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.

Appeal from a Final Judgment of the
United States District Court for the District of Massachusetts

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REPLY BRIEF OF PLAINTIFF-APPELLANT JUDITH GRAY

Claudia Center, 1st Cir. No. 1185204
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
415-343-0762

Matthew R. Segal, 1st Cir. No. 1151872
Ruth A. Bourquin, 1st Cir. No. 13282
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, INC.
211 Congress Street
Boston, MA 02110
617-482-3170
msegal@aclum.org

Richard L. Neumeier, 1st Cir. No. 18535
MORRISON MAHONEY LLP
250 Summer Street
Boston, MA 02210
617-439-7569

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INTRODUCTION

Defendants Thomas Cummings and the Town of Athol seek to portray Judith Gray as a predator and Cummings as her prey. This portrayal is not accurate.

Defendants do not dispute that, well before Cummings tased Gray in May 2013, this Court's Fourth Amendment case law had disapproved tasing people for "insolence." *Parker v. Gerrish*, 547 F.3d 1, 10 (1st Cir. 2008). They do not dispute that out-of-circuit cases, such as *Cyrus v. Town of Mukwonago*, 624 F.3d 856 (7th Cir. 2010), had prohibited tasing subdued individuals offering passive resistance. Nor do they dispute that, when applicable, Title II of the Americans with Disabilities Act requires municipalities to make reasonable accommodations—beyond what would normally be required—for persons with disabilities.

But Cummings and Athol argue that Gray was so violent and dangerous that she put Cummings in "crisis." Athol Br. 44.[1] This crisis, they say, excused Cummings from clearly established Fourth Amendment law against tasing people to overcome passive or non-physical resistance. Their ADA arguments are equally bold. Inviting this Court to create a circuit split, they argue that Title II contains an unstated exception that excuses police departments and officers from reasonably accommodating disabled

[1] Briefs are abbreviated as follows: "Gray Br." is Gray's opening brief; "Athol Br." is defendants' brief; "APA Br." is the brief of amici the American Psychiatric Association, the American Psychological Association, and the Judge David L. Bazelon Center for Mental Health Law; "IMLA Br." is the brief of amici the International Municipal Lawyers Association and the Massachusetts Chiefs of Police Association; and "Axon Br." is the brief of amicus Axon Enterprise.

people they choose to arrest, even when police retrieve unarmed patients who wander away from hospitals. And they insist that Gray was so dangerous that she created "exigent circumstances" negating any ADA obligation to accommodate her disability. *Id.* at 43-45.

These arguments are not faithful to defendants' obligation to view the record in the light most favorable to Gray, to Fourth Amendment cases governing *de minimis* resistance, or to the ADA's plain text. Here, although these facts go unmentioned in defendants' 40-page argument, a jury could find that Cummings tased a 57-year-old woman after taking her to the ground, while she was stationary and nonviolent, and absent any evidence that she physically resisted an attempted cuffing. Gray Br. 6-8. Tthis was less resistance than occurred in *Parker*.

Police officers must sometimes confront immediate threats or make split-second judgments. *See* Athol Br. 13; IMLA Br. 12-13. But not here. Cummings mistook mental illness as an "assault," took Gray to the ground, gave oral commands while Gray experienced obvious symptoms of mental illness but did not actively resist, placed a pain weapon in her back, and pulled the trigger. And he did it because she "refused to listen." RA 40. This case shows exactly why Fourth Amendment and ADA protections are so vital for people like Judith Gray

ARGUMENT

I. Defendants' discussion of excessive force misapprehends the record.

From their substantive Fourth Amendment analysis, to their assessment of clearly established law, to their analysis of Gray's state law claims, defendants "predicate[] most of [their] argument upon [their] preferred, but presently unacceptable, spin on the record." *Begin v. Drouin*, 908 F.3d 829, 835 (1st Cir. 2018).

A. A jury could find that Cummings used excessive force.

Applying the three-factor test of *Graham v. Connor*, 490 U.S. 386 (1989), Gray's opening brief showed how a jury could find that Cummings violated the Fourth Amendment: (1) Gray was being approached for treatment of her mental illness, not for arrest on a crime; (2) she was no safety threat; and (3) she was tased while subdued and offering at most nonviolent and stationary resistance to oral commands. Gray Br. 15-22. Defendants' contrary application of *Graham* strays from the undisputed facts.

1. Gray did not commit "assault and battery."

Cummings initiated all the physical contact here: he grabbed a barefoot, unarmed 57-year-old woman, took her to the ground, and tased her while, as the district court found, she was "non-violent" and "stationary." Add. 32. He did this despite answering a service call for Gray to be hospitalized rather than grabbed, tackled, and tased. RA 40.

