S. at 649 ("risk assessment must be based on medical or other *objective* evidence" (emphasis added)); *cf.* 28 C.F.R. § 35.130(h) (safety requirements must be "based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities"); *see also* U.S. Br. 16 (asserted risk must be "significant and based on objective evidence").[8]

Petitioners' assertion that Sheehan could "escape out the back window or down a fire escape"

[8] The law is no different in the Fourth Amendment context. *See Terry*, 392 U.S. at 21 ("[I]n justifying the particular intrusion the police officer must be able to point to *specific and articulable facts* which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (emphasis added)). Petitioners' argument that others might be in Sheehan's room also ignores Sheehan's testimony that, when the door was open, the officers "could see … that no one else was in the room with me." J.A. 279; *see also* J.A. 411 (showing size and layout of Sheehan's room, denoted "bedroom #3"). At the very least, this evidence raises a jury issue.

(Pet. Br. 29) also makes no sense. Reynolds testified that "[t]he day of the incident I felt Ms. Sheehan probably was a good 250 pounds. Seemed obese to me." J.A. 207; *see also* J.A. 206 (Sheehan's height was "5'5, maybe 5'6"). In the meantime, the record shows—and Petitioners admit—that the less-than-lethal-force unit arrived *before* the officers forcibly reopened the door to Sheehan's room. J.A. 324; Pet. Br. 10. Even if Sheehan had wanted to leave her room (she gave no indication of any such desire), even if her back window led to a fire escape or opened onto a graded hill (there is no evidence supporting either assertion),[9] and even if the police officers truly believed that Sheehan was likely to jump out her second-story window and make a run for it (despite her age, mental disability, and size), a reasonable officer on the scene would know that there was no credible flight risk.

Petitioners also claim that police officers "cannot be faulted for failing to diagnose a mental illness." Pet. Br. 33 (internal quotation marks and citation omitted). But Petitioners acknowledge, as they must, that the officers "knew that Sheehan was mentally ill." Pet. Br. 5. After all, "the very reason the officers encountered Sheehan in the first

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[9] Petitioners take issue with the court of appeals' statement that Hodge told the officers that the back window could not be used as a means of egress without a ladder (Pet. Br. 7), but Hodge's testimony is consistent with the court's statement. J.A. 116 (testifying that he had explained to the officers: "you have to have a ladder to get in through the window on the second floor").

place was to fulfill their duty to take into custody individuals who are mentally ill and judged to pose a threat to others—a duty imposed on law enforcement officers throughout the nation." Pet. Br. 38. In these circumstances, police officers are well aware that they are interacting with someone who is mentally ill, and they are trained to respond accordingly.[10]

3. Petitioners focus on the wrong issue when they argue that Sheehan posed a threat to Reynolds and Holder "at the time the officers re-opened her door." Pet. Br. 17. The central thrust of Sheehan's ADA claim is that Reynolds and Holder were required to consider her mental disability *before* they reopened her door and forced a violent confrontation. J.A. 320. As Reiter explained, "Officer Holder and Sgt. Reynolds forcibly entered Ms. Sheehan's private residence contrary to reasonable and generally accepted police practices." J.A. 315. The issue, therefore, is not whether Sheehan posed a risk to the police officers *after* they forced the second entry, but rather whether she posed such a significant risk *before* they did so. As discussed above, she did not.

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[10] Petitioners claim that "assessing the risk" for purposes of an ADA claim "bears more than passing resemblance to the challenge of determining how much force to use to effect an arrest under the Fourth Amendment." Pet. Br. 25. It is not clear why this is so. Nonetheless, Section I above shows that the force used by the officers was unreasonable under the Fourth Amendment balancing test. *See supra* at 14-24.

For similar reasons, this is not a case where the officers were required to make "split-second judgments … in circumstances that are tense, uncertain, and rapidly evolving." Pet. Br. 25 (internal quotation marks and citation omitted). As Reiter explained, "[p]olice field encounters are seldom 'split second decision making events.'" J.A. 322. Instead, "[t]hey are a series of events," ranging in this case from the initial call (which informed the officers that Sheehan was mentally disabled), to the meeting with Hodge (where the officers were informed that the building had been vacated), to the first entry (when Sheehan demanded to be left alone), and so on. J.A. 322-24. Indeed, when Reynolds and Holder decided to reenter Sheehan's room, they had been on the scene for 26 minutes. J.A. 323. The officers had *numerous* opportunities to "assess the situation, evaluate various tactical approaches and coordinate their efforts with other officers," and police officers are trained to do these things. J.A. 322.[11]

But even if the officers, through no fault of their own, had been required to make split-second

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[11] *See also* Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 Colum. Hum. Rts. L. Rev. 261, 322 (2003) ("*Unreasonable Seizures*") ("A police officer's insistence that he was forced to make a split-second decision would often seem to be a rationalization of his own actions that precipitated a crisis during an incident. The training given to police officers, when followed, minimizes the need for split-second decisions.").

judgments, "nothing in the text of the ADA suggests that a separate exigent-circumstances inquiry is appropriate." *Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.*, 673 F.3d 333, 339 (4th Cir. 2012). Instead, "consideration of exigent circumstances is included in the determination of the reasonableness of an accommodation." *Id.*[12] As the Fourth Circuit noted, "this view of the ADA has the ancillary benefit of encouraging the provision of accommodations during exigent circumstances." *Id.* Had Reynolds and Holder complied with that statutory mandate and considered Sheehan's mental disability before deciding to reenter her room—or had they complied with SFPD's training materials or its barricaded suspect policy—no split-second judgments would have been necessary.

