

What Are You En(titled) Two? Protecting Individuals with Disabilities During Interactions with Law Enforcement Under Title II of the ADA

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I. INTRODUCTION

*“I smile rarely, but I am surviving.”*¹

On the evening of January 12, 2013, 26-year-old Robert Saylor had just finished watching a movie at his local theater.² Mr. Saylor, who had Down Syndrome and an I.Q. of 40, exited the theater.³ He returned soon after to see the movie for a second time.⁴ He did not purchase a second ticket.⁵ Police officers were called.⁶ Despite a warning from Mr. Saylor’s caregiver that Mr. Saylor “didn’t like to be touched,”⁷ officers simply smirked and commented “[b]etter get the boys. We’re going to have some trouble tonight.”⁸ Mr. Saylor sat in his seat quietly as police confronted him.⁹ The officers insisted that

1. In an essay she wrote four years prior to her death at the hands of police officers, Deborah Danner described her struggle with schizophrenia. Deborah Danner, *Living with Schizophrenia* (Jan. 28, 2012), <https://assets.documentcloud.org/documents/3146953/Living-With-Schizophrenia-by-Deborah-Danner.pdf>.

2. Theresa Vargas, *Md. Man with Down Syndrome Who Died in Police Custody Loved Law Enforcement*, WASH. POST (Feb. 19, 2013), https://www.washingtonpost.com/local/md-man-with-down-syndrome-who-died-in-police-custody-loved-law-enforcement/2013/02/19/10e09fe0-7ad5-11e2-82e8-61a46c2cde3d_story.html?noredirect=on&utm_term=.0b7c291fbe5a.

3. Theresa Vargas, *Questions Haunt Family of Man with Down Syndrome Who Died in Police Custody*, WASH. POST (July 18, 2013), https://www.washingtonpost.com/local/questions-haunt-family-of-man-with-down-syndrome-who-died-in-police-custody/2013/07/18/693d4c2a-ee66-11e2-bed3-b9b6fe264871_story.html?utm_term=.75ce0a32f1b1.

4. Vargas, *Md. Man with Down Syndrome Who Died in Police Custody Loved Law Enforcement*, *supra* note 2.

5. *Id.*

6. *Id.*

7. Theresa Vargas, *Deputies, in Lawsuit, Describe Fatal Confrontation with Man with Down Syndrome*, WASH. POST (Sept. 13, 2017), https://www.washingtonpost.com/local/deputies-in-lawsuit-describe-fatal-confrontation-with-man-with-down-syndrome/2017/09/13/53010356-974a-11e7-82e4-f1076f6d6152_story.html?utm_term=.eaeded354fe0.

8. *Id.*

9. Theresa Vargas, *Judge Orders Civil Trial in Death of 26-year-old with Down Syndrome*, WASH. POST (Sept. 9, 2016), <https://www.washingtonpost.com/local/judge-orders-civil-trial-in-police-custody->

Mr. Saylor had to leave.¹⁰ As they attempted to physically remove him, Mr. Saylor cried out for his mother.¹¹ The officers fell to the ground with Mr. Saylor beneath them as three pairs of handcuffs were used to secure and pin him.¹² They then realized Mr. Saylor was not breathing.¹³ Officers attempted to resuscitate him, but it was too late: Mr. Saylor was pronounced dead at a local hospital that evening.¹⁴ A later autopsy would reveal the cause of death was asphyxiation.¹⁵

On October 18, 2016, Deborah Danner, who had schizophrenia, was home in her apartment when police barged in.¹⁶ Officers were responding to a 9-1-1 call reporting a woman acting erratically.¹⁷ When police entered, Ms. Danner was holding a pair of scissors.¹⁸ When police asked, she dropped the scissors.¹⁹ Ms. Danner then reached for a baseball bat.²⁰ Early news outlets reported that she tried to swing the bat at officers,²¹ but that was contradicted by subsequent police testimony.²² Still, police fired twice at Ms. Danner, shooting and killing her.²³ “At any point did she swing?” asked the prosecutor

death-of-26-year-old-with-down-syndrome/2016/09/09/4d5ba96c-76ce-11e6-b786-19d0cb1ed06c_story.html?utm_term=.57dceabff0c2.