Inverting those undisputed facts, defendants contend that Gray "assaulted and battered" Cummings by turning and walking toward him—as he was implicitly asking her to do—and then leaning into his clenched hand after he grabbed her by the shirt.

Athol Br. 15 (citing Mass. G.L. c. 265 § 13D). But they identify no Massachusetts assault-and-battery convictions arising from footsteps and weight shifts. Nor do they say why a jury would have to find that Gray leaned toward Cummings *voluntarily*, and not because her weight had been forcibly shifted by a six-foot-three, 215-pound officer. Their battery allegation is so creative that it apparently did not occur to Cummings; he did not charge Gray with battery, and the misdemeanors he did charge were dismissed. RA 39.[2]

2. Gray was not a threat.

"Whether an immediate threat exists is a question of fact for the jury as long as the evidence is sufficient to support such a finding." *Begin*, 908 F.3d at 834. Here, defendants relentlessly argue that Gray posed some threat while still upright. A jury could disagree. More important, these arguments overlook that Cummings tased Gray *after* taking her down and securing her.

A jury could find that Gray was on the ground, not moving, and decidedly nonthreatening at that crucial moment. RA 40, 156, 201. Defendants assert, without record support, that Cummings "likely" would have injured Gray if he had tried to handcuff her. Athol Br. 17. That is at most a jury argument. Cummings had just taken

[2] Defendants accuse Gray of conceding that she assaulted and battered Cummings because her complaint alleges that, by closing in on Gray, Cummings "precipitat[ed] an assault and battery." Athol Br. 15 n.15. As the complaint makes clear, Gray has always alleged that the assault and battery Cummings precipitated was one *he* committed. RA 15 ¶¶ 48-52.

Gray down *without* substantial harm, and backup was just moments away. RA 40-41, 155, 201-03. A jury could find that Cummings could have completed his arrest without harming Gray but that he chose, instead, to use a pain-inflicting weapon.

3. Gray did not actively resist.

Defendants assert that Gray engaged in "active" resistance. Athol Br. 18. But a subdued individual's stationary failure to present her arms for handcuffing is not "active" resistance as that term has been used in excessive force cases.

To begin, defendants' argument contradicts the law of this Circuit. *See* Gray Br. 23-24. In *Parker*, an individual physically "resisted" an officer's attempt "to move [his] arm" so that he could be handcuffed. 547 F.3d at 4. Parker subsequently placed his hands behind his back after the officer drew his Taser, but even then he "initially resisted" the officer's attempt to pry his hand off his wrist. *Id.* at 9. Though the parties disputed whether Parker made a threatening movement after releasing his grip, the officer who tased Parker "agreed that nothing Parker did prior to this instant"—namely, *twice* physically resisting being handcuffed—"justified the use of the Taser." *Id.* at 5. This Court concluded that "a jury could find this resistance *de minimis*," *id.* at 9, and defendants here concede that Parker "offered no significant active resistance to being handcuffed." Athol Br. 21. It follows that Gray, who never physically resisted being

handcuffed, could also be found to have offered at most *de minimis* resistance. *Accord Alexis v. McDonald's Restaurants of Mass., Inc.*, 67 F.3d 341, 353-53 (1st Cir. 1995).[3]

Accusing Gray of active resistance fares no better under the law of other circuits. Defendants fail to distinguish key cases discussed in Gray's opening brief, which construe passive or insignificant resistance to encompass noncompliance with commands. *Cyrus*, 624 F.3d at 863; *Meyers v. Baltimore Cty. Md.*, 713 F.3d 723, 733-35 (4th Cir. 2013); *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1094 (9th Cir. 2013); Gray Br. 23-27 & n.8. The cases defendants do cite fail to establish that a subdued individual's stationary noncompliance amounts to active resistance that can justify tasing her. *See, e.g.*, Athol Br. 20 (citing *Roell v. Hamilton Cty., Ohio/Hamilton Cty. Bd. of Cty. Commissioners*, 870 F.3d 471, 482 (6th Cir. 2017) (noting, in analyzing "whether Roell was actively resisting arrest," that "Roell resisted the deputies' attempts to restrain and handcuff him by kicking, flailing, and wriggling away from their grasp")).[4]

In fact, defendants incorrectly rely on cases where officers tased individuals in special circumstances that made handcuffing unusually difficult or risky: *Crowell v. Kirkpatrick*, 400 F. App'x 592 (2d Cir. 2010) (unpublished), *Caie v. W. Bloomfield Twp.*,

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[3] Similarly, defendants concede that *Garcia v. Dutchess County*, 43 F. Supp. 3d 281 (S.D.N.Y. 2014), where the individual resisted attempts to subdue and handcuff him, "did not involve an individual who was actively resisting arrest when tased." Athol Br. 18 n.7. By that logic, neither does this case.