Finally, Petitioners also claim that "whether a significant risk exists 'must be determined from the standpoint of the person who refuses the … accommodation ….'" Pet. Br. 23 (quoting *Bragdon*, 524 U.S. at 649). This argument misapplies the Court's holding in *Bragdon*. The issue in *Bragdon* was whether a dentist violated the ADA when he

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[12] *Accord Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1085 (11th Cir. 2007) ("The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance."); *see also* U.S. Br. 15 ("Although law enforcement activities enjoy no categorical immunity from the ADA when arresting an individual with a disability, exigencies surrounding police activity will typically play a significant role in determining whether a modification is reasonable.").

refused to treat in his office a patient infected with HIV. 524 U.S. at 628-29. In deciding whether the patient posed a significant threat to the health and safety of others, the Court expressly held that the dentist's "belief that a significant risk existed, *even if maintained in good faith*, would not relieve him from liability." *Id.* at 649 (emphasis added). That holding is consistent with the non-discrimination purpose of the ADA; otherwise, as the Court noted, an individual's subjective beliefs "could excuse discrimination without regard to the objective reasonableness of his actions." *Id.* at 650. Accordingly, in cases involving healthcare risks, courts are to assess "the objective reasonableness of the views of health care professionals *without deferring to their individual judgments*." *Id.* (emphasis added).

Applying this teaching here, it is not enough, as Petitioners argue, that Reynolds and Holder *subjectively* believed that Sheehan posed a threat to the safety of others. The Court should instead apply a totality of the circumstances test to the officers' interaction with Sheehan, give appropriate weight to the views of experienced professionals like Reiter, and assess the *objective reasonableness* of Petitioners' stated concerns. Applying that analysis, there are, at the very least, fact issues as to whether the direct threat exception to the reasonable accommodation requirement is satisfied.

B. The Proposed Modifications Would Have Eliminated Any Risk Sheehan Posed And Were Reasonable.

Even if Petitioners could establish as a matter of law that Sheehan was a significant threat to others, Sheehan's ADA claim is not subject to dismissal. As Petitioners note (Pet. Br. at 22), the ADA regulations define "direct threat" to mean "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures." 28 C.F.R. § 35.104. The regulations also make clear that this determination is to be based on an "individualized assessment." 28 C.F.R. § 35.139(b). Applying these regulations here, there is ample evidence that Reiter's modifications would have eliminated any threat and were reasonable.

1. Reiter described several tactics that Reynolds and Holder *should* have employed: they should have contained Sheehan, respected her comfort zone, used non-threatening communications, and employed the passage of time to their advantage. J.A. 311-12. He further explained: "Had the officers responded in a reasonable manner, consistent with generally accepted police practices the necessity to resort to the use of deadly force would likely not have occurred." J.A. 322. Reiter directly addressed the salient issues: the proposed tactics would have eliminated any threat and were reasonable.

Petitioners attack Reiter's analysis in several ways, each of which fails. First, they claim that the

report "blends 20/20 hindsight with speculation." Pet. Br. 36 n.4. That is both immaterial and incorrect. It is immaterial because the report, at the very least, creates a fact issue that must be resolved at trial. It is also incorrect because Reiter's opinions reflect the unanimous judgment of police professionals about how to handle emotionally disturbed persons. As Professor Michael Avery explains:

> Modern training materials are remarkably consistent in the approach they recommend to officers who respond to calls involving emotionally disturbed persons. The training is designed to protect the safety of the public, minimize the risks to the safety of the responding officer, and deal with the disturbed person in a humane manner, recognizing that he is ill. One such strategy ... emphasizes the following: "(1) safety, (2) non-threatening approach, (3) control of the scene, (4) defusing the situation, and (5) problem solving."

Unreasonable Seizures, 34 Colum. Hum. Rts. L. Rev. at 291 (footnotes omitted). Nor is any of this novel: the International Association of Chiefs of Police recommended the same tactics in responding to emotionally disturbed persons as early as 1979,

and an identical list can be found in other established training materials.[13]

Reiter's report and Professor Avery's article cite enough sources—including SFPD's own training materials and policies—to show that there is no serious dispute among professionals about how to handle these situations. *Id.* at 290 nn.133-38; J.A. 305-06, 311-14. Even in the absence of such training materials, lower courts have concluded that police officers acted reasonably when they used these tactics.[14] Far from blending hindsight with speculation, the fact that Reiter's suggested tactics are incorporated into all police training on this issue demonstrates that the tactics reflect foresight, not hindsight, and Reiter's opinion that different tactics would have led to a different outcome is not speculation, but the empirical experience of officers in the field.