10. Vargas, *Deputies, in Lawsuit, Describe Fatal Confrontation with Man with Down Syndrome*, *supra* note 7.

11. Vargas, *Questions Haunt Family of Man with Down Syndrome Who Died in Police Custody*, *supra* note 3.

12. *Id.*

13. *Id.*

14. Vargas, *Md. Man with Down Syndrome Who Died in Police Custody Loved Law Enforcement*, *supra* note 2.

15. *Id.*

16. Eli Rosenberg & Ashley Southall, *In Quick Response, de Blasio Calls Fatal Shooting of Mentally Ill Woman ‘Unacceptable,’* N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/20/nyregion/nypd-sergeant-fatal-shooting-bronx-woman.html>.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. James C. McKinley Jr., *Officer Says Bronx Woman Didn’t Swing Bat Before Being Shot*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/2018/02/05/nyregion/officer-says-bronx-woman-didnt-swing-bat-before-being-shot.html>.

23. *Id.*

handling Ms. Danner's death. "No," replied an officer who had seen the encounter.²⁴

Two years later Saheed Vassell, who had bipolar disorder, was standing on a street in Brooklyn.²⁵ He was a familiar figure in the neighborhood where he lived, and it was common knowledge he was mentally ill.²⁶ Neighbors described him as "harmless . . . a very nice guy, a good guy."²⁷ He had a penchant for picking things up off the street and playing with them.²⁸ On April 4, 2018, he found a metal pipe on the sidewalk and picked it up.²⁹ He held it outstretched in his arms.³⁰ Officers received a call reporting a man carrying a "silver firearm."³¹ Police arrived at the corner of the street and appeared to fire at Mr. Vassell almost instantly.³² He was shot ten times in total and was pronounced dead at the hospital.³³

Interactions between police officers and individuals with disabilities are not a new occurrence; neither are such interactions turning deadly, as was the case for Mr. Saylor, Ms. Danner, and Mr. Vassell. Individuals with a mental illness are sixteen times more likely to be killed during an encounter with police than someone without a mental illness.³⁴ They account for one in four of every fatal police encoun-

24. *Id.*

25. Benjamin Mueller & Nate Schweber, *Police Fatally Shoot a Brooklyn Man, Saying They Thought He Had a Gun*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/nyregion/police-shooting-brooklyn-crown-heights.html?login=email&auth=login-email>.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Amy B. Wang & Wesley Lowery, *'They Say It's a Gun': NYPD Releases Video, 911 Clips in Fatal Shooting of Man Holding Metal Pipe*, WASH. POST (Apr. 5, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/04/05/police-shoot-and-kill-brooklyn-man-after-mistaking-a-metal-pipe-for-a-gun/?utm_term=.98ee21f65065.

32. Mueller & Schweber, *supra* note 25.

33. Wang & Lowery, *supra* note 31.

34. DORIS A. FULLER ET AL., OFFICE OF RESEARCH & PUBLIC AFFAIRS, OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1 (2015).

ter.³⁵ While many of the interactions focused on in this Article arise out of confrontations between police and individuals with a mental illness, the Americans with Disabilities Act (“ADA”) does not discriminate between mental and physical disabilities. The issues addressed here are equally applicable to both physical and mental disabilities, especially in the context of disabilities that are not readily apparent, have no outward physical manifestations, or impede communication.

In 2015, the Supreme Court of the United States had a chance to address this issue in *City & County of San Francisco v. Sheehan* (“*Sheehan II*”).³⁶ The Supreme Court had to determine whether Title II of the ADA required law enforcement officers to provide reasonable accommodations to individuals with disabilities whom they are attempting to take into custody.³⁷ If the Court had answered that question in the affirmative, individuals with disabilities would have been entitled to the ADA’s protections during interactions with law enforcement. Instead, a lack of adversarial briefing resulted in the Court dismissing the issue as improvidently granted.³⁸ Left undecided was whether police officers are required to make reasonable accommodations for individuals with disabilities during arrests, and if so, how officers should implement such a rule.

Currently, the circuit courts have created three different approaches to answer that question. The Fifth Circuit does not require police to make reasonable accommodations prior to officers securing the scene.³⁹ The Fourth, Ninth, and Eleventh Circuits require police to make reasonable accommodations but consider the presence of exigent circumstances as one factor when determining reasonableness.⁴⁰ The Eighth Circuit finds requiring accommodations to be unreasona-

35. *Id.*

36. *City & Cty. of San Francisco v. Sheehan (Sheehan II)*, 135 S. Ct. 1765, 1772–74 (2015).

37. *Id.* at 1772.

38. *Id.* at 1774.

39. *See Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000).

