1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CITY AND COUNTY OF SAN :

4 FRANCISCO, CALIFORNIA, ET AL., :

5 Petitioners : No. 13-1412

6 v. :

7 TERESA SHEEHAN :

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9 Washington, D.C.

10 Monday, March 23, 2015

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 11:04 a.m.

15 APPEARANCES:

16 CHRISTINE VAN AKEN, ESQ., Deputy City Attorney, San

17 Francisco, Cal.; on behalf of Petitioners.

18 IAN H. GERSHERNGORN, ESQ., Deputy Solicitor General,

19 Department of Justice, Washington, D.C.; on behalf

20 of United States, as amicus curiae, supporting

21 vacatur in part and reversal in part.

22 LEONARD FELDMAN, ESQ., Seattle, Wash.; on behalf of

23 Respondent.

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1 P R O C E E D I N G S
2 (11:04 a.m.)
3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next this morning in Case No. 13-1412, the City
5 and County of San Francisco v. Sheehan.
6 Ms. Van Aken.
7 ORAL ARGUMENT OF CHRISTINE VAN AKEN
8 ON BEHALF OF THE PETITIONER
9 MS. VAN AKEN: Thank you, Mr. Chief Justice,
10 and may it please the Court:
11 This --
12 JUSTICE SCALIA: Ms. Van Aken, before you go
13 any further.
14 (Laughter.)
15 MS. VAN AKEN: Yes, Justice Scalia.
16 JUSTICE SCALIA: Your petition for -- for
17 writ of certiorari, I -- and it was a petition that had
18 your name on it, said on -- on the reasons for granting
19 the petition, this Court should resolve whether and how
20 the Americans with Disabilities Act applies to arrests
21 of armed and violent suspects who are disabled. The
22 circuits are in conflict on this question. The question
23 presented is recurring and important, and Title II of
24 the ADA does not require accommodations for armed and
25 violent suspects who are disabled, and that's the issue

1 on which there is a circuit conflict.
2 I now look at the Table of Contents of your
3 petition. This argument is not made in the petition at
4 all. You -- you concede that -- that Title II does
5 apply even to the arrest of -- of armed and dangerous
6 suspects. You just say in this case, "Modification to
7 Sheehan's arrest would not have eliminated the
8 significant risk she posed."
9 There -- there's a technical word for this.
10 It's called bait-and-switch. We might well not have
11 granted this petition had you not listed those reasons.
12 Are we supposed to appoint somebody else to argue the
13 point that you asked -- asked us to resolve in the --
14 in -- in your petition for certiorari?
15 MS. VAN AKEN: With respect, Justice Scalia,
16 San Francisco asked you to resolve the question of
17 whether and how the ADA applies to the arrest an armed
18 and -- of an armed and violent individual, and the
19 answer to that question is it only applies where the
20 significant threat that the individual poses has been
21 eliminated. And --
22 JUSTICE SCALIA: That's -- that's not what
23 your -- that's not what your petition said. Title II
24 does not require accommodations for armed and violent
25 suspects who are disabled, period, is what it says. And

1 that is not the argument you are -- you -- you make in
2 your -- in -- in your principal brief.
3 MS. VAN AKEN: Well, with respect,
4 Justice Scalia, page 3 of our reply in support of
5 certiorari -- so still at the certiorari stage -- says
6 that the issue here is not a fact-intensive
7 reasonableness question, but instead, it's whether an
8 armed and violent individual's accommodation is
9 required. And the answer to that is no, where the
10 significant risk hasn't been eliminated. And our
11 arguments at the certiorari stage certainly didn't turn
12 on any claim that the ADA simply --
13 JUSTICE SOTOMAYOR: I'm sorry. I -- I
14 looked at your papers below, and there, there was an
15 argument as to whether the ADA applied at all to
16 arrests. And nowhere do you raise the direct threat
17 argument; nowhere do you raise -- raise below the risk
18 argument. It was a pure legal question, the one I
19 thought we were going to answer.
20 But on appeal, you're now using the words
21 "direct threat" and -- and "risk." What are we supposed
22 to do with this?
23 MS. VAN AKEN: Justice Sotomayor --
24 JUSTICE SOTOMAYOR: Are we supposed to
25 change the -- the nature of the case and perhaps reverse

1 the Ninth Circuit on an argument that was never
2 presented to it?
3 MS. VAN AKEN: I -- I disagree, Your Honor.
4 In the Ninth Circuit, San Francisco argued that the --
5 the Ninth Circuit should adopt essentially the Fifth
6 Circuit's rule, that where there are exigent
7 circumstances, that there is no requirement of
8 accommodation. There was no argument that the ADA just
9 has nothing to do with arrests. It's that in exigent
10 arrests, like the Fifth Circuit said in Hainze, then you
11 don't -- there's not a reasonable accommodation. No
12 accommodation is reasonable.
13 So in a sense, the ADA doesn't apply, but
14 that's because of the exigency as the Fifth Circuit said
15 in Hainze, and that was the conflict that we asked this
16 Court to take the case to resolve.
17 JUSTICE ALITO: Before we get to the
18 question that you have briefed and the question that the
19 Solicitor General has briefed, there is another question
20 that logically comes first. The statute, 42 U.S.C.
21 12132, says, "No qualified individual with a disability
22 shall, by reason of such disability, be subjected to
23 discrimination by any such entity." That's the relevant
24 statutory provision, isn't it?
25 MS. VAN AKEN: Yes, Justice. Yes.

1 JUSTICE ALITO: All right. So all we have
2 there is discrimination. In the -- is there any
3 provision of the ADA that defines what is meant by
4 discrimination in that context? Not in the employment
5 context, in that context.
6 MS. VAN AKEN: Right. Congress's findings
7 included a statement that discrimination includes a
8 failure to make modifications in some circumstances. So
9 we understand discrimination to include a failure to
10 modify a government program --
11 JUSTICE SCALIA: Excuse me. Where does that
12 appear? Is that in the statute?
13 MS. VAN AKEN: It's -- it's 12101(a)(5),
14 Your Honor. The 42 U.S.C. 12101(a)(5).
15 JUSTICE SCALIA: Okay.
16 MS. VAN AKEN: And that's a finding that
17 discrimination includes not making an accommodation.
18 And this Court has recognized that accommodation is part
19 of the discrimination analysis. In -- in Olmstead, for
20 instance, the Court said that Congress had a broad view
21 of what discrimination meant.
22 So let -- let me return to my original
23 point, which was that -- that the case is about an
24 entry, and police officers here sought to reenter a
25 private home of a mentally ill woman who had just --

1 JUSTICE ALITO: Well, before you get to
2 that, I -- I'm still not entirely satisfied with your
3 answer about discrimination. We have to answer that
4 question before we get to the arguments that you make
5 and that the United States makes based on regulations
6 that have been issued pursuant to the statute.
7 If discrimination means what it means in
8 ordinary parlance, which means treating people
9 differently, then there would be no basis for those
10 regulations. But nobody's briefed this other issue,
11 this threshold issue. Now, maybe you're right. But it
12 hadn't been briefed.
13 MS. VAN AKEN: Well, I -- I think
14 discrimination includes the failure to make an
15 accommodation where it's reasonable to do so, and I base
16 that on the findings, as I mentioned. I base that on
17 the regulations, which this Court said in -- in Bragdon
18 were entitled to deference, at least in the -- the
19 public accommodations context. Congress has recognized
20 the reasonable accommodation duty in 42 U.S.C. 12206,
21 which -- which was subsequently enacted but mentions
22 accommodations.
23 And I also think it -- it sort of follows
24 from this context. The public service here is providing
25 an injury-free arrest to the extent possible.