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[13] *See Unreasonable Seizures,* 34 Colum. Hum. Rts. L. Rev. at 296 & n.170, 325-26 & n.319 (citing *Int'l Ass'n of Chiefs of Police, Training Key No. 274, Abnormal Behavior* 1-2 (1979); Gerard R. Murphy, *Managing Persons with Mental Disabilities: A Curriculum Guide for Police Trainers* (1989); and James J. Fyfe, *Policing the Emotionally Disturbed*, 28 J. Am. Acad. Psychiatry L. 345, 345 (2000)).

[14] *See, e.g., Waller ex rel. Estate of Hunt v. City of Danville,* 556 F.3d 171, 176-77 (4th Cir. 2009) (officers spoke with supervisors, called in a hostage negotiator, attempted to calm the situation, and waited two hours before entering); *Estate of Smith v. Marasco,* 430 F.3d 140, 145 (3d Cir. 2005) (officers spoke with their supervisor, attempted to make contact by phone, and did not enter residence for hours).

Second, Petitioners claim that "the officers' judgment that these measures would not have eliminated the significant risk that Sheehan posed to them and others was reasonable." Pet. Br. 36. This argument fails because there is no evidence that Reynolds and Holder ever considered, let alone reached a "judgment" regarding, reasonable accommodations under the ADA. To the contrary, in Reynolds' view, if "the public is at risk," then "[t]he disability really is not a factor …." J.A. 206. There is likewise no evidence that the officers consulted with anyone to determine whether such measures might be effective. Instead, the officers concluded that Sheehan was "a violent woman who had already threatened to kill her social worker" (J.A. 235) and decided to storm back into her room to arrest her (J.A. 174). On these facts, there is no reason to defer to the officers' post hoc rationalizations.

Third, Petitioners claim that "non-threatening communications" were ineffective. Pet. Br. 36. To the extent any communications occurred *after* the officers retreated and the door to Sheehan's room was closed—when such communications might have avoided a violent confrontation—the evidence indicates that the officers waited *at most* a few minutes before they decided to forcibly reenter the room. J.A. 40, 61, 323-24, 407. Thus, there was no *meaningful* attempt either to defuse the situation, as Reiter suggests, or to negotiate a surrender, as SFPD's barricaded suspect policy requires. Nor is there any evidence that the officers asked open-ended questions, a technique that Reiter opined is consistent with "generally accepted police

practices" and "documented in the training and written orders of the [SFPD]." J.A. 312. Had the officers done so, they could have learned that Sheehan "wasn't interested in being cooperative" because when she had cooperated with the police on two prior occasions she had suffered a "concussion on my head against the police vehicle" and police had "wrenched my right arm and hurt it." J.A. 270. Using established police practices, as summarized by Reiter and numerous other professionals (*see supra* at 38-39), Petitioners could have addressed Sheehan's concerns and avoided a violent confrontation.

Fourth, Petitioners claim that "all of Reiter's remaining proposals involved delaying Sheehan's arrest, in a situation where she would need only seconds to escape down a fire escape, gather more weapons to prepare for an attack, or fortify herself." Pet. Br. 36. These arguments lack merit for all of the reasons set forth above: Sheehan had no desire to "escape," backup had already arrived and could establish a perimeter, her physical condition hardly presented a flight risk, and throughout the encounter she had only threatened individuals who had entered her room without her permission. As Reiter testified, and as the record confirms, there was no compelling reason to rush into Sheehan's room and every reason to wait. J.A. 312 ("History has shown that the longer the encounter is allowed to occur, the better the chance of a successful and safe resolution.").

2. Reiter's report also shows that the proposed tactics were reasonable and would not

have fundamentally altered the nature of the service, program, or activity. As Reiter notes, the same tactics "are also documented in the training and written orders of the [SFPD]." *Id*. Petitioners' own policies and training materials thus *confirm* the reasonableness of Reiter's tactics and show that *no* fundamental alteration of the officers' conduct was required.

Petitioners nevertheless claim that any delay whatsoever would have been unreasonable because "the officers had probable cause to arrest Sheehan for the violent felony of assault." Pet. Br. 38. Even if it were appropriate to treat Sheehan as a violent felon (which it was not, *see supra* at 20-22), SFPD's barricaded suspects policy applies, on its face, to "a situation where a criminal, intent upon evading arrest, takes up a defensive position armed with a gun, explosive, or a weapon capable of harming others" as well as to hostage situations. *See* General Order 8.02, at II (discussed *supra* at 8). Petitioners have not explained why Sheehan was treated *worse* than a barricaded criminal, but one possible inference is that she was discriminated against *because of her disability*.

Petitioners' argument that "the intrinsic nature of the officers' duty here was to take Sheehan into custody as quickly as possible to protect public safety" (Pet. Br. 41) fails for similar reasons. Far from being told to resolve encounters with mentally ill individuals "quickly" (*id.*), officers are trained to slow things down to allow the situation to resolve peacefully (J.A. 312-13), and the "duty" of police officers under statutes like

California's Section 5150 is to protect the rights of mentally ill individuals as well as public safety.[15] These statutes do not, and cannot, trump accepted police practices for dealing with persons of diminished capacity or authorize excessive force in violation of an individual's constitutional rights. Moreover, as noted previously (*supra* at 21-22, 30-32), Petitioners' repeated references to "public safety" are seriously overstated.

