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## A *Gray Area*: The Scope of Title II of the ADA's Applicability to Ad Hoc Police Encounters

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# A GRAY AREA: THE SCOPE OF TITLE II OF THE ADA'S APPLICABILITY TO AD HOC POLICE ENCOUNTERS

**Abstract:** On February 22, 2019, in *Gray v. Cummings*, the United States Court of Appeals for the First Circuit considered whether, and to what extent, Title II of the Americans with Disabilities Act (ADA) applies to police encounters, including arrests. Recognizing that courts disagree on the point during an arrest at which Title II begins to apply, the First Circuit declined to enter the debate, assuming instead that Title II applied to the police encounter at hand for the purpose of adjudicating the claim on narrower grounds. This Comment argues that the next time the question of Title II's applicability to arrests reaches the First Circuit, the court should adopt the approach embraced by the majority of circuits. The majority approach properly finds that Title II applies to arrests without exception and that exigent circumstances, rather than bar Title II claims, weigh in the balance of assessing the reasonableness of a proposed accommodation. This approach better reflects the language of, and legislative intent behind, Title II and appropriately balances the safety concerns of both disabled individuals and law enforcement personnel by allowing for a more fact-specific inquiry.

## INTRODUCTION

Although fewer than four in every one hundred adults in the United States have a severe mental illness, these individuals make approximately one in every ten calls for police assistance.<sup>1</sup> Even more disconcerting, the mentally disabled make up a disproportionate number of those killed while interacting with police.<sup>2</sup> Indeed, individuals with untreated mental illnesses are sixteen times more likely to be killed by police than other civilians.<sup>3</sup> These violent police encounters often give rise to civil lawsuits alleging discriminatory treatment, for which the Americans with Disabilities Act (the ADA) is a common vehicle.<sup>4</sup>

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<sup>1</sup> Doris A. Fuller et al., *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters*, TREATMENT ADVOCACY CTR. 1 (2015), <https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf> [<https://perma.cc/V3DR-U7YH>]. Indeed, approximately one in three individuals who are transported to the emergency room for psychiatric care are brought there by the police. *Id.*

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See 2 MICHAEL L. PERLIN & HEATHER CUCULO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 11-2 (3d ed. 2018) (noting that the number of claims filed under the Americans with Disabilities Act (the ADA) has far surpassed original expectations); see, e.g., *Gray v. Cummings*, 917 F.3d 1, 7 (1st Cir. 2019) (assessing a cause of action under Title II of the ADA in response to alleged discrim-

The ADA prohibits discrimination on the basis of disability.<sup>5</sup> Title II in particular ensures that individuals with disabilities are able to participate in, and thus benefit from, the “services, programs, or activities” of public entities.<sup>6</sup> Because the ADA does not define the phrase “services, programs, or activities,” courts are divided on whether arrests and other police encounters fall within the scope of this language.<sup>7</sup> The answer to this question has proved to be insignificant, however, because the statute contains a catchall provision enabling individuals to state a claim under Title II simply by demonstrating that they were “subjected to discrimination” by a public entity.<sup>8</sup>

Nevertheless, courts also disagree on the point during an arrest at which Title II begins to apply.<sup>9</sup> Indeed, several courts have held that Title II of the ADA applies to the entire arrest without exception, whereas the Fifth Circuit has held that the mandates of Title II are inapplicable prior to the officers securing the scene.<sup>10</sup>

In 2019, in *Gray v. Cummings*, the First Circuit joined the discussion, considering for the first time whether, and to what extent, Title II applies to police encounters involving disabled individuals.<sup>11</sup> The First Circuit declined

ination that occurred during the course of a violent police encounter); *Haberle v. Troxell*, 885 F.3d 171, 174 (3d Cir. 2018) (same); *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1075 (11th Cir. 2007) (same). Title II claims arising from a police encounter with a disabled individual are often accompanied by claims under 42 U.S.C. § 1983. *See, e.g., Gray*, 917 F.3d at 7 (evaluating claims asserted under both Title II and § 1983); *Hainze v. Richards*, 207 F.3d 795, 797–98 (5th Cir. 2000) (same). *See generally* 42 U.S.C. §§ 12131–12165 (setting forth the mandates of Title II of the ADA). Section 1983 provides a cause of action against any person who, under color of state law, causes another person to be deprived of the “rights, privileges, or immunities” guaranteed by the Constitution. 42 U.S.C. § 1983 (2018); *see also Gray*, 917 F.3d at 7–8 (discussing *Gray*’s § 1983 claims).

<sup>5</sup> *See* 42 U.S.C. § 12101(b)(1) (2018) (providing that the purpose of Title II of the ADA is to eliminate discrimination against individuals with disabilities).

<sup>6</sup> *Id.* § 12132.

<sup>7</sup> *See id.* § 12131 (defining only “public entity” and “qualified individual with a disability”); *Haberle*, 885 F.3d at 180 (noting that courts disagree on whether arrests constitute “services, programs, or activities of a public entity”).

<sup>8</sup> *See* 42 U.S.C. § 12132 (stating that “no qualified individual with a disability shall . . . be subjected to discrimination by any such entity”); *Haberle*, 885 F.3d at 180 (referring to the “subjected to discrimination” language as a “catch-all phrase”).

<sup>9</sup> *Haberle*, 885 F.3d at 181. *Compare Bircoll*, 480 F.3d at 1085 (affirming that Title II applies to the entire police encounter at hand), *with Hainze*, 207 F.3d at 801 (holding that Title II does not apply until police officers “secur[e] the scene” and “ensur[e] that there is no threat to human life”).

<sup>10</sup> *Compare Bircoll*, 480 F.3d at 1085 (stating that there is no question as to Title II’s applicability to the police encounter at hand because Title II prohibits public entities from discriminating based on disability regardless of when the discriminatory treatment occurred), *and Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999) (noting that the law does not provide for a categorical rule excluding arrests from Title II’s reach), *with Hainze*, 207 F.3d at 801 (holding that Title II is inapplicable to ad hoc police encounters before the officer is able to “secur[e] the scene” and “ensur[e] that there is no threat to human life”).

<sup>11</sup> *Gray*, 917 F.3d at 16; *see also* Maria Cramer, *An Officer Tased a Bipolar Patient. Did He Violate a Law Protecting the Disabled?*, BOS. GLOBE (Jan. 9, 2019), <https://www.bostonglobe.com/metro/2019/01/09/woman-fleeing-hospital-tased-she-protected-federal-law-for-disabled/XVpyhz6L8>

to answer the question, however, choosing to assume that Title II applied to the incident at hand for the sole purpose of adjudicating the claim on narrower grounds.<sup>12</sup>

Part I of this Comment develops the legal, factual, and procedural background of *Gray*.<sup>13</sup> Part II considers the inconsistent approaches that circuit courts of appeals have utilized in applying Title II of the ADA to arrests, and highlights the First Circuit's reluctance to adhere to either one.<sup>14</sup> Finally, Part III suggests that the First Circuit in *Gray* should have adopted the approach embraced by the majority of circuits, rather than that of the Fifth Circuit, as the majority approach better adheres to the language of, and legislative intent behind, Title II.<sup>15</sup> It further argues that the majority approach, by allowing for a more fact-specific inquiry, provides better protection for both disabled individuals and law enforcement personnel.<sup>16</sup>

## I. TITLE II OF THE ADA AND ITS APPLICATION TO *GRAY V. CUMMINGS*

In 2019, in *Gray v. Cummings*, the First Circuit was presented with an issue that has troubled its sister courts—the scope of Title II's application to police encounters.<sup>17</sup> Section A of this Part describes Title II of the ADA.<sup>18</sup> Section B develops the facts and procedural posture of *Gray*, leading up to the First Circuit's analysis.<sup>19</sup>

### A. Title II of the ADA

The ADA is designed to protect individuals with qualified disabilities from discrimination.<sup>20</sup> Title II, in particular, states that “qualified individuals”

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ZZSy4lmRzvNI/story.html [https://perma.cc/578D-ST8M] (describing the question facing the First Circuit in *Gray* as whether the tactics employed by police officers in subduing individuals with disabilities can be limited by the ADA and, if so, which tactics are permissible).