1 Ms. Sheehan alleges that because of her disability, she
2 wasn't able to take advantage of that public service to
3 the extent other people would have been able to, but if
4 we had provided her an accommodation, then she would
5 have been able to. Now, we -- we disagree with that
6 factually, of course.
7 JUSTICE SCALIA: Excuse me. What -- what is
8 the public service that she could not --
9 MS. VAN AKEN: An injury-free arrest. An
10 arrest with a minimum of -- of force.
11 JUSTICE SCALIA: This is a public service?
12 MS. VAN AKEN: It's an activity, Justice
13 Scalia. And -- and it's an activity in the same sense
14 that imprisoning someone is a public activity, and this
15 Court said in -- in Yeskey that -- that that indeed was.
16 And so therefore, the ADA applied.
17 The service at issue here, the activity at
18 issue here is an arrest, but the circuits are unified
19 that Title II applies to arrest. Where they're divided
20 is how --
21 JUSTICE SCALIA: Let's call it an activity
22 instead of a service.
23 MS. VAN AKEN: Yes, Justice Scalia. Let's
24 call it an activity.
25 (Laughter.)

1 JUSTICE GINSBURG: I -- I have another
2 preliminary question.
3 The ADA does not apply to the individual
4 officers; right? It applies to the entity.
5 MS. VAN AKEN: Yes.
6 JUSTICE GINSBURG: So this -- the scenario
7 we presented are actions taken on the spot by two
8 officers. Is -- what is the entity liability? Is this
9 a vicarious liability?
10 MS. VAN AKEN: It's -- it's a respondeat
11 superior type of liability, and -- and I believe -- it's
12 certainly clear in the Ninth Circuit that the city is
13 liable for the individual actions of its officers. The
14 Monell doctrine only applies in the context of 42 U.S.C.
15 1983.
16 So we accept for purposes here that where
17 the officers are engaged in purposeful conduct on behalf
18 of the entity that the entity is liable for -- for
19 their --
20 JUSTICE GINSBURG: So you're not making the
21 argument that the entity would be liable for a pattern
22 or practice of discrimination, but not what the officer
23 on the beat does?
24 MS. VAN AKEN: No. I'm not making that
25 argument. I'm not making that argument.

1 JUSTICE KAGAN: And while we are talking
2 about questions that are not strictly speaking in the
3 case --
4 (Laughter.)
5 MS. VAN AKEN: Yes, Justice Kagan.
6 JUSTICE KAGAN: What is your view of when
7 you are liable for monetary damages? What is the
8 standard on that?
9 MS. VAN AKEN: Right. So the -- the ADA
10 adopts the Rehabilitations Act remedies, which in turn
11 adopts the Title VI remedies, so the city is liable in
12 damages when it has engaged in intentional conduct. And
13 the Ninth Circuit has expanded that to include
14 deliberate indifference as well. And -- and we think
15 that here if the conduct is purposeful, if the officers
16 are intentionally making an arrest rather than
17 refraining from making an arrest in a -- in the moment,
18 then that conduct is purposeful for purposes of the
19 remedy discussion.
20 JUSTICE KAGAN: As long as they are
21 intentionally making the arrest, do you think that that
22 meets the standards that --
23 MS. VAN AKEN: I think if they are on notice
24 that there's -- there might be an occasion to provide an
25 accommodation, and they nonetheless make the arrest,

1 then that meets the standard, I believe. I think that's
2 the case in the Ninth Circuit. It's County of Double v.
3 Kitsap --
4 JUSTICE SCALIA: It isn't that the
5 institution must be purposeful, that it must be a policy
6 of the institution? It's enough if the actor, the
7 officer in question, acted purposefully?
8 MS. VAN AKEN: Well, that was certainly the
9 assumption of the Ninth Circuit here, Justice Scalia.
10 That -- that the entire liability issue in this case
11 turns on whether the officers failed to make a
12 reasonable accommodation.
13 JUSTICE SCALIA: You don't -- you don't
14 challenge that? You think that --
15 MS. VAN AKEN: Not in this case. We don't
16 challenge that in this case. That's a -- that's a rule
17 in the Ninth Circuit.
18 JUSTICE SCALIA: So you -- you want us to
19 assume that Title II applies, and then to say that in
20 this case, however, because of this particular
21 individual's behavior, there was an exemption from that
22 normal application of Title II. And then we will decide
23 in some future case whether it's true that Title II
24 applies at all; right? That's --
25 MS. VAN AKEN: I think Title II applies

1 here. If -- I think the Court --

2 JUSTICE SCALIA: You didn't say so in

3 your -- in your petition.

4 MS. VAN AKEN: I respectfully disagree,

5 Justice Scalia. We argued about how Title II applies to

6 this case, and we argued that it did not apply -- it did

7 not create a duty here because of the degree of

8 exigency.

9 JUSTICE SCALIA: Title II of the ADA does

10 not require accommodations for armed and violent

11 suspects who are disabled.

12 MS. VAN AKEN: Correct. Now, that is not an

13 argument --

14 JUSTICE SCALIA: You're not -- you're not

15 arguing that here. You are saying in the circumstances

16 of this case, is all you're saying.

17 MS. VAN AKEN: I am arguing now --

18 JUSTICE SCALIA: Is it -- is it enough that

19 the individual was armed and dangerous? Is that alone

20 enough?

21 MS. VAN AKEN: Yes. That is enough because

22 the individual was armed and dangerous. If there -- if

23 the individual had been disarmed, Title II would create

24 an obligation. If the individual were not dangerous,

25 Title II would create an obligation.

1 JUSTICE KAGAN: Well, what about this case?
2 Suppose that there is an armed and dangerous person who
3 the officer knows is deaf, and the officer says put your
4 hands up or I will shoot.
5 MS. VAN AKEN: Yes.
6 JUSTICE KAGAN: And, of course, the deaf
7 person doesn't put his hands up and the officer shoots.
8 Is that -- I guess you are saying that the ADA has
9 nothing to do with that case.
10 MS. VAN AKEN: I -- if the person is
11 dangerous in that moment and it is necessary to shoot to
12 protect public safety such as if the armed and violent
13 deaf individual is raising a gun at the officer, then,
14 yes, the ADA --
15 JUSTICE SCALIA: Well, that's not what you
16 answered to me. You said if the individual is armed and
17 dangerous -- actually it should be armed and violent,
18 that -- now you are saying that is not enough.
19 This individual was armed and violent, and
20 you say it's not enough. It depends on the
21 circumstances. Now, which do you want us to hold?
22 MS. VAN AKEN: Dangerous, Justice Scalia.
23 Dangerous. If the individual presents a significant
24 threat, then no accommodation is required.
25 JUSTICE SCALIA: All right.

1 MS. VAN AKEN: Any accommodation --

2 JUSTICE SCALIA: And there is a circuit

3 conflict on that point; isn't there?

4 MS. VAN AKEN: I believe there is, Justice

5 Scalia, because the Fifth Circuit in Hainze said that

6 anytime there is exigent circumstances, you just don't

7 look to the ADA. And what the Ninth Circuit has really

8 done here, in our view, has given almost no weight to

9 the exigency of the circumstances.

10 And I think there's two ways the Court can

11 resolve this case. One is to hold the direct threat

12 regulation applies to situations like this one because

13 the significant risk had not been eliminated here, and

14 therefore --

15 JUSTICE SOTOMAYOR: Where was that in your

16 brief?

17 MS. VAN AKEN: I'm sorry. Which brief?

18 JUSTICE SOTOMAYOR: Where was -- the brief

19 below it, to the circuit court. Where did you use the

20 words direct threat and parrot the statute?

