No. 18-1303

United States Court of Appeals
for the First Circuit

JUDITH GRAY,
Plaintiff-Appellant,

v.

THOMAS A. CUMMINGS; TOWN OF ATHOL, MASSACHUSETTS,
Defendants-Appellees.

Appeals from the United States District Court for the District of Massachusetts in Civil Action No. 4:15-cv-10276-TSH

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND THE MASSACHUSETTS CHIEFS OF POLICE ASSOCIATION, INC. IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amici curiae submitting this brief have no parent corporation nor do any publicly held corporations own 10% or more of any of their stock.

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CONCISE STATEMENT OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties, and subdivision thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the Unites States Courts of Appeals, and in state supreme and appellate courts.

The Massachusetts Chiefs of Police Association, Inc. (MCOPA), is a non-profit corporation comprised of nearly 370 municipal and campus law enforcement executives from across the Commonwealth of Massachusetts. The MCOPA was formed in 1887 to advance professional police services; promote enhanced

[1] Pursuant to Rule 29, amici curiae state that no counsel for any party authored this brief in whole or in part, and that no entity or any person aside from counsel for amici curiae made any monetary contribution toward the preparation and submission of this brief. Amici curiae state that counsel for all parties received notice and consented to the filing of this brief.

administrative, technical, and operational police practices; foster cooperation and the exchange of information and experience among police leaders and police organizations of recognized professional and technical standing throughout the Commonwealth. The MCOPA further champions the recruitment and training of qualified persons in the police profession and encourages all police personnel statewide to achieve and maintain the highest standards of ethics, integrity, community interaction and professional conduct. The MCOPA provides traditional membership services, including meetings, member support, legislative advocacy, and legal assistance.

The MCOPA has a vested interest in the way law enforcement services are provided in the Commonwealth, the policies guiding law enforcement statewide, along with ensuring that law enforcement professionals are given the appropriate guidance to enforce the law in an ethical, lawful, and constitutional manner. This case raises an issue which profoundly impacts the manner in which law enforcement services are provided, and further impacts the already tenuous veil of safety and protection our police officers enjoy in order to accomplish their daily job functions.

Approximately 44.7 million American adults struggle with some form of mental illness, and more than a quarter of these are reported as serious.[2] Another 21.5 million American adults suffer from a substance abuse disorder; approximately half of these have co-occurring mental health and addiction disorders.[3] Since the 1970s, most communities have moved away from formally institutionalizing individuals with mental illness in favor of providing treatment in the community.[4]

Against this backdrop, police officers are on the front lines in responding to incidents involving the mentally ill. Sometimes an officer can be forewarned that he or she is being called to a situation involving an individual with a mental illness. However, most often, police officers can only guess at the source of a person's motivation and erratic behavior. And even when an officer does have advance notice that the subject of the call has a mental illness, the officer still cannot know

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[2] National Institute of Mental Health, *Mental Illness*, https://www.nimh.nih.gov/health/statistics/mental-illness.shtml (last visited Nov. 9, 2018). This number does not take into account the approximately 22% of youths aged 13-18 with a severe mental impairment. *Id.* Serious mental illnesses or impairments include schizophrenia, bipolar disorder, and major depression. Substance Abuse and Mental Health Services Administration, *Mental and Substance Use Disorders*, https://www.samhsa.gov/disorders (last visited Nov. 9, 2018).

[3] National Institute of Mental Health, *supra* note 2; *see also* American Addiction Centers, *Statistics on Drug Addiction: Quick Facts on Drug Addiction*, https://americanaddictioncenters.org/rehab-guide/addiction-statistics/ (last visited Nov. 9, 2018).

[4] *See O'Connor v. Donaldson*, 422 U.S. 563 (1975).

the scope of the person's symptoms or what actions that person may take. Officers frequently become the target for a person's anger and irrational acts while they attempt to defuse dangerous and tense situations, often with little time for deliberation regardless of whether they are aware that the subject is mentally ill. Our society can and should do more to help individuals with mental illnesses, however, where public safety and lives are at stake, the law must promote safety over accommodation and should not require police officers to risk public safety as they consider what are reasonable accommodations under the Americans with Disabilities Act ("ADA") when dealing with a violent or dangerous mentally ill individual.