<sup>12</sup> *Gray*, 917 F.3d at 17–18.

<sup>13</sup> See *infra* notes 17–52 and accompanying text.

<sup>14</sup> See *infra* notes 54–90 and accompanying text.

<sup>15</sup> See *infra* notes 91–116 and accompanying text.

<sup>16</sup> See *infra* notes 91–116 and accompanying text.

<sup>17</sup> See *Gray*, 917 F.3d at 16 (noting that determining whether and to what extent Title II applies to ad hoc police encounters during the course of an investigation or arrest is a difficult question, to which the answer is “less than certain”).

<sup>18</sup> See *infra* notes 20–33 and accompanying text.

<sup>19</sup> See *infra* notes 34–53 and accompanying text.

<sup>20</sup> See 42 U.S.C. § 12101(b)(1) (noting that the purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”). When the ADA was enacted, Congress recognized that approximately forty-three million Americans were suffering from one or more mental or physical disabilities, and that, out of those forty-three million, individuals who had experienced discrimination were particularly likely to be denied proper legal recourse. PERLIN & CUCULO, *supra* note 4, § 11-2; see also 42 U.S.C. § 12101(a)(4) (stating that those who experience discrimination on the basis of disability have typical-

may not be denied the opportunity to participate in, and thus reap the benefits of, a public entity's "services, programs, or activities," and it contains no statutory exceptions, thereby evidencing its broad scope.<sup>21</sup>

Although the ADA clearly defines the phrases "qualified individual with a disability" and "public entity," it does not provide a definition for the phrase "services, programs, or activities."<sup>22</sup> As such, courts are divided on whether arrests made by police officers constitute the "services, programs, or activities" of a public entity, such that the arrest itself, or the manner in which it is carried out, may constitute discrimination.<sup>23</sup> Title II is framed in the alternative, how-

ly had no legal recourse to help remedy such discrimination, particularly when compared to those who experience discrimination on the basis of race, color, sex, national origin, religion, or age).

<sup>21</sup> 42 U.S.C. § 12132 (stating 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"); *see also Gray*, 917 F.3d at 14–15 (differentiating Title II from Titles I and III, which prevent disability-related discrimination in employment and in the provision of public accommodations respectively).

<sup>22</sup> *See* 42 U.S.C. § 12131 (providing definitions for "public entity" and "qualified individual with a disability" alone); *see also* Ryan Lefkowitz, *What Are You Entitled To? Protecting Individuals with Disabilities During Interactions with Law Enforcement Under Title II of the ADA*, 49 U. MEM. L. REV. 707, 717 (2019) (noting that Title II does not define "services, programs, or activities"). Title II defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). The term "disability" refers to "a physical or mental impairment that substantially limits one or more major life activities of such individual," "a record of such impairment," or "being regarded as having such an impairment." *Id.* § 12102(1). A "public entity" is defined as "any State or local government," as well as "any department, agency, special purpose district, or other instrumentality of a State or States or local government . . ." *Id.* § 12131(1). Thus, because a police department is undoubtedly a "public entity," it is undisputed that its "services, programs, or activities" are governed by Title II. *See Gray*, 917 F.3d at 16 (stating that Title II undeniably controls the "services, programs, and activities of a municipal police department"); *see also Haberle*, 885 F.3d at 179–80 (stating that police departments easily fall within the definition of a public entity). Additionally, Title II of the ADA does not define "discrimination." Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, 1432 (2015). Rather, it provides that the Attorney General shall promulgate regulations setting forth the conduct a public entity may or may not engage in. 42 U.S.C. § 12134(a)–(b); *see also* Weber, *supra*, at 1432 (noting that the Attorney General's regulations must be consistent with the regulations set forth by the Department of Health, Education, and Welfare governing recipients of federal financial assistance under section 504 of the Rehabilitation Act of 1973). For example, one regulation states that a public entity cannot introduce "eligibility criteria that screen out or tend to screen out an individual with a disability . . . from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." 28 C.F.R. § 35.130(b)(8) (2019).

<sup>23</sup> *Haberle*, 885 F.3d at 180. *Compare* *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part and cert. dismissed in part* by 135 S. Ct. 1765, 1772 (2015) (declaring that the phrase "services, programs, or activities" should be interpreted broadly to cover "anything a public entity does"), *with* *Rosen v. Montgomery Cty.*, 121 F.3d 154, 157 (4th Cir. 1997) (stating that characterizing an arrest as a "program or activity" of a county is "a stretch of the statutory language and of the underlying legislative intent."). Indeed, the Fourth Circuit stated that it is extreme-

ever, allowing plaintiffs to prevail merely by proving that they experienced discrimination at the hands of a public entity, rather than that arrests fall within a public entity's "services, programs, or activities."<sup>24</sup> As a result, several courts have avoided categorizing them as such.<sup>25</sup> Accordingly, whether based on the conclusion that arrests constitute the "services, programs or activities" of a public entity or on the statute's blanket prohibition of discrimination by a public entity, courts are in general agreement that Title II governs arrests.<sup>26</sup>

Courts have recognized two ways that a police officer may violate Title II of the ADA while executing an arrest.<sup>27</sup> The first, which the First Circuit refers to as the "effects" theory, provides that a police officer may violate the ADA by improperly arresting an individual with a disability because the officer misperceived the disability's outward manifestations as criminal activity.<sup>28</sup> The second, known as the "accommodation" theory, provides that a police officer

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ly difficult to place an arrest within the ADA. *Rosen*, 121 F.3d at 157 (declining to hold that a drunk driving arrest was covered under Title II). The Fourth Circuit reasoned that in order to benefit from a county's "services, programs, or activities," the disabled individual must participate voluntarily. *See id.* (citing to *Torcasio v. Murray*, 57 F.3d 1340, 1347 (4th Cir. 1995), for the proposition that the language of § 12131(b) implies voluntariness of the disabled individual). The Supreme Court has subsequently called the Fourth Circuit's narrow interpretation of Title II into question. *See Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 211 (1998) (rejecting the argument that prison "services, programs, or activities" do not fall within the scope of Title II simply because participation in them is involuntary); *Lefkowitz*, *supra* note 22, at 717; *see also Gorman v. Barch*, 152 F.3d 907, 912 (8th Cir. 1998) (holding that "services, programs, or activities" of a public entity need not be voluntary in order to be covered by Title II of the ADA). Recently, courts that have held that arrests are a public service or activity have relied, at least in part, on a Department of Justice regulation that states that Title II applies to "all services, programs, and activities provided or made available by public entities." 28 C.F.R. § 35.102 (emphasis added).

<sup>24</sup> *See* 42 U.S.C. § 12132 ("[N]o 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.") (emphasis added).

<sup>25</sup> *See, e.g., Haberle*, 885 F.3d at 180 (concluding that it is unnecessary to decide whether arrests constitute the "services, programs, or activities" of a public entity due to the language of § 12132, which allows arrestees to demonstrate instead that they were "subjected to discrimination" by the police); *Bircoll*, 480 F.3d at 1084 (declining to enter the debate as to whether police conduct during the course of an arrest falls within the "services, programs, or activities" of public entities in light of Title II's catchall phrase).

<sup>26</sup> *Lefkowitz*, *supra* note 22, at 718; *see Haberle*, 885 F.3d at 181 (noting that no court of appeals had found the ADA to be wholly inapplicable to law enforcement encounters).

<sup>27</sup> *E.g., Gray*, 917 F.3d at 15; *Gohier*, 186 F.3d at 1220–21.

