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Sheehan v. City and County of San Francisco: Balancing the Obligation of Police Officers and the Rights of the Disabled

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Comment

SHEEHAN V. CITY AND COUNTY OF SAN FRANCISCO: BALANCING THE OBLIGATION OF POLICE OFFICERS AND THE RIGHTS OF THE DISABLED

I. INTRODUCTION

Congress enacted the Americans with Disabilities Act (“ADA”) with the purpose of preventing discrimination against disabled individuals.¹ Even though ADA protections have been applied to areas involving law enforcement, it is unclear whether the ADA applies to arrests and the question remains a matter of disagreement among the Circuit Courts.² The issue at heart is the balance between a disabled person’s right to not be discriminated against and police officers’ obligation to protect public safety.³ In *Sheehan v. City and County of San Francisco*, the Court of Appeals for the Ninth Circuit held that the ADA applies to arrests and considered whether police officers discriminated against Sheehan, a mentally disabled patient, by failing to provide reasonable accommodations during her arrest.⁴

¹ See *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) (“[T]he purpose of the ADA is to prevent the discrimination of disabled individuals . . .”).

² See *Sheehan v. City and Cty. of San Francisco*, 743 F.3d 1211, 1231–32 (9th Cir. 2014) (noting that, while some courts have recognized Title II claims in the context of arrests, it remains a “matter of some disagreement among [the] circuits” whether police officers have to accommodate a person’s disability during an arrest). See also *Hainze*, 207 F.3d at 799–800 (“The broad language of the statute . . . has occasioned the courts’ application of Title II protections into areas involving law enforcement. There is some disagreement, however, whether an arrest falls within the ambit of Title II . . .”); Rachel E. Brodin, Comment, *Remedying a Particularized Form of Discrimination: Why Disabled Plaintiffs Can and Should Bring Claims for Police Misconduct Under the Americans with Disabilities Act*, 154 U. PA. L. REV. 157, 159 (2005) (“The United States Supreme Court has not yet ruled on the applicability of Title II to police actions in effecting an arrest, and historically the circuit courts have been split on the question.”).

³ See *Sheehan*, 743 F.3d at 1215 (explaining that the fundamental issue is the constitutional balance between police efforts to render emergency assistance and an individual’s right to be left alone).

⁴ *Id.* at 1217, 1232 (agreeing with the Eleventh and Fourth Circuits that the ADA applies to arrests, and concluding that there were triable issues as to whether the police officers failed to provide reasonable accommodations for Sheehan’s disability during her arrest). See generally Fourth, CA9: *ADA Applies to Arrests of the Mentally Ill (Noting Circuit Split)*, FOURTHAMENDMENT.COM (Feb. 23, 2014), <http://fourthamendment.com/?p=10445> [<https://perma.cc/56XA-YPG5>] (summarizing the *Sheehan v. City and County of San Francisco* opinion by the Ninth Circuit).

This Comment first presents the facts of *Sheehan*.⁵ Next, this Comment discusses the legal background of the ADA, focusing on its applicability to arrests.⁶ Third, this Comment analyzes the Ninth Circuit's holding in *Sheehan*, arguing that, even though the court's holding was correct, the court proposed no clear standard for guidance in the future.⁷ Finally, this Comment proposes a standard for guidance that better balances the competing interests of the police force and arrestees with disabilities.⁸

II. STATEMENT OF FACTS

On August 7, 2008, Teresa Sheehan, a mentally ill woman, was shot five or six times by two police officers from the San Francisco Police Department.⁹ The near fatal shooting ensued after Sheehan's social worker, Heath Hodge, attempted to perform a welfare check on Sheehan.¹⁰ After Sheehan reacted violently, Hodge completed an application for a 72-hour involuntary commitment and then called the police department to ask for help in transporting Sheehan to a mental facility.¹¹

When the officers that responded to the call entered Sheehan's room, she approached them with a knife and threatened to kill them.¹² The

⁵ See *infra* Part II (stating the pertinent facts of the *Sheehan* opinion).

⁶ See *infra* Part III (discussing Title II of the ADA).

⁷ See *infra* Part IV.B (examining the language of the ADA and its application to arrests).

⁸ See *infra* Part IV.C (proposing a test for the reasonableness analysis under the ADA in the context of arrests).