SUMMARY OF ARGUMENT

When someone calls 9-11, police officers rush into dangerous situations that ordinary citizens run away from. An active shooter, a hostage situation, domestic violence, a person threatening to kill him or herself via "suicide by cop:" are just a small sample of the types of tense calls police officers receive daily that require them to assess a variety of facts quickly and attempt to defuse the situation without loss of life or serious injury. In many of these dangerous situations, the person the officers encounter may have a mental illness, but often times, the police officers do not know why the person is behaving in a certain manner.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. It is an open question as to whether Title II of the ADA applies in the context of police arrests. *See City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1773-74 (2015) (dismissing the question of whether Title II applies to an arrest of an armed and violent suspect as improvidently granted); *see also Roell v. Hamilton Cty.*, 870 F.3d 471, 489 (6th Cir. 2017) (noting that the Supreme Court has not "squarely addressed whether Title II of the ADA applies in the context of an arrest"). Further, if Title II does apply to arrests, the circuits are split as to how it applies in a situation involving a violent or dangerous suspect. *Amici* believe that important policy considerations counsel in favor of the Fifth Circuit's approach, which provides 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." *See Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000). To hold otherwise would eviscerate the policy rationales underpinning qualified immunity and allow for the kind of judicial second-guessing and use of 20/20 hindsight of an officer's on-the-spot judgment in

dangerous circumstances that the Supreme Court has expressly rejected. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018), *citing Graham v. Connor*, 490 U.S. 386, 396 (1989).

ARGUMENT

I. POLICE OFFICERS ARE ON THE FRONT LINES OF THE MENTAL HEALTH AND DRUG CRISES IN THIS COUNTRY.

Recent statistics indicate that more than 44 million American adults and a nearly half of our adolescents suffer from some form of mental illness.[5] Another 21 million Americans struggle with substance disorders[6] and of those, nearly 40% suffered from both a mental health and substance use disorder, known as co-occurring disorders.[7] Of the tens of millions suffering from mental illness, barely half receive treatment.[8] Similarly, a majority of substance abusers are not

[5] National Institute of Mental Health, *supra* note 2.
[6] American Addiction Centers, *Statistics on Drug Addiction: Quick Facts on Drug Addiction*, https://americanaddictioncenters.org/rehab-guide/addiction-statistics/ (last visited Nov. 9, 2018).
[7] *Id.* Additionally, 1.3 million American teens suffered from a substance abuse disorder. *Id.*
[8] National Institute of Mental Health, *Mental Health Information: Statistics*, https://www.nimh.nih.gov/health/statistics/index.shtml (last visited Nov. 9, 2018).[9] Christine Vestal, *Still Not Enough Treatment in the Heart of the Opioid Crisis*, PEW, Sept. 26, 2018, https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/09/26/still-not-enough-treatment-in-the-heart-of-the-opioid-crisis (last visited Nov. 9, 2018).

receiving treatment, including the millions addicted to opioids,[9] fueling a worsening public health crisis.[10]

Unfortunately, as mental health and drug disorders have increased, funding for services related to mental health and drug disorders has decreased. *See* Brief of *Amici Curiae* American Psychiatric Association, American Psychological Association, and the Judge David L. Bazelon Center for Mental Health Law (hereinafter "Mental Health Professional Brief") at 6. Over the last several decades mental health treatment in the United States has moved from an institutional to a community-based treatment setting. *Id.* at 5. However, there simply are not enough services available in the community to help individuals suffering from mental illnesses or addiction disorders.[11] When these individuals do

[9] Christine Vestal, *Still Not Enough Treatment in the Heart of the Opioid Crisis*, PEW, Sept. 26, 2018, https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/09/26/still-not-enough-treatment-in-the-heart-of-the-opioid-crisis (last visited Nov. 9, 2018).