<sup>28</sup> *Gray*, 917 F.3d at 15 (citing *Gohier*, 186 F.3d at 1220). Other courts have referred to this theory as the "wrongful-arrest" theory. *See, e.g., Gohier*, 186 F.3d at 1221. For example, a police officer may violate the ADA under this theory when the officer arrests a deaf individual for failing to follow oral instructions. Alexis D. Campbell, Note, *Failure on the Front Line: How the Americans with Disabilities Act Should Be Interpreted to Better Protect Persons in Mental Health Crisis from Fatal Police Shootings*, 51 COLUM. HUM. RTS. L. REV. 313, 330–31 (2019); *see, e.g., Lewis v. Truitt*, 960 F. Supp. 175, 178–79 (S.D. Ind. 1997) (denying the police officers' motion for summary judgment where the arrestee claimed that he was arrested for "Resisting Law Enforcement" in spite of the fact that the officers knew he was deaf and that they failed to take the necessary steps to communicate with him).

may violate the ADA by failing to reasonably accommodate an individual's disability during the course of an arrest, thus causing the individual to suffer unnecessary harm.<sup>29</sup>

Notably, the latter theory generally requires the consideration of exigent circumstances, which threaten human life or safety, as they are critical in determining the reasonableness of a proposed accommodation.<sup>30</sup> Although all courts to apply the "accommodation" theory have concluded that exigent circumstances play a significant role in evaluating Title II's applicability to arrests, they disagree on the nature of that role.<sup>31</sup> Indeed, some courts have held that exigent circumstances relieve officers of their duty to reasonably accommodate an individual's disability entirely, thus precluding the individual from bringing a claim under Title II of the ADA.<sup>32</sup> In contrast, other courts have held that exigent circumstances shed light on the reasonableness of an officer's actions, but do not operate as a prohibitive bar to liability.<sup>33</sup>

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<sup>29</sup> *Gray*, 917 F.3d at 15. A Department of Justice regulation supports this theory, stating that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are 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." 28 C.F.R. § 35.130(b)(7)(i). The "reasonable modifications" required by the DOJ regulation refer to the "reasonable accommodations" that form the basis of the "accommodation" theory. See Carly A. Myers, Note, *Police Violence Against People with Mental Disabilities: The Immutable Duty Under the ADA to Reasonably Accommodate During Arrest*, 70 VAND. L. REV. 1393, 1410 (2017) (noting that a claim under the accommodation theory is typically characterized as a failure to make reasonable modifications).

<sup>30</sup> See Robyn Levin, Note, *Responsiveness to Difference: ADA Accommodations in the Course of an Arrest*, 69 STAN. L. REV. 269, 282, 285 (2017) (indicating that courts adjudicating reasonable accommodation claims must consider whether the exigent circumstances made the requested accommodation unreasonable). An exigent circumstance is defined as (1) "[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures," or (2) "[a] situation in which a police officer must take immediate action to effectively make an arrest, search, or seizure for which probable cause exists," and "[e]xigent circumstances may exist if . . . a person's life or safety is threatened." *Exigent Circumstances*, BLACK'S LAW DICTIONARY (11th ed. 2019); see also Myers, *supra* note 29, at 1413 (defining exigent circumstances as circumstances that are present where a person's unlawful activity causes a perceived danger to a police officer or the public at large).

<sup>31</sup> Myers, *supra* note 3129, at 1413.

<sup>32</sup> See, e.g., *Hainze*, 207 F.3d at 801 (holding that Title II claims are unavailable where the exigent circumstances are such that a threat to human life exists).

<sup>33</sup> See, e.g., *Sheehan*, 743 F.3d at 1232 (concluding that exigent circumstances speak to the reasonableness of a proposed accommodation). The Supreme Court attempted to clarify this issue in 2015 when it issued its decision in *City & County of San Francisco v. Sheehan*. 135 S. Ct. at 1772–74. In its petition for certiorari, San Francisco requested that the Court determine "[w]hether Title II of the Americans with Disabilities Act requires law enforcement to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." Petition for Writ of Certiorari, *Sheehan*, 135 S. Ct. 1765 (No. 13-1412). After the Court granted certiorari, however, San Francisco declined to raise this issue before the Court, instead conceding that arrests of disabled individuals fall under Title II. *Sheehan*, 135 S. Ct. at 1778–79 (Scalia, J., concurring). As a result, the Court did not address this question, dismissing it as "improvidently granted." *Id.* at 1769. Notably, in 2018, when the Supreme Court had another opportunity to answer this very same question, the Court declined to do so. See *Vos v. City of Newport Beach*, 892 F.3d 1024, 1037 (9th Cir. 2018), *cert. de-*

### B. The Factual Background and Procedural Posture of Gray

On May 2, 2013, Judith Gray, who suffered from bipolar disorder, had a manic episode and called the police for assistance.<sup>34</sup> Police officers from the Athol Police Department transported Gray to Athol Memorial Hospital where she was admitted pursuant to a Massachusetts law permitting the involuntary hospitalization of individuals who pose a serious risk of harm due to mental illness.<sup>35</sup> Approximately six hours later, however, when hospital staff discovered that Gray left the hospital without authorization, they called the police and requested that they locate and return Gray, a “section 12 patient,” to the hospital.<sup>36</sup> Thomas Cummings, a police officer of the Athol Police Department, responded to the request and quickly located Gray.<sup>37</sup>

Despite Officer Cummings’s repeated requests that Gray return to the hospital, she refused to comply with his demands.<sup>38</sup> A physical confrontation ensued once Gray turned and approached Officer Cummings with clenched fists.<sup>39</sup> As a result, Officer Cummings brought Gray to the ground and ordered that she place her hands behind her back.<sup>40</sup> When she did not obey his instructions, he threatened to tase her.<sup>41</sup> Gray’s continued defiance led Officer Cummings to place the Taser in “drive stun” mode before tasing her in the back for approximately four to six seconds.<sup>42</sup> At this point, he was able to handcuff

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nied, 139 S. Ct. 2613 (2019) (mem.). In *Vos v. City of Newport Beach*, the Ninth Circuit had reversed the district court’s grant of summary judgment in favor of the city on the ADA claim, holding that the officers in question had time to employ the requested accommodations. *Id.*

<sup>34</sup> *Gray*, 917 F.3d at 5–6.

<sup>35</sup> *Id.* at 6; see also MASS. GEN. LAWS ch. 123, § 12 (2018) (authorizing involuntary “[e]mergency restraint and hospitalization of persons posing risk of serious harm by reason of mental illness”).

<sup>36</sup> *Gray*, 917 F.3d at 6. In Massachusetts, a “section 12 patient” is an individual who poses “risk of serious harm by reason of mental illness” and therefore requires “[e]mergency restraint and hospitalization.” MASS. GEN. LAWS ch. 123, § 12.

<sup>37</sup> *Gray*, 917 F.3d at 6. When Officer Cummings located Gray, she was less than a quarter mile from the hospital walking barefoot along the sidewalk. *Id.* Officer Cummings had graduated from the Boylston Regional Police Academy in 2011, where he was trained to interact with individuals suffering from mental illness. *Gray v. Cummings*, No. 15-10276, 2017 WL 8942566, at \*2 (D. Mass. 2017).

<sup>38</sup> *Gray*, 917 F.3d at 6. When Officer Cummings pleaded with Gray to return to the hospital, she responded with profanity. *Id.* Although Officer Cummings requested backup, he did not wait for it to arrive. Brief of Plaintiff-Appellant at 6, *Gray*, 917 F.3d 1 (No. 18-1303).

<sup>39</sup> *Gray*, 917 F.3d at 6.