40. *See Sheehan v. City & Cty. of San Francisco (Sheehan I)*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev’d on other grounds*, 135 S. Ct. 1765 (2015); *Seremeth v. Bd. of Cty. Comm’rs*, 673 F.3d 333, 339 (4th Cir. 2012); *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1085 (11th Cir. 2007).

ble when police face exigent circumstances.⁴¹ This three-way circuit split, and the further lack of consistency in how different circuits apply the same approach, has resulted in gross disparity between the circuit courts in a Title II claim's viability arising out of interactions with police.⁴²

In light of the circuit split and the continued high rate of fatal interactions between police and individuals with disabilities, it is inevitable that the Supreme Court will revisit the issue it declined to address in *Sheehan II*.⁴³ When it does so, it will have the opportunity both to ensure that individuals with disabilities are protected and give clear, readily administrable guidance to law enforcement on what the law requires during such encounters.

Part II of this Article will discuss the framework of Title II of the ADA and its general applicability to law enforcement and arrests. Part III of this Article looks at how courts have dealt with the fraught relationship between law enforcement and individuals with disabilities. Specifically, this section analyzes how the courts have applied Title II of the ADA in the context of arrests, including the Supreme Court's dismissal of the issue in *Sheehan II* and the current case law under the circuit split. Part IV is an in-depth look at the application of the different circuit approaches, focusing on why the approaches are not viable long-term solutions and why they should be rejected if the Supreme Court revisits the issue. Part V reveals how the high occurrence of fatal interactions between individuals with disabilities and the police makes Title II's applicability more necessary and more inevitable for the Supreme Court to address. Part V offers a new approach, the Unreasonable Per Se Approach: The ADA is always applicable during arrests, but an accommodation is per se unreasonable if the existence of exigent circumstances can be shown. Part V also explains how such a rule could be implemented, why it is consistent with current precedent on police conduct and the ADA regulations,

41. See *Bahl v. County of Ramsey*, 695 F.3d 778, 785–86 (8th Cir. 2012).

42. Compare *Bircoll*, 480 F.3d at 1086–87 (finding police did not have to provide reasonable accommodations during a traffic stop), with *Sheehan I*, 743 F.3d at 1233 (finding that police may be required to provide reasonable accommodations during an interaction with a woman wielding a knife).

43. See *Sheehan II*, 135 S. Ct. at 1773 (“Whether the statutory language [of Title II] applies to arrests is an important question that would benefit from briefing and an adversary presentation.”).

and how it best balances the interests of law enforcement while protecting individuals with disabilities. Part VI briefly concludes.

II. TITLE II OF THE ADA'S GENERAL APPLICABILITY TO LAW ENFORCEMENT

Due to the broad language of the statute, courts have been hesitant to exclude law enforcement from Title II's application. Yet to include police as a covered entity also opens up a range of police activities, such as arrests and detention, to lawsuits under the ADA. Balancing the ADA's goal and broad language with police discretion has emerged as a clear tension in the discussion of whether Title II applies to police conduct.

A. Framework of the ADA

Congress passed the ADA in 1990 with the goal of "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."⁴⁴ Congress explicitly recognized that "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem."⁴⁵ The ADA is a "broad remedial statute"⁴⁶ that provides protection in a variety of critical areas.⁴⁷ These protections are divided among three subchapters: Title I, Title II, and Title III. Title I protects against discrimination in employment,⁴⁸ and Title III prohibits discrimination by a place of public accommodation.⁴⁹ Lawsuits filed under either title are similar insofar as they generally implicate a private entity. Title II is different in that it provides protection against

44. 42 U.S.C. § 12101(b)(1) (2012).

45. *Id.* § 12101(a)(2).

46. *Penny v. United Parcel Serv., Inc.*, 128 F.3d 408, 414 (6th Cir. 1997) (observing that the ADA is a "broad remedial statute").

47. 42 U.S.C. § 12101(a)(3) (2012) ("[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.").

48. *Id.* § 12112.

49. *Id.* § 12182.

discrimination by a public entity,⁵⁰ and it is under Title II that the intersection of police conduct and the ADA arises.

Under Title II, “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.”⁵¹ To make a prima facie case for a Title II violation, a plaintiff must show that: “(1) he is a qualified individual; (2) with a disability; (3) he was excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or was subjected to discrimination by any such entity; (4) by reason of his disability.”⁵²

An individual is “qualified” within the meaning of Title II if that person “meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”⁵³ In addition to being eligible for the program or activity, an individual must also be “disabled” as it is defined under the ADA.⁵⁴ The ADA defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities of such individual.”⁵⁵ An individual also meets the definition of “disabled” where “the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”⁵⁶ This extends the protections of the ADA to individuals who are discriminated against based on perceived disabilities, regardless of whether that perception is accurate. The requirement that an individual be both qualified and disabled to receive the ADA’s protections is a fact-specific issue unique to each individual case.

50. *Id.* § 12132.