[10] In 2017, the Department of Health and Human Services declared a public health emergency related to the opioid epidemic. U.S. Dep't of Health and Human Services, *What is the U.S. Opioid Epidemic?*, https://www.hhs.gov/opioids/about-the-epidemic/index.html (last visited Nov. 9, 2018).

[11] Christine Vestal, *Overburdened Mental Health Providers Thwart Police Push for Drug Treatment*, PEW, Dec. 14, 2017, https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/12/14/overburdened-mental-health-providers-thwart-police-push-for-drug-treatment (noting shortage of behavioral health professionals to help treat people with addiction disorders); *see also* Mental Health Professional Brief, p. 5.

not receive the care they need, police officers are often their primary point of contact.[12]

Many state and local governments are working on innovative solutions to keep individuals with mental health and addiction disorders out of jail, by for example, offering Law Enforcement Assisted Diversion or LEAD programs, whereby instead of arresting an individual for a low-level offense like shoplifting or petty theft, the individual is referred to treatment.[13] In Charlestown, West Virginia, for example, 170 low-level drug offenders have been diverted to treatment in the last three years and over 70% of those have turned their lives around.[14]

While these innovative solutions are laudable, according to a joint study by the National Sheriffs' Association and the Treatment Advocacy Center (the "Joint Study"), which surveyed 2,406 law enforcement officers, police are "overwhelmed 'dealing with unintended consequences of a policy change that in effect removed the daily care of our nation's severely mentally ill population from the medical

[12] Treatment Advocacy Center, *Justifiable Homicides by Law Enforcement Officers: What is the Role of Mental Illness?*, Sept. 2013, http://www.treatmentadvocacycenter.org/storage/documents/2013-justifiable-homicides.pdf (last visited Nov. 9, 2018) (noting that "law enforcement officers are now functioning as the frontline 'outpatient system'" for the mentally ill).
[13] Christine Vestal, *supra* note 11.
[14] Treatment Advocacy Center, *supra* note 12.

community and placed it with the criminal justice system.'"[15] For example, in 2013 in Tucson, Arizona, the police department received more than 10 mental illness related calls per day and in San Diego County, the number of police encounters with the mentally ill doubled between 2009 and 2011.[16]

Unfortunately, individuals with addiction disorders and mental illnesses, just like the population at large, sometimes become violent in police encounters or engage in behavior that is a danger to themselves, law enforcement, and/or the public. In these scenarios, it can be difficult for officers to distinguish between drug use and mental disorders, particularly in a non-clinical setting, such as where a police officer encounters an unknown member of the community.[17]

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[15] *Id.* at 4.
[16] *Id.*
[17] *See also* Substance Abuse and Mental Health Services Administration, Substance Abuse Treatment for Persons with Co-Occurring Disorders, Vol. No. 42, https://www.ncbi.nlm.nih.gov/books/NBK64178/ (last visited Nov. 9, 2018) (stating, "[t]he toxic effects of substances can mimic mental illness in ways that can be difficult to distinguish from mental illness."). A number of drugs produce symptoms that are similar to schizophrenia, anxiety disorders, and depression. Doug Brunk, *Designer drug symptoms can mimic schizophrenia, anxiety, depression*, MDEdge, Feb. 12, 2016, https://www.mdedge.com/psychiatry/article/106511/addiction-medicine/designer-drug-symptoms-can-mimic-schizophrenia-anxiety (last visited Nov. 9, 2018). For example, synthetic drugs like "bath salts" can result in the user experiencing "paranoia, auditory and visual hallucinations, and delusions" and can result in a disconnection from reality and erratic behavior. American Addiction Centers, *7 Ways You Can Tell If Someone Is Using Bath Salts*, https://www.mentalhelp.net/articles/7-ways-you-can-tell-if-someone-is-using-bath-salts/ (last visited Nov. 9, 2018). The Mayo Clinic notes that the signs and symptoms of schizophrenia, "may vary, but usually involve delusions,

According to FBI data, from 2005 through 2008, the average number of justifiable homicides by law enforcement was 374 per year.[18] Of these, 68% occurred as a result of an attack on an officer.[19] Although the Department of Justice does not collect information about whether the victims of justifiable homicides were mentally ill, according to anecdotal evidence examined in the Joint Study, at least half of the victims of justifiable homicides suffered from mental illness.[20] According to the Joint Study, most mentally ill individuals shot by law enforcement were not receiving treatment for their mental illness at the time of the shooting.[21] While *Amici* do not dispute the Mental Health Professionals' assertion that "most individuals with mental illness are not violent," the reality is that a large percentage of violent law enforcement encounters involve the mentally ill, creating serious challenges for police officers as they attempt to interpret the mental state of these subjects while performing their public safety duties.