[4] Defendants cite an unpublished Massachusetts case concluding that refusing to submit to handcuffing can support a conviction for resisting arrest, Athol Br. 16 (citing *Commonwealth v. Dinovo*, 94 Mass. App. Ct. 1104 (2018)). That case sheds no meaningful light on what constitutes active resistance for purposes of excessive force.

485 F. App'x 92 (6th Cir. 2012) (unpublished), *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004), and *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892 (4th Cir. 2016). In *Crowell*, protesters chained themselves to a "several hundred pound barrel drum," and officers "attempted several alternate means of removing them from the property before resorting to use of their tasers." 400 F. App'x at 595. In *Caie*, an individual "flail[ed] his arms violently" when officers first attempted to handcuff him, and the court noted that "his consumption of a large quantity of alcohol and drugs, his erratic behavior, and his self-proclaimed desire to provoke the officers into using deadly force could lead reasonable officers to conclude that he was a threat to officer safety." 485 F. App'x at 92, 94, 96. In *Draper*, the individual "was hostile, belligerent and uncooperative," and, unlike Gray, still upright when tased. 369 F.3d at 1278. And in *Armstrong*, the Fourth Circuit held that an officer violated the Fourth Amendment by tasing an individual after several officers unsuccessfully tried other means to pry him off of a post to which he had been clinging, but that the law had not been clearly established in April 2011. 810 F.3d at 896, 900-01.

These cases do not justify what Cummings did to Gray. Far from implying that the Fourth Amendment permits a police officer to tase a subdued individual without first trying to apply handcuffs, they portray tasing as "a last resort," *Crowell*, 400 F. App'x at 595, or at least an escalation that is not lawful unless forcible handcuffing has proved unworkable. Those circumstances were absent here. While Gray was subdued and

nonviolent, Cummings tased her without trying to handcuff her, without waiting for backup, and without calling an ambulance from the nearby hospital. RA 40-41, 252-53.

Defendants' portrayal of Gray as a batterer, a threat, and an "active" resister is particularly dismaying because of how obviously Gray needed help and how badly Cummings hurt her. A reasonable officer would have understood that Gray needed medical attention for her mental illness. Cummings therefore "should have made greater effort to take control of the situation through less intrusive means," *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010), instead of tasing Gray in the back. Cummings and Athol acknowledge that drive-stun tasing causes "significant[]" pain, but they claim that Gray "suffered no injury." Athol Br. 17, 19. This is both incorrect—Gray was burned (Gray Br. 8)—and wordplay. Gray's pain was evidently so intense that, as she testified, "I must have passed out because I woke up in Emergency." RA 190.[5]

B. The relevant law was clearly established in May 2013.

"In arguing for clearly established law, a plaintiff is not required to identify cases that address the particular factual scenario that characterizes his case." *Begin*, 908 F.3d

[5] Taser's manufacturer, Axon, disputes that Gray passed out because she does not *remember* being unconscious and instead inferred it from the fact that "one minute" Cummings was threatening to tase her, and "the next minute" she "woke up" in pain at the hospital. Axon Br. 4; RA 190. This argument is self-refuting.

Axon's brief also attaches and relies on declarations that are not in the record. Axon Br. 5 n.2, 10 n.8, and Exhibits 1 and 2. Axon did not seek Gray's consent to the submission of these items, and they are not properly before the Court. *Ruiz-Casillas v. Camacho-Morales*, 415 F.3d 127, 132 (1st Cir. 2005) (citing Fed. R. App. P. 10(a)).

at 836 (quoting *Alfano v. Lynch*, 847 F.3d 71, 76 (1st Cir. 2017)) (cleaned up). It is enough to identify "a sufficiently specific benchmark." *Id.* Gray has done so: by May 2013 it was clearly established that the Fourth Amendment prohibits tasing a nonviolent, stationary, and subdued individual with mental illness who fails to comply with oral commands. Gray Br. 22-28. In response, defendants mostly reprise their reliance on irrelevant cases involving active resistance or flight. Athol Br. 21-24.[6] When defendants finally consider the district court's finding that Cummings was nonviolent and stationary, *id.* at 24-27, they again resort to inapplicable cases.