21 MS. VAN AKEN: Yes --

22 JUSTICE SOTOMAYOR: Because you're -- you're

23 not parroting the statute. The statute says, in

24 determining whether an individual possesses a direct

25 threat, a public entity must make an individualized

1 assessment based on reasonable judgement that relies on
2 current medical damage or on the best available
3 objective evidence to ascertain the nature, duration,
4 and severity of the risk, the probability that the
5 potential injury will occur, and whether reasonable
6 modifications will mitigate the risk.
7 MS. VAN AKEN: That is from the regulation,
8 Justice Sotomayor. We did not --
9 JUSTICE SOTOMAYOR: That is the regulation.
10 MS. VAN AKEN: -- cite the regulation to
11 the -- to the Ninth Circuit. What we cited was Hainze,
12 and Hainze's analysis that in exigent circumstances you
13 don't provide an accommodation. Now, we certainly think
14 that at least where the exigent circumstances rise to
15 the level that they did here, you don't provide an
16 accommodation. And the reason for that is that the
17 fundamental government activity here is protecting
18 public safety.
19 And so in that situation -- in a situation
20 like this one, time is of the essence, and so to
21 delay -- to delay an arrest as an accommodation where
22 time is of the essence isn't a reasonable accommodation
23 as a matter of law. And my argument to this Court is
24 that because officers are making risk judgments --
25 JUSTICE SOTOMAYOR: I'm sorry,

1 what -- I -- I -- let's assume certain facts.
2 MS. VAN AKEN: Okay.
3 JUSTICE SOTOMAYOR: All right? Contrary to
4 what you're -- I will wait for your reply.
5 MS. VAN AKEN: I'm sorry, Justice Sotomayor.
6 JUSTICE SOTOMAYOR: May I finish the
7 question?
8 CHIEF JUSTICE ROBERTS: Yes.
9 JUSTICE SOTOMAYOR: There is no exit
10 possible, and the police officers knew that.
11 MS. VAN AKEN: I'm sorry?
12 JUSTICE SOTOMAYOR: The police officers knew
13 that there was no way to escape from that apartment.
14 They knew that the building was empty. Could you still
15 defend their decision to go in given that they could
16 have waited and tried to talk her out?
17 MS. VAN AKEN: So if the building -- if they
18 knew the building was empty, unlike here, and if they
19 knew there was no exit, unlike here, we still think
20 there would be a question about whether she had other
21 weapons in the room and could be preparing some kind of
22 ambush or some kind of barricade, and that's something
23 that the officers here testified they were concerned
24 about it, page 198 and one 199 of the Joint Appendix.
25 So what they thought was necessary was to get that door

1 open so that they could see what Ms. Sheehan was doing,
2 so they could see if she were preparing an ambush or
3 barricade.
4 JUSTICE SOTOMAYOR: That's different than
5 what they did however.
6 MS. VAN AKEN: Well--
7 JUSTICE SOTOMAYOR: They opened the door,
8 and they rushed in and pepper sprayed her. They -- they
9 weren't just opening the door to see if she had a gun or
10 other instruments of danger.
11 MS. VAN AKEN: Justice Sotomayor --
12 JUSTICE SOTOMAYOR: So let's -- let's assume
13 my hypothetical. Doesn't -- doesn't this require them,
14 if it doesn't change the nature of their service,
15 protecting the public, to wait for their backup and to
16 wait for the crisis intervention team?
17 MS. VAN AKEN: If they knew there was no
18 danger from not opening the door, then, yes, that could
19 be a reasonable accommodation. They didn't know that
20 here.
21 JUSTICE SOTOMAYOR: So why isn't that a jury
22 fact?
23 MS. VAN AKEN: I'm sorry --
24 JUSTICE SOTOMAYOR: Why isn't that a jury
25 fact?

1 MS. VAN AKEN: It's not a jury fact because
2 no reasonable jury could conclude that there was no
3 significant danger here. I -- the -- what the officers
4 were doing was preventing a danger that they had a
5 reasonable basis to believe existed. They were doing
6 that by opening a door. With respect, they didn't rush
7 it. It was Ms. Sheehan who rushed out and crossed the
8 threshold. What they did is open the door prepared with
9 pepper spray to use it, and then prepared to use their
10 firearms that they needed to, and that's unfortunately
11 what they needed to do.
12 I'd like to reserve the remainder of my time
13 for rebuttal.
14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Gershengorn.
16 ORAL ARGUMENT OF IAN H. GERSHENGORN
17 ON BEHALF OF UNITED STATES, AS AMICUS CURIAE,
18 SUPPORTING VACATUR IN PART AND REVERSAL IN PART
19 MR. GERSHENGORN: Mr. Chief Justice, and may
20 it please the Court:
21 The ADA provides individuals with
22 disabilities with important rights in their interactions
23 with the police, including arrest. However, under the
24 circumstances here, the Ninth Circuit applied the wrong
25 standard when it sent to the jury both the ADA claim and

1 the Fourth Amendment claim, because it gave insufficient
2 weight to the safety risks the officers faced when they
3 confronted an individual who was mentally ill and armed
4 and violent.
5 I would like to have touch base first on the
6 two preliminary -- two of the preliminary questions that
7 the Court has identified. First, it is clear that the
8 ADA applies to arrests. The ADA applies broadly to any
9 department or agency of the local Government, that
10 includes the police, and it applies broadly to
11 activities, services, and programs which also includes
12 arrests.
13 JUSTICE KENNEDY: There is no circuit
14 conflict on that point?
15 MR. GERSHENGORN: There is no circuit
16 conflict since Yeskey that it applies to arrests, Your
17 Honor, so that is correct. And we think that that makes
18 --
19 JUSTICE SCALIA: Of course, at the common
20 law, it was -- it was clear that statutes normally did
21 not apply to the police, for instance, even though the
22 speeding law does not have an exemption for police
23 vehicles, a policeman could speed. It was just assumed
24 that normal criminal offenses did not apply to a
25 policeman acting within the scope of his duties.

1 MR. GERSHENGORN: But, Your Honor, the ADA,
2 of course, is not a criminal statute, and it was an
3 intent by Congress to apply quite broadly, as this Court
4 recognized in Yeskey, it applies to State prisons. The
5 text of the statute doesn't have any exemption at all
6 for police activities --
7 JUSTICE SCALIA: No, I'm not talking about
8 prisons. I'm just talking about enforcing the law.
9 MR. GERSHENGORN: Your Honor, but I do think
10 that, again, the statute has no exceptions, and this
11 Court -- the lower courts are in agreement, and it's
12 consistent with the Justice Department guidance, and
13 there is a good reason for that. It's along the lines
14 of Justice Kagan's hypothetical, that things like
15 providing an interpreter during the arrest of a deaf
16 individual, as this Court, in the case that was before
17 this Court about a decade ago in Gorman, providing
18 transportation for a wheelchair bound individual to the
19 police station, for conducting sobriety tests, have a
20 walk the line test for someone with physical
21 disabilities, those are the core kinds of things that
22 the ADA is designed to get at.
23 JUSTICE GINSBURG: And do you also agree
24 with Ms. Van Aken that there is vicarious liability,
25 because the ADA operates against entities, not