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hallucinations or disorganized speech, and reflect an impaired ability to function." The Mayo Clinic, *Schizophrenia*, Apr. 10, 2018, https://www.mayoclinic.org/diseases-conditions/schizophrenia/symptoms-causes/syc-20354443 (last visited Nov. 9, 2018). Thus, for a police officers who is not a mental health professional, these symptoms would appear indistinguishable.

[18] Treatment Advocacy Center, *supra* note 12, at 6.

[19] *Id.*

[20] *Id.* at 6-7.

[21] *Id.* at 7.

While many officers, like officer Cummings in this case, receive crisis intervention training and other instruction related to interactions with the mentally ill, the fact remains that they are not mental health professionals. When a tragic outcome occurs, it is understandable to want to hold someone accountable, but the way to address the mental health crisis in this country is not through rigid application of the ADA when the officer faces a rapidly evolving and dangerous situation involving a person with a mental illness.

II. WHETHER AND HOW TITLE II APPLIES TO A POLICE OFFICER'S ARREST OF A VIOLENT OR DANGEROUS SUSPECT IS AN OPEN QUESTION.

There is no overriding precedent establishing that Title II of the ADA governs the arrest of a disabled individual. The Supreme Court appeared poised to consider that issue in *City and County of San Francisco v. Sheehan,* a case where police shot a mentally unstable subject who charged at them with a knife before they could subdue and arrest her, but ultimately determined that the question had not been properly briefed on the merits. 135 S. Ct. at 1774-75. In the absence of guidance from the Supreme Court, courts typically apply two theories to assess whether law enforcement's actions leading up to securely arresting a threatening, hostile, or simply resistant subject were actionable under the ADA.[22] "Wrongful

[22] It is an open question as to whether the Title II of the ADA applies at all to the decision-making by individual police officers in the context of arrests or is directed solely at policy-level decisions. *See Sheehan,* 135 S. Ct. at 1773.

arrest" liability arises where officers take a disabled subject into custody because they incorrectly perceive the disability as a violation of law, while "failure to accommodate" claims assert that accommodations were possible under the circumstances and were ignored. *See Montae v. American Airlines, Inc.*, 757 F. Supp. 2d 47, 52 (D. Mass. 2010), citing *Gohier v. Enright,* 186 F.3d 1216, 1220-21 (10th Cir. 1999). *Amici* support the arguments set forth in Appellee's brief regarding both theories of ADA liability, but this brief focuses on the "failure to accommodate" theory.

Circuits have reached different conclusions about the applicability of Title II to arrest scenarios on the failure to accommodate theory and whether and how exigent circumstances like those in this case apply to such arrests. On the one hand, the Fifth Circuit has 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.***" *Hainze*, 207 F.3d at 801 (emphasis added). In *Hainze,* officers received a call from a family member that Hainze was carrying a knife, acting in a threatening manner, had a history of depression, was under the influence of alcohol and drugs, and was threatening to commit "suicide by cop." *Id.* at 797. When the officers encountered Hainze, he was holding a knife and was talking to individuals in a truck. *Id.* Upon being

ordered by police to move away from the vehicle, he advanced on the officers. *Id.* They twice ordered Hainze to stop, but he refused and when he was within four to six feet of the officers they shot him. *Id.* In concluding that Hainze could not advance a failure to accommodate theory of liability under the ADA, the court reasoned that requiring officers "to use less than reasonable force in defending themselves or others, or to hesitate to consider other possible actions in the course of making such split-second decisions" is not "the type of 'reasonable accommodation' contemplated by Title II." *Hainze,* 207 F.3d at 801-02. The court emphasized that its rule was a temporal one, and once the scene was secure and the threat to the public was eliminated, the officers would be under a duty to reasonably accommodate his disability. *Id.* at 802.