⁹ *Sheehan*, 743 F.3d at 1216-17.

¹⁰ *Id.* at 1215, 1217. Sheehan resides at Conrad House, a facility that accommodates persons dealing with mental illness. *Id.* at 1217. Hodge was concerned about Sheehan's health because she had been off her medication for months, she was not taking care of herself, and her condition was deteriorating. See *id.* at 1218 (indicating that Sheehan had been off her medication for one and a half years, housemates reported that Sheehan had stopped eating, and was wearing the same clothes for several days).

¹¹ See *id.* at 1217 (explaining that when Hodge entered Sheehan's room to perform the welfare check on Sheehan, Sheehan told him she had a knife). After Sheehan's threat, Hodge evacuated the building of other residents, completed the application for Sheehan's 72-hour detention, and called the police nonemergency line to request help transporting Sheehan to a mental facility. *Id.* On the 72-hour involuntary detention application, Hodge indicated that Sheehan was a danger to others and that she was gravely disabled. *Sheehan*, 743 F.3d at 1218. However, he did not indicate that she was a danger to herself. *Id.* In addition, Hodge gave the police officers no reason to believe that Sheehan was either suicidal or likely to injure herself. *Id.*

¹² See *id.* 1218-19 (noting that it is not entirely undisputed what happened when the officers entered Sheehan's room, but that Sheehan conceded to grabbing the knife and threatening the officers). Officer Katherine Holder and Sergeant Kimberly Reynolds were the police officers dispatched by the San Francisco Police Department to help Hodge transport Sheehan. *Id.* at 1217. Their dispatch information stated: "Social worker just went inside to check on his patient, subject is known to make violent threats, told reporting party

officers retreated, but then decided to forcibly re-enter Sheehan's room.¹³ As they re-entered and she approached them with the knife again, the officers pepper sprayed her, without effect, and then shot her multiple times.¹⁴ Sheehan survived the shooting and then filed an action under the ADA against the City and County of San Francisco, the Police Chief, and both police officers.¹⁵ The defendants moved for summary judgment and the district court granted their motion.¹⁶ On appeal, the Ninth Circuit held that the ADA applies to arrests and that the City was "not entitled to judgment as a matter of law on Sheehan's ADA claims."¹⁷

III. LEGAL BACKGROUND

The ADA was signed into law in order to eliminate discrimination against disabled individuals.¹⁸ Title II of the ADA provides that "no

to get out or she'll knife him (no weapon seen)" *Id.* at 1217-18. Hodge informed the officers that "he had cleared the building of other residents and that the only way out of Sheehan's room, other than the main door to the second floor hallway, was a second floor window that could not be used as a means of egress without a ladder." *Sheehan*, 743 F.3d at 1218. Hodge also showed the police officers the involuntary commitment application. *Id.*

¹³ *See id.* at 1219 (providing that the officers decided to re-enter because they thought it was "necessary to ensure officer safety and to prevent Sheehan from escaping (and becoming a threat to others)"). In fact, after retreating from Sheehan's room, the officers called for back-up and drew their weapons. *Id.* However, the officers decided to re-enter the room before backup arrived. *Id.*

¹⁴ *See id.* at 1219-20 (admitting that what happened after the officers re-entered Sheehan's room is subject to dispute, but the officers' version of the story is that Sheehan approached them holding a knife and, after they pepper sprayed her without effect, they fired their weapons). Sheehan's version of the events differs in that she only took one step toward the officers when they entered before they started pepper spaying her and shooting at her. *Sheehan*, 743 F.3d at 1220.

¹⁵ *See id.* (exposing that Sheehan filed an ADA action, among other claims, after a jury hung on assault charges and acquitted her on a criminal threat count brought by the city after the incident). Sheehan's complaint alleged that the officers violated her rights under the ADA when they failed to reasonably accommodate her disability when they decided to forcibly re-enter her room. *Id.* at 1232.

¹⁶ *See id.* at 1220 (stating that Sheehan timely appealed the district court's grant of summary judgment in favor of the defendants).

¹⁷ *Id.* at 1232-33. The court noted that a reasonable jury could find that the officers had failed to reasonably accommodate Sheehan's disability when they decided to forcibly re-enter her room. *Id.* at 1233. Because the reasonableness of an accommodation is a question of fact, the court concluded that district court erred when they granted defendant's motion for summary judgment. *Sheehan*, 743 F.3d at 1233.