1 individuals, not officers. So do you also accept that
2 there is vicarious liability, rather than the
3 enterprise, the entity would be liable if it had a
4 pattern or practice.
5 MR. GERSHENGORN: We do believe that,
6 Justice Ginsburg, that there is the effect -- the
7 effectively respondeat superior liability much of the
8 time will only be for injunctive relief, precisely
9 because in the absence of an intentional harm, damages
10 would not be available. But, yes, we do believe that
11 there is the equivalent of respondeat superior
12 liability. Of course, none of that has been briefed in
13 this case, but if I could just touch on one more issue
14 that hasn't been briefed in this case that the Court
15 should not resolve is Justice Alito's question about
16 usual accommodation.
17 This Court said in Tennessee v. Lane, both
18 in Justice Stevens' majority opinion, and in Chief
19 Rehnquist's dissent that reasonable accommodation was
20 required by Title II of the ADA. That makes sense.
21 Titles I, II, III, and the Rehab Act all require
22 reasonable accommodation. Titles I and III do so
23 expressly in 21.112 and Section 21.182. And Title II
24 does it by reference. What Title II is it broadly
25 defines discrimination. And then in Section 12.201, the

1 Congress provided that the regulations and provisions --
2 the protections in Title II shall be the same or no less
3 than the protections in the Rehab Act, including the
4 regulations in the Rehab Act. So I think it's clear
5 that reasonable accommodation occurs -- is required by
6 --
7 JUSTICE ALITO: It does seem to me that the
8 dynamics are different in the arrest context. Now,
9 here, I guess the officers had reason to know that this
10 individual had a disability, but what happens if police
11 officers have to arrest somebody out on the street that
12 seems to be behaving in an unusual fashion. How can
13 they determine whether that person has a disability, it
14 may be someone who is schizophrenic and isn't taking his
15 or her medications, or it might be somebody who does not
16 have a mental illness, but has taken some kind of
17 controlled substance, how do they make those
18 determinations on the spot when they're arresting
19 someone.
20 MR. GERSHENGORN: So, the ADA applies when
21 you know or believe that the person has a disability,
22 including mental illness. So in some of the
23 hypotheticals that Your Honor just poses, the ADA would
24 not apply. But, of course, in this case, they did, as
25 Your Honor says, they did know. And in fact, the whole

1 purpose of the entry was to address a problem of mental
2 illness.
3 JUSTICE ALITO: But in the case I posited,
4 there would be an issue about whether the officers
5 should have known that this person was behaving
6 bizarrely, had a mental illness?
7 MR. GERSHENGORN: We don't believe that
8 should have known is the standard in the ADA. So it's
9 not a should have known standard with respect to the
10 disability.
11 With respect to how the Court should
12 approach this, and the question that we understand to
13 presented and whether it should adopt the Hainze
14 approach. We have proposed for the Court that it apply
15 the Barnett standard. The root of that standard is the
16 recognition that in the mine run of cases like this,
17 with an armed and violent individual, it would be a
18 great danger to the officers or to the public, and short
19 time. And so consistent with the Justice Department
20 guidelines, which say the officers' priority is to
21 stabilize the situation, and I think with the instincts
22 of the courts of appeals, we think the right way to
23 operationalize that instinct and map it onto this
24 Court's precedent is through a Barnett standard, which
25 is to recognize that it will very rarely be the case

1 that an accommodation is needed.

2 So when might one be needed under Barnett?

3 Well, it goes, I think, to Justice Sotomayor's hypo with

4 one tweak. It's our view that the rare occasions when

5 an accommodation would be needed involves something like

6 when it's contained and visible. So a threat that you

7 knew there was no opportunity for escape and you could

8 see the individual, perhaps if there was a security

9 camera in Ms. Sheehan's room, or another example, if you

10 had a mentally ill individual with a knife cornered in

11 an alley, so there was possibility of escape and the

12 officers could retreat. We think those might be the

13 rare situations that a reasonable accommodation would be

14 needed. The reason for that is a reasonable

15 accommodation is not -- a reasonable modification is not

16 needed, in our view, when it presents significant safety

17 risks to the officer or the public.

18 JUSTICE SCALIA: What about saying it is

19 never reasonable to accommodate somebody who is armed

20 and violent?

21 MR. GERSHENGORN: Your Honor, that is --

22 JUSTICE SCALIA: That seems to me a fairly

23 sensible statement. It is never reasonable to

24 accommodate somebody who is armed and violent, period.

25 MR. GERSHENGORN: So, Your Honor --

1 JUSTICE SCALIA: Which is what some courts
2 have held.
3 MR. GERSHENGORN: The Fifth Circuit, I
4 believe, is the only court to have held that. We don't
5 think that that's the right standard, although we think
6 their instinct there is a lot closer than what the Ninth
7 Circuit has done. We don't think it's right for two --
8 one legal reason and one sort of practical reason. The
9 legal reason is this Court has avoided generally in the
10 context of reasonableness the sort of bright line rules
11 that the Fifth Circuit has articulated. So that is the
12 first reason. With respect to the practical
13 consequences, I think it does get to my response to
14 Justice --
15 JUSTICE SCALIA: Excuse me, but I don't
16 accept that. That's not a bright line rule.
17 MR. GERSHENGORN: I think if you say it
18 doesn't apply at all --
19 JUSTICE SCALIA: It doesn't apply -- it
20 doesn't apply in one particular circumstance, where the
21 person is armed and violent.
22 MR. GERSHENGORN: Your Honor, we think that
23 a -- sort of one notch back from that is actually the
24 right approach, that it captures the idea that Your
25 Honor is articulating, and that drove the Fifth Circuit,

1 but does it without the absolute rule, which is, I
2 think, how many of the other circuits, other than the
3 Ninth Circuit, are applying it. They recognize that
4 exigency is very, very important, but there will be
5 times when the exigency is sort of an unstable
6 equilibrium, where the officers may have an obligation
7 to back off.
8 JUSTICE GINSBURG: And you are asking for a
9 remand -- you say most of the time officers can go
10 ahead. But there may be some times when not.
11 What is there in the fact picture here that
12 would warrant a remand? Remand to determine what?
13 MR. GERSHENGORN: So, Your Honor, we do
14 think a remand is appropriate, but we will say we're not
15 -- we haven't seen anything in the record that would
16 create that special circumstances. But in fairness to
17 plaintiffs, because it is a different standard than the
18 one that they faced below, and they prevailed below, we
19 think they should have a chance to go through the
20 extensive record and make the arguments to the Ninth
21 Circuit.
22 JUSTICE KAGAN: Mr. Gershengorn, if I can
23 just get your understanding. What are the special
24 circumstances that we're reserving here? What is the
25 reason for not adopting Justice -- the Fifth Circuit

1 rule?

2 MR. GERSHENGORN: Because I think there will

3 be times when the exigency is --

4 JUSTICE KAGAN: Tell me what those facts

5 are.

6 MR. GERSHENGORN: When you -- a paradigmatic

7 case is when it is -- it's visible -- when the suspect

8 is visible and contained. So in other words, you can be

9 assured that there is no additional risk from waiting,

10 and that you can be assured that there is no danger to

11 the public. So for example, had there been a clear door

12 into Ms. Sheehan's room so they could see what she was

13 doing, if she was sort of huddled in the corner, that

14 might be a situation in which a reasonable modification

15 was appropriate, even though the situation was not

16 overcontained in that sense, had she made a break for

17 the window, had she made a move for another weapon, they

18 could have done something about it.

19 THE COURT: Well, but I suppose suicide is

20 always a concern in a case like that, right?