In contrast, the Fourth, Ninth, and Eleventh Circuits have concluded that the ADA applies to an arrest scenario, even one involving a dangerous situation, but that exigent circumstances are a factor when determining whether the requested "accommodation" is reasonable under the totality of the circumstances. *See Sheehan v. City & County of San Francisco,* 743 F.3d 1211, 1232 (9th Cir. 2014) (finding that the ADA applies to arrest scenarios, but that "exigent circumstances inform the reasonableness analysis under the ADA); *Waller ex rel. Estate of Hunt v. Danville,* 556 F.3d 171, 175 (4th Cir. 2009) (concluding that exigent circumstances bear "materially on the inquiry into reasonableness under the ADA"

and that "[a]ccomodations that might be expected [by police officers] when time is of no matter become unreasonable to expect when time is of the essence"); *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1085 (11th Cir. 2007) (holding "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"). Still other circuits have been reluctant to declare that Title II applies to arrests in the context of violent or dangerous arrestees, but note that even if it does, the presence of exigent circumstances would override a failure to accommodate, as a matter of law. *See Roell*, 870 F.3d at 489 (concluding that summary judgment was appropriate for the county and that the court "need not decide whether Title II applies in the context of arrests because even if … the failure-to-accommodate claim is cognizable" exigent circumstances existed that required the deputies "to make a series of quick, on-the-spot judgments in a continuously evolving environment" where a mentally unstable individual was approaching them brandishing a garden hose with a metal nozzle).

To further complicate matters, some courts that apply "exigent circumstances" in the context of a failure to accommodate claim under the ADA seem to proceed analytically in a manner highly analogous to the Fifth Circuit's bright-line rule. For example, the Eighth Circuit has concluded that "whether

officers reasonably accommodated [an] individual [with a disability] is 'highly fact-specific and varies depending on the circumstances of each case, including the exigent circumstances presented by criminal activity and safety concerns' and that '**we will not second guess [an officer's] judgments, where . . . an officer is presented with exigent or unexpected circumstances**." *De Boise v. Taser Int'l, Inc.*, 760 F.3d 892, 899 (8th Cir. 2014) (emphasis added), *quoting Bahl v. Cty. of Ramsey*, 695 F.3d 778, 784-85 (8th Cir. 2012). The court in *Bahl* reasoned that "it would be unreasonable to require that certain accommodations be made in light of overriding public safety concerns." *Bahl*, 694 F.3d at 785.

This Court has noted that "[i]t is questionable whether the ADA was intended to impose any requirements on police entering a residence to take someone into protective or other custody beyond the reasonableness requirement of the Fourth Amendment, described earlier." *Buchanan v. Maine*, 469 F.3d 158, 176, n.13 (1st Cir. 2006). Thus, whether and how Title II applies to an arrest situation involving a violent or dangerous individual is an open question in this circuit. *See Adle v. Me. State Police Dep't*, 279 F.Supp. 3d 337, 363-64 (D. Me. 2017). Although the circuits are not entirely congruent, they all seem to recognize that at the very least, exigent circumstances, like those at issue in this case, inform the analysis. As further explained below, *Amici* believe that this court's adoption of the Fifth Circuit's bright-line rule would promote consistency and fairness,

protecting the public and law enforcement in violent and uncertain scenarios until an arrest is effectuated.