¹⁸ *See Tucker v. Tennessee*, 539 F.3d 526, 531 (6th Cir. 2008) (quoting 42 U.S.C. § 12101(b)(1): "Congress enacted the . . . [ADA] with the noble purpose of 'provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'"); Jennifer Fischer, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-Arrest, and Pretrial Processes*, 23 LAW & INEQ. 157, 159 (2005) (indicating that President George Bush Sr. signed the ADA into law on July 26, 1990).

qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹⁹

In the context of arrests, courts have recognized two types of claims under Title II of the ADA: (1) wrongful arrest cases; and (2) reasonable accommodation cases.²⁰ In the wrongful arrest cases, a plaintiff has a valid claim if he was arrested “based on his disability, not for any criminal activity.”²¹ On the other hand, reasonable accommodation cases arise when police properly arrest a suspect with a disability, for a crime unrelated to that disability, but fail to “reasonably accommodate the person’s disability in the course of . . . arrest, causing the person to suffer greater injury or indignity in that process than other arrestees.”²² Courts have accepted the wrongful arrest theory as establishing a claim under Title II of the ADA but, even though failing to reasonably accommodate a person’s disability is discriminatory, the Circuit Courts are in disagreement on whether a claim can be established under the reasonable accommodation theory.²³

¹⁹ 42 U.S.C. § 12132 (2012). See generally *O’Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1060 (9th Cir. 2007) (explaining that, in order to establish a claim of discrimination, a plaintiff must prove that: “(1) he is an individual with a disability; (2) he is otherwise qualified to participate in or receive the benefit of a public entity’s services, programs or activities; (3) he was either excluded from participation in or denied the benefits of the public entity’s services, programs or activities or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits or discrimination was by reason of her disability”) (internal citations omitted).

²⁰ See *Waller ex rel. Hunt v. City of Danville, Va.*, 556 F.3d 171, 174 (4th Cir. 2009) (asserting that courts have recognized two types of claims under the ADA: (1) wrongful arrest; and (2) reasonable accommodation); *Brodin*, *supra* note 2, at 161–62 (identifying two theories for stating ADA claims arising from an arrest: (1) the wrongful arrest theory; and (2) the reasonable accommodation theory); *Fischer*, *supra* note 18, at 181 (classifying decisions in arrest, post-arrest, and pretrial ADA cases into three categories: (1) wrongful arrest cases; (2) exigent circumstances cases; and (3) post-arrest and pretrial cases).

²¹ *Waller ex rel. Hunt*, 356 F.3d at 174. See generally *Gohier v. Enright*, 186 F.3d 1216, 1220 (10th Cir. 1999) (noting that these claims arise when police wrongfully arrest someone with a disability “because they misperceived the effect of that disability as criminal activity”); *Brodin*, *supra* note 2, at 162 (explaining that arrestees have a claim under the wrongful arrest theory when they are arrested for actions taken as a result of their disability).

²² *Gohier*, 186 F.3d at 1220–21.

²³ See *Sheehan v. City and Cty. of San Francisco*, 743 F.3d 1211, 1231–32 (9th Cir. 2014) (acknowledging the split among the circuits regarding the applicability of the ADA to arrests, specifically whether police officers are required to reasonably accommodate for disabilities during an arrest). See generally *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1081–82 (11th Cir. 2007) (“Title II of the ADA also provides that the Attorney General shall promulgate regulations that implement Title II” and explaining that, as a result, the Department of Justice promulgated a regulation providing that “a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are