<sup>40</sup> *Id.* Notably, there was a substantial size differential between Officer Cummings and Gray—Officer Cummings was six feet, three inches tall and weighed 215 pounds, whereas Gray was five feet, ten inches tall and weighed one hundred and forty pounds. *Id.*

<sup>41</sup> *Id.* Indeed, rather than heed Officer Cummings’s warning, Gray “tucked her arms underneath her chest and flex[ed] tightly.” *Id.*

<sup>42</sup> *Id.* at 6–7. Tasers typically have two modes: “dart mode” and “drive stun” mode. Brief for the Defendants-Appellees, Thomas A. Cummings; Town of Athol, Massachusetts, at 27 n.6, *Gray*, 917 F.3d 1 (No. 18-1303). When a Taser is in “dart mode,” it is capable of overriding a person’s central nervous system. *Id.* “Drive stun” mode, on the other hand, is a less painful mode that causes temporary, localized pain and is incapable of overriding the target’s central nervous system. *Id.* at 18, 27 n.6. As a result, however, Gray still suffered considerable pain and lost consciousness. Brief of Plaintiff-



Gray, and she was ultimately transported back to the hospital.<sup>43</sup> Although charges were initially filed against Gray for “assault on a police officer, resisting arrest, disturbing the peace, and disorderly conduct,” the charges were ultimately dropped.<sup>44</sup>

Gray then brought suit against Officer Cummings and the town of Athol, Massachusetts in the United States District Court for the District of Massachusetts, asserting, among other violations, a cause of action under Title II of the ADA against Athol.<sup>45</sup> With respect to the ADA claim, Gray advanced arguments under both the “effects” theory and the “accommodation” theory.<sup>46</sup> First, Gray claimed that the criminal charges filed against her served as evidence that Officer Cummings misperceived her refusal to comply as criminal behavior, rather than recognizing that her behavior was simply a symptom of her disability.<sup>47</sup> Second, Gray argued that Officer Cummings should have accommodated her disability by, for example, waiting for the assistance of an ambulance or a mental health professional.<sup>48</sup>

Following discovery, Officer Cummings and Athol moved for summary judgment, the consideration of which was referred to a magistrate judge.<sup>49</sup> The magistrate judge concluded that Officer Cummings did not violate the ADA

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Appellant, *supra* note 38, at 15. Athol Police Department’s protocol as it pertains to the use of a Taser states that officers should not use Tasers on “[t]hose known to be suffering from severe mental illness.” *Id.* at 6.

<sup>43</sup> *Gray*, 917 F.3d at 7.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* Notably, a claim under Title II of the ADA may only be brought against a public entity, rather than an individual defendant. See 42 U.S.C. § 12132 (preventing disabled individuals from being excluded from the “services, programs, or activities of a public entity” or from being “subjected to discrimination by any such entity”) (emphasis added). As such, Gray was unable to bring a claim under Title II against Officer Cummings himself. See *id.*; *Gray*, 917 F.3d at 14. Gray also brought state-law claims for assault and battery, malicious prosecution, and violations of the Massachusetts Civil Rights Act, as well as two separate causes of action under 42 U.S.C. § 1983 against both Athol and Officer Cummings. *Gray*, 917 F.3d at 7. She sought both monetary damages and injunctive relief. *Id.* at 19. First, Gray’s § 1983 claim against Officer Cummings asserted that he used excessive force during her arrest and, as a result, violated her Fourth Amendment rights. *Id.* at 8. To succeed on this claim, Gray had to demonstrate that, under the totality of the circumstances, Officer Cummings used an unreasonable amount of force during the course of the arrest. *Id.* To determine whether a given use of force is reasonable, a number of factors must be considered, including the severity of the crime, whether and to what extent the suspect posed a threat, and whether the suspect resisted arrest in any way. *Id.* Next, Gray alleged that Athol violated her Fourth Amendment rights by inadequately training its officers to appropriately interact with individuals suffering from mental illness. *Id.* at 13–14. For a town to be held liable on a failure-to-train claim, the plaintiff must demonstrate that the town knew, or should have known, that the training was deficient and displayed deliberate indifference to the unconstitutional consequences of these deficiencies. *Id.* at 14. To demonstrate deliberate indifference, a plaintiff typically must present a pattern of constitutional violations by untrained employees. *Id.*

<sup>46</sup> *Gray*, 917 F.3d at 15.

<sup>47</sup> *Id.* at 15–16.

<sup>48</sup> *Id.* at 16.

<sup>49</sup> *Id.* at 7.

because, despite Gray's disability, he employed a reasonable amount of force in light of the existing threat.<sup>50</sup> The district court adopted the magistrate judge's recommendation as it pertained to the ADA claim in full.<sup>51</sup> Gray appealed the district court's decision to the United States Court of Appeals for the First Circuit.<sup>52</sup> The First Circuit affirmed the district court's grant of summary judgment in favor of Athol on Gray's Title II claim, concluding that Gray failed to demonstrate a genuine issue of material fact as to the officer's deliberate indifference to the risk of an ADA violation.<sup>53</sup>

## II. COURTS DISAGREE ON WHETHER, AND TO WHAT EXTENT, TITLE II OF THE ADA APPLIES TO ARRESTS

Although no federal circuit has held Title II of the ADA to be entirely inapplicable to arrests, courts are divided on one significant issue—the exact extent to which it applies to arrests.<sup>54</sup> As a result, an individual bringing an ADA claim in one jurisdiction may be effectively barred from bringing the same claim in another.<sup>55</sup>

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<sup>50</sup> *Id.* Additionally, the magistrate judge found no violation of the Fourth Amendment on the part of either Officer Cummings or Athol, recommending summary judgment in favor of both defendants on the § 1983 claim. *Id.* Specifically, with regard to the claim against Officer Cummings, the magistrate judge found that, as a matter of law, the use of a Taser in drive stun mode was reasonable given the circumstances at hand. *Id.* at 8. Moreover, the magistrate judge determined that, even if Officer Cummings had committed a constitutional violation, he was entitled to qualified immunity because he did not infringe on a clearly established constitutional right. *Gray*, 2017 WL 8942566, at \*7. Indeed, to successfully raise a qualified immunity defense, a defendant must demonstrate that the allegedly violated constitutional right was not “clearly established” at the time of the violation, such that the defendant did not have fair notice that the conduct was unconstitutional. *Id.* Here, the magistrate judge concluded that the right was not clearly established because a reasonable person in Officer Cummings's shoes would not have believed that using a Taser to subdue Gray was unlawful. *Id.* at \*9. Additionally, because a constitutional violation on the part of an Athol police officer is required to hold Athol liable for failure to train under § 1983, and the magistrate judge had found no such violation, the magistrate recommended granting Athol's motion for summary judgment. *Id.* The district court adopted the magistrate judge's recommendation. *Gray*, 917 F.3d at 7; *Gray v. Cummings*, 4:15-CV-10276, 2018 WL 1956872, at \*1 (D. Mass. 2018). It declined, however, to address the magistrate's finding that Officer “Cummings employed reasonable force under all of the circumstances,” because it agreed that “the right not to be tased while offering non-violent, stationary, resistance to a lawful seizure was not [c]learly established at the time of the confrontation between . . . Gray and Officer Cummings.” *Gray*, 917 F.3d at 7; *Gray*, 2018 WL 1956872, at \*1.

<sup>51</sup> *See Gray*, 2018 WL 1956872, at \*1 (adopting the Report and Recommendation of the magistrate judge).

<sup>52</sup> *Gray*, 917 F.3d at 7.

<sup>53</sup> *Id.* at 18–19.

<sup>54</sup> *Gray v. Cummings*, 917 F.3d 1, 16–17 (1st Cir. 2019); *Haberle v. Troxell*, 885 F.3d 171, 181 (3d Cir. 2018). *Compare Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1085 (11th Cir. 2007) (declaring that Title II applies to arrests without exception), *with Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) (holding that Title II does not apply to an arrest before police officers “secur[e] the scene” and “ensur[e] that there is no threat to human life”).

<sup>55</sup> Levin, *supra* note 30, at 272–73.

Section A of this Part explains the approach adopted in *Hainze v. Richards*, in which the Fifth Circuit held that exigent circumstances serve as a bar to Title II claims.<sup>56</sup> Section B describes the approach embraced by a number of other courts, including the Ninth and the Eleventh Circuits, that considers exigent circumstances when assessing the reasonableness of a proposed accommodation.<sup>57</sup> Finally, Section C explores the First Circuit's reluctance to adopt either approach.<sup>58</sup>

### A. Exigent Circumstances as a Bar to Title II Claims

In 2000, in *Hainze v. Richards*, the Fifth Circuit Court of Appeals adopted a unique approach for determining if and when Title II of the ADA applies to police encounters.<sup>59</sup> In *Hainze*, a woman requested that the police bring her nephew, Kim Michael Hainze, who had a history of depression, to the hospital for mental health treatment.<sup>60</sup> She indicated that Hainze was under the influence of alcohol and antidepressants and was threatening to commit suicide or "suicide by cop."<sup>61</sup> The officers located Hainze standing by the passenger door of a pickup truck carrying a knife.<sup>62</sup> He approached the officers and, after he ignored their commands to stop, they fired two shots into his chest.<sup>63</sup>

Having survived his gunshot wounds, Hainze brought a claim against the county for relief under Title II of the ADA using the "accommodation" theory.<sup>64</sup> Specifically, he claimed that the county failed to reasonably accommodate his disability by failing to adopt a policy that protected individuals experiencing mental health crises, thus resulting in discriminatory treatment.<sup>65</sup> The Fifth

<sup>56</sup> See *infra* notes 59–68 and accompanying text.