However, regardless of the rule this Court adopts, exigent circumstances existed in this case, such that even under the more lenient "totality of the circumstances" test, officer Cummings did not violate the ADA. The facts known to officer Cummings included: 1) he was responding to a "Section 12" patient, which means that a mental health professional made the determination that failing to hospitalize Ms. Gray would "create a likelihood of serious harm"[23]; 2) Ms. Gray assaulted and battered officer Cummings by approaching him quickly and pushing closer to him, requiring him to assume a defensive posture and take her to the ground for his own safety; 3) Ms. Gray actively resisted arrest by refusing to put her hands behind her back; 4) Ms. Gray refused multiple orders from officer Cummings, including orders to release her arms or she would be tased. *See* Record Appendix, p. 28-30, 40. Based on the information available to officer Cummings, including that Ms. Gray posed a likelihood of serious harm, and the fact that she assaulted and battered him, the accommodations Ms. Gray proposes would not have been reasonable under the circumstances.

[23] *See* Mass. Gen. Laws c. 123 §12.

III. IF TITLE II APPLIES TO ARRESTS, IMPORTANT POLICY RATIONALES COUNSEL IN FAVOR OF THE FIFTH CIRCUIT RULE IN SITUATIONS INVOLVING DANGEROUS OR VIOLENT ARRESTEES.

A. THE FOURTH AMENDMENT DOES NOT CONTEMPLATE TWO TRACKS OF ANALYSIS IN ARREST SCENARIOS.

There are important policy rationales for adopting a bright-line rule, which provides that the ADA does not apply in arrest scenarios until the scene is secure and any threat to human life has been resolved. *See Hainze,* 207 F.3d at 801. To begin with, in the vast majority of circumstances, an officer does not know if the person he or she has encountered has a mental illness, is exhibiting erratic behavior due to drug use, and if the latter, whether the drug use is a result of an addiction, which itself would be considered a disability under the ADA.[24] If courts require an accommodation in a dangerous situation involving a mentally ill individual, does that mean officers must also provide accommodations to individuals who pose dangers to officers based on their drug use? The answer to that complex question underscores the need for a bright-line rule.[25] What the officer does know in these

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[24] Even in situations where the officer is forewarned of a person's mental illness, the officer has no way to know how the mental illness will manifest itself.

[25] During oral argument in *Sheehan,* an exchange between Justice Scalia, Chief Justice Roberts, and Ms. Sheehan's attorney underscored the challenge with Ms. Sheehan's and Ms. Gray's ADA arguments:

> Justice Scalia: Is – is being high on drugs a mental disability?
> Mr. Feldman: I think it would depend on why somebody is high on drugs. They – they may –

situations are facts tending to show that the suspect poses a danger to the officer, the public, and/or to himself or herself. It is these objective facts that guide an officer's decision-making in tense and rapidly evolving situations, regardless of the suspect's ADA status.

These cases should not turn on the suspect's mental illness, but rather whether under the circumstances known to the officer, the amount of force used was reasonable under the Fourth Amendment based on the long-established factors set forth in *Graham v. Connor*, and without the use of 20/20 hindsight. 490 U.S. 386, 396 (1989). If an officer acts unreasonably by utilizing too much force under the circumstances, the Fourth Amendment is the proper avenue to address that claim, not the ADA. Although the Ninth Circuit takes the position that a person's

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> Justice Scalia: He's high on drugs because he took drugs.
> Mr. Feldman: Well, if it was a choice to take drugs –
> Justice Scalia: Yes.
> Mr. Feldman: -- and it was unrelated to a mental disability –
> Justice Scalia: Right.
> Mr. Feldman: -- then – then I think it would not be a mental disability.
> Justice Scalia: Why?
> …
> Chief Justice Roberts: And presumably, there's no way to tell if there's somebody you come upon on the street who's exhibiting signs of being on – on drugs, whether that is because of prescription medication or illicit drugs.
> Mr. Feldman: I – I think that's right.
> Chief Justice Roberts: And – but they – but they have to be treated differently.
> Mr. Feldman: They do.

Transcript of Oral Argument, at p. 44-45, *Sheehan*, 135 S. Ct. 1765 (2015).

mental illness can be considered in determining what level of force is reasonable under the Fourth Amendment, it has admonished that courts should not create "two-tracks" under the excessive force analysis, one for the mentally ill and one for serious criminals. *See Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010). But in practice, that is what the Ninth Circuit has done, as Judge Bea recently explained in his dissent in *Vos v. City of Newport Beach*:

> While [the Ninth Circuit] may consider whether a person is emotionally disturbed in determining what level of force is reasonable, [the Ninth Circuit has] never ruled that police are obligated to put themselves in danger so long as the person threatening them is mentally ill. Such a conclusion would be illogical - especially given the admonition in *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010), quoted by the majority, that we will not "create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.