51. *Id.*

52. *Bowers v. Nat’l Collegiate Athletic Ass’n*, 475 F.3d 524, 553 n.32 (3d Cir. 2007); *see also Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1083 (11th Cir. 2007).

53. 42 U.S.C. § 12131(2) (2012).

54. *Id.* § 12102.

55. *Id.* § 12102(1)(A).

56. *Id.* § 12102(3)(A).

Implicated in all cases concerning Title II's applicability to police are whether law enforcement falls under the term "public entity" and whether an arrest is a covered "service[], program[], or activit[y]."⁵⁷ Under current precedent, even the sharply divided circuit courts have unanimously held that both law enforcement and arrests are captured by Title II's protections.

B. Law Enforcement as a Covered Public Entity

Title II defines "public entity" to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government."⁵⁸ The Supreme Court applied Title II to state prisons in *Pennsylvania Department of Corrections v. Yeskey*, emphasizing the statute's broad language and its lack of any textual exceptions.⁵⁹ Relying both on the Congressional language of the ADA and the Supreme Court's expansive interpretation of a "public entity" in *Yeskey*, the Fourth Circuit found that local police agencies also fall within the definition of a "public entity."⁶⁰

Although scant analysis has been devoted to the validity of attributing the actions of individual officers to the municipality they serve, the circuit courts have implicitly accepted this theory of liability.⁶¹ Even in cases that declined to broadly apply Title II to police conduct, it remained uncontested that police departments fell within the definition of a "public entity."⁶²

57. *Id.* § 12132; *Bowers*, 475 F.3d at 553 n.32; *Bircoll*, 480 F.3d at 1083.

58. 42 U.S.C. § 12131(1)(A)–(B) (2012).

59. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998).

60. *See Seremeth v. Bd. of Cty. Comm'rs*, 673 F.3d 333, 338 (4th Cir. 2012) ("[I]n light of *Yeskey*'s expansive interpretation, the ADA applies to police . . .").

61. *Windham v. Harris Cty.*, 875 F.3d 229, 235 (5th Cir. 2017) ("These provisions allow individuals to sue local governments for disability discrimination committed by police . . ."); *Seremeth*, 673 F.3d at 337; *Bahl v. County of Ramsey*, 695 F.3d 778, 788 (8th Cir. 2012). *But see Sheehan II*, 135 S. Ct. at 1773–74 (Although "the parties agree that . . . an entity can be held vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employees. . . . [W]e have never decided whether that is correct, and we decline to do so here, in the absence of adversarial briefing.")

62. *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000) ("Neither party disputes that . . . the . . . Sheriff's Department is a public entity.")

C. Arrests as Covered Services, Programs, or Activities

Although Title II defines “public entity,” it does not define “services, programs, or activities.” Courts interpreting Title II have therefore struggled to determine whether its language captures arrests. Both Title II’s implementing regulations and the supporting case law have found that “[T]itle II applies to anything a public entity does.”⁶³ The Third, Sixth, and Ninth Circuits have also agreed that “services, programs, and activities” should be properly construed as “anything a public entity does.”⁶⁴

The main decision criticizing Title II’s applicability to arrests is outdated in light of the Supreme Court’s holding in *Yeskey* and has been called into doubt by subsequent opinions.⁶⁵ In *Rosen v. Montgomery County*, the Fourth Circuit noted an “obvious problem is fitting an arrest into the ADA at all.”⁶⁶ This rationale relied on a narrow interpretation of what constituted a “program or activity” under the ADA.⁶⁷ In light of the expansive reading of Title II’s “programs, services, or activities” language in *Yeskey*, subsequent opinions rejected this skepticism and many courts cast doubt on the validity of *Rosen* following *Yeskey*.⁶⁸

63. *Seremeth*, 673 F.3d at 338 (quoting 28 C.F.R. § 35, app. B (2012)).

64. *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002) (citation omitted); *Yeskey v. Pa. Dep’t of Corr.*, 118 F.3d 168, 171 (3d Cir. 1997), *aff’d*, 524 U.S. 206 (1998); *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998).

65. *Infra* Section II.C.

66. *Rosen v. Montgomery Cty.*, 121 F.3d 154, 157 (4th Cir. 1997) (“[C]alling a drunk driving arrest a ‘program or activity’ of the County . . . strikes us as a stretch of the statutory language and of the underlying legislative intent.”).

67. *Id.*

68. *See, e.g., Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 381 (D. Md. 2011) (“[T]he weight of subsequent authority, in the Supreme Court as well the Fourth Circuit and other courts, calls into question . . . reliance on *Rosen*.”); *Calloway v. Boro of Glassboro Dep’t of Police*, 89 F. Supp. 2d 543, 556 (D. N.J. 2000) (finding *Rosen* “discredited” in light of *Yeskey*).