In *Gohier v. Enright*, the Tenth Circuit clarified that “a broad rule . . . excluding arrests from the scope of Title II . . . is not the law.”²⁴ Even though the court noted that the facts of the case did not fall into the wrongful arrest theory, the court did not discuss the “reasonable-accommodation-during-arrest theory.”²⁵ A year later, in *Hainze v. Richards*, the Fifth Circuit addressed the question and held that “Title II does not apply to an officer’s on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer’s securing the scene and ensuring that there is no threat to human life.”²⁶ The Sixth Circuit, in *Tucker v. Tennessee*, adopted the exigent circumstances analysis proposed by the Fifth Circuit.²⁷ However, in *Bircoll v. Miami-Dade County*, the Eleventh Circuit did not address the question whether the ADA applies to arrests and declined to adopt the Fifth and Sixth Circuit’s exigent circumstances approach.²⁸ Similar to *Bircoll*, in *Waller ex rel. Estate of Hunt*

necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”) (internal citations omitted); *Sheehan*, 743 F.3d at 1231 (“Discrimination includes a failure to reasonably accommodate a person’s disability.”); Fischer, *supra* note 18, at 182 (noting that Congress specifically referred to wrongful arrest as the type of discrimination the ADA meant to protect against).

²⁴ *Gohier*, 186 F.3d at 1221.

²⁵ See *id.* at 1221–22 (distinguishing the facts of *Gohier* from cases applying the wrongful arrest theory and expressing no opinion on whether a claim could have been brought under the reasonable-accommodation-during-arrest theory). The court specifically noted that the plaintiff failed to make a claim under the reasonable accommodation theory, and thus, it was not necessary to rule on the matter. *Id.*

²⁶ 207 F.3d 795, 801 (5th Cir. 2000). The standard adopted by the Fifth Circuit is regarded as an exception to the applicability of the ADA to arrests. See *Waller ex rel. Hunt*, 356 F.3d at 174–75 (explaining that some courts have adopted the exigent circumstances exception to absolve police officers from the duty to provide reasonable accommodations during an arrest); David A. Maas, *Expecting the Unreasonable: Why a Specific Request Requirement for ADA Title II Discrimination Claims Fails to Protect Those Who Cannot Request Reasonable Accommodations*, 5 HARV. L. & POL’Y REV. 217, 221 (2011) (identifying the exigent circumstances and public-safety exceptions to the ADA’s anti-discrimination commands).

²⁷ See 539 F.3d 526, 536 (6th Cir. 2008) (“Where . . . officers are presented with exigent or unexpected circumstances, it would be unreasonable to require certain accommodations be made in light of the overriding public safety concerns.”) However, the court concluded that the ADA applies to post-arrest procedures. *Id.* at 537.

²⁸ See 480 F.3d at 1084–85 (declining to enter the circuits’ debate on the applicability of the ADA to arrests and declining to adopt the exigent circumstances test outlined by the Fifth Circuit in *Hainze*). The court further noted that “[t]he exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance.” *Id.* The court explained that “the question is whether, given criminal activity and safety concerns, any modification of police procedures is reasonable before the police physically arrest a criminal suspect, secure the scene, and ensure that there is no threat to the public or officer’s safety.” *Id.*

v. City of Danville, the Fourth Circuit declined to adopt the exigent circumstances approach.²⁹ In addition, the court went on to analyze a claim for failure to reasonably accommodate during an arrest.³⁰ Finally, in *Sheehan v. City and County of San Francisco*, the Ninth Circuit held that Title II of the ADA applies to arrests.³¹

IV. ANALYSIS

A. *The Sheehan v. City and County of San Francisco Decision*

In an unanimous decision, the Ninth Circuit held that Title II of the ADA applies to arrests.³² Judge Fisher, writing for the court, began by noting the circuit split on the subject and provided a brief explanation of the different views regarding the applicability of the ADA to arrests among the Fourth, Fifth, Tenth, and Eleventh Circuits.³³ Following, Judge Fisher stated that the court was in agreement with the majority of circuits in that the ADA applies to arrests.³⁴ In support of this conclusion, Justice Fisher noted that the ADA applies to “police ‘services, programs, or activities,’” and explained that the court has interpreted the terms services, programs, and activities to cover “anything a public entity does.”³⁵ Nonetheless, Judge Fisher went on to indicate that “exigent circumstances inform the reasonableness analysis under the ADA”³⁶

²⁹ See 556 F.3d at 175 (refusing to decide whether and when the exigent circumstances test applies in ADA claims). Nonetheless, the court noted that “[r]easonableness in law is generally assessed in light of the totality of the circumstances, and exigency is one circumstance that bears materially on the inquiry into reasonableness under the ADA.” *Id.*

³⁰ See *id.* at 174–75 (considering whether police officers failed to reasonably accommodate the plaintiff during a two hour standoff). The court concluded that the duty to reasonably accommodate was satisfied because the accommodations the plaintiff proposed were unreasonable considering the unstable circumstances the officers faced. *Id.* at 176–77.