Vos v. City of Newport Beach, 892 F.3d 1024, 1042 (9th Cir. 2018) (Bea, J. dissenting).

Requiring officers to "reasonably accommodate" a suspect's mental illness during a tense and rapidly evolving situation would also create two tracks of arrestees. Certainly, when no danger is present, officers should accommodate a suspect's mental illness if such an accommodation is reasonable. However, as Justice Bea explained in *Vos*: "[t]he danger to the officer is not lessened with the realization that the person who is trying to kill him is mentally ill." *Id.* at 1043. It would be dangerous and illogical for this Court to create a two-track system of

arrestees in circumstances involving violence or a danger to police officers, the public at large, or the arrestee him or herself.

B. ADOPTING THE FIFTH CIRCUIT'S RULE IS CONSISTENT WITH THE POLICY CONSIDERATIONS OF QUALIFIED IMMUNITY.

Not only would a rule contrary to the Fifth Circuit's potentially create "two tracks" for excessive force analysis, but it would also undermine the important policy rationales the Supreme Court has articulated for qualified immunity. "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. Al-Kidd*, 563 U.S. 731, 743 (2011). The Court has reiterated the need for officers to have "breathing room" in the context of dangerous and tense encounters by reminding courts not to "judge officers with the 20/20 vision of hindsight." *Sheehan*, 135 S. Ct. at 1777, quoting *Graham*, 490 U.S. at 396. The same principles countenancing courts to provide "breathing room" are equally important in the context of the ADA when police officers encounter suspects creating a danger, who may or may not have a mental illness.

The Supreme Court has articulated a number of policy rationales for the doctrine of qualified immunity, which all point toward adopting the Fifth Circuit's bright-line rule regarding the ADA. Application of the ADA accommodation principles to a police officer's use of force while arresting a violent or dangerous

mentally ill suspect will result in increased lawsuits and the diversion of municipal resources, and could deter qualified individuals from entering the police force.[26] *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *see also White v. Pauly*, 137 S. Ct. 548, 551 (2017) (noting importance of qualified immunity to "society as a whole"). More importantly, if a police officer is worried about ADA liability in rapidly evolving, dangerous situations involving a potentially mentally ill suspect, that officer may hesitate, which could result in the loss of life, either to the officer or a member of the public or to the suspect.[27] *See Harlow*, 457 U.S. at 814 (explaining that without qualified immunity, "there is danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'") quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir.), *cert denied*, 339 U.S. 949 (1950). As the Fifth Circuit explained:

> 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. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby

[26] Title II of the ADA does not provide for liability for an individual officer, but it is an open question as to whether it provides for respondeat superior liability. *See Sheehan*, 135 S. Ct. at 1773-74.

[27] As evidenced in the recent shootings in Pittsburgh and Thousand Oaks, officers unhesitatingly exhibit heroism in complex and rapidly unfolding scenarios, where contemplation of a subject's mental state would be wholly counterproductive and would ignore the fluid, rapid, and unpredictable nature of evolving events.

> civilians, would pose an unnecessary risk to innocents. While the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public.

Hainze, 207 F.3d at 801; *see also Waller*, 556 F.3d at 173 (noting the danger "that an excessive focus on avoiding civil liability could skew the officers' assessments" in a third-party hostage situation).

The Supreme Court has clearly established that qualified immunity exists to ensure that officers will unflinchingly discharge their duties. Courts should adopt a rule under the ADA as it applies to the arrest of a violent or dangerous individual that is consistent with that proposition.

C. IN THE ABSENCE OF A BRIGHT-LINE RULE, POLICE OFFICERS WILL BE SUBJECTED TO UNWARRANTED SECOND-GUESSING OF CONSTITUTIONALLY REASONABLE CONDUCT.