<sup>57</sup> See *infra* notes 69–86 and accompanying text.

<sup>58</sup> See *infra* notes 87–90 and accompanying text.

<sup>59</sup> See *Hainze*, 207 F.3d at 801 (holding that Title II does not cover a police officer's conduct prior to securing the scene); see also *Gray*, 917 F.3d at 16 (noting that other courts have taken a different approach from that of the Fifth Circuit).

<sup>60</sup> *Hainze*, 207 F.3d at 797.

<sup>61</sup> *Id.* An individual commits "suicide by cop" by provoking a police officer to use deadly force against him or her. *Id.* at 797 n.1.

<sup>62</sup> *Id.* at 797. Despite the cold weather, Hainze was not wearing shoes when the officers located him. *Id.* The officers emerged from their vehicles, drew their weapons, and demanded that Hainze back away from the truck. *Id.* Hainze replied with profanity. *Id.*

<sup>63</sup> *Id.* The officers fired the shots when Hainze was approximately four to six feet away. *Id.* The entire encounter, from the time the officers located Hainze until the moment he was shot, lasted approximately twenty seconds. *Id.*

<sup>64</sup> *Id.* at 797–98, 801.

<sup>65</sup> *Id.* at 801. Hainze also claimed that by using deadly force to subdue him, the police officer denied him the benefits of the mental health training provided to all of the county's officers. *Id.* at 800. The Fifth Circuit rejected this claim, emphasizing that to successfully state a claim under Title II, an individual must be denied the benefits of a public entity's "services, programs, or activities" by the public entity itself. *Id.* at 801. In so doing, the Fifth Circuit observed that Hainze was denied the bene-

Circuit disagreed, concluding that Title II does not apply to ad hoc police encounters before the officer has ensured that the scene is secure and that no threat exists, irrespective of whether the encounter involves a disabled individual.<sup>66</sup> As such, the Fifth Circuit implemented a bright-line rule, effectively holding that exigent circumstances serve as a complete bar to Title II claims.<sup>67</sup> Stated another way, where exigent circumstances are present, the reasonable accommodation of an individual's disability is not required.<sup>68</sup>

### *B. Exigent Circumstances as a Factor in Determining the Reasonableness of an Accommodation*

Alternatively, other courts have held that Title II applies without exception to ad hoc police encounters, including arrests.<sup>69</sup> These courts have concluded that exigent circumstances do not bar Title II claims, but rather shed light on the reasonableness of a proposed accommodation.<sup>70</sup>

fits of the county's mental health training by reason of his assault on the officer with a deadly weapon, not by the county itself. *Id.*

<sup>66</sup> *Id.* at 801. The Fifth Circuit reasoned that law enforcement officials should not have to consider ADA compliance when exigent circumstances are present, as doing so would endanger the public. *Id.* Requiring officers to stop to consider other courses of action while making split-second decisions, the Fifth Circuit held, "is [not] the type of 'reasonable accommodation' contemplated by Title II." *Id.* at 801–02.

<sup>67</sup> *Id.* at 801; see also Levin, *supra* note 30, at 286 (construing the Fifth Circuit's approach to exigent circumstances as a complete bar to ADA claims). In *Wilson v. City of Southlake*, the Fifth Circuit referred to this rule as the "exigent circumstances exception." 936 F.3d 326, 331 (2019) (internal quotations omitted). In that case, the family of an eight-year old boy with substantial disabilities brought a number of actions, including an action under Title II of the ADA, against the city of Southlake, Texas, the Southlake Police Department, and School Resource Officer (SRO) Randy Baker. *Id.* at 328–29. The boy's family argued that SRO Baker violated the ADA when he responded to an incident at school in which the boy attempted to hit the principal with nunchucks by handcuffing him and taking him to the principal's office where SRO Baker continued to "berate[e] and antagoniz[e]" him. *Id.* The district court granted the city's motion for summary judgment, finding that the "exigent circumstances exception" applied. *Id.* at 330–31. It would put innocent people at risk, the court reasoned, to require SRO Baker to investigate the boy's disability before working to defuse the situation. *Id.* at 330. The Fifth Circuit reversed, holding that the exception did not apply because there was no threat of imminent harm or, in other words, there were no exigent circumstances; "this was merely a disruption." *Id.* at 331 (internal quotations omitted).

<sup>68</sup> See *Hainze*, 207 F.3d at 801–02; see also Lefkowitz, *supra* note 22, at 725 (noting that the *Hainze* approach "is the only approach that renders Title II completely inapplicable in certain situations"); Levin, *supra* note 30, at 286 (stating that, under the *Hainze* approach, reasonable accommodations are not required before the scene is secure and no threat to human life exists).

<sup>69</sup> *Gray*, 917 F.3d at 16 (noting that other courts have adopted a different approach from that of the Fifth Circuit); see, e.g., *Bircoll*, 480 F.3d at 1085 (declaring that Title II applies to an arrest regardless of the exigent circumstances present); *Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999) (stating that arrests are not categorically excluded from Title II).

<sup>70</sup> See, e.g., *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part and cert. dismissed in part* by 135 S. Ct. 1765, 1772 (2015) (holding that "exigent circumstances inform the reasonableness analysis under the ADA"); *Bircoll*, 480 F.3d at 1085 (concluding that "exigent circumstances presented by criminal activity . . . go more to the reasonableness of the

For example, in *Bircoll v. Miami-Dade County*, decided in 2007, the Eleventh Circuit assessed a Title II claim that arose after police officers pulled over Steven Bircoll, who had no hearing in his left ear and ten percent hearing in his right, for a traffic stop.<sup>71</sup> When Bircoll stepped out of his car, the officer smelled alcohol and administered several field sobriety tests.<sup>72</sup> Ultimately, the officer determined that Bircoll was too impaired to drive and arrested him for driving under the influence (DUI).<sup>73</sup>

Subsequently, Bircoll filed a lawsuit alleging that the county violated Title II of the ADA by failing to provide him with auxiliary aids to facilitate his communication with the officer during the field sobriety tests.<sup>74</sup> The Eleventh Circuit held that the applicability of the ADA was not in question, as Title II clearly prohibits discrimination by a public entity on the basis of disability.<sup>75</sup> Rather, the question was whether any modification to police procedure is reasonable given the exigent circumstances.<sup>76</sup> As such, the Eleventh Circuit concluded that, in light of the serious public safety concerns that a DUI stop on the side of a highway entails, waiting for an oral interpreter before administering a field sobriety test would not have been a reasonable accommodation.<sup>77</sup>

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requested ADA modification than whether the ADA applies in the first instance”). Similarly, the Fourth Circuit has held that determining whether a proposed accommodation is reasonable depends, at least in part, on the exigent circumstances present. *Seremeth v. Bd. of Cty. Comm’rs Frederick Cty.*, 673 F.3d 333, 339 (4th Cir. 2012). Deciding what constitutes a reasonable accommodation, the Fourth Circuit declared, is a fact and circumstances inquiry. *Id.* at 340.

<sup>71</sup> *Bircoll*, 480 F.3d at 1075–76.

