No. 13-1412

In the Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL., PETITIONERS

v.

TERESA SHEEHAN

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR IN PART AND REVERSAL IN PART

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QUESTIONS PRESENTED

1. Whether the anti-discrimination provision of Title II of the Americans with Disabilities Act, 42 U.S.C. 12132, requires a law enforcement entity to modify its practices when arresting an individual with a disability who is armed and violent.

2. Whether in 2008 it was clearly established that the Fourth Amendment prohibited police officers from making an otherwise lawful entry under the emergency aid and exigent circumstances exceptions to the warrant requirement to arrest an armed and violent individual known to have mental illness due to the individual's foreseeable resistance.

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INTEREST OF THE UNITED STATES

This case concerns how Title II of the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (42 U.S.C. 12101 *et seq.*), applies to the arrest of an individual with a disability. The Justice Department has responsibility for the implementation and enforcement of Title II, and the Department has issued regulations and interpretive guidance that bear on the ADA issue.

The case also presents the question whether police officers violated clearly established Fourth Amendment law by making a warrantless entry and using force to arrest an individual known to have mental illness. The same qualified-immunity principles that apply under 42 U.S.C. 1983 apply in civil actions against federal officials under *Bivens* v. *Six Unknown*

Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In addition, the standard for determining whether a right is "clearly established" for qualified-immunity purposes is identical to the standard for deciding whether a criminal defendant charged under 18 U.S.C. 241 or 242 had "fair warning" that she was violating a constitutional right. See *Hope* v. *Pelzer*, 536 U.S. 730, 740 (2002).

For these reasons, the United States has a substantial interest in the Court's disposition of this case.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The pertinent constitutional, statutory, and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

This case concerns the arrest of respondent, an individual who has mental illness, in 2008. Police officers entered respondent's room without a warrant and shot her after she advanced toward them brandishing a knife. Respondent survived and brought suit under 42 U.S.C. 1983, raising claims under the ADA and the Fourth Amendment. See Pet. App. 3-4.

1. Respondent, who has schizoaffective disorder, lived in a San Francisco group home for people with mental illness. Br. in Opp. 1. On August 7, 2008, her social worker, Heath Hodge, entered her room to perform a welfare check. Pet. App. 7. Respondent reacted violently, threatening to kill Hodge with a knife. *Id.* at 8. Hodge retreated, cleared the building of residents, and called the San Francisco Police Department for assistance in transporting respondent to a mental health facility for psychiatric treatment

under Cal. Welf. & Inst. Code § 5150 (West Supp. 2014). Pet. App. 7.

Officers Katherine Holder and Kimberly Reynolds responded to the call. Pet. App. 8. The dispatch information stated that respondent "is known to make violent threats" and had "told reporting party to get out or she'll knife him (no weapon seen)." *Ibid.* When the officers arrived, Hodge described his confrontation with respondent and showed them a Section 5150 application for her detention. *Id.* at 8-9. The application stated that respondent had been off her psychotropic medicine for more than a year and had recently shown increased symptoms. *Id.* at 9. Respondent reportedly had stopped eating, had been wearing the same clothing for several days, and had been coming and going at odd hours. *Ibid.* The application described how respondent had violently yelled at Hodge, "I have a knife and I'll kill you if I have to!" *Id.* at 10. Hodge had checked boxes on the application indicating that respondent was gravely disabled and a danger to others, but he did not check the box stating that respondent was a danger to herself. *Ibid.*

The officers decided to take respondent into custody. Pet. App. 10. Hodge told them the building was clear of residents and that the only access to respondent's second-story room was through the door or through a window with the use of a ladder. *Id.* at 9. The officers knocked on respondent's door, announced they were police officers, and entered using a key. *Id.* at 10. After they entered, respondent came toward them, holding a knife and threatening to kill them. *Id.* at 11-12. The officers retreated to the hallway and respondent closed the door. *Id.* at 12.

The officers called for backup, then drew their weapons and a container of pepper spray and forced respondent's door open again. Pet. App. 12-13. Sergeant Reynolds later explained that they decided to enter immediately to ensure officer safety and to prevent respondent from escaping. *Id.* at 12. Sergeant Reynolds stated that "the threat became more scary" with the door closed because they did not know whether respondent "had an avenue of escape" or access to "other weapons." *Ibid.* Sergeant Reynolds also stated that she was not "100 percent sure that [the] place was clear" and was concerned that "somebody could have been in there" with respondent. J.A. 47. The officers did not consider respondent's mental illness when they made the second entry. Pet. App. 12.

When the door opened, respondent immediately advanced toward the officers with the knife raised, forcing them into the hallway. Pet. App. 13. Sergeant Reynolds used the pepper spray, but it did not stop respondent. *Ibid.* When respondent continued to approach, the officers shot her. *Ibid.* Respondent was so close that Officer Holder "was forced to fire from the hip to prevent [respondent] from cutting her arm." *Ibid.*

Respondent survived and was subsequently prosecuted for assaulting a police officer with a deadly weapon and making criminal threats. Pet. App. 14. The jury hung on the assault charges and acquitted her on the threats count. *Id.* at 15. The city elected not to retry her. *Ibid.*

Respondent then filed this action under 42 U.S.C. 1983 against the officers and the City and County of

San Francisco, alleging, *inter alia*, violations of the ADA and the Fourth Amendment.