21 MR. GERSHENGORN: So, Your Honor, there is a

22 risk of danger to self, and the officers are allowed to

23 take that into account. We think that in a situation in

24 which you can see her, that that would be a situation in

25 which there were an agreement for a reasonable

1 modification, but we recognize that harm to self is
2 something that the officers can take into --
3 JUSTICE KENNEDY: I think the standard you
4 just proposed gives no guidance at all to an officer
5 faced with a violent -- with a violent person.
6 MR. GERSHENGORN: Your Honor, may I answer?
7 CHIEF JUSTICE ROBERTS: Sure.
8 MR. GERSHENGORN: Your Honor, I do think it
9 gives guidance in this sense. It says that absent a
10 situation in which you have -- in which you can have
11 some confidence that there is no risk to the public, you
12 don't have to worry about a reasonable modification.
13 Thank you.
14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Feldman.
16 ORAL ARGUMENT OF LEONARD FELDMAN
17 ON BEHALF OF RESPONDENT
18 MR. FELDMAN: Mr. Chief Justice, and may it
19 please the Court:
20 The principal dispute in this case is a
21 factual one, not a legal dispute. It's a factual
22 dispute.
23 JUSTICE SCALIA: Exactly. I don't know why
24 we took the case.
25 MR. FELDMAN: And I agree entirely with that

1 comment, Justice Scalia. And that's why, in our brief,
2 we commented that perhaps this is an appropriate
3 instance where the Court would dismiss as improvidently
4 granted.
5 The Hainze discussion is very different than
6 what's being proposed here. Hainze got it wrong. What
7 Hainze said was that any time there's a -- a
8 confrontation that's out in the open, we just won't
9 apply the ADA. But one of the powers of the ADA, one of
10 the strengths is the regulatory framework is so
11 comprehensive. And so we have the direct threat
12 exception, the direct threat defense, Section 139 of the
13 ADA regs. And it addresses all of the issues that are
14 before this Court.
15 The first and the primary consideration is,
16 was there or wasn't there a substantial risk to the
17 public. And critically, it doesn't talk about risks to
18 the individual. That's not within the ADA regulations.
19 We're just talking about, is there a risk to the public.
20 And that's the disputed issue in this case. That's the
21 issue that the Ninth Circuit set down.
22 But there's another part to Section 139, and
23 that's whether this -- that if there is a significant
24 risk, if you can mitigate that risk with reasonable
25 accommodations. And that's what Lou Reiter talks about

1 in his report, is the various ways that we mitigate a
2 risk when we're dealing with someone who is mentally
3 disabled.
4 But let's go back to the risks, because,
5 Justice Sotomayor, I think you hit the nail on the head.
6 There was no public risk here. And the reason for that
7 is because she was in her room, and she had made clear
8 she wanted to be left alone. She didn't chase after
9 these officers. She closed the door. The officers had
10 climbed up two flights of stairs to get to her front
11 door.
12 JUSTICE SOTOMAYOR: Well, the actual dispute
13 was that Hodge, the social worker, claims he told them
14 that this was a second-floor apartment, and there was no
15 way to leave, and that the building had been evacuated.
16 MR. FELDMAN: Exactly.
17 JUSTICE SOTOMAYOR: So there's a factual
18 dispute between what they say and the witness says.
19 MR. FELDMAN: Right. And the only time that
20 we get beyond the -- the record, I guess -- one of the
21 arguments that you heard from Ms. Van Aken about, well,
22 she might have had a gun, she might have had a
23 hostage --
24 CHIEF JUSTICE ROBERTS: She might have
25 wanted to commit suicide --

1 MR. FELDMAN: Yes.
2 CHIEF JUSTICE ROBERTS: -- which is a
3 reason -- I mean, the officers did not go in there to
4 shoot her. They used the pepper spray first. Why isn't
5 that a sufficient justification?
6 MR. FELDMAN: Two reasons, Your Honor.
7 First of all, the -- the -- the reply brief makes very
8 clear that when they went in the second time, it wasn't
9 to help her. It was to apprehend her. And the second
10 is that --
11 CHIEF JUSTICE ROBERTS: Well, I'm not sure I
12 understand that distinction. If you think she's going
13 to harm herself, apprehending her prevents that.
14 MR. FELDMAN: Shooting and killing her is
15 not an efficacious way to prevent --
16 CHIEF JUSTICE ROBERTS: I -- I understand
17 the point. And it's -- it's a clever point to make,
18 except, as I said earlier, they used pepper spray the
19 first time. And it was only when the pepper spray was
20 ineffective that they had a necessity of taking armed
21 action.
22 MR. FELDMAN: Right. To get back to your
23 questions, the regulations that have been adopted in
24 ADA, the Department of Justice made a determination that
25 danger to self was not a consideration under the --

1 under the direct threat defense to the ADA. That was a
2 decision that the Department of Justice made. So that
3 determination is not relevant here, but that, too, was
4 hotly disputed.
5 Remember that Hodge, when he filled out the
6 form, he checked "greatly disabled." He checked "danger
7 to others." He did not check "danger to self." And
8 what he testified to was that he did not give these
9 officers any reason to believe that she was a danger to
10 herself. Greatly disabled --
11 CHIEF JUSTICE ROBERTS: Well, I
12 understand -- I understand the factual dispute in this
13 case. But is your position that based on the Justice
14 regulations, that danger to self is never a
15 justification for approaching and trying to apprehend
16 and subdue somebody in this situation?
17 MR. FELDMAN: Under the ADA, that's clear.
18 And the reason for that is the ADA contemplates
19 providing reasonable accommodations as a way of avoiding
20 discrimination. It would be inconsistent with the ADA
21 if officers were to, as in this case, pepper spray, take
22 people into custody as a way of preventing them from
23 doing harm to themselves.
24 CHIEF JUSTICE ROBERTS: I don't know why you
25 wouldn't think the pepper spray, instead of the weapons,

1 in the first instance wasn't a reasonable accommodation.

2 MR. FELDMAN: If they had gone in with

3 pepper spray, it might be a very different case. But

4 they went in with pepper spray with their guns

5 unholstered.

6 JUSTICE KENNEDY: Just -- just to make

7 clear --

8 MR. FELDMAN: And --

9 JUSTICE KENNEDY: -- you say danger to --

10 to -- to self is -- is not a reason for apprehending the

11 person?

12 MR. FELDMAN: Not under the -- it's not a

13 reason -- let me be clear. It is not a reason for

14 failing to accommodate under the ADA.

15 JUSTICE SOTOMAYOR: Or at least trying to.

16 MR. FELDMAN: Correct.

17 JUSTICE SOTOMAYOR: She had called for

18 backup, and she had called for the CIT, correct?

19 MR. FELDMAN: Right. Right. Danger to self

20 may present issues under the Fourth Amendment, but

21 that's not our case.

22 JUSTICE SCALIA: Why should that be? I -- I

23 can't imagine why that should be. I mean, if you have a

24 person that you know is mentally unstable and they're --

25 they're about to kill themselves, you -- you -- you have

1 to back off and say, well, you know, this is not -- not
2 something that requires accommodation.
3 MR. FELDMAN: And that's the determination
4 that the Department of Justice made --
5 JUSTICE SCALIA: I don't care. That doesn't
6 make sense.
7 MR. FELDMAN: I -- I -- I can't tell you,
8 Your Honor, that it does or doesn't make sense. I can
9 only tell you that that's the law under the ADA. And
10 everybody -- all the parties here have relied on
11 Section 139, because it's what governs this issue. And
12 it doesn't ask the police officers whether or not
13 somebody is a harm to themselves.
14 JUSTICE GINSBURG: But this case is about
15 danger to the police -- police officers. This is --
16 this is a case where a social worker says, she
17 threatened to kill me.
18 MR. FELDMAN: Yeah. And I think that's a
19 very good point. I -- I don't think this Court has to
20 reach out and address what might or might not be the law
21 in a situation involving someone who might be a threat
22 or a harm to themselves.
23 JUSTICE KAGAN: Mr. -- Mr. Feldman, do you
24 agree with the Solicitor General's standard here, and
25 you just disagree on the facts, or do you disagree with

1 the Solicitor General's standard?

2 MR. FELDMAN: No. We disagree very

3 strenuously with any notion that a special circumstances

4 test should apply here.