First, defendants discuss the Fourth Circuit's 2016 decision in *Armstrong*, but that case does not support qualified immunity here. In *Armstrong*, an individual physically resisted three officers when they "tried to pry [his] arms and legs off of the post" around which he had wrapped himself. 810 F.3d at 896. After "struggling" with Armstrong, the officers repeatedly tased him on drive-stun mode. The Fourth Circuit held that the officers violated the Fourth Amendment, but not law that had been clearly established by April 2011. It noted that prior cases—including its February 2013 decision in *Meyers*—had held "that tasers are proportional force *only* when deployed in response to a situation in which a reasonable officer would perceive some immediate danger that could be mitigated by using the taser." *Id.* at 902. Adding to that foundation, *Armstrong*

[6] *See, e.g.*, Athol Br. 22-23 (citing *Cockrell v. City of Cincinnati*, 468 F. App'x 491, 495 (6th Cir. 2012) (unpublished) (suspect was fleeing), and *McKenney v. Harrison*, 635 F.3d 354, 360 (8th Cir. 2011) (suspect made a sudden movement)).

held that "'*physical resistance*' is not synonymous with 'risk of immediate danger.'" *Id.* at 905 (emphasis added); *id.* at 909 ("[T]he subject of a seizure does not create such a risk simply because he is doing something that can be characterized as resistance—even when that resistance includes physically preventing an officer's manipulations of his body.").

Armstrong thus stated what this Court had *already* held in 2008: even physical resistance to handcuffing does not justify tasing someone who poses no safety threat. *Parker*, 547 F.3d at 10. Because *Parker* was the law of this Circuit when Cummings tased Gray, it forecloses qualified immunity here without regard to whether Gray physically resisted an attempt to manipulate her body so she could be handcuffed. But, of course, there was no such attempt. After Cummings took Gray down, and without trying to apply handcuffs, he tased her for not "listen[ing]" to oral commands. RA 40. Qualified immunity is therefore foreclosed not only by *Parker*, but also by other cases addressing Fourth Amendment law preceding May 2013. *See, e.g.*, *Armstrong*, 810 F.3d at 908 n.12 (explaining that *Meyers* had already held "that tasing an individual who 'was unarmed and effectively was secured' is clearly unconstitutional"); *Cyrus*, 624 F.3d at 863 (explaining that tasing a nonviolent misdemeanant who did not try to flee, but resisted being handcuffed, constitutes excessive force); *Gravelet-Blondin*, 728 F.3d at 1093 (noting that "[t]he right to be free from the application of non-trivial force for engaging in mere passive resistance was clearly established prior to 2008," and citing cases from 2010 and

2011 in explaining that passive resistance includes "an affirmative step to contravene officer orders or engaged in behavior that posed some threat to officer safety").

Second, citing *Hagans v. Franklin County Sheriff's Office*, 695 F.3d 505 (6th Cir. 2012), defendants purport to identify unnamed "examples" of cases allowing the tasing of an individual for "refus[al] to move his arms from under his body." Athol Br. 26. But *Hagans* contains no such examples. It held that the law in 2007 had not clearly established that an officer had engaged in excessive force by tasing someone who physically resisted officers who "struggle[d]" to handcuff him, including by "lock[ing] his arms tightly" and "kicking his feet." 695 F.3d at 509. Not surprisingly, *Hagans* cites cases involving active resistance by unsecured suspects.[7]

The absence of evidence that Cummings physically tried to handcuff Gray, let alone that Gray "physically prevent[ed] . . . manipulations of [her] body," *Armstrong*, 810 F.3d at 909, is even more significant here due to Gray's mental illness. In May 2013, a reasonable officer would have been especially reluctant to tase someone experiencing obvious symptoms of mental illness for noncompliance with oral commands. *Bryan*,

[7] *See Williams v. Sandel*, 433 F. App'x 353, 355 (6th Cir. 2011) (unpublished) (describing individual's abundant physical resistance to being handcuffed); *Caie*, 485 F. App'x at 92, 94, 96 (individual "flail[ed] his arms violently" and, given other behaviors, could reasonably have been construed as "a threat to officer safety"); *Williams v. Ingham*, 373 F. App'x 542, 548 (6th Cir. 2010) (unpublished) (suspect physically struggled with officers, "continued to struggle to hold his hands under his body and would not show them to the officers, who still did not know whether Williams had a weapon," an officer resorted to "two close-fist blows to Williams' middle back" to try to free has hands, and the officer used his Taser "[o]nly when this failed").

630 F.3d at 829; *Cyrus*, 624 F.3d at 862, 863; *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004). Indeed, nearly two years earlier, in July 2011, Athol forbid its officers from tasing individuals "known to be suffering from severe mental illness." RA 257. Likewise, citing the Ninth Circuit's 2010 decision in *Bryan*, Taser's manufacturer advises officers to "make greater effort to control [the] situation through less intrusive means" when interacting with "Person[s] in Need of Medical Assistance Due to Mental Health."[8]

Cummings encountered a harmless person in need of medical attention, and he hurt her for not listening to him. No reasonable officer—no reasonable person—could have thought that was lawful.