2. The district court granted summary judgment to petitioners. Pet. App. 55-81.

a. On the ADA claim, the district court held that the ADA does not apply to on-the-street police activity "prior to the officer's securing the scene and ensuring that there is no threat to human life." Pet. App. 79 (quoting *Hainze* v. *Richards*, 207 F.3d 795, 801 (5th Cir.), cert. denied, 531 U.S. 959 (2000)). Because the officers here were "attempt[ing] to detain a violent, mentally disabled individual under exigent circumstances," the court ruled that "[i]t would be unreasonable to ask [them] * * * to first determine whether their actions would comply with the ADA before protecting themselves and others." *Id.* at 79-80.

b. On the Fourth Amendment claim, the district court held that exigent circumstances justified the officers' warrantless entries into respondent's room and that their use of force was reasonable. The initial entry was permissible because "the officers had an objectively reasonable basis for believing that [respondent] was in need of immediate aid." Pet. App. 70. The second entry was justified because the emergency continued and indeed was heightened by the risk that respondent might escape, hurt herself, or harm others. *Id.* at 71. The court also concluded that "the officers' use of force was objectively reasonable" given the "dire and escalating threat" they faced. *Id.* at 73, 77.

3. The court of appeals vacated the district court's judgment in relevant part and remanded. Pet. App. 1-48.

a. The court of appeals held that the ADA "applies to arrests, though * * * exigent circumstances inform the reasonableness analysis." Pet. App. 43. The court reasoned that summary judgment was improper on respondent's failure-to-accommodate claim because a jury "could find that the situation had been defused sufficiently, following the initial retreat from [respondent's] room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics." *Id.* at 45.

b. The court of appeals further ruled that summary judgment was inappropriate on the Fourth Amendment claim. The court held that, although the warrantless entries were permissible and the shooting was justified when it occurred, "a reasonable jury could find that the officers' decision to force a confrontation" by entering respondent's room the second time "was objectively unreasonable." Pet. App. 28. The court emphasized that respondent "was in a confined area and not a threat to others—so long as [the officers] did not invade her home." *Id.* at 29. Thus, although "the officers were permitted to act without a warrant at the time of the second entry," respondent could pursue her Fourth Amendment claim on the theory that the officers acted unreasonably by "caus-[ing] a violent—and potentially deadly—confrontation with a mentally ill person without a countervailing need." *Id.* at 23, 31. The court further found that the constitutional violation was clearly established because "[i]f there was no pressing need to rush in, and every reason to expect that doing so would result in [respondent's] death or serious injury, then any reasonable officer would have known that this use of force was excessive." *Id.* at 33.

c. Judge Graber dissented from the qualified immunity holding. Pet. App. 48-54. She emphasized that the officers did not need a warrant to make the second entry, *id.* at 48-52, and that the use of force was reasonable given the officers' "need to resolve an ongoing emergency that involved a deadly weapon," *id.* at 52.

SUMMARY OF ARGUMENT

I. A. Title II of the ADA applies to all law enforcement activities, including arrests. Title II broadly covers all public entities and prohibits disability discrimination with respect to all of their services, programs, and activities. 42 U.S.C. 12132; see *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998). By its plain terms, the provision therefore extends to arrests. The ADA's legislative history and the Justice Department's implementing regulations and interpretive guidance confirm this reading.

B. To comply with Title II during an arrest, public entities must make reasonable modifications to accommodate an individual's disability. However, the exigencies surrounding police activity can play a significant role in determining whether a modification is reasonable. If objective evidence shows that a modification raises significant safety concerns, it will not qualify as reasonable and so need not be provided under the ADA.

C. When police officers arrest an individual with a disability who is armed and violent, any deviation from ordinary law enforcement tactics will generally present very real safety risks. Thus, in the run of cases involving this type of arrest situation, the ADA will not require a modification. A plaintiff nevertheless should remain free to show that special circumstances rendered a modification reasonable on the

particular facts. See *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401, 403-405 (2002).

D. In this case, respondent was armed and violent when police officers attempted to arrest her. She therefore bore the burden of demonstrating that a modification would not have presented significant safety concerns for the officers or others. The case should be remanded for the court of appeals to analyze the summary judgment record under this framework.

II. Petitioner officers are entitled to qualified immunity on respondent's Fourth Amendment claim because they violated no clearly established law.

A. As the court of appeals correctly recognized, the officers were permitted to enter respondent's room under well-established exceptions to the warrant requirement, and their use of force was reasonable at the moment it occurred. The court nevertheless held that respondent's Fourth Amendment claim could proceed on the theory that the officers were liable for provoking the violent confrontation. Thus, framing the right at the appropriate level of specificity, the qualified immunity question is whether in 2008 it was clearly established that the Fourth Amendment prohibited officers from making an otherwise lawful entry under the emergency aid and exigent circumstances exceptions to arrest an armed and violent individual known to have mental illness due to the individual's foreseeable resistance.

No decision from this Court or the courts of appeals at the relevant time clearly established such a right. The decisions the Ninth Circuit relied on to deny qualified immunity are cast at a high level of generality or easily distinguished on their facts.

B. This case does not provide an appropriate vehicle to consider whether or under what circumstances officers can be liable for provoking a violent response from an individual who has mental illness. See *Pearson* v. *Callahan*, 555 U.S. 223, 236-243 (2009). Petitioners did not seek review of the court of appeals' constitutional ruling, and they have not briefed that issue in this Court. Moreover, the Fourth Amendment issue is heavily fact-dependent and its resolution is unlikely to serve a useful law-elaboration purpose. Finally, the constitutional issue presents novel and potentially difficult questions concerning whether an officer's knowledge of a suspect's mental illness affects the Fourth Amendment analysis. In contrast, this Court easily can—and should—conclude that the officers violated no clearly established right.