Lastly, Petitioners attempt to bolster their argument that the methods suggested by Reiter were unreasonable by claiming that the "rapidly unfolding circumstances … did not permit any of the process that typically occurs when a covered entity considers an accommodation." Pet. Br. 39. This argument likewise fails:

- As the United States correctly notes, "when an individual has an impairment that interferes with her ability to request an accommodation, a public entity cannot avoid its ADA obligations by contending that the plaintiff failed to make a specific request." U.S. Br. 21 n.7 (citing *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1197 (10th Cir. 2007)). Here too, Petitioners

[15] *See Smith v. Cnty. of Kern*, 25 Cal. Rptr. 2d 716, 720 (Ct. App. 1993) ("section 5150 is designed to protect against injury to the committed individual and the public as a result of the individual's mental condition"); Bruce J. Winick, *Civil Commitment: A Therapeutic Jurisprudence Model* 42 (2005) (civil commitment statutes "protect the individual's well being" and "protect[] community from harm").

have not explained how a mentally ill woman, untrained in the law, would know to request an accommodation under the ADA and what accommodation to request.

- If the "interactive process" referenced by Petitioners applies in Title II cases,[16] it requires plaintiffs to "provide the governmental entity an opportunity to accommodate them *through the entity's established procedures*,"[17] and "*both parties* have an obligation to proceed in a reasonably interactive manner to ascertain a reasonable accommodation."[18] Petitioners did not make any procedures available to Sheehan and did not proceed in a reasonably interactive manner.
- To the extent Sheehan needed to request a reasonable accommodation, she did so by repeatedly demanding that the officers leave her alone. In Reiter's terminology, Sheehan asked the officers to "respect [her] comfort zone" and use "[t]ime" to their advantage. J.A. 312.

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[16] *But see Meeks v. Schofield*, 10 F. Supp. 3d 774, 791 (M.D. Tenn. 2014) (recognizing that "the interactive process pertains to employment-related ADA claims, not to Title II ADA claims").

[17] *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 578 (2d Cir. 2003) (emphasis added).

[18] *Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1231 (10th Cir. 2009) (emphasis added; internal quotation marks and citation omitted).

If anything, Petitioners' reliance on the "interactive process" provides strong support for Reiter's opinion that Reynolds and Holder acted unreasonably when they forcibly reopened the door to Sheehan's room with guns drawn and without any meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual.

C. The "Special Circumstances" Test In *US Airways v. Barnett* Does Not Apply Here, And The ADA Cases Cited By Petitioners Are Likewise Inapposite.

1. Contrary to the United States' argument (U.S. Br. 17-21), the legal framework set forth in *Barnett* does not logically apply here. In *Barnett*, the plaintiff requested, as an accommodation under Title I of the ADA, that his employer allow him to retain a physically undemanding mailroom position even though more senior employees were allowed to bid on the position. 535 U.S. at 394. In that narrow circumstance, where a requested accommodation "would violate the rules of a seniority system," the Court held that "the employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient" to establish that the requested accommodation is not "reasonable." *Id.* at 403, 405. At the same time, the Court recognized that "[t]he plaintiff (here the employee) nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which

the ADA may not trump in the run of cases), the requested 'accommodation' is 'reasonable' on the particular facts." *Id.* at 405.

Because no similar conflict exists here, the *Barnett* framework is inapposite. Whereas the employee's requested accommodation in *Barnett* "would violate the rules of a seniority system" (*id.* at 403), the requested accommodations here would not violate or contradict any of Petitioners' stated rules or policies. To the contrary, those accommodations are entirely consistent with universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual and SFPD's training materials and barricaded suspect policy. *See supra* at 7-8, 38-39. It is the officers' conduct, not Reiter's suggested tactics, that violated the applicable "rules." On these facts, there is no conflict that would justify adopting the "special circumstances" test in *Barnett* in cases involving arrests of mentally disabled individuals.

For similar reasons, the *Barnett* framework, as argued by the United States, would be bad policy. If that framework were adopted here, police officers will not be required to comply with the ADA's reasonable accommodation requirement when arresting a suspect with a disability who is armed and violent *unless* there are "special circumstances showing that an accommodation was reasonable on the particular facts." U.S. Br. 21. Not only would such a result contradict the "broad" anti-discrimination "mandate" of the ADA (*PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (citing 42

U.S.C. § 12101(b))) by sanctioning discrimination against mentally disabled individuals whose illness causes erratic, irrational, or seemingly uncooperative behavior, it would not provide any of the certainty that the law enforcement amici seek: police officers would be left to guess what are or are not "special circumstances" that would require reasonable accommodation.