C. Defendants' defense of Cummings dooms their defense of Athol.

Notwithstanding Athol's policy against tasing someone in mental health crisis, there remain triable issues of fact regarding whether Athol failed to properly train Cummings and bears responsibility for his undue tasing of Gray. Gray Br. 30. Gray's expert has shown, and the mental health professional amici agree, that a 40-hour Crisis Intervention Team training program can facilitate ADA compliance. RA 161-62; APA Br. 10-13. And some of defendants' amici concede that, "when no danger is present,

[8] LAAW International, LLC, *Study Aid: Understanding the 4th Amendment's Objective Reasonableness Standard (and Qualified Immunity ("QI"))*, Jan. 10, 2019, available at https://www.axon.com/training/resources (select "Download All Training Version 20.2," then "Legal Reference Materials," then "2018-01-10 Understanding 4th Amendment Force Study Aid.pdf") (last visited Dec. 3, 2018).

officers should accommodate a suspect's mental illness if such an accommodation is reasonable." IMLA Br. 19.

But defendants do not argue that Cummings's actions reflect an unforeseen and appropriately disciplined departure from town policy or training. They argue that turning toward an officer is assault, that anyone who leans into the clenched fist of an officer who has grabbed her is automatically guilty of battery, and that such a person can be tased even after being rendered stationary—even if the person is experiencing obvious symptoms of mental illness and simply failing to comply with oral commands. Athol Br. 13-14, 42 n.11. This argument is frightening, and a jury should be allowed to decide whether Athol caused Cummings to act in accordance with it.

A jury might find that Cummings alone bears § 1983 responsibility for violating Athol's policy and clearly established Fourth Amendment law. But Athol's willingness to treat its policy as meaningless in this Court confirms that a jury should decide whether Athol also rendered the policy meaningless to Cummings.

D. Gray presented triable state law claims.

Defendants do not dispute that Gray's state law claims generally rise and fall with their construction of the facts underlying Gray's § 1983 claim. Athol Br. 32-33. As shown above, defendants' construction is mistaken. For example, with respect to Gray's assault and battery claim, a jury could find that Cummings lacked good faith and acted out of malice, due to impatience with Gray's failure to "listen." *Cf. Nelson v. Salem State Coll.*, 446 Mass. 525, 537-38 (2006).

Likewise, Cummings is not entitled to qualified immunity for violating the Massachusetts Civil Rights Act (MCRA). Although defendants correctly note that the MCRA requires a showing of "threats, intimidation or coercion" separate from but directed at a secured right, Gray has made that showing. When Gray needed help to be returned to the hospital, Cummings implicitly threatened to arrest her, grabbed her, took her to the ground, and then threatened to tase her if she did not present her hands for cuffing. These were all acts of "threats, intimidation or coercion"[9] that interfered with or attempted to interfere with rights "secured by" the constitutions and laws of the United States and the Commonwealth—including Gray's rights to be free from excessive force and to be reasonably accommodated on the grounds of her disability. Thus, summary judgment was not warranted on Gray's MCRA claim. *See* Mass. G.L. c. 12, §§ 11H and I; *Adams v. Commonwealth,* 416 Mass. 558, 562-63 (1993) (recognizing MCRA violation based on excessive force during an arrest).

II. Defendants' ADA arguments contradict the statutory text, the prevailing case law, and the record below.

Defendants supply no reasoned basis to permit police departments to disregard the ADA when they agree to return an unarmed, nonviolent person to a hospital for

[9] *See Tortola v. Inspector of Buildings of Tewksbury,* 41 Mass. App. Ct. 120, 133 (Mass. Ct. App. 1996) ("Coercion need not be explicit"); *Glovsky v. Roche Bros. Supermarket, Inc.,* 469 Mass. 752, 763 (2014) (a uniformed officer's order contains an implicit threat of arrest or forcible ejection constituting "threats, intimidation or coercion"); *Batchelder v. Allied Stores Corp.,* 393 Mass. 819, 823 (1985) (order by police to stop an activity can establish "threats, intimidation or coercion").

treatment of her mental illness. Nor do they adequately explain why a jury would have to conclude that defendants complied with the ADA by closing in on, taking down, and tasing the unarmed, nonviolent patient here.

A. A municipality must abide by Title II when asking its police department to return an unarmed, nonviolent person to a hospital.

For the first time on appeal, defendants argue that Title II of the ADA does not encompass police encounters ending in arrest or any actions by individual police officers. Athol Br. 35-38. Beyond being waived, these arguments are incorrect.

1. Title II reaches police-civilian encounters, including arrests.

No court of appeals has held that Title II exempts police encounters or individual police actions, and for good reason. As Gray has shown, Title II applies to any "department" or "agency" of a local government, including the police, and "it applies broadly to activities, services, and programs," which necessarily include police interactions with individuals. Gray Br. 31 (citing 42 U.S.C. §§ 12131-32; 28 C.F.R. § 35.130(b)(7)). True, the Supreme Court has yet to opine on this issue. *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765 (2015). But this is partly because the parties and the United States in *Sheehan* "all argue[d] (or at least accept[ed]) that § 12132 applies to arrests." *Id.* at 1773. The International Municipal Lawyers Association, though coy about the issue in this case, also agreed that Title II "extends to law enforcement investigation and arrest." Br. of Amici Curiae Int'l Municipal Lawyers Ass'n, Major

Cities Chiefs Ass'n, and Nat'l Sheriffs' Ass'n at 6, *Sheehan*, 135 S. Ct. 1765, No. 13-141 (U.S. filed Jan. 16, 2015).