The Fifth Circuit's bright-line rule is more administrable and also prevents second-guessing of police officers' tactics that the Supreme Court has explained is inappropriate in the context of dangerous situations. *See Sheehan*, 135 S. Ct. at 1777. Even if experts believe the situation could have been handled differently so long as a reasonable officer could have believed that his or her conduct was justified, qualified immunity is appropriate. *See Sheehan*, 135 S. Ct. at 1777, citing *Saucier* v. *Katz*, 533 U.S. 194, 216, n. 6 (2001) (Ginsburg, J., concurring in judgment). This Court has likewise explained:

> [T]he Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases. Decisions from this circuit and other circuits are consistent with that view. And in close cases, a jury does not automatically get to second-guess these life and death decisions, even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently.

Roy v. Inhabitants of Lewiston, 42 F.3d 691, 695 (1st Cir. 1994).

But that second-guessing is precisely what happens in ADA cases without a bright-line rule. For example, in *Amirault v. City of Roswell*, police officers received a call about a potentially suicidal individual, however, when they eventually found him in his car, he told them he was fine, and they made the decision not to involuntarily commit him. 1996 U.S. Dist. LEXIS 9887, at *14 (D.N.M. Mar. 28, 1996). He proceeded to drive to his ex-girlfriend's home and lit himself on fire. *Id.* He survived, and sued the police officers, arguing they should have involuntarily committed him. *Id.* And while the court ultimately found in the officers' favor, that did not prevent years of distracting litigation and drain on the department's resources. *Id.*

Arguments made in *Adle v. Me. State Police Dep't*, also illustrate this problem. 279 F. Supp. 3d 337, 363-64 (D. Me. 2017). In *Adle*, police and crisis negotiators engaged in a six-hour confrontation with a mentally unstable individual with a knife. *Id.* at 365. Officers tried numerous tactics to get the individual to put down his knife and submit to their custody, including negotiations, talking about

his children, offering food, water, and medical care, and ultimately resorted to less-lethal methods like pepper spray and Tasers. *Id.* at 343-47. When none of that worked and the unsecure wooded area where this negotiation was taking place was beginning to get dark, the officers decided to try to use a fire hose on him to disarm him. *Id.* at 346-347. Unfortunately, the encounter ended tragically when the fire hose did not work and the suspect advanced on the officers with the knife, and fearing for their lives, they shot and killed him. *Id.* Although the police officers engaged a crisis negotiation team to assist in the situation, the family sued, claiming the police should have done more to accommodate their loved one's mental disability rather than treating him like a criminal. Specifically, the family argued that the "militaristic response unreasonably exacerbated [his] mental health crisis," and their experts opined that the use of the fire hose caused him to become confrontational with the police. *Id.* at 364-65. The district court ultimately rejected this argument, noting that it was "speculative" and further concluded:

> Many of the Plaintiff's accommodations were tried without success or rejected as unworkable. There is no dispute that negotiations extended over six hours. The Plaintiff offers no facts to suggest that lights were available that could have effectively lit the forest and allowed for further negotiations…The Plaintiff has not developed facts about whether nets and tranquilizers would have been effective under the circumstances or whether the materials to accomplish such a capture were available. One gets the distinct impression that had these other tactics been unsuccessfully tried, the Plaintiff would be arguing that the MSP should have used a fire hose.

Id. at 365.

Adle illustrates exactly the fallacies in a broad application of Title II to scenarios involving violent or dangerous arrestees. Without a bright-line rule in this area, police officers will be subjected to relentless litigation and second-guessing of otherwise objectively reasonable tactics in dangerous situations.

CONCLUSION

This Court should conclude that the accommodations required under Title II of the ADA do not apply to dangerous situations prior to police securing the scene, consistent with the Fifth Circuit's rule. Such an approach will protect the public and law enforcement so long as dangerous and uncertain conditions exist, while permitting the ADA's accommodative measures as soon as that danger has passed. Regardless of the rule this Court adopts, the ADA claim against officer Cummings should fail as a matter of law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 5,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2018, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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