³¹ See *Sheehan v. City and Cty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014) (stating that even though the Ninth Circuit does not adopt the Eleventh and Fifth Circuit’s exigent circumstances analysis to exempt police officers from having to reasonably accommodate during an arrest, the court indicated, “exigent circumstances inform the reasonableness analysis”).

³² See *id.* at 1217 (concluding that police officers have to reasonably accommodate during arrests). Judge Graber wrote a dissenting opinion, but she concurred with the court’s decision regarding the applicability of ADA to arrests. *Id.* at 1234–36.

³³ See *id.* at 1232–33 (discussing the different views among the circuits regarding the applicability of the ADA to arrests). See generally *supra* Part III (summarizing the circuit split).

³⁴ See *Sheehan*, 743 F.3d at 1232 (holding that the ADA applies to arrests and exigent circumstances inform the reasonableness of an accommodation).

³⁵ *Id.* (quoting 42 U.S.C. § 12132 and *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002)).

³⁶ *Id.*

B. *Appraisal of the Sheehan v. City and County of San Francisco Decision*

The court in *Sheehan* reached the correct result when it held that Title II of the ADA applies to arrests because the language of the ADA supports such a conclusion and public policy considerations weigh in favor of such a holding. The language of the ADA, as interpreted by the courts, supports the conclusion that Title II of the ADA extends to areas of law enforcement, such as arrests.³⁷ Title II of the ADA protects “qualified individual[s] with a disability.”³⁸ A qualified individual with a disability is defined as “an individual with a disability who, with or without reasonable modifications . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipts of services or the participation in programs or activities provided by a public entity.”³⁹ The Supreme Court instructed that the words “eligibility” and “participation” in the preceding definition do not require voluntariness on the part of the person seeking the protections of the ADA.⁴⁰ Since voluntariness is not required to meet the eligibility requirements entitling an individual to the receipt of services or participation in programs provided by a public entity, the definition of a qualified individual with a disability does not exclude suspected criminals.⁴¹ Accordingly, the protections established by Title II of the ADA extend to disabled arrestees.⁴²

Furthermore, under the ADA, a public entity includes “any department, agency, special purpose district, or other instrumentality of a State or States or local government[.]”⁴³ This is interpreted to include “every possible agency of state or local government,” such as law

³⁷ See generally *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000) (“The broad language of the statute and the absence of any stated exceptions has occasioned the courts’ application of Title II protections into areas involving law enforcement.”).

³⁸ 42 U.S.C. § 12132 (2012).

³⁹ *Id.* § 12131(2).

⁴⁰ See *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1081 (11th Cir. 2007) (quoting *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 211 (1998), where the Supreme Court held that disabled prisoners can bring claims under the ADA if denied participation in activities provided by the prison).

⁴¹ See *Brodin*, *supra* note 2, at 170–72 (examining the Supreme Court’s decision in *Yeskey*, holding that the definition of a qualified individual with a disability included prisoners and suspected criminals).

⁴² See *id.* (explaining that the Supreme Court’s broad reading of Title II of the ADA allowed *Yeskey* to open the door for lower courts to apply the ADA to police officers’ actions).

⁴³ 42 U.S.C. § 12131(1)(B).

enforcement agencies.⁴⁴ Thus, police departments are public entities.⁴⁵ Lastly, the ADA's broad language has been construed as "bring[ing] within its scope 'anything a public entity does.'"⁴⁶ Therefore, the phrase "services, programs, or activities" in § 12132 of Title II and the words "programs" and "activities" in the definition of a "qualified individual with a disability" encompass arrests.⁴⁷ Accordingly, the language of the ADA supports the conclusion that Title II applies to arrests because disabled arrestees are qualified individuals and arrests are a service, program, or activity performed by a public entity – police departments.⁴⁸

In considering public policy, the interests of the police force and the rights of arrestees with disabilities have to be balanced. In favor of holding that the ADA applies to arrests are studies suggesting that persons with mental disabilities are more likely to be arrested and cases showing that police officers have often injured or killed people with mental disabilities when attempting to apprehend them.⁴⁹ However, holding that the ADA applies to arrests could unduly burden police officers' jobs.⁵⁰ During arrests, officers are often acting under time constraints that require on-the-spot decisions and thus, holding that the ADA applies to arrests could potentially interfere with an officers' decision making and jeopardize their ability to act on time.⁵¹ Therefore,

⁴⁴ *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (quoting *Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir. 1997) and citing *Gorman v. Bartch*, 152 F.3d 907, 912-13 (8th Cir. 1998)).