5 Looking at the U.S. Airways case, the Court

6 adopted that test for very good reasons. And it was

7 because, in that case, there was a direct conflict

8 between the proposed accommodation and the employer's

9 seniority rules. So in that circumstance, the Court

10 added a burden to the plaintiff.

11 That isn't our case. In our case, we have

12 symmetry between the proposed accommodation, on the one

13 hand, and the way that San Francisco trains its officers

14 and also universally accepted methods for dealing with

15 mentally disabled individuals. So we're not in a

16 situation where we need to adopt a special circumstances

17 test. And as was noted earlier, I don't know what it

18 means, and I don't know how a police officer can

19 possibly figure that out.

20 What I said earlier about the direct threat

21 exception, and how powerful it is and how useful it is,

22 that's what's in the regulation. And that's language

23 that police officers understand because they are doing

24 that already in the Fourth Amendment. Is there a direct

25 threat here? Can it be mitigated through reasonable

1 accommodations? Police officers aren't trained, and I
2 don't know that they ever would be, to figure out what a
3 special circumstance is.
4 So we have a regulation. It's been adopted
5 through notice and comment rulemaking. It's expressed
6 in language that police officers can understand. It's
7 been applied by the lower courts. This just isn't a
8 case in which we should be adopting a special
9 circumstances test, particularly since it wasn't
10 addressed below. The Ninth Circuit didn't address any
11 special circumstance test. And from what I know, no
12 court in this country has ever decided whether to adopt
13 that special circumstance test. So I think that --
14 JUSTICE GINSBURG: Well, what did -- I
15 thought that the government said if somebody is armed
16 and dangerous, the presumption is no modifications are
17 required.
18 MR. FELDMAN: Under Hainze, if a person is
19 armed and dangerous, then the ADA doesn't apply.
20 That's a different issue that, as Justice
21 Scalia has mentioned, hasn't been raised here. The
22 argument that the Government is making, as I understand
23 it, is that if somebody is armed and dangerous, then
24 there is a presumption that the direct threat exception
25 is satisfied. And that's the only way to see that

1 argument and -- and have it make sense in the
2 regulatory --
3 JUSTICE SOTOMAYOR: I -- I have a hard time
4 actually understanding if there's much of a difference
5 between the reg and the Government's special
6 circumstance, because the ADA, as a matter of course,
7 doesn't say you have to change your procedures unless a
8 reasonable accommodation can reduce the risk or can
9 eliminate the risk. So what's the difference between
10 that and special circumstance?
11 MR. FELDMAN: The -- the Government is
12 putting their thumb on the scale. That's the
13 difference.
14 JUSTICE SOTOMAYOR: There I -- I agree with
15 you. Any time we start creating tests, I think it
16 complicates things when you just go by the language.
17 The issue always for the jury is, could they have
18 eliminated this risk.
19 MR. FELDMAN: And I agree with that.
20 JUSTICE SOTOMAYOR: That is what the
21 statute -- that's what the reg says.
22 MR. FELDMAN: Right, right. But it should
23 not be necessary for a plaintiff in an ADA case to also
24 have to show that there were special circumstances. All
25 the plaintiff needs to show is what the reasonable

1 accommodations would be to prevent discrimination, and
2 the -- the burden then shifts to the defendant to make
3 the showing of direct threat, if that's the defense that
4 the defendant wants to assert. And throwing the special
5 circumstances test in the middle of that, it -- it
6 violates and -- and undermines the regulatory framework.
7 JUSTICE KAGAN: Well, but I think the idea
8 of the government's test, Mr. Feldman, is this is an
9 extraordinary circumstance in which the government is
10 facing somebody who has a weapon, somebody who may be
11 violent at any time, and that we shouldn't turn every
12 case into an inquiry about, was this the absolute best
13 thing that the police could have done. You know,
14 there's -- there's a lot of uncertainty in these
15 situations, and some reason to give the police officers
16 who have to deal with them the benefit of the doubt.
17 MR. FELDMAN: Well, if -- if you see it that
18 way, Your Honor, then I think we're back to where we
19 started, and the point that Justice Sotomayor was
20 making, there wasn't a threat here. So if we're going
21 to have a special circumstances test --
22 JUSTICE KAGAN: Okay. But then that's,
23 again, just the question of does this meet the special
24 circumstances or does it not meet the special
25 circumstances? I guess what I was trying to sort of

1 figure out was the reason why you object to the
2 government's test in the first instance.
3 MR. FELDMAN: I think the best way to put it
4 is that they put their thumb on the scale, and it's a
5 scale that has been carefully balanced in the
6 regulations and the statute, and there isn't any reason
7 for this Court to start changing what the regulatory
8 framework is. It's not an issue that the lower courts
9 have had an opportunity to develop. I don't know what
10 circumstances it might or might apply in. It may be
11 very well an issue that the Petitioners here can raise
12 in the district court on summary judgment, and an issue
13 that this Court can decide at a later date. But the
14 issue before the Court today is really just this fact
15 issue that I started with, which is, was there a direct
16 threat here. And all of the --
17 CHIEF JUSTICE ROBERTS: So what -- if you
18 were giving the two-sentence guidance in the -- in the
19 education course to the police about what to do in a
20 situation where they confront somebody who is mentally
21 unstable, what would you tell them to do?
22 MR. FELDMAN: If the direct threat defense
23 is not satisfied, then you must accommodate that
24 individual's disability.
25 CHIEF JUSTICE ROBERTS: Well, that doesn't

1 give -- I mean, that throws a lot of legal terms at
2 them. I mean, in terms of their actual on-the-ground
3 guidance, can you do better than saying you must
4 accommodate the disability?
5 MR. FELDMAN: Well, they're trained in
6 accommodation techniques, so I don't think that's really
7 the issue. There's no dispute that the way to interact
8 with mentally disabled individuals is through
9 communication and time. Police officers know that, and
10 they're trained that way. I think the difficulty that
11 the Solicitor General and the Petitioners are
12 identifying is that these are difficult circumstances
13 and potentially dangerous.
14 But that's what the direct threat defense
15 governs. And to put English onto the direct threat
16 defense, the police officers have to be asking
17 themselves, as I think they already do under Graham v.
18 Connor, is there an immediate threat to the public, and
19 is that a threat that we can eliminate somehow?
20 And if it can be eliminated by, for example,
21 here leaving the door closed, bringing in a negotiator,
22 giving Sheehan time to deescalate, that entire risk that
23 the officers here confronted was avoidable. And one of
24 the things that Section 139 asks is what is the
25 likelihood of -- of -- of the threat, and -- and what is

1 the extent of the threat? Because whatever the risks of
2 deescalation here, the course that these officers picked
3 led to the certainty of a violent confrontation with a
4 mentally ill and agitated woman who is standing behind
5 this door with a knife. And they knew that when they
6 went in with their pepper spray.
7 It was reasonably foreseeable that when they
8 went in with their pepper spray, and they sprayed
9 Ms. Sheehan, because she was going to still be there
10 with a knife, the stage had been set, it was reasonably
11 foreseeable that they would need to shoot her.
12 JUSTICE SCALIA: Gee, I -- I would -- I
13 would have thought it was foreseeable that the pepper
14 spray would disable her.
15 MR. FELDMAN: If she wasn't --
16 JUSTICE SCALIA: Isn't that what pepper
17 spray is supposed to do.
18 MR. FELDMAN: It is. And -- and the
19 Ninth --
20 JUSTICE SCALIA: Was this defective pepper
21 spray? What was -- what was the matter here?
22 MR. FELDMAN: The Ninth Circuit has been
23 quite good about explaining that nonlethal force does
24 not work in the intended way when we're dealing with
25 mentally disabled individuals.