<sup>72</sup> *Id.* at 1076–77. Specifically, the officer allegedly administered the Romberg balance test, the one-leg stand exercise, the walk-and-turn test, and the finger-to-nose test. *Id.* at 1077–78. Bircoll and the officer disagreed as to the results of the aforementioned tests. *Id.* The officer testified that Bircoll passed the first test, the Romberg balance test, but Bircoll stated that he was unable to complete it. *Id.* at 1077. As to the second test, the one-leg stand test, Bircoll stated that he performed it easily, whereas the officer claimed that Bircoll failed. *Id.* Specifically, the officer stated that Bircoll failed this test because, in order to maintain balance, he needed to raise his arms and shuffle his feet. *Id.* Next, Bircoll testified that he successfully completed the third test, the walk-and-turn test. *Id.* at 1077–78. The officer, however, contended that Bircoll was unable to maintain his balance and failed as a result. *Id.* at 1078. Finally, Bircoll stated that he did not remember performing the finger-to-nose test. *Id.* According to the officer, however, Bircoll failed for a number of reasons, including that he missed the tip of his nose. *Id.*

<sup>73</sup> *Id.* at 1078.

<sup>74</sup> *Id.* at 1085. According to Bircoll, had the officer provided him with auxiliary aids, he would have better understood the officer’s requests. *Id.* Indeed, Bircoll contended that he asked the officer to call an interpreter, but the officer declined to do so. *Id.* at 1086. Notably, Bircoll also claimed that another officer subjected him to discrimination during the consent warning and breath test at the police station. *Id.* at 1085. The Eleventh Circuit disagreed, however, finding instead that this officer maintained effective communication with Bircoll. *Id.* at 1088.

<sup>75</sup> *Id.* at 1085.

<sup>76</sup> *Id.* This question, which the Eleventh Circuit referred to as the “reasonable-modification inquiry,” must be decided case by case because of its fact-specific nature. *Id.* at 1085–86.

<sup>77</sup> *Id.* at 1086. The Eleventh Circuit reasoned that DUI stops are time-sensitive and that waiting for an oral interpreter would impede the officer’s ability to get an accurate measure of the driver’s

In 2014, in *Sheehan v. City & County of San Francisco*, the Ninth Circuit similarly held that exigent circumstances affect the reasonableness of a proposed accommodation.<sup>78</sup> Here, police officers had visited Teresa Sheehan, a mentally ill woman, after her social worker became concerned for her well-being.<sup>79</sup> When the officers arrived at her home, she grabbed a knife and threatened to kill them, causing them to retreat to the hallway.<sup>80</sup> After calling for backup, the officers drew their weapons and reentered the room.<sup>81</sup> When Sheehan approached the officers with the knife once again, they shot her approximately five to six times.<sup>82</sup>

Sheehan survived the encounter and subsequently brought an action against the city, asserting violations of Title II of the ADA under the “accommodation” theory.<sup>83</sup> She alleged that the officers failed to accommodate her disability when they forcibly re-entered her room, rather than attempting to defuse the situation.<sup>84</sup> In considering the extent to which Title II applies to arrests, the Ninth Circuit expressly declined to adopt the Fifth Circuit’s approach, holding instead that the reasonableness of a proposed accommodation depends on the exigent circumstances present.<sup>85</sup> Applying this rule to the facts

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intoxication which, in turn, would endanger the public. *Id.* (noting that the DUI stop took place at approximately three in the morning).

<sup>78</sup> *Sheehan*, 743 F.3d at 1232.

<sup>79</sup> *Id.* at 1215. Sheehan’s social worker indicated that ever since Sheehan had stopped taking her medication, she had become “gravely disabled” and “a danger to others.” *Id.* Indeed, she had threatened him when he went to visit her earlier that day at the group home for people suffering from mental illness where she lived. *Id.* at 1215, 1217. As such, the social worker wanted the police’s assistance in bringing her to a mental health facility for a psychological assessment and treatment. *Id.* at 1215.

<sup>80</sup> *Id.* at 1215. Sheehan admitted to having a knife and threatening the officers’ lives. *Id.* at 1219. She also testified that she had indicated to the officers that they did not possess a search warrant and that they needed a subpoena if they wanted to speak to her. *Id.*

<sup>81</sup> *Id.* at 1215–16. One officer testified that she felt compelled to reenter the room in order to determine whether Sheehan had managed to escape or obtain additional weapons. *Id.* at 1219. She feared that if Sheehan had escaped, she would become a threat to others. *Id.* She conceded that she did not consider Sheehan’s mental illness when she made the decision to enter her room the second time. *Id.*

<sup>82</sup> *Id.* at 1216. One of the officers stated that she first tried spraying Sheehan with pepper spray but that it did not succeed in stopping Sheehan’s advances. *Id.* at 1219–20. It was only then that she fired her weapon. *Id.* at 1220. According to Sheehan, however, the pepper spray caused her to lose her sight and she began to fall. *Id.* The officers, she claimed, then shot at her as she fell. *Id.*

<sup>83</sup> *Id.* at 1216, 1232.

<sup>84</sup> *Id.* at 1232–33. Specifically, Sheehan claimed that the officers should have communicated in a non-threatening manner and defused the situation by allowing additional time to pass before forcing their way back into the room and initiating a dangerous confrontation. *Id.* at 1233.

<sup>85</sup> *Id.* at 1232. Although in *City & County of San Francisco v. Sheehan*, the Supreme Court reversed the Ninth Circuit’s holding as it pertained to qualified immunity, it did not address the question of Title II’s application to the arrest of an “armed, violent, and mentally ill suspect.” 135 S. Ct. at 1772–73. As such, the Ninth Circuit’s holding regarding the scope of Title II’s application to arrests remains binding precedent as of the date of this Comment. See *Sheehan*, 743 F.3d at 1232 (holding that the reasonableness of a proposed accommodation depends on the exigent circumstances at hand);

at hand, the Ninth Circuit concluded that a reasonable jury could find that, once the officers had retreated from Sheehan's room, the situation had been sufficiently defused so as to give the officers ample time to provide the accommodations Sheehan demanded.<sup>86</sup>

### C. The First Circuit Joins the Discussion

In order to adjudicate Judith Gray's claim under Title II of the ADA, the First Circuit in *Gray v. Cummings* had to determine, as its sister courts had done, whether, and to what extent, Title II applies to ad hoc police encounters.<sup>87</sup> The First Circuit expressly declined to do so and simply assumed, for the purpose of adjudicating the claim on narrower grounds, that Title II applies to ad hoc police encounters and that exigent circumstances should be considered when assessing the reasonableness of an officer's actions.<sup>88</sup> Thus, the First Circuit applied the approach embraced by both the Ninth and Eleventh Circuits.<sup>89</sup> In so doing, the First Circuit affirmed the district court's grant of summary judgment in favor of Athol on Gray's ADA claim, holding that Gray failed to demonstrate a genuine issue of material fact as to the officer's deliberate indifference to the risk of violating Title II, an element necessary for obtaining monetary damages on an ADA claim.<sup>90</sup>

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Levin, *supra* note 30, at 292 (noting that "the *Sheehan* ADA finding remains good law in the Ninth Circuit").

<sup>86</sup> *Sheehan*, 743 F.3d at 1233–34.

<sup>87</sup> *Gray*, 917 F.3d at 16 (Retired Justice David Souter was sitting by designation). The First Circuit also addressed two additional matters of first impression: (1) whether "a public entity [may] be held liable under Title II for a line employee's actions on a theory of respondeat superior," and (2) whether "proof of a defendant's deliberate indifference . . . [is] sufficient to support a plaintiff's claim for damages under Title II." *Id.* The First Circuit declined to answer either, simply assuming, to Gray's benefit, that Athol could be held vicariously liable for Officer Cummings's conduct under Title II of the ADA and that "deliberate indifference" was the applicable standard. *Id.* at 17.