Other courts have noted that arrests may not need to be covered services, programs, or activities to be actionable under Title II. Courts have looked to the phrase “or be subjected to discrimination by [that] entity”⁶⁹ as a “catch-all phrase that prohibits all discrimination by a public entity, regardless of the context,”⁷⁰ and “thereby avoiding the difficult semantics of categorizing each governmental action as ‘services, programs, or activities.’”⁷¹

Whether arrests are actionable either as a covered service or under the broader “discrimination” clause of Title II, the preamble to the ADA’s regulations makes clear that the ADA was intended to apply to the conduct of police, including arrests: “[D]iscriminatory arrests and brutal treatment are . . . unlawful police activities. The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities.”⁷²

Despite the remaining discord in how and when courts apply Title II to the conduct of police, there is general agreement among the courts that Title II governs police conduct and arrests in some capacity. Divergent views remain among the courts on how Title II applies to police conduct.

69. 42 U.S.C. § 12132 (2012).

70. *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44–45 (2d Cir. 1997) (“[T]he language of Title II’s anti-discrimination provision does not limit the ADA’s coverage to conduct that occurs in the ‘programs, services, or activities’ of the City. Rather, it is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context, and that should avoid the very type of hair-splitting arguments the City attempts to make here.”).

71. *Seremeth v. Bd. of Cty. Comm’rs*, 673 F.3d 333, 338 (4th Cir. 2012).

72. 28 C.F.R. § 35.130 (1998), app. A, subpart B.

III. OVERVIEW OF CURRENT TITLE II JURISPRUDENCE AND STATUS OF THE CIRCUIT SPLIT

Although no circuit court has found that Title II does not apply to police conduct in some capacity,⁷³ how it applies remains the subject of confusion and contention. In *Sheehan II*, the Supreme Court addressed reasonable accommodation claims before dismissing the issue as improvidently granted.⁷⁴ Yet two different Title II theories have been recognized as applying to police conduct: (1) reasonable accommodation claims and (2) wrongful arrest claims.⁷⁵ Left untouched by *Sheehan II* were three divergent views from the circuit courts as to how the ADA applies in the context of arrests and their effect on the two theories of liability under Title II.

A. Distinguishing the Two Available Theories of Liability Under Title II

Out of the broad language and framework of Title II's mandate, courts have generally recognized two actionable claims for arrestees: (1) wrongful arrest claims and (2) reasonable accommodation claims.⁷⁶ Under a wrongful arrest theory, Title II liability is implicated when the police arrest someone with a disability because they misperceive a disability's effects as criminal activity.⁷⁷ A reasonable accommodation claim arises when police investigate and arrest a person with a disability for a crime but fail to "reasonably accommodate the person's disability in the course of investigation or arrest."⁷⁸ This theory draws from the ADA's definition of discrimination as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."⁷⁹

73. *Haberle v. Troxell*, 885 F.3d 170, 181 (3d Cir. 2018) ("[N]o court of appeals has held that the ADA does not apply at all [to arrests].").

74. *Sheehan II*, 135 S. Ct. at 1778.

75. *Waller v. City of Danville*, 556 F.3d 171, 174 (4th Cir. 2009); *Gohier v. Enright*, 186 F.3d 1216, 1220–21 (10th Cir. 1999).

76. *Waller*, 556 F.3d at 174; *Gohier*, 186 F.3d at 1220–21.

77. *Gohier*, 186 F.3d at 1221.

78. *Id.* at 1220–21; *see Waller*, 556 F.3d at 174.

79. 42 U.S.C. § 12112(b)(5)(A) (2012) (from Title I's definition).

This Article concerns requiring police officers to provide reasonable accommodations during an arrest and focuses on the reasonable accommodation theory of liability. Discussion of the wrongful arrest theory is limited to recognizing the inadvertent effects the circuit court approaches have on Title II liability in general and how that impacts the viability of wrongful arrest claims.⁸⁰

B. How the Supreme Court Declined to Answer the Question in Sheehan II

In 2014, the Supreme Court granted certiorari on the issue of “[w]hether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody.”⁸¹ The petition for certiorari came out of a Ninth Circuit case, *Sheehan v. City & County of San Francisco* (“*Sheehan I*”), which answered the question in the affirmative.⁸² The Ninth Circuit found that Title II could require police officers to provide reasonable accommodations during an arrest and held that the City was not entitled to judgment as a matter of law on the ADA claim.⁸³

The case concerned Teresa Sheehan, a woman with schizoaffective disorder.⁸⁴ She resided in a group home for individuals with mental illnesses.⁸⁵ Her social worker became concerned when Sheehan stopped taking her medication, stopped changing her clothes or eating, and would not respond to knocks on her door.⁸⁶ When her social worker used a key to enter Sheehan’s room, Sheehan responded by threatening him.⁸⁷ The social worker called police and asked for help getting Sheehan to a psychiatric facility for evaluation.⁸⁸ After attempting to speak with Sheehan through the door, officers used a

80. *See supra* Section IV.A.4.