Nor is it necessary to adopt a "special circumstances" test in Title II cases. Instead, courts can continue to apply 28 C.F.R. § 35.139(a), which makes clear that Title II "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others." That standard is based on an existing Title II regulation, has been applied by lower courts, is expressed in terms that police officers can easily understand and apply, and will appropriately address the safety concerns identified by Petitioners' supporting amici. Critically, those amici expressly rely on 28 C.F.R. § 35.139(a) *without* arguing that a new and different standard should apply. Int'l Municipal Lawyers Br. 11; Nat'l League of Cities Br. 23. And even when the direct threat exception is not applicable, the accommodation must be "reasonable," which takes into account exigent circumstances. *See supra* at 35. That standard, too, is easily understood, has been applied by courts, and will adequately address

any concerns regarding exigent circumstances and limited resources.[19]

But even if a "special circumstances" test were to apply here, such circumstances are manifestly present. Building on the Court's discussion of "special circumstances" in *Barnett*, the United States claims that special circumstances would exist if, for example, "a plaintiff could demonstrate that her proposed modification did not mark a significant deviation from ordinary police procedures—or was *more* consistent with the entity's procedures for dealing with individuals with disabilities than the officers' actions—and that the exigency had dissipated by the time of the arrest." U.S. Br. 20 (emphasis in original). That is precisely what the record in this case shows: after the officers retreated and the door to Sheehan's room was closed, there was no reason why the

[19] For similar reasons, the Court should reject the argument that the most cost-effective way to accommodate people with mental illnesses during arrests is to provide training and that "once that training is provided, individual officers should not be required to perform an ADA accommodations analysis when they face urgent public safety risks." Int'l Municipal Lawyers Br. 3. The argument ignores the very real possibility, amply demonstrated here, that officers will ignore or act contrary to their training. If officers do so and violate the ADA, then there should be ADA liability. Otherwise, disabled individuals will have no recourse where an officer's conduct is reasonable under Fourth Amendment principles but nonetheless discriminates against disabled individuals on the basis of a disability. Nothing in the ADA or its regulations supports such a permissive and unprincipled approach to the statute's non-discrimination mandate.

officers could not have complied with applicable training materials regarding mentally disabled individuals or SFPD's stated policy regarding barricaded suspect incidents. At the very least, these are fact issues that preclude summary judgment in Petitioners' favor.

2. For many of the same reasons, the other cases cited by Petitioners and their supporting amici are readily distinguishable. In many cases, the court sanctioned the use of force by police officers because the situation was uncontained and police officers were directly exposed to a dangerous and unavoidable threat.[20] In another, family members and bystanders were directly exposed to such a threat.[21] In others, the defendants *considered and attempted to accommodate* the plaintiff's disability.[22] Lastly, in one case, the court

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[20] *See, e.g., De Boise v. Taser Int'l, Inc.*, 760 F.3d 892, 895 (8th Cir. 2014), *petition for cert. filed* (U.S. Jan. 8, 2015) (No. 14-812) (plaintiff exited home and approached officers); *Bates ex rel. Johns v. Chesterfield Cnty.*, 216 F.3d 367, 369 (4th Cir. 2000) (plaintiff attacked officer outside home); *Hainze*, 207 F.3d at 797 (plaintiff attacked officers with knife on public street); *Gohier v. Enright*, 186 F.3d 1216, 1218 (10th Cir. 1999) (plaintiff walked toward officer on public street with object that appeared to be a knife). Petitioners' reliance on *De Boise* (Pet. Br. 31) is also misplaced because, as noted above, a petition for a writ of certiorari was filed and remains pending in that case.

[21] *See Seremeth*, 673 F.3d at 335.

[22] *See, e.g., Seremeth*, 673 F.3d at 335 (American Sign Language trainee and plaintiff's father called as interpreter); *Waller*, 556 F.3d at 176-77 (discussed *supra* at 39 n.14); (continued . . .)

found the requested accommodation was unreasonable because it would interfere with the officer's ability to accurately measure inebriation during a DUI stop.[23]

The situation here is markedly different. Viewing the facts in the light most favorable to Sheehan, the "direct threat" exception to the reasonable accommodation requirement was not satisfied. *See supra* at 29-33. And it is undisputed that Reynolds and Holder did not consider Sheehan's disability when they decided to forcibly reenter her room. *See supra* at 6. Nor did they make any meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual. *See supra* at 40-41. Instead, contrary to applicable training materials and SFPD's barricaded suspect policy, they "cause[d] a violent—and potentially deadly—confrontation with a mentally ill person without a countervailing need." Pet. App. 31. The Court should not sanction such misconduct.

(. . . continued)
Tucker v. Tennessee, 539 F.3d 526, 528 (6th Cir. 2008) (pen and paper and untrained interpreter used to communicate).

[23] *Bircoll*, 480 F.3d at 1086.

III. Reynolds And Holder Are Not Entitled To Qualified Immunity Because They Acted Contrary To Clearly Established Circuit Precedent When They Forcibly Reopened The Door To Sheehan's Room With Guns Drawn Without Any Meaningful Consideration Of Her Mental Disability.

A. Addressing Sheehan's Section 1983 claim against Reynolds and Holder, Petitioners claim that the court of appeals erred in concluding that the officers are not entitled to qualified immunity. Pet. Br. 41-59. In considering qualified immunity on summary judgment, courts engage in a two-pronged inquiry. Under the first prong, courts must examine whether the facts "[t]aken in the light most favorable to the party asserting the injury … show the officer's conduct violated a [federal] right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Under the second prong, courts ask whether the right at issue was "clearly established" at the time of the alleged misconduct. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The Court recently emphasized that, in deciding *both* prongs, courts "may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan*, 134 S. Ct. at 1866 (citing *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004) (*per curiam*); *Saucier*, 533 U.S. at 201; and *Hope*, 536 U.S. at 733 n.1).