⁴⁵ *See id.* (providing that the ADA applies to law enforcement agencies).

⁴⁶ *Id.* (quoting *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211 (1998)).

⁴⁷ *Tucker v. Tennessee*, 539 F.3d 526, 532 (6th Cir. 2008).

⁴⁸ *See generally supra* Part IV.B (dissecting § 12132 to determine whether the ADA applies to arrests).

⁴⁹ *See Brodin, supra* note 2, at 160 n.23 ("In medium and large cities nationwide, police departments estimate that an average of approximately seven percent of police calls involve mentally ill people."); *Fischer, supra* note 18, at 165-66 ("One study shows that 42-50% of persons with a mental illness will be arrested at some point in their lives, compared with another study that indicated only 7-8% of the general population will have contact with the police. Other studies show that persons with a mental illness are more likely to be arrested than the general population."). *See also Brodin, supra* note 2, at 158 ("There are a number of cases in which police officers, in attempts to apprehend people with mental disabilities, have injured or killed them, even when the victim's family or friend originally summoned the officers to provide assistance.").

⁵⁰ *See Maas, supra* note 26, at 220-21 (examining the burden placed on law enforcement by the ADA's requirement to provide reasonable accommodations). If the ADA applies to arrests, there is an additional burden placed on law enforcement to train police officers to comply with ADA mandates. *See id.* at 222-23 (examining the challenges of training law enforcement to comply with the duty to provide accommodations, and highlighting the difficulties presented by the number of police interactions and the vast array of disabilities).

⁵¹ *See, e.g., Tucker v. Tennessee*, 539 F.3d 526, 531 (6th Cir. 2008) ("[F]orestalling all police activity until an interpreter can be located to aid communication with the deaf protagonist would be impractical and could jeopardize the police's ability to act in time to stop a fleeing

requiring officers to consider whether their actions during an arrest conform to the ADA could hinder “their ability to perform their duties,” and risk public safety.⁵² Specifically, in the context of reasonable accommodation cases during arrests, officers’ ability to perform their duties would be hindered because they “would be second-guessed for pursuing one [accommodation] over the other, on grounds that there was always something more or different that could have been done.”⁵³

Nonetheless, officers’ interests are already protected under the ADA by statutory language indicating that there is no ADA violation if “the public entity can show that the accommodation requested . . . would ‘result in a fundamental alteration in the nature of a service, program, or activity’ or ‘undue financial and administrative burdens.’”⁵⁴ Furthermore, taking into consideration exigent circumstances under the reasonableness analysis further protects the officers’ interests.⁵⁵ Since concerns related to public safety and officers’ abilities to perform their duties are addressed in the reasonableness of an accommodation analysis, the ADA has to apply to arrests in order to protect the rights of arrestees with disabilities.⁵⁶

C. *Consequences of the Sheehan v. City and County of San Francisco Decision*

Even though the court in *Sheehan* reached the correct result when it held that Title II of the ADA applies to arrests, the court failed to indicate what factors should be considered in the reasonableness analysis under the ADA. As a result, lower courts have no standard for guidance. Accordingly, this comment proposes a factors test akin to the reasonableness analysis under Fourth Amendment claims.⁵⁷

suspect . . .”); *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) (“Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations.”).

⁵² See *Hainze*, 207 F.3d at 801 (“To require the officers to factor in whether their actions are going to comply with the ADA . . . would pose an unnecessary risk to innocents.”); *Tucker*, 539 F.3d at 536 (“Imposing a stringent requirement under the ADA is inconsistent with [the] expectation [that law enforcement officers respond fluidly to changing situations and individuals they encounter], and impedes their ability to perform their duties.”); *Waller ex rel. Hunt v. City of Danville, Va.*, 556 F.3d 171, 175 (4th Cir. 2009) (“Requiring officers to consider ADA compliance . . . would risk public safety.”).