ARGUMENT

I. THE AMERICANS WITH DISABILITIES ACT APPLIES TO LAW ENFORCEMENT ACTIVITIES AND REQUIRES REASONABLE MODIFICATIONS, BUT DOES NOT ORDINARILY REQUIRE POLICE OFFICERS TO ALTER THEIR PROCEDURES WHEN ARRESTING AN INDIVIDUAL WITH A DISABILITY WHO IS ARMED AND VIOLENT

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The ADA broadly covers, and prohibits discrimination in, both private and public activity, including employment, 42 U.S.C. 12111-12117, public accommodations, 42 U.S.C. 12181-12189, public transportation, 42 U.S.C. 12141-12165, and, as relevant here, the full range of activities conducted by public entities, 42 U.S.C. 12131-12134.

Title II of the ADA, 42 U.S.C. 12131-12165, prohibits a "public entity" from discriminating against a "qualified individual with a disability." 42 U.S.C. 12132. This case concerns how Title II's anti-discrimination mandate applies to law enforcement entities when they arrest an individual with a disability who is armed and violent.

A. Title II Applies To All Law Enforcement Activities, Including Arrests

1. The starting point in determining the ADA's applicability to law enforcement operations is, as always, the statutory text. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998). Title II's anti-discrimination provision provides that no 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." 42 U.S.C. 12132.[1] The statute defines "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." 42 U.S.C. 12131(1)(A) and (B).

By its plain terms, Title II applies to all governmental entities, including law enforcement agencies. Title II uses the term "any" in its ordinary "expansive" sense, *i.e.*, "one or some indiscriminately of whatever kind." *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). Moreover, the statutory

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[1] Because Title II applies only to entities, it does not authorize individual liability for damages. See Pet. App. 78 ("[S]ection 12132 does not permit suits against private individuals.").

text contains no "exception that could cast the coverage of" law enforcement entities "into doubt." *Yeskey*, 524 U.S. at 209. Accordingly, law enforcement agencies fall within the ADA's comprehensive definition of a public entity.

The statutory text further demonstrates that law enforcement entities are subject to Title II's anti-discrimination mandate with respect to all of their operations, including arrests. The reference to "services, programs, or activities," 42 U.S.C. 12132, is an all-inclusive phrase that covers everything a public entity does. See, *e.g.*, *The Random House Dictionary of the English Language* 20 (2d ed. 1987) (defining "activity" as "a specific deed, action, function, or sphere of action"); *Webster's Third New International Dictionary* 1812 (1986) (defining "program" as "a plan of procedure: a schedule or system under which action may be taken toward a desired goal").[2] And the statute further protects individuals with disabilities from being "subjected to discrimination," 42 U.S.C. 12132, which can occur during any aspect of an individual's interaction with a public entity. The statute therefore extends to all law enforcement operations, including arrests. See Pet. Br. 34 ("There is no claim that an

[2] Notably, Congress expressly defined the term "[p]rogram or activity" in Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (29 U.S.C. 701 *et seq.*), which served as the model for Title II, to "mean[] all of the operations of" a covered entity. 29 U.S.C. 794(b). Because Congress directed that Title II should not "be construed to apply a lesser standard than the standards applied under" Section 504, 42 U.S.C. 12201(a), the phrase "service, programs, or activities" carries a similarly broad meaning under the ADA. See *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632 (1998).

arrest is not one of the 'services, programs, or activities' of a public entity under 42 U.S.C. 12132.").

2. The legislative history confirms that Congress contemplated that Title II would apply to law enforcement operations generally, and to arrests in particular. The House Report specified that Title II's anti-discrimination mandate would "extend[] * * * to *all* actions of state and local governments." H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 84 (1990) (emphasis added). The report further singled out arrests as an example of an activity where "discriminatory treatment based on disability can be avoided by proper training." *Id.* Pt. 3, at 50. In addition, legislators emphasized that Title II would address discrimination in law enforcement, including the arrest of individuals with disabilities. See, *e.g.*, 136 Cong. Rec. 11,461 (1990) ("Many times, deaf persons who are arrested are put in handcuffs. But many deaf persons use their hands to communicate. * * * [T]hese mistakes * * * constitute discrimination."); *id.* at E1913, E1916 (daily ed. June 13, 1990) ("[P]ersons who have epilepsy are sometimes inappropriately arrested because police officers have not received proper training to recognize seizures and to respond to them."). Congress thus expected and intended Title II to cover all law enforcement operations in accordance with the statute's plain text.

3. The administrative implementation of Title II also supports this reading. Pursuant to an express delegation from Congress, the Justice Department has authority to promulgate regulations implementing Title II and the responsibility to provide technical assistance to public entities concerning ADA compliance. 42 U.S.C. 12134(a), 12206. The Department has

construed Title II to "appl[y] to anything a public entity does." 28 C.F.R. Pt. 35, App. B; see *ibid.* ("All governmental activities of public entities are covered."). In particular, the Department oversees the implementation of Title II with respect to "[a]ll programs, services, and regulatory activities relating to law enforcement." 28 C.F.R. 35.190(b)(6). And the Department has further stated that "[t]he general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities." 56 Fed. Reg. 35,703 (July 26, 1991).

Consistent with this interpretation, the Department has repeatedly issued guidance to assist law enforcement entities in complying with the ADA, including in the context of arrests. For example, the Department's Title II Technical Assistance Manual states that "[a] municipal police department encounters many situations where effective communication with members of the public who are deaf or hard of hearing is critical," including "interviewing suspects prior to arrest," and "interrogating arrestees." U.S. Dep't of Justice, *Americans with Disabilities Act: Title II Technical Assistance Manual Covering State and Local Government Programs and Services* § II-7.1000(B), illus. 3, at 5 (Nov. 1993 & Supp. 1994) (*Title II Technical Assistance*). In addition, 2006 guidance states that "[t]he ADA affects virtually everything that officers and deputies do," including "arresting, booking, and holding suspects." U.S. Dep't of Justice, *Commonly Asked Questions About the Americans with Disabilities Act and Law Enforcement* § I (Apr. 4, 2006) (*2006 Guidance*).