81. Petition for Writ of Certiorari, *Sheehan II*, 135 S. Ct. at 1773.

82. *Sheehan I*, 743 F.3d at 1233.

83. *Id.*

84. *Sheehan II*, 135 S. Ct. at 1769.

85. *Id.*

86. *Id.*

87. *Id.* at 1769–70.

88. *Id.* at 1770.

key to enter the room.⁸⁹ Sheehan grabbed a kitchen knife and brandished it at the officers while verbally threatening them.⁹⁰ The officers retreated from Sheehan's bedroom and Sheehan closed the door behind them, blocking herself in the room.⁹¹ Instead of waiting for backup to arrive, the officers decided to re-enter the room and secure Sheehan, believing that the situation "required [their] immediate attention."⁹² They did not take into consideration whether Sheehan's disability should be accommodated.⁹³ When the officers attempted to re-enter Sheehan's room, they pepper-sprayed her immediately but could not get her to drop the knife.⁹⁴ With Sheehan only feet away, officers fired their guns at Sheehan multiple times.⁹⁵ She survived.⁹⁶

The district court granted summary judgment in favor of the municipality on the ADA claim.⁹⁷ Sheehan appealed to the Ninth Circuit, which considered, for the first time, whether Title II authorized a reasonable accommodation claim against police officers during an arrest.⁹⁸ The court found that it did and that "[a] reasonable jury . . . could find that the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary."⁹⁹ The Ninth Circuit reversed the grant of summary judgment, and the municipality appealed.¹⁰⁰

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1771.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Sheehan I*, 743 F.3d at 1231, *rev'd*, 135 S. Ct. 1765 (2015).

99. *Id.* at 1233.

100. *Sheehan II*, 135 S. Ct. at 1772.

While the petition of certiorari also included an issue concerning qualified immunity, certiorari was granted predominantly on the Title II issue.¹⁰¹ Ultimately, it was the qualified immunity issue that decided *Sheehan II*, and the Court dismissed the Title II issue as improvidently granted.¹⁰² This curious posture comes out of large concessions made by the municipality both at oral argument and in its briefs. Although the municipality argued in its reply brief at the certiorari stage that “the only question for this Court to resolve is whether any accommodation of an armed and violent individual is reasonable or required under Title II of the ADA,” Justice Scalia noted in a scathing dissent that “the petitioners’ principal brief, reply brief, and oral argument had nary a word to say about that subject.”¹⁰³ The municipality had effectively conceded that Title II does require such accommodations in its merits brief and during oral argument.¹⁰⁴

Although the municipality still made arguments to support its position, the Supreme Court noted “[t]he argument that San Francisco now advances is predicated on the proposition that the ADA governs the manner in which a qualified individual with a disability is arrested.”¹⁰⁵ The Court went further and recognized that “San Francisco, the United States as *amicus curiae*, and Sheehan all argue (or at least accept) that [Title II] applies to arrests.”¹⁰⁶ In light of the lack of adversarial briefing on the Title II issue, the Court dismissed it as improvidently granted and reversed the judgment of the Ninth Circuit on an issue of qualified immunity.¹⁰⁷ With the Title II issue dismissed, the question of whether Title II requires police to make reasonable

101. *Id.* at 1779 (Scalia, J., dissenting in part) (“[T]here was little chance that we would have taken this case to decide only the second, fact-bound [question presented]—that is, whether the individual petitioners are entitled to qualified immunity on respondent’s Fourth Amendment claim.”).

102. *Id.* at 1778.

103. *Id.* at 1772; *id.* at 1778 (Scalia, J., dissenting in part).

104. *Id.* at 1773 (“San Francisco’s new argument effectively concedes that the relevant provision of the ADA . . . may ‘requir[e] law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody.’”) (alteration in original) (emphasis omitted).

105. *Id.*

106. *Id.*

107. *Id.* at 1778.

accommodations remained an open question, and the circuit split went unresolved.

