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                     :

8   - - - - - - - - - - - - - - - - - x

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          C O N T E N T S

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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 -- 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
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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:          We're 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. 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 Duvall 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 that --

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'll 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.

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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
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1    assessment based on reasonable judgment 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    in.  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   reasonable 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    Title --

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 in 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

Official

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

30

Alderson Reporting Company

 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 the self is -- is not a reason for apprehending

11   the 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 their self.

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    de-escalation 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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**5** 7:13,14
**50** 55:23
**54** 2:13

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**6**
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**7**
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**8**
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**9**
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