Nor does Title II disregard actions by individual officers. Its governing terms and regulations guarantee that persons with disabilities will receive *individualized* accommodations, which must sometimes be delivered by *individual* public employees.[10] Municipalities can assure these accommodations by properly training their employees, including police officers. APA Br. 23-26. But training will have no useful effect if the ADA is interpreted to permit individual officers to do as they please.

Seemingly as a fallback position, defendants argue—here, but not below—in favor of the Fifth Circuit's holding 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 v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000); *see* Athol Br. 38. It is unclear whether the Fifth Circuit will keep this rule, given the emerging consensus that the ADA governs arrests, and this Court should not adopt it. A *per se* exemption for "on-the-street encounters" does not

[10] *See, e.g.*, 42 U.S.C. § 12131 (defining "qualified individual with a disability" as "an individual with a disability" who meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity); 28 C.F.R. § 35.104 (same); *id.* § 35.130 (describing discrimination with respect to "a qualified individual with a disability"); 28 C.F.R. § 35.139(b) ("In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment . . . .").

appear in the text of Title II and is unnecessary to keep officers safe. The ADA requires only reasonable accommodations, and true exigencies can render accommodation unreasonable. *See Roell v. Hamilton Cty.*, 870 F.3d 471, 489 (6th Cir. 2017); APA Br. 20-22 & n.39. In fact, neither defendants nor their amici have identified any ADA decision unfairly holding a municipality liable for actions involving an officer under threat. *See* IMLA Br. 23-24.

2. Title II applies here because Gray was unarmed, nonviolent, secured, and in need of treatment for her mental illness.

This case illustrates a police encounter that falls within the text and purpose of Title II. It began with a quintessential call for *services*: a patient with mental illness wandered away from a hospital, and the hospital asked a municipality—specifically, its police department—to bring her back. Cummings himself has acknowledged that this kind of request is a call for "service." RA 19, 197, 214. The ADA's application to these services cannot be read to depend on whether a town provides them via police officers, social workers, or paramedics.

Indeed, while defendants and their amici purport to advance policy reasons to graft a judge-made police exception onto Title II, this case demonstrates that Congress correctly opted against such an exception.[11] If towns could avoid ADA compliance by

[11] *See, e.g.*, House Comm. Judiciary, H.R. Rep. No. 101-485, pt. 3, at 50 (1990), reprinted in 1990 U.S.C.CA.N. 445, 473 ("[T]o comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received

assigning tasks to police departments rather than social services agencies, they would be even more likely to send armed officers to confront persons with disabilities. And if police departments could skirt the ADA by making arrests, they would be more likely to handcuff and tase "mentally ill individual[s] [who are] in need of a doctor, not a jail cell." *Bryan*, 630 F.3d at 829. Thus, as the mental health professional amici explain, "applying the ADA to arrests of individuals with mental illness is important precisely because encounters between such individuals and law enforcement are such a pervasive part of police work." APA Br. 22.

What is more, the ADA would apply here even under the Fifth Circuit's rule. Under *Hainze*, "[o]nce the area was secure and there was no threat to human safety, the Williamson County Sheriff's deputies would have been under a duty to reasonably accommodate Hainze's disability in handling and transporting him to a mental health facility." 207 F.3d at 802. Gray's walking posed no safety threat. And after Cummings took her to the ground, "the area was secure," and there was "no threat to human safety." Thus, consistent with *Hainze*, Cummings was required to reasonably accommodate Gray's disability in "handling" her. *Id.*

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proper training in the recognition of and aid for seizures."); 136 Cong. Rec. 11,461 (1990) (statement of Rep. Mel Levine) ("Regretfully, it is not rare for persons with disabilities to be mistreated by the police. . . . Although I have no doubt that police officers in these circumstances are acting in good faith, these mistakes are avoidable and should be considered illegal under the Americans with Disabilities Act."); 136 Cong. Rec. 11,471 (1990) (statement of Rep. Steny Hoyer) ("[P]ersons who have epilepsy are sometimes inappropriately arrested because police officers have not received proper training to recognize seizures and to respond to them.").