1. Starting with the first prong—whether the evidence, viewed in Sheehan's favor, shows a violation of a constitutional right—the answer is yes. As set forth above (*supra* at 14-24), it was

objectively unreasonable, and therefore a violation of Sheehan's Fourth Amendment rights, for Reynolds and Holder to forcibly reopen the door to Sheehan's room with guns drawn without taking her mental illness into account and, contrary to police officer training, without any meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual. Critically, Petitioners do not directly challenge that determination; instead, their second Question Presented asserts only that the law regarding this issue was not clearly established (Pet. Br. i), which is the second prong of the qualified immunity analysis.

2. Turning to that second prong, the court of appeals identified three cases that govern this inquiry. The first case is *Graham*. Pet. App. 33. As discussed previously (*supra* at 16), the Court held in *Graham* that "[d]etermining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." 490 U.S. at 396 (internal quotation marks and citation omitted). When the facts are viewed in the light most favorable to Sheehan—as required by *Tolan*, 134 S. Ct. at 1866—the result under *Graham* is precisely as the court of appeals concluded: "If there was no pressing need to rush in [*i.e.*, no significant governmental interests at stake], and every reason to expect that doing so would result in Sheehan's

death or serious injury [*i.e.*, a significant intrusion on Sheehan's Fourth Amendment rights], then any reasonable officer would have known that this use of force was excessive." Pet. App. 33.

The court of appeals also cited circuit precedent applying *Graham* in the circumstances similar to those presented here. In *Alexander*, police officers, while assisting in the execution of an administrative warrant, shot and killed a mentally ill man who had threatened to shoot the officers if they entered his house and had attempted to do so after the police officers broke down his door. 29 F.3d at 1358. The facts in *Alexander* were more favorable to the police officers than are the facts of this case in two significant respects: (1) unlike Sheehan, who had only a small bread knife, the suspect in *Alexander* had a gun and threatened to shoot the officers with it; and (2) unlike Reynolds and Holder, who ignored their training and SFPD's barricaded suspect policy, the officers in *Alexander* (who happened to be *SFPD* officers) waited for backup to arrive, including "a team of hostage negotiators," and "tried to talk to" the suspect for "nearly an hour" before storming in. *Id.* Despite those facts, absent here, the Ninth Circuit found that the "[p]laintiff's claim, if supported by the evidence, states a classic Fourth Amendment violation under *Graham*." *Id.* at 1366.

The Ninth Circuit addressed a similar situation, with equal clarity, in *Deorle*. Deorle had threatened to hurt the police officers surrounding his property, acted as though he might attempt suicide by cop, and was carrying a bottle of lighter

fluid as he approached the officer who shot him. 272 F.3d at 1276-78. But he was confined and crisis negotiators were en route. *Id.* Applying *Graham*, the Ninth Circuit rejected the officer's qualified immunity defense because "[e]very police officer should know that it is objectively unreasonable to shoot … an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals." *Id.* at 1285. Also significant here, the court emphasized that "where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that *must* be considered in determining, under *Graham*, the reasonableness of the force employed." *Id.* at 1283 (emphasis added). The Ninth Circuit reiterated that point in *Drummond*. Citing *Deorle*, the court stated: "we have held that a detainee's mental illness *must be reflected in any assessment* of the government's interest in the use of force." 343 F.3d at 1058 (emphasis added). Contrary to these preexisting decisions in the relevant circuit, the officers in this case *did not consider* Sheehan's disability when they decided to forcibly reenter her room with guns drawn. *See supra* at 6. Such conduct violates clearly established case law.

B. Petitioners and the United States take issue with the above analysis, but their arguments are without merit.

1. Petitioners and the United States criticize the court of appeals' analysis under *Graham* as an attempt to define clearly established law at an impermissibly high level of generality. Pet. Br. 47; U.S. Br. 30-31. These arguments do not accurately reflect the court of appeals' analysis. The court did not hold that *Graham* addressed the specific facts at issue here. Rather, it analyzed the circumstances of this case within the balancing test in *Graham* and held—as *Graham* clearly established—that the use of deadly force is unreasonable if there is no countervailing governmental interest. Pet. App. 33. Viewing the facts in the light most favorable to Sheehan, that result clearly follows from *Graham*. But even if that constitutional right was not clearly established in *Graham*, it certainly was in *Alexander* and *Deorle* (the other cases that the court of appeals cited in support of its ruling (Pet. App. 33-36)).

2. Petitioners and the United States attempt to avoid this controlling circuit precedent in numerous ways. First, they ask a different question: whether it was clearly established that a violent and armed suspect has a Fourth Amendment right to be free from lawful, forcible entry if such entry might provoke a violent confrontation. Pet. Br. 43-45; U.S. Br. 28. That question, too, misconstrues the court of appeals' ruling. The crux of that ruling is that it was unreasonable for Reynolds and Holder to force a violent and potentially deadly confrontation (a) "without taking Sheehan's mental illness into account" (Pet. App. 26), and (b) "without a countervailing need" (Pet. App. 31). Regardless of

whether the officers' actions might provoke a violent confrontation, Sheehan's constitutional rights were clearly established, at the appropriate level of specificity (*see Wilson v. Layne*, 526 U.S. 603, 615 (1999); U.S. Br. 23), by *Graham*, *Alexander*, and *Deorle*.