<sup>88</sup> *Id.* In so doing, the court reaffirmed the principle that courts need not decide unresolved legal issues when it is unnecessary to do so. *Id.* at 18 (citing *United States v. Gonzalez*, 736 F.3d 40, 40 (1st Cir. 2013)) (noting that Gray was required to demonstrate a genuine issue of material fact as to Officer Cummings's "deliberate indifference" to violating the ADA and that she failed to do so). Similarly, the Third Circuit declined to expressly adopt either approach for determining which accommodations, if any, are reasonable in the context of an arrest where exigent circumstances are present. *Haberle*, 885 F.3d at 181 n.11. Instead, the Third Circuit denied the ADA claim due to the disabled individual's failure to plead sufficient facts to demonstrate deliberate indifference. *Id.* The Third Circuit noted, however, that it may need to address the question in the future. *Id.*

<sup>89</sup> *Gray*, 917 F.3d at 17; see *Sheehan*, 743 F.3d at 1215 (agreeing with the Eleventh Circuit that the reasonableness analysis under Title II is informed by the exigent circumstances present); *Bircoll*, 480 F.3d at 1085 (stating that the exigent circumstances speak to the reasonableness of a proposed ADA modification).

<sup>90</sup> *Gray*, 917 F.3d at 18–19. To be eligible for monetary damages on a Title II claim, a plaintiff must demonstrate "intentional discrimination" by the public entity. *Id.* at 17. Although other courts have held that a showing of "deliberate indifference" may be sufficient to meet this requirement, the First Circuit has not so held. *Id.* Rather than do so here, the First Circuit simply assumed that a showing of "deliberate indifference" would suffice. *Id.* at 8, 18–19 (assuming that "deliberate indifference"

### III. THE FIRST CIRCUIT SHOULD REJECT THE FIFTH CIRCUIT'S *HAINZE* APPROACH IN FAVOR OF THE MAJORITY APPROACH

In *Gray v. Cummings*, the First Circuit adjudicated Gray's ADA claim without deciding whether Title II requires police officers to reasonably accommodate an individual with a disability during the course of an arrest where exigent circumstances are present.<sup>91</sup> As such, the First Circuit missed an opportunity to set forth a standard that signals to the public, and law enforcement in particular, the importance of protecting the disabled during their encounters with police.<sup>92</sup> The next time the First Circuit is presented with this issue, it should reject the Fifth Circuit's approach in *Hainze* in favor of the more flexible approach adopted by the majority of circuits.<sup>93</sup>

Section A of this Part demonstrates that the *Hainze* approach disregards the language of and legislative intent behind Title II of the ADA.<sup>94</sup> Section B argues that the majority approach adopted by the Ninth and Eleventh Circuits, among others, allows for a more fact-specific inquiry, thus sufficiently addressing legitimate concerns for the safety of law enforcement personnel and the public at large.<sup>95</sup>

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was sufficient because doing so was most favorable to Gray, as required at the summary judgment stage). As such, to prevail on the "effects" theory claim, Gray would have had to demonstrate that Officer Cummings knew that her refusal to comply with his demands was a manifestation of her disability. *Id.* at 18. Similarly, to prevail on the "accommodation" theory, Gray would have had to show that Officer Cummings knew that he was required to provide a reasonable accommodation. *Id.* The First Circuit concluded that Gray failed to make either showing. *Id.* Specifically, the First Circuit held that although Officer Cummings knew that Gray had a disability, due to his understanding that she was a "section 12 patient," he was not aware of the nature of her disability; namely, he did not know that she was bipolar or that she was experiencing a manic episode. *Id.* Without this knowledge, the First Circuit reasoned, Officer Cummings would be unable to determine whether Gray's behavior was a symptom of her disability and, accordingly, which accommodations, if any, were reasonable. *Id.* Notably, Gray's complaint sought injunctive relief as well. *Id.* at 19. Specifically, Gray sought an injunction requiring Athol to (1) properly discipline its police officers by, for example, terminating officers who demonstrate a propensity to use excessive force, (2) implement a procedure for the appropriate use of force against those who do not pose a threat, and (3) supply officers with training that would prepare them to adequately interact with individuals with mental illnesses. Complaint & Jury Demand at 7, *Gray v. Cummings*, 2017 WL 8942566 (D. Mass. 2015) (No. 15-10276). In order for Gray to be granted injunctive relief, however, she was required to demonstrate a likelihood of being tased again. *Gray*, 917 F.3d at 19. Because Gray merely claimed that, as a result of her disability, she is likely to encounter the police again, she did not meet the required showing. *Id.*

<sup>91</sup> *Gray v. Cummings*, 917 F.3d 1, 17–18 (1st Cir. 2019).

<sup>92</sup> Compare *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) (failing to provide protection for disabled individuals under the ADA where exigent circumstances are present), with *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part and cert. dismissed in part* by 135 S. Ct. 1765, 1772 (2015) (providing additional protections for the disabled by holding that exigent circumstances shed light on the reasonableness of a proposed accommodation).

<sup>93</sup> See *infra* notes 96–116 and accompanying text.

<sup>94</sup> See *infra* notes 96–103 and accompanying text.

<sup>95</sup> See *infra* notes 104–116 and accompanying text.



*A. The Hainze Approach Overlooks the Language of, and  
Legislative Intent Behind, Title II of the ADA*

Congress intended for the ADA to serve as a “comprehensive national mandate” prohibiting the discrimination of individuals with disabilities.<sup>96</sup> Congress’s desire for Title II, in particular, to be far-reaching in scope is demonstrated by the absence of any statutory exceptions in its language.<sup>97</sup> In contrast, Titles I and III contain “direct threat” exceptions, which provide that accommodations are not required where they would create a direct threat to the health or safety of others.<sup>98</sup> By holding that Title II does not apply to an arrest where a threat to human life exists, the Fifth Circuit effectively wrote in a direct threat exception and, consequently, overlooked the language of, and legislative intent behind, the statute.<sup>99</sup>

Notably, although there is no “direct threat” provision within the language of Title II itself, the Department of Justice promulgated a regulation containing such an exception.<sup>100</sup> Specifically, the regulation provides that public entities need not accommodate a disabled individual where that individual directly threatens the health or safety of other members of the public.<sup>101</sup> In determining whether an individual poses such a threat, however, the public entity must consider “whether reasonable modifications of policies, practices, or procedures

<sup>96</sup> 42 U.S.C. § 12101(b)(1) (2018); *see also Gray*, 917 F.3d at 14 (noting that the purpose of the ADA is to put an end to discrimination against disabled individuals on a national scale). *See generally* 42 U.S.C. §§ 12111–12117; 12131–12165; 12181–12189 (providing for protection from disability discrimination related to employment, public entities, and public accommodations, respectively).

<sup>97</sup> *See generally* 42 U.S.C. § 12132. Comparing Title II of the ADA with section 504 of the Rehabilitation Act of 1973, which was the key piece of disability legislation until the ADA was enacted in 1990, further illustrates Congress’s desire for the ADA to be far-reaching in scope. *Compare* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701–797 (2015)) (applying only to federally funded entities and programs), *with* 42 U.S.C. § 12132 (covering a wider range of entities, including state and local governments).

<sup>98</sup> 42 U.S.C. §§ 12111–12113(b); *id.* § 12182(b)(3). Title I of the ADA prohibits discrimination against disabled individuals in the employment context. *Id.* § 12112. Under Title I, a “direct threat” is defined as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” *Id.* § 12111(3). Similarly, under Title III, which prohibits disability-related discrimination in public accommodations, “direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.” *Id.* § 12182(b)(3) (internal quotations omitted).

<sup>99</sup> *See Hainze*, 207 F.3d at 801; *see also Lefkowitz*, *supra* note 22, at 734 (stating that the Fifth Circuit’s “securing the scene” exception has no basis in Title II of the ADA); Levin, *supra* note 30, at 314 (noting that the Fifth Circuit’s approach is not rooted in either the legislative history or language of the ADA). Indeed, in a case addressing a claim of discrimination under Title II almost two decades later, Judge Ho declared that the Fifth Circuit in *Hainze* “created a categorical ‘exigent circumstances’ defense that appears nowhere in the text of either the [ADA] or the Rehabilitation Act.” *Wilson v. City of Southlake*, 936 F.3d 326, 333 (2019) (Ho, J., concurring). Moreover, he stated that it is “not surprising that every circuit to opine on this issue has . . . rejected [the Fifth Circuit’s] approach.” *Id.*

<sup>100</sup> *See* 28 C.F.R. § 35.139(a) (2019) (providing a “direct threat” exception to the prohibitions under Title II of the ADA).