Because Congress expressly vested the Department with authority to implement the ADA through regulations and technical assistance, the Department's interpretation of Title II must be accorded "controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *ABF Freight Sys., Inc.* v. *NLRB*, 510 U.S. 317, 324 (1994) (quoting *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 844 (1984)); see *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998) (recognizing that "the Department's views are entitled to deference"); *Johnson* v. *City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998) (granting deference to *Title II Technical Assistance*). The Department's conclusion that Title II extends to all law enforcement activities follows from the text and history of the statute and definitively establishes that Title II applies to arrests.

B. Title II Requires Law Enforcement Entities To Make Reasonable Modifications When Arresting An Individual With A Disability

1. Because law enforcement entities are subject to Title II, they must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. 35.130(b)(7); *Title II Technical Assistance* § II-3.6100, at 14. That requirement extends to the arrest of an individual with a disability. For example, Title II may require a police department to "modif[y] its regular practice of handcuffing arrestees behind their backs, and instead handcuff[] deaf individuals in front in order for the person to sign or write notes." *2006 Guidance* § V. In addition, "an interpreter may be needed in lengthy or complex transactions" involving a deaf arrestee. U.S.

Dep't of Justice, *Communicating with People Who Are Deaf or Hard of Hearing: ADA Guide for Law Enforcement Officers* (Jan. 2006) (*ADA Law Enforcement Guide*); see *Calloway* v. *Boro of Glassboro Dep't of Police*, 89 F. Supp. 2d 543, 555-556 (D.N.J. 2000) (recognizing ADA may require this modification to enable "a hearing impaired individual to participate in the specific police activity in an appropriate manner").

To provide another example, police officers investigating suspected drunk driving must recognize that "typical tests for intoxication, such as walking a straight line, will be ineffective for individuals whose disabilities cause unsteady gaits"; one possible modification is to use "[o]ther tests, like breathalyzers," to obtain "more accurate results and reduce the possibility of false arrest." *2006 Guidance* § II. The ADA also requires law enforcement entities to make reasonable modifications when transporting arrestees with mobility disabilities. *Ibid.* (advising that police departments may be "require[d] * * * to use lift-equipped vans or buses"); see *Gorman* v. *Bartch*, 152 F.3d 907, 913 (8th Cir. 1998) (ADA is "applicab[le] to transportation of arrestees.").

2. Although law enforcement entities 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. See, *e.g.*, *Seremeth* v. *Board of Cnty. Comm'rs*, 673 F.3d 333, 341 (4th Cir. 2012); *Bircoll* v. *Miami-Dade*

Cnty., 480 F.3d 1072, 1084-1086 (11th Cir. 2007).[3] In particular, police officers do not need to modify their procedures if the modifications would interfere with their ability to address a safety threat, so long as the risk posed by the modification is significant and based on objective evidence. Cf. *Bragdon*, 524 U.S. at 649 (observing that the ADA does "not ask whether a risk exists, but whether it is significant"). For example, when responding to "a violent crime in progress or a similar urgent situation involving a person who is deaf," an "officer's immediate priority is to stabilize the situation," and the officer is permitted to "make an arrest" without the aid of an interpreter. *2006 Guidance* § III; see *ADA Law Enforcement Guide* (advising that if deaf suspect's "behavior is threatening," police officers "can make an arrest and call for an interpreter to be available later at the booking station").

Ensuring the safety of officers and others is an important factor in the context of an ongoing arrest because, while the ADA "demand[s] unprejudiced thought and reasonable responsive reaction" to accommodate individuals with disabilities, it does not

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[3] A public entity may not, however, rely on exigent circumstances to defend against an ADA claim premised on the failure to properly train law enforcement officers in recognizing and accommodating disabilities. A failure-to-train claim is unaffected by any on-the-ground exigencies surrounding an arrest because "[t]he alleged non-compliance with the training requirements of the ADA" occurs not at the moment of the arrest, but at an earlier time when "policy makers fail[] to institute policies to accommodate disabled individuals * * * by giving the officers the tools and resources to handle the situation peacefully." *Schorr* v. *Borough of Lemoyne*, 243 F. Supp. 2d 232, 238 (M.D. Pa. 2003).

"demand action beyond the realm of the reasonable." *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401 (2002); see *Bragdon*, 524 U.S. at 649 (recognizing "the importance of prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks"). Thus, under a "practical view of the statute," *Barnett*, 535 U.S. at 402, a modification that raises significant safety concerns will not be reasonable.[4]

C. When Police Officers Arrest A Suspect With A Disability Who Is Armed And Violent, A Modification Ordinarily Will Not Be Reasonable Due To Safety Concerns

This case presents the question whether the ADA requires police officers to modify their conduct when arresting an individual with a disability who is armed and violent. To defeat a motion for summary judgment, a plaintiff raising a failure-to-accommodate claim must "show that an 'accommodation' seems

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[4] Safety concerns also may obviate the need to provide an accommodation in other circumstances. For example, Title II "does not require a public entity to permit an individual to participate in * * * services, programs, or activities * * * when that individual poses a direct threat to the health or safety of others." 28 C.F.R. 35.139(a). Because the Department's regulations define "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification," 28 C.F.R. 35.104, a public entity that seeks to avoid ADA liability on this ground must demonstrate that reasonable modifications could not eliminate the threat or reduce it to an acceptable level. See *Title II Technical Assistance* § II-2.8000, at 8. In addition, a public entity "may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities" so long as the "safety requirements are based on actual risks." 28 C.F.R. 35.130(h).

reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Barnett*, 535 U.S. at 401. Because a deviation from ordinary police procedures in this type of arrest situation generally will involve a significant threat to the officers or others on the scene, an accommodation will not be reasonable in the run of cases. However, a plaintiff should "nonetheless remain[] free to show that special circumstances warrant a finding that * * * the requested 'accommodation' is 'reasonable' on the particular facts." *Id.* at 405.[5]

1. Two factors support the conclusion that a modification will ordinarily not be reasonable due to safety concerns when officers arrest an individual with a disability who is armed and violent. First, the risk involved will generally qualify as significant. Arrests are a particularly "dangerous and difficult" law enforcement activity. *Maryland* v. *Garrison*, 480 U.S. 79, 87 (1987). That danger is plainly enhanced when a suspect is armed and has engaged in violent behavior. Cf. *Terry* v. *Ohio*, 392 U.S. 1, 24 (1968) (recognizing need to "neutralize the threat of physical harm" when "an officer is justified in believing that the individual * * * he is investigating at close range is armed and presently dangerous to the officer or to others").

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[5] *Barnett* analyzed the reasonable-accommodation standard under Title I, which prohibits disability discrimination in employment. Because the regulations implementing Title II contain a similar discrimination prohibition, a plaintiff's burden to show the existence of a reasonable modification should be interpreted the same way. Compare 42 U.S.C. 12112(b)(5)(A) with 28 C.F.R. 35.130(b)(7); see *Dadian* v. *Village of Wilmette*, 269 F.3d 831, 841 (7th Cir. 2001) ("[T]he methods of proving discrimination under Titles I and III should also apply to Title II.").

Law enforcement officers accordingly must calibrate their actions to arrest an armed and violent suspect in the safest manner possible. A modification under these circumstances generally can be expected to impede an officer's ability to ensure her own safety and the safety of others in the vicinity.

Second, the exigencies surrounding the arrest of an armed and violent individual will often create time pressure that may render an accommodation infeasible without increasing safety concerns. When an arrestee possesses a weapon and has threatened officers or others with it, the situation is inherently volatile and will often require swift action to disarm the suspect and secure the area. If police tactics dictate immediate action to resolve the threat, a delay to consider or provide accommodations will likely increase the danger in the ordinary case. See *Waller* v. *City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009) ("Accommodations that might be expected when time is of no matter become unreasonable to expect when time is of the essence."); see also *2006 Guidance* § III (an officer's "immediate priority" when responding to "a violent crime in progress or a similar urgent situation" must be to "stabilize the situation" rather than provide an accommodation).

2. Because a modification in arresting a suspect with a disability who is armed and violent presents significant safety risks in the run of cases, it will ordinarily be unreasonable. In a somewhat analogous context, this Court has recognized that "[t]he statute does not require proof on a case-by-case basis" that the covered entity was justified in denying the accommodation. *Barnett*, 535 U.S. at 403 (holding that ADA ordinarily does not require accommodations that

would trump a seniority system in the employment context). Instead, the ADA plaintiff bears the burden of "show[ing] that special circumstances warrant a finding that * * * the requested 'accommodation' is 'reasonable' on the particular facts." *Id.* at 405.

Applying *Barnett*'s burden-shifting analysis in this context, a public entity's showing that officers were engaged in arresting an armed and violent individual and acted in accordance with their usual procedure should "by itself ordinarily [be] sufficient" to warrant summary judgment on a failure-to-accommodate claim. 535 U.S. at 405. Thus, to avoid dismissal of her claim, a plaintiff who was armed and violent "must explain why, in the particular case," a modification in arresting her "can constitute a 'reasonable accommodation' even though in the ordinary case it cannot." *Id.* at 406.

A plaintiff will satisfy this burden if she can identify a modification that would not have created significant risks that officers had time to implement. For example, a plaintiff who has mental illness may be able to show that officers controlled the timing of executing an arrest warrant and could have altered their procedures with no offsetting safety concern by having a mental-health professional on site. Or 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. A plaintiff also could demonstrate that she no longer had access to a weapon and had ceased acting violently by the time of the arrest. Cf. *Barnett*, 535 U.S. at

405 (listing examples of special circumstances but recognizing they do not "exhaust the kinds of showings that a plaintiff might make" because each case will involve different facts). If a plaintiff points to special circumstances showing that an accommodation was reasonable on the particular facts despite the presence of a weapon and violent behavior during an arrest, a law enforcement entity will not be entitled to summary judgment on that issue.[6]

D. The Case Should Be Remanded For Application Of This ADA Standard

Respondent asserts that petitioners violated the ADA when they forced a second entry into her room rather than accommodating her mental illness by "respect[ing] her comfort zone, engag[ing] in non-threatening communications and us[ing] the passage of time to defuse the situation." Pet. App. 45.[7] Be-

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[6] Even if a plaintiff carries her threshold burden of identifying a reasonable accommodation, a public entity will not be liable if it "can demonstrate that making the modification[] would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7). In addition, as already noted, 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).

[7] Respondent did not specifically request these modifications during her interaction with the officers. However, 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. See *Robertson* v. *Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1197 (10th Cir. 2007) (observing that entity's knowledge that individual requires a modification will sometimes "follow from the entity's knowledge of the individual's disability"). Thus, if

cause it is undisputed that respondent was armed and had threatened to kill the officers and her social worker, her proposed modification—delaying an entry that police officers judged should be immediate to effectuate her arrest—would not be reasonable in the run of cases. Accordingly, to survive petitioners' motion for summary judgment, respondent should bear "the burden of showing special circumstances" demonstrating that on the particular facts her proposed modification would not have created significant safety risks for the officers or others. *Barnett*, 535 U.S. at 406. Because the court of appeals did not consider the summary judgment record in light of this framework, the Court should follow its usual practice of remanding to the lower courts to apply the appropriate ADA standard. See, *e.g.*, *ibid.*; *Bragdon*, 524 U.S. at 655.