1 If I get shot with pepper spray, I'm on the
2 ground dropping whatever knives I have, but when
3 mentally ill individuals get shot with pepper spray,
4 they don't always process it the same way. Sometimes
5 they see that as a threat, and sometimes they act
6 irrationally.
7 JUSTICE ALITO: What would you say to
8 officers who encounter a person on the street about
9 determining whether the person has a disability?
10 MR. FELDMAN: I think that's a difficult
11 issue that isn't presented here, but police officers are
12 trained to recognize disabilities. And the -- the
13 learning materials that Lou Reiter discusses in his
14 report include how to identify somebody who is of
15 diminished capacity or mentally disabled. Again, that's
16 not our case. These officers knew that she was disabled
17 because they weren't called to the scene to arrest her,
18 they were called to the scene --
19 JUSTICE ALITO: I understand it's not this
20 case, but our decision would have implications in other
21 contexts. So you would tell the officers, well, you
22 have to determine whether this person is substantially
23 limited in a major life activity, and if so, that person
24 has a disability, what would you do?
25 MR. FELDMAN: I would say that if you know,

1 or can reasonably determine that an individual is
2 suffering from a mental disability, then the ADA
3 reasonable accommodation requirements apply.
4 JUSTICE SCALIA: Is -- is being high on
5 drugs a mental disability?
6 MR. FELDMAN: I think it would depend on why
7 somebody is high on drugs. They -- they may --
8 JUSTICE SCALIA: He's high on drugs because
9 he took drugs.
10 MR. FELDMAN: Well, if it was a choice to
11 take drugs --
12 JUSTICE SCALIA: Yes.
13 MR. FELDMAN: -- and it was unrelated to a
14 mental disability --
15 JUSTICE SCALIA: Right.
16 MR. FELDMAN: -- then -- then I think it
17 would not be a mental disability.
18 JUSTICE SCALIA: Why?
19 JUSTICE KAGAN: Mr. Gershengorn said that
20 the ADA was only triggered when the officer knew there
21 was a disability. Do you disagree with that from your
22 answer to Justice Alito?
23 MR. FELDMAN: I -- I agree with Ms. Van Aken
24 that it's either knew or should have known.
25 CHIEF JUSTICE ROBERTS: And presumably,

1 there's no way to tell if there's somebody you come upon
2 on the street who's exhibiting signs of being on -- on
3 drugs, whether that is because of prescription
4 medication or illicit drugs.
5 MR. FELDMAN: I -- I think that's right.
6 CHIEF JUSTICE ROBERTS: And -- but they --
7 but they have to be treated differently.
8 MR. FELDMAN: They do.
9 JUSTICE SOTOMAYOR: I'm sorry. Why?
10 MR. FELDMAN: Well, because --
11 JUSTICE SOTOMAYOR: If the -- if the danger
12 is present, right? All right? Why do they have to be
13 treated differently? One -- one would assume that if
14 someone's dangerous and violent, and there's no way to
15 modify dealing with them, does it matter whether they're
16 disabled or not or what the cause is or not? The issue
17 is, don't resort to violence automatically if there's a
18 way to mitigate the risk. Isn't that the answer?
19 Now, whether you'll be liable for potential
20 damages or an injunction or anything else, that depends
21 on whether you knew the person was disabled. That's a
22 different issue altogether.
23 MR. FELDMAN: I agree with -- with what you
24 said. The difference is whether there's liability under
25 the ADA. That turns on whether the officer knew or

1 should have known that the individual was disabled. The
2 Fourth Amendment issues, you're absolutely right. When
3 an officer confronts somebody who is of diminished
4 capacity for whatever reason, the officer has to use
5 reasonable force. And -- and in a totality of the
6 circumstances test, the diminished capacity is one of
7 those circumstances. And it's not just for the
8 protection --
9 JUSTICE SOTOMAYOR: If you know about it.
10 MR. FELDMAN: Right.
11 JUSTICE SOTOMAYOR: But if you don't, and
12 whatever the cause is, if the person's violent and
13 there's no way to mitigate the risk, it doesn't matter
14 whether they're disabled or not.
15 MR. FELDMAN: Correct, because of Section
16 139. And again, that's the strength of Section 139 is
17 it tells the police officers exactly what they need to
18 know.
19 So we have a very robust regulatory
20 framework and it comes back down to this very simple
21 issue of whether there was a risk. And things like
22 guns, there is no evidence of any guns; things like
23 hostages, there was no evidence of any hostages. The
24 officers were able to look into her apartment. They
25 didn't see hostages. Hodge was in her apartment, he

1 didn't see a hostage. He told them that the apartment
2 building was empty. In terms of a risk of flight, they
3 knew that they were on the second floor. Hodge had said
4 to them that they needed a ladder to get in.
5 JUSTICE GINSBURG: Hodge also said there was
6 probably a fire escape. He was wrong about that, but he
7 did say that.
8 MR. FELDMAN: He didn't say that to them at
9 the time, he said that in his deposition, and what he
10 said was he doesn't know whether there is or isn't a
11 fire escape. So all these officers knew at the time is
12 that they were in a second floor building, with a second
13 floor and Hodge had said to them very specifically, you
14 need a ladder to get in. That was the evidence. That's
15 the best available objective evidence that was available
16 to these officers. And under this Court's Fourth
17 Amendment jurisprudence, that's what we look at,
18 objective evidence. Under the ADA, again, Section 139
19 uses that phrase, "best available objective evidence."
20 JUSTICE KAGAN: And -- and, Mr. Feldman, I
21 guess I'm still trying to figure out exactly who's
22 advocating for what legal standard and how those
23 standards are connected with each other. But if -- if
24 you are using this direct threat regulation, do you
25 understand you and the City to be advocating for the

1 same legal standard?

2 MR. FELDMAN: I think so. I think what

3 differentiates the City on the one hand and us on the

4 other is not what testifies, but whether it's satisfied

5 here.

6 JUSTICE KAGAN: Because you're both looking

7 to the regulation as the test.

8 MR. FELDMAN: Right.

9 JUSTICE KAGAN: And the City says it's

10 satisfied; you say it's not.

11 MR. FELDMAN: Right. And -- and the

12 interesting thing is they're supporting the amici cite

13 the same regulation. Our supporting amici cite the same

14 regulation. That is the regulation that governs whether

15 there is or isn't a defense to a failure to accommodate.

16 JUSTICE KAGAN: So the only party who is not

17 saying that that's the standard is the Solicitor

18 General, whose stand -- whose regulation it is.

19 MR. FELDMAN: Well, the Solicitor -- that's

20 right. That's right.

21 (Laughter.)