B. Gray's triable ADA claim cannot be defeated at summary judgment by an "exigent circumstances" theory.

Beyond their shoot-the-moon claim that police encounters with unarmed hospital patients fall outside the scope of Title II, defendants' ADA arguments largely restate their unsupported view of Gray's behavior. They do not dispute that, when Title II applies, it requires reasonable accommodation of persons with disabilities, and that it applies when an officer misperceived symptoms of the disability as crimes. But they contend that the person in "crisis," and legally entitled to special accommodation, was not the 57-year-old woman on the ground experiencing symptoms of bipolar disorder, but instead the healthy, armed, 215-pound officer standing over her. Athol Br. 44. This contention is not one that a jury would have to accept.

1. A jury could find that Cummings failed to reasonably accommodate Gray.

Defendants do not deny that the ADA's reasonable-accommodation requirement obliges public employees to take actions for persons with disabilities that they would not otherwise take. Here, defendants claim that Cummings accommodated Gray by initially following her at a "non-aggressive distance," until he didn't and closed in on her. And purporting to rely on "exigent circumstances," defendants all but concede that Cummings made no accommodations for Gray "[o]nce" she turned toward him. Athol Br. 43-44; *id.* at 42, 44 (arguing that Cummings accommodated Gray "until" she turned toward him).

On this record, a jury could find that Athol violated Gray's ADA rights. Cummings did not keep a non-aggressive distance; within 25 or 30 seconds, he closed from 100 feet away from Gray to five feet away. RA 200-01. He did not wait for backup or call an ambulance. He took Gray down instead of backing away. And even after subduing Gray by taking her to the ground, he tased her for not complying with oral commands to present her hands for cuffing. Gray Br. 6-8, 36; RA 40. Defendants make no effort to respond to Gray's expert testimony that these actions unduly escalated the situation, contradicted nationally recognized protocols for dealing with mentally ill persons, and reflected inadequate training in interacting with mentally ill persons. RA 251-58, 259-60. *See Voutor v. Vitale* 761 F.2d 812, 822 (1st Cir. 1985) (holding that expert testimony is relevant to causation).

A jury could also reject defendants' contention that Cummings faced exigent circumstances. ADA cases have recognized exigent circumstances where officers confront individuals who are armed or engaging in objectively dangerous behavior. *See, e.g.*, *Waller ex rel. Estate of Hunt v. Danville, VA*, 556 F.3d 171, 175 (4th Cir. 2009) ("A reasonable belief on the part of officers that this was a potentially violent hostage situation may not resolve the ADA inquiry, but it cannot help but inform it.") (quotation marks omitted). As shown above and in the opening brief, these cases hardly suggest that a jury would be *required* to find an exigency in the case of an unarmed 57-year-old woman who was tased in the back while stationary and on the ground. "Exigent" does not mean "any."

2. A jury could find that Cummings misperceived Gray's symptoms as crimes.

Defendants recognize that the ADA has been interpreted to protect people with disabilities when they are misperceived as having taken some action, such as when a police officer mistakes driving while having a stroke for driving while drunk. Athol Br. 40. Significantly, defendants recognize that this misperception theory applies when people with disabilities are wrongly thought to have the requisite criminal *intent* behind some action, as when a police officer correctly observes that an individual has violated his commands but overlooks that it is because the person is deaf. *Id.* (citing *Lewis v. Truitt*, 960 F. Supp. 174 (S.D. Ind. 1997)). As Gray has shown, a jury could find that those circumstances are present here.

Indeed, defendants themselves suggest that Gray's facial expression influenced Cummings's decision to arrest her. Athol Br. 5. A jury could find that this expression was a symptom of her mental illness. Moreover, as can occur with a deaf person, Gray's behaviors were contrary to law enforcement commands, but a jury could find that was only because she could neither process nor comply with them. Although defendants argue that Gray waived this argument below, that is not so. *Compare* Athol Br. 41-42, *with* RA 15 ¶47; 138-39. On appeal, Gray has simply explained how Cummings's misperception of Gray's behavior mirrors the misperception of a deaf person's behavior. Gray Br. 34 (discussing *Delano-Pyle v. Victoria Cty., Tex.*, 302 F.3d 567 (5th Cir. 2002)).

C. The ADA entitles Gray to relief.

Defendants argue that, even if Gray's ADA rights were violated, she must be denied injunctive and monetary relief. Their argument against injunctive relief relies on disputed factual assertions about the likelihood that Gray will be harmed again, as well as the incorrect claim that Gray somehow waived the request for a permanent injunction appearing in her complaint. *Compare* Athol Br. 46, *with* RA 16 ¶4. Especially given Athol's present claim that tasing Gray was not only legally permissible but "safer and lesser" than the alternatives, Athol Br. 17, Gray's request for a permanent injunction should survive.