II. PETITIONER OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY DID NOT VIOLATE A CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHT

Qualified immunity shields individuals from suit unless their actions "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002) (citation omitted). The doctrine is designed to ensure that "fear of personal monetary liability and harassing litigation" will not "unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987).

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respondent can carry her burden of showing that a reasonable modification existed, it would not be a valid defense to observe that she failed to expressly request it.

Qualified immunity "turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1245 (2012) (citation omitted). This standard leaves "ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (citation omitted). Here, petitioner officers are entitled to qualified immunity because respondent cannot demonstrate that they violated any clearly established Fourth Amendment right.[8]

A. 1. a. The first step in analyzing whether a right was "clearly established" is to define the right "at the appropriate level of specificity." *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999); see *Anderson*, 483 U.S. at 639. Framed "as a broad general proposition"—for instance, the right to be free from unreasonable searches and seizures—any constitutional right would be clearly established, and no official would be immune from suit. See *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 (2012) (citation omitted). Instead, a right must

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[8] The Fourth Amendment reasonableness inquiry differs from reasonableness under the ADA in an important respect. An officer violates the Fourth Amendment only when her actions are *unreasonable*; thus, the Constitution provides leeway for officers to choose among several reasonable courses of conduct. In contrast, the ADA directs that if a reasonable modification exists, law enforcement entities must provide it (assuming no statutory defenses apply), even if it would also be reasonable not to provide the modification. For this reason, so long as an officer's actions were reasonable in light of clearly established Fourth Amendment standards, it is irrelevant to qualified immunity that those actions might have violated the ADA.

be established "in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Ibid.* (citation omitted). A court then must ask whether "every reasonable official would [have understood] that what he is doing violates" that particularized right. *Id.* at 2093 (citation omitted; brackets in original). Although "the very action in question [need not have] previously been held unlawful," *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 377 (2009) (citation omitted), a plaintiff must point to "controlling authority" or "a robust consensus of cases of persuasive authority" establishing that the official's conduct was unconstitutional. *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (citation omitted). In other words, "existing precedent must have placed the * * * constitutional question beyond debate." *Reichle*, 132 S. Ct. at 2093 (citation omitted).

This Court has repeatedly demonstrated how to define a Fourth Amendment right with specificity to determine whether it was clearly established. For example, in *Wilson*, *supra*, the Court framed the relevant inquiry not in terms of "the protections of the Fourth Amendment" generally, but instead in terms of whether "a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed." 526 U.S. at 615. In *Brosseau* v. *Haugen*, 543 U.S. 194 (2004) (per curiam), the Court framed the relevant inquiry not in terms of the general Fourth Amendment right against the use of excessive force, but instead in terms of whether it was clearly established that an officer cannot "shoot a disturbed felon, set on avoiding capture through ve-

hicular flight, when persons in the immediate area are at risk from that flight." *Id.* at 200. And in *Saucier* v. *Katz*, 533 U.S. 194 (2001), the Court framed the relevant inquiry not in general excessive-force terms, but rather by asking whether a "reasonable officer in petitioner's position could have believed that hurrying respondent away from the scene, where the Vice President was speaking and respondent had just approached the fence designed to separate the public from the speakers, was within the bounds of appropriate police responses." *Id.* at 201-202, 208.

b. In this case, the right at issue must be framed by reference to the court of appeals' theory of Fourth Amendment liability. As an initial matter, the court recognized that the officers' entries into respondent's room did not require a warrant, Pet. App. 20-25, and that the officers' use of force was reasonable when it occurred, *id.* at 37. Those rulings are clearly correct. The officers' first entry into respondent's room was justified by the emergency aid exception to the warrant requirement, which applies when objective grounds exist to believe that "a person within [the house] is in need of immediate aid." *Michigan* v. *Fisher*, 558 U.S. 45, 47 (2009) (per curiam) (citation omitted; brackets in original). Respondent was off her medication, had stopped eating and taking care of herself, and had just threatened her social worker, who "considered the situation dire enough to apply for a [Section] 5150 detention, * * * call for police assistance," and clear the building of residents. Pet. App. 21. The officers thus had "an objectively reasonable basis for concluding that there was an urgent need to protect [respondent] from serious harm," and

they "acted reasonably by treating the situation as a genuine emergency." *Id.* at 20-21.

The officers were also permitted to reenter respondent's room without a warrant after she forced them to temporarily retreat by threatening them with a knife. When officers encounter an obstacle during a lawful search that requires them to briefly leave the premises, they may subsequently resume the search without independent justification. Pet. App. 24; see *Michigan* v. *Tyler*, 436 U.S. 499, 511 (1978) (classifying second entry as "no more than an actual continuation of the first" under these circumstances). In any event, the emergency aid exception continued to apply because respondent's behavior confirmed her social worker's assessment that she was experiencing a mental health crisis and urgently required help. Pet. App. 23-24. Moreover, after respondent brandished a knife and forced the officers to leave her room, they reasonably could have believed that "immediate entry [wa]s necessary to protect themselves or others from serious harm," thus permitting a warrantless entry under the exigent circumstances exception. *Ryburn* v. *Huff*, 132 S. Ct. 987, 989 (2012) (per curiam).[9]

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[9] The court of appeals deemed it "questionable" whether this exception would apply because "there was no reason to fear [respondent's] escape" from her second-story window and "[a]rguably, the officers could have avoided harm to themselves by retreating a safe distance from the door." Pet. App. 25 n.8. That reasoning contradicts this Court's recent admonition that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn*, 132 S. Ct. at 991-992. The officers here testified that their second entry was motivated by safety concerns because they were unable to evaluate or contain the threat respondent posed once her door was closed. Pet. App. 12. The officers did

Finally, the officers' use of force was reasonable at "the moment of the shooting," Pet. App. 5a, because respondent "had threatened to kill the officers, she wielded a knife in an upraised position, she advanced toward the officers, she did not drop the knife after being pepper sprayed (or even after being shot) and the shooting took place while [respondent] was only a few feet from a cornered Officer Holder." *Id.* at 37; *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) (excessive-force analysis informed by "whether the suspect poses an immediate threat to the safety of the officers or others").