<sup>101</sup> *Id.*

. . . will mitigate the risk [of such a threat].”<sup>102</sup> Thus, unlike the Fifth Circuit’s bright-line rule, the Department of Justice’s “direct threat” exception recognizes that some threats can be mitigated through “reasonable modifications” and, consequently, that some police encounters involving a perceived threat to the health or safety of others should still be covered by the ADA.<sup>103</sup>

*B. The Majority Approach Allows for a Fact-Specific Inquiry,  
Appropriately Balancing Legitimate Public Safety  
Concerns with the Rights of the Disabled*

As the First Circuit noted in *Gray*, determining the extent to which Title II applies to arrests is particularly challenging because it requires balancing two important concerns—protecting the rights of disabled individuals on the one hand and ensuring the safety of law enforcement personnel and the general public on the other.<sup>104</sup> Indeed, the primary argument in favor of the *Hainze* approach is that police officers already have the difficult task of quickly identifying and responding to life-threatening situations.<sup>105</sup> In light of these difficult circumstances, requiring police officers to stop to consider whether their conduct complies with the ADA would endanger them and the general public.<sup>106</sup> Although this argument is certainly not without merit, it fails to recognize that scenarios exist in which requiring a police officer to consider ADA compliance before taking action would not put anyone’s safety at risk, even where exigent circumstances may be present.<sup>107</sup> The majority approach, on the other hand, acknowledges this possibility.<sup>108</sup>

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<sup>102</sup> *Id.* § 35.139(b).

<sup>103</sup> *See id.*; Levin, *supra* note 30, at 312 (arguing that when threats can be mitigated by “reasonable modifications,” officers are not exempt from the requirements under Title II of the ADA).

<sup>104</sup> *See Gray*, 917 F.3d at 20 (emphasizing that this is a difficult case because of the two competing considerations).

<sup>105</sup> *See Hainze*, 207 F.3d at 801 (describing the numerous challenges police officers face when conducting “in-the-field investigations”); *see also* Tucker v. Tennessee, 539 F.3d 526, 536 (6th Cir. 2008), *abrogated on other grounds by* Anderson v. City of Blue Ash, 798 F.3d 338 (6th Cir. 2015) (concluding that interpreting the ADA to place too stringent a requirement on police officers would inhibit their ability to respond to rapidly changing situations).

<sup>106</sup> *See Hainze*, 207 F.3d at 801 (stating that Congress’s intention in enacting the ADA was not to prevent the discrimination of disabled individuals at the expense of public safety); *see also* Brief of Amici Curiae Int’l Mun. Lawyers Ass’n & Mass. Chiefs of Police Ass’n, Inc., in Support of Appellees & Affirmance, at 28, *Gray*, 917 F.3d 1 (No. 18-1303) (“[I]f 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.”).

<sup>107</sup> *See Hainze*, 207 F.3d at 801 (creating a bright line rule holding that where exigent circumstances are present, claims under Title II of the ADA cannot be raised).

<sup>108</sup> *See, e.g., Sheehan*, 743 F.3d at 1232 (holding that exigent circumstances speak to the reasonableness of a proposed accommodation rather than bar Title II claims).

Arguably, *Gray* is one such case in which considering ADA compliance would not have threatened the officer's or the public's safety, despite the existence of exigent circumstances.<sup>109</sup> When Officer Cummings first located Gray and demanded that she return to the hospital, he followed her at a distance of approximately one hundred feet.<sup>110</sup> Pausing to consider whether the ADA required him to continue to monitor her from a distance until an ambulance arrived, as Gray asserted was reasonably necessary to accommodate her disability, would have been unlikely to create an additional threat to Officer Cummings's safety.<sup>111</sup>

Once Officer Cummings closed in on Gray and she began to approach him with clenched fists, however, some level of threat to his safety arguably arose.<sup>112</sup> Under the *Hainze* approach, the factfinder's analysis would be limited to determining whether that threat rose to the level of exigent circumstances—a yes or no determination.<sup>113</sup> The factfinder would be stripped of the opportunity to fully evaluate, for example, the severity of a Taser relative to other courses of action that might have been available to Officer Cummings at the time—a factor that sheds light on the reasonableness of the Officer's actions.<sup>114</sup>

When the First Circuit is called upon to revisit the extent of Title II's applicability to ad hoc police encounters, it should adopt the majority approach, as it allows for a fact-specific inquiry that maximizes protections for the disabled, while still promoting the safety of law enforcement personnel and the public at large.<sup>115</sup> Indeed, exigent circumstances and the unique risks they pose

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<sup>109</sup> See *Gray*, 917 F.3d at 6 (noting that it was not until Officer Cummings came within five feet of Gray that she approached him with clenched fists).

<sup>110</sup> *Id.*; Brief of Plaintiff-Appellant, *supra* note 38, at 6.

<sup>111</sup> See *Gray*, 917 F.3d at 6 (failing to provide a plausible reason as to why Officer Cummings could not continue to follow Gray at a distance of approximately one hundred feet, as he had done for roughly twenty-five to thirty seconds, until an ambulance arrived, particularly in light of the fact that Gray was located only a quarter of a mile from the hospital).

<sup>112</sup> See *id.* at 9 (noting that a jury could find that, under the circumstances, Officer Cummings reasonably believed that Gray presented a risk of danger to him).

<sup>113</sup> See *Hainze*, 207 F.3d at 801 (holding that Title II is inapplicable to ad hoc police encounters before the officer is able to "ensur[e] that there is no threat to human life").

<sup>114</sup> See *Gray*, 917 F.3d at 19 (noting that "nationally recognized police standards" would have required Officer Cummings to either wait for backup or call an ambulance before approaching her); *Hainze*, 207 F.3d at 801 (establishing a rule that bars liability where exigent circumstances are present). Indeed, in considering Gray's § 1983 claim against Officer Cummings, the First Circuit noted that, when looking at the record most favorably to Gray, "a reasonable jury could find that Gray had committed no crime and that she posed no threat to [Officer] Cummings when he tased her." *Gray*, 917 F.3d at 9.

<sup>115</sup> See *Sheehan*, 743 F.3d at 1232 (holding that exigent circumstances inform the reasonableness of a contemplated accommodation); *Bircoll*, 480 F.3d at 1085 (concluding that the exigent circumstances that accompany a DUI stop on the side of a highway impact the reasonableness of proposed accommodations); Myers, *supra* note 29, at 1422 (arguing that the approach adopted by the Ninth and Eleventh Circuits properly addresses concerns for the safety of police officers and the general public).

still play a substantial role in the analysis, but rather than serve as a complete bar to Title II claims, they weigh in the balance of determining the reasonableness of a proposed accommodation.<sup>116</sup>

### CONCLUSION

Courts across the country have been faced with the difficult question of whether, and to what extent, Title II of the ADA applies to police encounters, including arrests. Most circuits have held that Title II applies to arrests without exception and, therefore, that officers have a duty to reasonably accommodate an individual's disability irrespective of the circumstances. In contrast, the Fifth Circuit has held that Title II does not apply before officers have secured the scene and ensured that there is no threat. As such, the Fifth Circuit concluded that exigent circumstances bar Title II claims. Recognizing the competing concerns implicated by protecting individuals with disabilities and ensuring that law enforcement personnel are fully able to perform their important duties, it is not surprising that the First Circuit was reluctant to articulate an appropriate standard for evaluating police conduct. In failing to answer this question, however, the First Circuit missed an opportunity to set forth a standard that demonstrated to the public, and law enforcement personnel in particular, the importance of protecting the disabled during their encounters with police. When the First Circuit is inevitably presented with this question once again, it should adopt the majority approach as it better reflects the language of, and legislative intent behind, Title II and sufficiently balances the aforementioned concerns by enabling the factfinder to engage in a fact-specific inquiry.

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<sup>116</sup> See Myers, *supra* note 29, at 1422 (noting that exigent circumstances are one factor, among several, that inform the reasonableness of an accommodation).