Second, Petitioners and the United States claim that *Alexander* can be distinguished because the police officers entered the plaintiff's home to execute an administrative warrant, not to arrest the plaintiff or under the emergency aid or exigent circumstances exception to the warrant requirement, and that *Deorle* is distinguishable because Deorle, unlike Sheehan, was unarmed, had not attacked anyone, and had generally obeyed police instructions. Pet. Br. 47-48; U.S. Br. 31-32. These distinctions are immaterial. If there is no *immediate need* to enter an individual's home, as in *Alexander* and this case, then doing so by force, with guns drawn, is unreasonable. In addition, Reynolds and Holder knew that Sheehan was acting irrationally due to her mental illness, that her conduct was not purposeful, and that she had not threatened anyone who did not enter her room without her permission. *Supra* at 20-21. But contrary to circuit precedent holding that an individual's emotional disturbance "must be considered in determining, under *Graham*, the reasonableness of the force employed" (*Deorle*, 272 F.3d at 1283), the officers did not consider Sheehan's mental disability when they decided to forcibly reenter Sheehan's room. *Deorle* clearly established that requirement, and *Drummond*

confirmed it, long before the officers confronted Sheehan.

Third, Petitioners and the United States argue that the court of appeals' holding conflicts with several cases in which this Court recognized police officers' need, in various contexts, to act swiftly to minimize the risk of a violent confrontation or secure evidence. Pet. Br. 43-44; U.S. Br. 29. In some of those cases, police officers entered dwellings to protect others from an apparent threat[24] or while in hot pursuit of suspects.[25] In another, the Court declined to apply the exclusionary rule to evidence collected after execution of a warrant that violated the knock-and-announce rule, explaining that such a result might lead to preventable violence or destruction of evidence.[26] In Petitioners' other case, the Court upheld a warrantless entry based on a credible threat of destruction of evidence.[27] This case, in contrast, did not involve a hot pursuit or risk of ambush, flight, or destruction of evidence.

Fourth, Petitioners argue that the court of appeals' ruling is not consistent with other Ninth Circuit decisions. Pet. Br. 45-50 (discussing cases). But none of the decisions referenced by Petitioners

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[24] *See, e.g.*, *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

[25] *Warden v. Hayden*, 387 U.S. 294, 297-99 (1967); *United States v. Santana*, 427 U.S. 38, 42-43 (1976).

[26] *Hudson v. Michigan*, 547 U.S. 586, 595 (2006).

[27] *Kentucky v. King*, 131 S. Ct. 1849, 1860 (2011).

abrogates the pertinent legal principles, clearly established in *Alexander* and *Deorle*, that it is manifestly unreasonable to force a violent and potentially deadly confrontation with a mentally ill individual (a) without a countervailing need and (b) without considering the individual's mental disability.

The Ninth Circuit recognized as much in *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002). Petitioners make much of the fact that *Billington* acknowledged that subsequent cases have placed "important limitations on *Alexander*" (Pet. Br. 48), but they never attempt to identify the core holding that remains untouched. Contrary to Petitioners' representation, the *Billington* court did not hold that so long as an entry satisfies an exception to the warrant requirement it can be upheld as lawful even if "imprudent," "inappropriate," and "reckless." *Id*. Instead, the court merely noted that a plaintiff must do more than submit an expert report that contains such accusations. *Billington*, 292 F.3d at 1189. As *Billington* holds, courts must ultimately "decide as a matter of law whether a reasonable officer could have believed that his conduct was justified." *Id*. (internal quotation marks and citation omitted). Here, no reasonable officer could have believed that breaking through Sheehan's door with guns drawn was justified in light of her mental disability and the lack of a countervailing need.

As to the so-called "provocation theory," the court in *Billington* expressly read *Alexander*, as limited by subsequent case law, "to hold that where

an officer intentionally or recklessly provokes a violent confrontation, *if the provocation is an independent Fourth Amendment violation*, he may be held liable for his otherwise defensive use of deadly force." *Id.* (emphasis added). Here, as discussed above (*supra* at 14-24), there is such an independent Fourth Amendment violation. And while various courts have found no Fourth Amendment violation when an officer used force against a disabled individual (*see* Pet. Br. 49), those cases involved credible and unavoidable threats of harm to police and others and truly exigent circumstances.[28] In this case, in contrast, had it not been for the officers' unreasonable and unlawful conduct, any potential threat would have been avoidable.