The court of appeals nevertheless held that respondent's Fourth Amendment claim could proceed because "a jury could find that the officers acted unreasonably by forcing the second entry and provoking a near-fatal confrontation." Pet. App. 5.[10] As the

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not know whether respondent had access to other weapons or would barricade herself in her room, making their ultimate entry more dangerous. *Ibid.* They also feared that respondent might attempt to escape or harm any others who were present. *Id.* at 71. Because respondent was armed and had threatened the officers and her social worker, a reasonable officer could have believed that there was "an imminent threat of violence." *Ryburn*, 132 S. Ct. at 990.

[10] The court erred in suggesting that jurors should decide whether the officers' actions were objectively reasonable. "At the summary judgment stage, * * * the reasonableness of [an officer's] actions * * * is a pure question of law." *Scott* v. *Harris*, 550 U.S. 372, 381 n.8 (2007) (citation omitted). Likewise, the question whether the officers are entitled to qualified immunity because they "reasonably but mistakenly believed that their entry was necessary," Pet. App. 36, is a legal issue that "ordinarily should be decided by the court long before trial." *Hunter*, 502 U.S. at 228 (criticizing the Ninth Circuit for "routinely plac[ing] the question of immunity in the hands of the jury").

court saw things, "[a] reasonable jury could find that [respondent] was in a confined area and not a threat to others—so long as they did not invade her home." *Id.* at 29. Thus, the court could not conclude that the officers conducted the otherwise lawful search and seizure "in a reasonable manner" because "[t]he officers' decision to force an entry was in effect a decision to cause a violent—and potentially deadly—confrontation with a mentally ill person without a countervailing need." *Id.* at 31. And the court further held that this provocation theory was clearly established because "[i]f there was no pressing need to rush in, and every reason to expect that doing so would result in [respondent's] death or serious injury, then any reasonable officer would have known that this use of force was excessive." *Id.* at 33.

Thus, framing the right at the appropriate level of specificity, the qualified immunity question is whether in 2008 it was clearly established that the Fourth Amendment prohibited officers from making an otherwise lawful entry under the emergency aid and exigent circumstances exceptions to arrest an armed and violent individual known to have mental illness due to the individual's foreseeable resistance.

2. As so framed, the right at issue was not clearly established in 2008.

a. No decision of this Court clearly established that the Fourth Amendment prohibited officers from making an otherwise proper warrantless entry to arrest an individual who has mental illness due to the individual's anticipated resistance. In fact, the Court had recently eschewed a rule that would require officers to cease their lawful pursuit of a fleeing suspect to avoid the use of deadly force. See *Scott* v. *Harris*, 550

U.S. 372, 385-386 (2007). As the Court explained, "[t]he Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness." *Ibid.*

More fundamentally, the court of appeals identified no authority requiring an officer to delay entry under a provocation theory notwithstanding the officer's lawful invocation of the emergency aid and exigent circumstances exceptions. Indeed, there is at least some tension between the court's theory and the justification for those exceptions, which apply when urgent circumstances require immediate action. See, *e.g.*, *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006) (officers may rely on emergency aid exception "to render emergency assistance * * * or to protect an occupant from imminent injury"); *Warden* v. *Hayden*, 387 U.S. 294, 299 (1967) (exigency exception applies when officers confront grave danger to "their lives or the lives of others"). In these circumstances, "[s]peed * * * [i]s essential," such that "[t]he Fourth Amendment does not require police officers to delay" to obtain a warrant. *Id.* at 298-299 (holding that dangerous occupant's access to weapons is itself an exigent circumstance justifying immediate warrantless entry, rather than a fact creating a constitutional obligation to delay). The court of appeals cited no law clearly establishing that enough exigency may exist to excuse the warrant requirement, yet officers nevertheless act unreasonably by responding with immediate action.

b. Decisions from the courts of appeals likewise provided no notice that the officers' entry could be unconstitutional. The Seventh Circuit, for example, had observed that "[t]here is no precedent in this Circuit (or any other) which says that the Constitution

requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used." *Plakas* v. *Drinski*, 19 F.3d 1143, 1148, cert. denied, 513 U.S. 820 (1994). The Eighth Circuit similarly had rejected the notion that officers could be liable for "creat[ing] the need to use force by their actions prior to the moment of seizure." *Schulz* v. *Long*, 44 F.3d 643, 649 (1995). And several courts had found no constitutional violation or had granted qualified immunity on strikingly similar facts. See, *e.g.*, *Menuel* v. *City of Atlanta*, 25 F.3d 990, 995-997 (11th Cir. 1994) (rejecting Fourth Amendment claim based on lethal force used in arresting mentally ill individual after she attacked officers with a knife and temporarily forced their retreat from her home); *Buchanan* v. *Maine*, 469 F.3d 158, 165-166, 168 (1st Cir. 2006) (deeming it "perfectly clear" that officers were entitled to immunity on claim that they violated the Fourth Amendment by entering home to take mentally ill individual into custody, thereby precipitating the need to use deadly force); see also Pet. Br. 50-54 (collecting additional cases).

Because a reasonable officer canvassing these precedents would not have had clear notice that the Fourth Amendment prohibited her entry, the officers here are entitled to qualified immunity.