22 MR. FELDMAN: But -- but the Solicitor

23 General does have a footnote in their brief that says

24 that even after the -- the special circumstances

25 analysis is conducted, the direct threat analysis might

1 also be applicable. And I don't quite understand how
2 that is the case, but as I said, I don't think this is
3 the right case for this Court to -- to be thinking about
4 whether a special circumstances test make sense. It
5 just hasn't had an opportunity to be vetted below. But
6 what we're left with is pretty wide agreement that the
7 direct threat defense governs these issues.
8 And so if the Court doesn't have any more
9 questions about that, I'll briefly address qualified
10 immunity.
11 The issue on qualified immunity is -- is
12 also a narrow one. It's not whether there is a Fourth
13 Amendment violation, but whether the actions here
14 violated clearly established law. And in the Ninth
15 Circuit, we have two cases that involve substantially
16 similar facts, and they're both cited by the Ninth
17 Circuit in its decision below. One was Alexander and
18 the other was Diorro.
19 Alexander is a particularly interesting case
20 because the defendant there was the City and County of
21 San Francisco. So if they were aware of any case, you
22 would think that would be one of them. The plaintiff in
23 Alexander was mentally ill. The officers arrived at his
24 house to execute an administrative warrant, and rather
25 than allow them to do it, the plaintiff there threatened

1 to shoot anyone who entered his house. And it's the
2 exact same circumstances we have here. The situation
3 was contained, there was no need to immediately enter
4 and the officers made the decision to go in in
5 circumstances that led to a violent outcome. And the
6 Ninth Circuit held that the officers there were not
7 entitled to qualified immunity as a matter of law
8 because the extent of the threat was unknown and
9 disputed. So it -- it raised a jury question.
10 Diorro is the other case that the Ninth
11 Circuit cited. Diorro stands for the proposition that
12 where an officer knows that an individual's mentally
13 disabled, that's something that has to be considered in
14 determining what force is appropriate under the Fourth
15 Amendment. And we have very clear testimony from the
16 officers here that at least when Reynolds made the
17 decision to force their way back into Sheehan's
18 apartment, they didn't consider Sheehan's disability.
19 JUSTICE GINSBURG: I thought in Diorro, the
20 plaintiff was unarmed, had not attacked or touched
21 anyone, had generally obeyed instructions.
22 MR. FELDMAN: Well, what the Court said is
23 that he was unarmed in the sense that he didn't have a
24 knife or a gun. What he had, though, was lighters
25 fluid. And so he had a dangerous instrumentality and --

1 and the issue is the same, the police officers forced a
2 violent confrontation when there wasn't a need to do so.
3 CHIEF JUSTICE ROBERTS: It's very hard when
4 you have such a fact-intensive inquiry, and I think that
5 was part of your submission, to say that the law was
6 clearly established as to how they should function in a
7 particular circumstance, which I think is important when
8 you're talking about making the officers personally
9 liable.
10 MR. FELDMAN: Yeah. Although this Court has
11 looked at whether the facts of a previous case are
12 substantially similar or sometimes it's -- it's
13 described as being fundamentally similar. The facts
14 don't have to be the same. Substantial similarity
15 doesn't require exact similarity. But the facts of
16 Alexander, in particular, are very, very close to the
17 facts in our case. So whether it's fact specific or
18 not, we -- we've got --
19 JUSTICE SCALIA: Only facts in the same
20 jurisdiction -- of cases in the same jurisdiction are
21 relevant?
22 MR. FELDMAN: I think that's a bigger
23 issue than what we --
24 JUSTICE SCALIA: Yes. Well, I mean, suppose
25 this officer knows that in -- in some jurisdictions or

1 at least in the Fifth Circuit, boy, you know, if this
2 person's armed and violent, I don't have to accommodate
3 at all. So, you know, you could say that the point
4 was -- was not clear. I mean, how can you say that --
5 that it was clear under -- at least under Supreme Court
6 law?
7 MR. FELDMAN: Well, the Supreme Court's
8 decision in Wilson v. Lane and Hope v. Pelzer, both look
9 at whether there's precedent in the controlling circuit.
10 These are officers who are in San Francisco within the
11 jurisdiction of the Ninth Circuit, and unless and until
12 this Court takes a case and reverses something that the
13 Ninth Circuit has said, I think that they're duty bound
14 to comply with Ninth Circuit precedent.
15 JUSTICE ALITO: On the qualified immunity
16 issue, could we consider the question whether there was
17 a Fourth Amendment violation at all? Assuming the
18 City -- assuming that counsel for the officers raised
19 that argument?
20 MR. FELDMAN: Well, yes, absolutely. They
21 did not raise it in their Petitioner's brief or the
22 reply brief. They focused instead on the second prong
23 of the qualified immunity analysis, but certainly, this
24 Court has the discretion to reach the Fourth Amendment
25 principles instead.

1 JUSTICE ALITO: Well, do you think they
2 waived that argument?
3 MR. FELDMAN: I think there's an argument
4 that they did, but again, it's -- it's an issue that I
5 think the Court has discretion to do what's appropriate.
6 But I think it would be unusual for the Court to
7 address -- and I think the Solicitor General makes this
8 point, too -- to address an issue that hasn't been
9 adequately briefed.
10 If I could just conclude. I think the Court
11 knows that this is a case with enormous policy
12 implications. One of our amici, and we've got several,
13 one of our amici counts among its members a family that
14 called the police to get help with their mentally
15 disabled son. And the police showed up, and they, I'm
16 sure, intended to help that individual, but instead,
17 they hurt it. And we see this in the news day after
18 day, week after week, where the police arrive to help
19 somebody and they wind up hurting them.
20 And, Your Honors, it's only when officers
21 and public entities are held accountable for actions
22 like those that occurred here that we can expect to see
23 a change in that pattern. So we ask that this Court
24 affirm the Ninth Circuit.
25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Ms. Van Aken, you have three minutes
2 remaining.
3 REBUTTAL ARGUMENT OF CHRISTINE VAN AKEN
4 ON BEHALF OF THE PETITIONERS
5 MS. VAN AKEN: I'd like to make two points
6 in my very brief time. The first is that I think
7 the Court took this case because there's a division in
8 the circuits about the weight that they give to exigency
9 and safety concerns in dangerous arrests like this one.
10 I don't think there could be any question that in the
11 Fifth Circuit, in the Fourth Circuit, where exigency has
12 a lot of weight in the reasonableness analysis, that
13 this case would have come out differently. And I think
14 that's the fundamental legal difference between the
15 circuits and between the parties.
16 What I heard Mr. Feldman say -- this is my
17 second point, and it goes to the reasonableness of an
18 accommodation. I heard him say that it would only be
19 reasonable to accommodate her if they could have
20 eliminated the risk, but the risk was eliminated when
21 the door was closed. And with respect, I agree with the
22 Solicitor General. He's incorrect that the risk was
23 eliminated, because -- Mr. Feldman is incorrect that the
24 risk is eliminated because Ms. Sheehan, whether or not
25 she was fully contained, whether or not they had been

1 told by Mr. Hodge that there was no other exit, she
2 certainly was not visible. And behind her closed door,
3 she could have been gathering her other knives,
4 preparing an ambush, she had a cluttered room full of
5 household items, maybe there was a cup of bleach she
6 could throw in the face of the officers. The point is
7 that the officers knew that they meant -- she meant them
8 harm, they knew that she did not intend to go peacefully
9 to the hospital, and they knew that at some point
10 someone was going to have to go back in that room and
11 deal with the situation. And so delay behind a closed
12 door could have been allowing her time to calm down, but
13 the officers had no way to know that.
14 The final point I want to make is that --
15 JUSTICE SOTOMAYOR: Isn't that the point of
16 the treatment, though, to try to give it a chance? I
17 mean, what your adversary has said is, we can't assume,
18 unless we want a society in which the mentally ill are
19 automatically killed, there's 350 people a year,
20 estimated, who are shot by police officers and killed,
21 who have mental illness. And this is not to minimize,
22 there's a hundred police officers who are killed, almost
23 half of them from ambushes, and the other 50, I'm not
24 sure what the circumstances were, but not ambush
25 circumstances. The point is, isn't the ADA -- and the

1 House report makes this very clear -- intended to ensure
2 that police officers try mitigation in these situations
3 before they jump to violence.
4 MS. VAN AKEN: Not where it increases safety
5 risks to the officers. The nature of the activity at
6 the point where they were deciding whether to go in or
7 not was to resolve a safety risk. So any accommodation
8 that increases a safety risk isn't reasonable as a
9 matter of law. Thank you.
10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 The case is submitted.
12 (Whereupon, at 12:03 p.m., the case in the
13 above-entitled matter was submitted.)
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