⁵³ *Waller ex rel. Hunt*, 556 F.3d at 176.

⁵⁴ *Tucker*, 539 F.3d at 533 (quoting 28 C.F.R. pt. 35.164).

⁵⁵ *Sheehan*, 743 F.3d at 1232.

⁵⁶ See *supra* Part IV.B (balancing the burden placed on police officers by the ADA’s mandate to reasonably accommodate during arrests and the interests of disabled arrestees).

⁵⁷ See *Brodin*, *supra* note 2, at 184 (noting that, even though ADA claims do not implicate constitutional principles, Congress passed the ADA in order to enforce the constitutional right of equal protection). Thus, the proposed analysis should be similar because

In determining whether there was a failure to reasonably accommodate during an arrest, the proposed test balances two factors, each composed of subfactors.⁵⁸ First, courts should examine the circumstances surrounding the arrest, taking into consideration (1) the nature and severity of the crime; (2) the time constraints; and (3) the location.⁵⁹ Under the nature and severity of the crime subfactor, courts should evaluate the risk of serious harm to the public, the officers, and the arrestee.⁶⁰ When considering the time constraints subfactor, courts should evaluate whether time is of the essence for officers to properly carry out their duties.⁶¹ Finally, under the location factor, courts should consider

countervailing governmental interests come into play when considering the reasonableness of an accommodation. *See generally id.* at 179 (examining the balancing test employed in Fourth Amendment claims, which balances “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight”).

⁵⁸ *See* *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002) (“The question whether a particular accommodation is reasonable . . . requires a fact-specific, individualized analysis of the disabled individual’s circumstances and the accommodations that might allow him to meet the program’s standards.”).

⁵⁹ *See supra* Part IV (proposing a test for determining the reasonableness of an accommodation provided during an arrest that balances two factors: the circumstances surrounding the arrest and the appropriateness of the officer’s attempt at reasonably accommodating the individual).

⁶⁰ *See, e.g., Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1086 (11th Cir. 2007) (noting that in DUI stops the danger to human life is high and thus, it was not reasonable to accommodate a deaf arrestee). Under this subfactor, it would be informative to consider whether there is a violent hostage situation and what is the likelihood that a confrontation will ensue. *See, e.g., Waller ex rel. Hunt v. City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009) (explaining that a “reasonable belief on the part of officers that this was a potentially violent hostage situation” informs the ADA inquiry). *See also Bircoll*, 480 F.3d at 1087 (determining what reasonable accommodations are necessary for a deaf arrestee depends on the “nature of the criminal activity involved and the importance, complexity, context, and duration of the police communication at issue”). Courts should also assess the arrestee’s behavior, considering whether he is armed, resisting arrest or evading arrest, and if he is suicidal. *See, e.g., Waller ex rel. Hunt*, 556 F.3d at 175 (“Although the officers did not face an immediate crisis, the situation was nonetheless unstable: officers could not see or speak to Evans, Hunt implied that he had weapons, and Hunt was growing more and more agitated.”).

⁶¹ *See Waller ex rel. Hunt*, 556 F.3d at 175 (“Just as the constraints of time figure in what is required of police under the Fourth Amendment, they bear on what is reasonable under the ADA.”). *See also Bircoll*, 480 F.3d at 1086 (explaining that it was not reasonable to accommodate the deaf arrestee because time was of the essence); *Tucker v. Tennessee*, 539 F.3d 526, 536 (6th Cir. 2008) (noting that the circumstances did not permit taking the time to reasonably accommodate deaf arrestees). Under this subfactor, it would be informative to consider whether the situation has been diffused or contained, whether the scene is secured, whether there is risk of flight, and whether there is an immediate need to subdue the arrestee. *See generally Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) (indicating that the safety of the arrestee, the officers, and nearby civilians is an important consideration).

whether the arrest is taking place at a public location or the person's home.⁶²

Second, courts should assess the appropriateness of the officer's attempt at reasonably accommodating the individual, taking into consideration (1) whether there was a good faith effort to accommodate; and (2) the burden of accommodating.⁶³ When evaluating the good faith subfactor, courts must question whether the accommodations provided were reasonably calculated to be effective.⁶⁴ Furthermore, courts should explore what accommodations could have been effective, and if there were multiple accommodations available, officers have "the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for [them] to provide."⁶⁵ Finally, under the burden of the accommodation subfactor, courts should analyze whether accommodating a person's disability during arrest would "fundamentally alter the nature of the service, program, or activity" or "impose an undue burden."⁶⁶ Thus, officers are not required to employ "any and all" accommodations available, but only those that would be reasonable considering the totality of the factors.⁶⁷

⁶² See, e.g., *Bircoll*, 480 F.3d at 1086 ("Forestalling all police activity at a roadside DUI stop until an oral interpreter arrives is . . . impractical . . .").