3. Moving beyond controlling case law in the Ninth Circuit, Petitioners and the United States

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[28] *See, e.g.*, *Fisher v. City of San Jose*, 558 F.3d 1069, 1080 (9th Cir. 2009) (upholding warrantless entry by police after a 12-hour standoff with an inebriated individual who had threatened to shoot officers and aimed a rifle at them from inside his apartment); *Gregory v. Cnty. of Maui*, 523 F.3d 1103, 1108 (9th Cir. 2008) (no violation where police used physical control tactics to disarm and subdue a suspect who lunged at them with a weapon); *Long v. City & Cnty. of Honolulu*, 511 F.3d 901, 904-05 (9th Cir. 2007) (no violation where suspect appeared to shoot at officers from his property after lengthy standoff and after having previously shot two other people); *Blanford v. Sacramento Cnty.*, 406 F.3d 1110, 1112-14 (9th Cir. 2005) (no violation where suspect was shot while wielding a 2-1/2 foot sword attempting to enter a residence after having failed to heed repeated commands to stop).

argue that the applicable legal principles were not clearly established in light of the rulings of other circuits. *See* Pet. Br. 50-54; U.S. Br. 30. Those cases are irrelevant in light of *Alexander*, *Deorle*, and *Drummond*, which are *controlling authority within the Ninth Circuit*. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (recognizing "controlling authority" principle); *Wilson*, 526 U.S. at 617 (same); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (same). Moreover, even in other circuits, courts have recognized that an individual's mental state is relevant in assessing the reasonableness of the use of force. *See, e.g.*, *Champion v. Outlook Nashville, Inc.,* 380 F.3d 893, 904 (6th Cir. 2004); *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995).

Petitioners' reliance on state law is equally misplaced. Citing *Stanton v. Sims*, 134 S. Ct. 3 (2013), Petitioners claim that Reynolds and Holder are entitled to qualified immunity because a California statute relieved them of a duty to retreat. Pet. Br. 54. In *Stanton*, the Court cited two California state court decisions applying the hot pursuit doctrine to warrantless misdemeanor arrests to illustrate that a right was not clearly established by a previous decision of the Court. 134 S. Ct. at 7. Here, in contrast, the federal right is clearly established by circuit precedent, including *Alexander* and *Deorle,* as well as by *Graham*. *Stanton* did not hold, nor is there any logical basis to hold, that a *state statute* can somehow authorize conduct that violates a clearly established constitutional right.

4. Finally, Petitioners argue that Reynolds and Holder are entitled to qualified immunity because, under some set of facts, a court could find that they reasonably concluded that they needed to immediately force a second entry to disarm Sheehan. Pet. Br. 56-59. The United States, too, asserts that the reasonableness of the officers' actions should be decided as a matter of law. U.S. Br. 27 n.10. These arguments ignore the requirement, recently emphasized in *Tolan*, that all facts must be construed in the non-moving party's favor on summary judgment, including in a qualified immunity analysis. 134 S. Ct. at 1866. When the facts are viewed favorably to Sheehan, Reynolds and Holder are not entitled to qualified immunity. But at the very least, whether Sheehan posed an imminent threat after the officers retreated and the door to her room was closed is a fact issue that should be resolved at trial in accordance with the court of appeals' ruling. Pet. App. 36. If there was no such threat, as the discussion above shows, then even "plainly incompetent" officers (Pet. Br. 42; U.S. Br. 23) would know that they cannot rush into a mentally disabled individual's home with guns drawn and without any meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual. Qualified immunity confers no such right.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Page(s)

APPENDIX

1. Amendment IV of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. 42 U.S.C. § 1983 provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the

District of Columbia shall be considered to be a statute of the District of Columbia.

3. 42 U.S.C. § 12101 provides in pertinent part:

Findings and purpose

* * * * *

(b) Purpose

It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

4. 42 U.S.C. § 12131 provides in pertinent part:

Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government; [and]

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government[.]

* * * * *

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

5. 42 U.S.C. § 12132 provides:

Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by

reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

6. 28 C.F.R. § 35.104 provides in pertinent part:

Definitions.

For purposes of this part, the term—

* * * * *

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.

7. 28 C.F.R. § 35.130 provides in pertinent part:

General prohibitions against discrimination.

* * * * *

(b)(7) 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 the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

* * * * *

8. 28 C.F.R. § 35.139 provides:

Direct threat.

(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.

(b) 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.

9. California Welfare & Institutions Code § 5150 (effective to June 26, 2012) provided:

When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, designated members of a mobile crisis team

provided by Section 5651.7, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation.

Such facility shall require an application in writing stating the circumstances under which the person's condition was called to the attention of the officer, member of the attending staff, or professional person, and stating that the officer, member of the attending staff, or professional person has probable cause to believe that the person is, as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled. If the probable cause is based on the statement of a person other than the officer, member of the attending staff, or professional person, such person shall be liable in a civil action for intentionally giving a statement which he or she knows to be false.

10. California Welfare & Institutions Code § 5008 provides in pertinent part:

Definitions

* * * * *

(h)(1) For purposes of Article 1 (commencing with Section 5150), Article 2 (commencing with Section 5200), and Article 4 (commencing with Section 5250) of Chapter 2, and for the purposes of Chapter

3 (commencing with Section 5350), "gravely disabled" means either of the following:

(A) A condition in which a person, as a result of a mental health disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter.

(B) A condition in which a person, has been found mentally incompetent under Section 1370 of the Penal Code….