C. Overview of Current Precedent Under the Circuit Courts

There is a three-way circuit split as to how failure to accommodate claims under Title II are handled in the context of arrests. Eight circuit courts have addressed the issue, with the Tenth and Sixth Circuits declining to specifically decide Title II's applicability.¹⁰⁸ The Tenth Circuit, one of the first to review the issue, did not decide whether Title II applies to reasonable accommodation claims because the plaintiff had only alleged a wrongful arrest claim.¹⁰⁹ The Tenth Circuit did note "that a broad rule categorically excluding arrests from the scope of Title II . . . is not the law."¹¹⁰ Almost ten years later, the Sixth Circuit similarly declined to hold that Title II applies to arrests. Instead, the court ruled that "even if the arrest were within the ambit of the ADA, the district court correctly found that the City Police did not intentionally discriminate against [the plaintiffs] because of . . . their disabilities."¹¹¹ The Third Circuit found that "police officers may violate the ADA when making an arrest by failing to provide reasonable accommodations for a qualified arrestee's disability," but did not address how it would apply.¹¹²

From the five circuits to decide how Title II applies during an arrest, three distinct approaches have emerged: the Fifth Circuit approach (the "*Hainze* Approach");¹¹³ the approach adopted by the Fourth, Ninth, and Eleventh Circuits (the "Majority Approach");¹¹⁴ and the Eighth Circuit's approach (the "Eighth Circuit Approach").¹¹⁵

108. See *Tucker v. Tennessee*, 539 F.3d 526, 536 (6th Cir. 2008); *Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999).

109. *Gohier*, 186 F.3d at 1221 ("This court need not decide whether this case is better analyzed under a wrongful-arrest or reasonable-accommodation-during-arrest theory. . . . *Gohier* has expressly declined to invoke the second.").

110. *Id.*

111. *Tucker*, 539 F.3d at 536.

112. *Haberle v. Troxell*, 885 F.3d 170, 180 (3d Cir. 2018) ("[W]e believe that the ADA can indeed apply to police conduct during an arrest.").

113. See *infra* Section III.C.1.

114. See *infra* Section III.C.2.

115. See *infra* Section III.C.3.

1. The *Hainze* Approach

One of the earlier circuit court cases to grapple with the issue was *Hainze v. Richards*.¹¹⁶ Decided in 2000, the approach to emerge from *Hainze* continues to govern reasonable accommodation claims arising out of police interactions within the Fifth Circuit. In *Hainze*, Alicia Cluck called 9-1-1 requesting that the police transport her suicidal nephew to a hospital for mental-health treatment.¹¹⁷ Cluck told police that her nephew, Kim Michael Hainze, had a history of depression and was under the influence of anti-depressants and alcohol.¹¹⁸ Cluck warned officers that Hainze was armed with a knife and had talked about committing “suicide by cop.”¹¹⁹ Police officers were dispatched to Hainze’s location, and upon arriving they observed Hainze standing by a truck occupied by two other individuals.¹²⁰ Officers could see Hainze had a knife in his hand.¹²¹ One officer drew his weapon and ordered Hainze to step away from the truck.¹²² Hainze began walking towards the officers and ignored the officers’ orders to stop.¹²³ When Hainze was within four to six feet, officers fired two shots into Hainze’s chest.¹²⁴ Hainze survived and sued under Title II.¹²⁵ Summary judgment was granted in favor of the defendant officers, and Hainze appealed.¹²⁶

On appeal, Hainze advanced a reasonable accommodation claim, arguing that the county “failed to reasonably accommodate his disability by ‘failing and refusing to adopt a policy protecting the well-being of [Hainze], as a person with a mental illness in a mental health crisis situation, thus resulting in discriminatory treatment from [the] sheriff’s deputies.’”¹²⁷ The Fifth Circuit noted that “only one

116. 207 F.3d 795 (5th Cir. 2000).

117. *Id.* at 797.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 797–98.

126. *Id.* at 798.

127. *Id.* at 801.

court has considered whether Title II applies to in-the-field investigations by police officers that may or may not lead to an arrest.”¹²⁸ The only other court to consider the issue was the Tenth Circuit in *Gohier*, which was decided on different grounds.¹²⁹

Recognizing the “onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations,” the Fifth Circuit concluded that Congress did not “intend[] that the fulfillment of [the ADA’s] objective be attained at the expense of the safety of the general public.”¹³⁰ The court cited no statutory or regulatory language in support of this conclusion.¹³¹ Consistent with these concerns, the court held that “Title II does not apply to an officer’s on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer’s securing the scene and ensuring that there is no threat to human life.”¹³²

Effectively, the *Hainze* Approach rendered Title II inapplicable to all police conduct, even misconduct, so long as it occurred prior to officers “securing the scene” they are responding to. In light of concerns of officer safety and the safety of the general public, the Fifth Circuit gave police broad discretion to determine when a scene is secure, and therefore when Title II begins applying. The *Hainze* Approach is the only approach that renders Title II completely inapplicable in certain situations.