3. The court of appeals rested its contrary conclusion on this Court's decision in *Graham* and two Ninth Circuit decisions. Pet. App. 35-36. None of those cases, however, clearly established that the officers here acted unreasonably.

a. The court of appeals cited *Graham* for the general proposition that reasonableness requires balancing an "individual's Fourth Amendment interest[]"

against the "countervailing governmental interests." Pet. App. 33. But that general principle does not establish a particularized right on behalf of individuals with mental illness to be free of a warrantless entry due to their anticipated resistance even when exigent circumstances exist. Because "*Graham* * * * [is] cast at a high level of generality," *Haugen*, 543 U.S. at 199, and does not discuss whether police officers may lawfully enter a home under the exigent circumstances exception when they can anticipate a violent response, *Graham*'s "general constitutional rule" did not bar the officers' conduct with "obvious clarity." *Hope*, 536 U.S. at 741 (citation omitted). See *al-Kidd*, 131 S. Ct. at 2084 (observing that the Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality") (citation omitted).

b. The court of appeals also erred in denying qualified immunity based on *Alexander* v. *City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), cert. denied, 513 U.S. 1083 (1995). In *Alexander*, police officers who were present to help execute an administrative warrant for a health code inspection forced an entry into a mentally ill individual's home and shot him after he fired a gun at them. *Id.* at 1358, 1360. Noting that the officers' entry was not justified by exigent circumstances, the Ninth Circuit held that summary judgment was inappropriate on a Fourth Amendment claim. *Id.* at 1363-1367 & n.11. The court reasoned that the use of force would be excessive to execute an administrative warrant, but not to arrest the decedent for threatening the officers. *Id.* at 1367. But the court further held that the officers had no right to enter the house to arrest the decedent

"[w]ithout an arrest warrant, and without exigent circumstances." *Id.* at 1361.

In contrast to *Alexander*, the emergency aid and exigent circumstances exceptions applied here. *Alexander* therefore could not place "beyond debate" the question whether officers may enter a home under those exceptions even if an individual's violent response is foreseeable. *Reichle*, 132 S. Ct. at 2093 (citation omitted).

c. The court of appeals' reliance on *Deorle* v. *Rutherford*, 272 F.3d 1272 (9th Cir. 2001), cert. denied, 536 U.S. 958 (2002), is equally misplaced. *Deorle* denied summary judgment on an excessive-force claim when an officer shot an emotionally disturbed individual who was "unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense." *Id.* at 1275. Because *Deorle* involved dramatically different facts, it provided no clear notice to the officers here that the Fourth Amendment prohibited their entry.

B. Because it was not clearly established in 2008 that the officers' actions violated the Fourth Amendment, they are entitled to qualified immunity. This case accordingly does not require the Court to decide whether or under what circumstances officers can be liable for provoking a violent response from an individual with mental illness. See *Camreta* v. *Greene*, 131 S. Ct. 2020, 2031 (2011) (suggesting that this approach is most consistent with well-established principles of constitutional avoidance).

Several factors counsel against reaching the constitutional question in this case. See *Pearson* v. *Callahan*, 555 U.S. 223, 236-243 (2009) (describing situa-

tions in which courts properly limit their analysis to the clearly-established prong). First, petitioners did not seek review of the court of appeals' constitutional ruling and this Court's grant of certiorari therefore does not squarely encompass that issue. See Pet. i (question presented limited to "[w]hether it was *clearly established* that even where an exception to the warrant requirement applied an entry into a residence could be unreasonable under the Fourth Amendment by reason of the anticipated resistance of an armed and violent suspect within") (emphasis added). Second, and relatedly, petitioners have not briefed the constitutional question. See *Pearson*, 555 U.S. at 239 (recognizing "risk of bad decisionmaking" if briefs do not address whether a constitutional violation occurred); *Wood* v. *Moss*, 134 S. Ct. 2056, 2070 (2014) ("[l]imiting [the Court's] decision" to whether a right was clearly established when briefing "trained on" that issue). Third, the question whether, drawing all inferences in respondent's favor, the officers violated the Fourth Amendment by entering her room when they did rather than briefly waiting for a non-lethal team to arrive "involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts"; thus, "the law elaboration purpose will [not] be well served" by addressing the issue. *Buchanan*, 469 F.3d at 168; see *id.* at 167 (granting qualified immunity on claim that "a reasonable officer would have waited outside [the mentally ill decedent's] house," rather than making an immediate entry that would foreseeably necessitate the use of deadly force); see *Pearson*, 555 U.S. at 237 (citing *Buchanan* for proposition that "there are cases in which the consti-

tutional question is so factbound that the decision provides little guidance for future cases").

Finally, there can be no doubt that the right at issue here was not clearly established, but it is a more difficult question whether any such right exists. See *Pearson*, 555 U.S. at 236-237 (discouraging "substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case"). This Court has never addressed whether a police officer's knowledge of a suspect's mental illness may affect the constitutionality of the officer's actions. See Pet. App. 27, 30-31 (observing that individuals with mental illness, in contrast to other suspects, may react irrationally to "an escalating show of force," and that police officers are accordingly trained to alter their tactics in this circumstance); cf. *Scott*, 550 U.S. at 384 & n.10 (indicating that a suspect's culpability factors into the Fourth Amendment reasonableness analysis). In the absence of full briefing, this case is an inappropriate vehicle to consider the issue—particularly given the straightforward conclusion that the officers are entitled to qualified immunity because they violated no clearly established right.

CONCLUSION

The judgment of the court of appeals should be vacated in part and reversed in part.

Respectfully submitted.

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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. Amendment XIV of the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to

any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. 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.

4. 42 U.S.C. 12131 provides:

Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4)[1] of title 49).

(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.

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[1] See References in Text note below.

6. 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.

* * * * *

7. 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.