With respect to damages, Gray has identified triable evidence of deliberate indifference capable of supporting a damages award under Title II. Gray Br. 13, 38-40. Defendants contend that there should be no vicarious liability under the ADA, and that damages liability should instead require a public entity's deliberate indifference to "actual notice" of an employee's conduct, citing the 1998 Title IX case of *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998). But "all Courts of Appeals that have considered the issue appear to permit an employer to be held vicariously liable under Title II for intentional discrimination by its employees." *Fortin on behalf of TF v. Hollis Sch. Dist.*, No. 15-CV-179-JL, 2017 WL 4157065, at *6 (D.N.H. Sept. 18, 2017) (rejecting *Gebser* standard).[12] The one contrary ruling cited by defendants arose in a

[12] *See Delano-Pyle*, 302 F.3d at 574-75 ("The Fourth, Seventh, Ninth, and Eleventh circuits have all agreed that when a plaintiff asserts a cause of action against an

sprawling *pro se* lawsuit where a magistrate judge stated that *Gebser* "extends to . . . Title II," but cited cases that do not support that proposition. *Manuel v. City of Bangor*, No. 09-CV-339-B-W, 2009 WL 3398489, at *3 (D. Me. Oct. 21, 2009)).[13]

The weight of authority reflects substantial differences between Title IX and Title II. Title II requires public entities to cease disability discrimination and take affirmative steps to ensure that disabled individuals are not discriminated against. 42 U.S.C. §§ 12131-12134; 28 C.F.R. pt. 35. Given these obligations, a public entity cannot sit back and await actual notice:

> [A]n entity that provides services to the public cannot stand idly by while people with disabilities attempt to utilize programs and services designed for the able-bodied; instead, to satisfy Section 504 and Title II, such entities may very well need to act affirmatively to modify, supplement, or tailor their programs and services to make them accessible to persons with disabilities.

Pierce v. District of Columbia, 128 F. Supp. 3d 250, 266, 269 (D.D.C. 2015); *accord Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1197 (10th Cir. 2007) ("In certain

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employer-municipality, under either the ADA or the RA, the public entity is liable for the vicarious acts of *any* of its employees as specifically provided by the ADA.") (emphasis in original) (citing *Rosen v. Montgomery Cty. Md.*, 121 F.3d 154, 157 n.3 (4th Cir. 1997); *Silk v. City of Chicago*, 194 F.3d 788, 806 (7th Cir. 1999); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1141 (9th Cir. 2001); *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996)); *see also Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 377 (D. Md. 2011) ("[P]ublic entities are liable under principles of respondeat superior for their employees' violations of the ADA and Rehabilitation Act.").

[13] *See Duvall*, 260 F.3d at 1138, 1141 (applying *respondeat superior* under the ADA and Rehabilitation Act); *Bartlett v. N.Y. State Bd. of Law Examiners*, 156 F.3d 321, 331 (2d Cir. 1998) (noting that "intentional discrimination against the disabled does not require personal animosity or ill will"), *vacated on other grounds*, 527 U.S. 1031 (1999)).

instances . . . the entity will know of the individual's need for an accommodation because it is 'obvious.'").

Here, in any event, Athol well understood that people known to be experiencing mental illness should not be tased, and Gray's symptoms would have been obvious to a reasonable officer. RA 40, 257. A jury could find that Athol not only failed to prevent Cummings from taking an action that Athol understood to be improper, but that Cummings was deliberately indifferent to Gray's disability.

CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the judgment below and remand this case for trial.

Dated: December 11, 2018

Respectfully submitted,

/s/ Matthew R. Segal

Matthew R. Segal, 1st Cir. No. 1151872
Ruth A. Bourquin, 1st Cir. No. 13282
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, INC.
211 Congress Street
Boston, MA 02110
617-482-3170
msegal@aclum.org

Richard L. Neumeier, 1st Cir. No. 18535
MORRISON MAHONEY LLP
250 Summer Street
Boston, MA 02210
617-439-7569

Claudia Center, 1st Cir. No. 1185204
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
415-343-0762

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(C)

I, Matthew Segal, as counsel for the Appellant, Judith Gray, hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), as follows:

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,402 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

(2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond 14-point type.

/s/ Matthew R. Segal

Matthew R. Segal, 1st Cir. No. 1151872
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MASSACHUSETTS, INC.
211 Congress Street
Boston, MA 02110
(617) 482-3170 x330
msegal@aclum.org

Dated: December 11, 2018

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. All of the following participants in this case are registered CM/ECF users, so they will be served by the appellate CM/ECF system:

Leonard H. Kesten
Thomas R. Donohue
Brody, Hardoon, Perkins & Kesten
One Exeter Plaza, 12th floor
Boston, MA 02116
617-880-7100
lkesten@bhpklaw.com
tdonohue@bhpklaw.com

/s/ Matthew R. Segal
Matthew R. Segal

Dated: December 11, 2018