⁶³ See, e.g., *Tucker*, 539 F.3d at 537 (agreeing with the district court's determination that there was a good faith effort to accommodate).

⁶⁴ See, e.g., *id.* (noting that the jail made a good faith effort to accommodate deaf arrestees in a manner that was effective). The court should keep in mind that the "duty to accommodate is a continuing duty that is not exhausted by one effort." *U.S. EEOC v. UPS Supply Chain Sols.*, 620 F.3d 1103, 1111 (9th Cir. 2010).

⁶⁵ *UPS Supply Chain Sols.*, 620 F.3d at 1111. See, e.g., *Bircoll*, 480 F.3d at 1087 (noting that "whether another effective, but non-burdensome, method of communication exists" is important in determining whether a requested accommodation was reasonable). Under this subfactor, it would be informative to consider whether commonly used accommodations were employed, such as using the passage of time to diffuse the situation, speaking with a supervisor or someone familiar with the arrestee's disability; calling for backup; giving the arrestee time and space to calm down; using non-threatening communication; and any other less confrontational tactics. See, e.g., *Waller ex rel. Hunt*, 556 F.3d at 176-77 (reasoning that the duty of reasonable accommodation was satisfied because the officers spoke with their supervisor and with persons close to the situation and attempted to calm the situation by waiting before entering the apartment).

⁶⁶ *Bircoll*, 480 F.3d at 1082.

⁶⁷ *Id.*

V. CONCLUSION

Congress enacted the ADA in order to prevent discrimination against disabled individuals.⁶⁸ Even though some courts have held that ADA protections extend to arrests, the subject is a “matter of disagreement among [the] Circuits.”⁶⁹ In *Sheehan v. City and County of San Francisco*, the Ninth Circuit held that the ADA applies to arrests.⁷⁰ The court’s holding was correct because the language of the ADA and public policy considerations support such a conclusion.⁷¹ However, the court failed to provide a standard for guidance when analyzing the reasonableness of an accommodation under the ADA in the context of arrests.⁷² Accordingly, this Comment proposed a factors test that provides a standard for guidance.⁷³ Under the test, courts balance two factors: the circumstances surrounding the arrest and the appropriateness of the officer’s attempt at reasonably accommodating the arrestee.⁷⁴ The test is not all-inclusive, but it provides an ample standard for guidance that balances the interests of the police force and the rights of arrestees with disabilities.

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⁶⁸ See *supra* note 1 and accompanying text (indicating that Congress sought to prevent discrimination of disabled individuals when it enacted the ADA).

⁶⁹ *Sheehan v. City and Cty. of San Francisco*, 743 F.3d 1211, 1231–32 (9th Cir. 2014) (explaining that it remains a “matter of some disagreement among [the] circuits” whether police officers have to accommodate a person’s disability during an arrest).

⁷⁰ *Sheehan*, 743 F.3d at 1232.

⁷¹ See *supra* Part IV.B (examining the language of the ADA and its applicability to arrests).

⁷² See *supra* Part IV.C (noting that the only guidance provided by the Ninth Circuit was that exigent circumstances inform the reasonableness of an accommodation).

⁷³ See *supra* Part IV.C (proposing that a court determining the reasonableness of an accommodation provided during an arrest should consider two factors: the circumstances surrounding the arrest and the appropriateness of the officer’s attempt at reasonably accommodating the individual).

⁷⁴ See *supra* Part IV.C (recommending that under the first factor courts consider (1) the nature and severity of the crime; (2) the time constraints; and (3) the location, and that, under the second factor, courts determine (1) whether there was a good faith effort to accommodate; and (2) the burden of accommodating).

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