128. *Id.* at 800.

129. *Id.* (“[T]he [Tenth Circuit] did not answer the question whether a valid cause of action exists under the second category of Title II arrest cases, the ‘reasonable accommodation’ theory, because *Gohier* did not claim that Colorado Springs failed to . . . handle situations involving mentally ill individuals in a manner that reasonably accommodates their disability.”).

130. *Id.* at 801.

131. *Id.*

132. *Id.*

2. The Majority Approach

A broader application of Title II emerged when the Eleventh Circuit considered the issue in *Bircoll v. Miami-Dade*,¹³³ and this approach was later adopted by the Fourth and Ninth Circuits.¹³⁴ The plaintiff, Stephen Bircoll, was a deaf individual who police pulled over while driving home from his girlfriend's house early in the morning.¹³⁵ Sergeant Charles Trask pulled Bircoll over for a traffic violation.¹³⁶ When Trask approached Bircoll's car, Bircoll rolled down his window and informed Trask that he was deaf and had a speech impediment.¹³⁷ Trask asked Bircoll to step out of the car, at which point Trask detected the smell of alcohol and noticed Bircoll had red and watery eyes.¹³⁸ Trask had Bircoll perform field sobriety tests.¹³⁹ Trask alleged that Bircoll failed the various field sobriety tests and was arrested as a result.¹⁴⁰ Bircoll contended that he was unable to complete the tests because he could not lip-read and perform the tests at the same time.¹⁴¹ Bircoll filed a Title II reasonable accommodation claim alleging a failure to accommodate his disability during the field sobriety tests, as well as subsequent treatment post-arrest.¹⁴²

As a threshold matter, the Eleventh Circuit noted that Bircoll's reasonable accommodation claim was viable regardless of "whether police conduct during an arrest is a program, service, or activity covered by the ADA."¹⁴³ Bircoll maintained a viable "ADA claim under the final clause in the Title II statute: that he was 'subjected to discrimination' by a public entity, the police, by reason of his disabil-

133. *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1085 (11th Cir. 2007).

134. *Sheehan I*, 743 F.3d at 1232, *rev'd on other grounds*, 135 S. Ct. 1765 (2015); *Seremeth v. Bd. of Cty. Comm'rs*, 673 F.3d 333, 339 (4th Cir. 2012).

135. *Bircoll*, 480 F.3d at 1076.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1077–78.

140. *Id.*

141. *Id.* at 1077.

142. *Id.* at 1080.

143. *Id.* at 1084.

ity.”¹⁴⁴ Turning its analysis first to whether police had to provide reasonable accommodations during the field sobriety tests, the Eleventh Circuit rejected the *Hainze* Approach: “the question is not so much one of the applicability of the ADA because Title II prohibits discrimination by a public entity by reason of Bircoll’s disability.”¹⁴⁵

The court found Title II applied and redirected the inquiry to the reasonableness of the proposed accommodations.¹⁴⁶ It held that “the question is whether, given criminal activity and safety concerns, any modification of police procedures is reasonable before the police physically arrest a criminal suspect, secure the scene, and ensure that there is no threat to the public or officer’s safety.”¹⁴⁷ Under the Majority Approach, the existence of exigent circumstances becomes a factor to be considered when determining the reasonableness of the accommodation. The distinguishing factor between the Majority Approach and the *Hainze* Approach is that, unlike in *Hainze*, exigency or security of the scene does not bear on Title II’s applicability. Instead, it bears on the reasonableness of the proposed accommodation.

Applying this new approach, the Eleventh Circuit looked to the exigency surrounding the traffic stop. Despite noting “[t]he reasonable-modification inquiry in Title II-ADA cases is ‘a highly fact-specific inquiry,’” the court rejected Bircoll’s claim that a jury could find providing an interpreter a reasonable accommodation.¹⁴⁸ It held “that waiting for an oral interpreter before taking field sobriety tests is not a reasonable modification of police procedures given the exigent circumstances of a DUI stop on the side of a highway, the on-the-spot judgment required of police, and the serious public safety concerns in DUI criminal activity.”¹⁴⁹

Although the Fourth Circuit did not directly reference the holding of *Bircoll*, it adopted the same approach five years later in *Seremeth v. Board of County Commissioners*.¹⁵⁰ The Fourth Circuit

144. *Id.*

145. *Id.* at 1085.

146. *Id.* (“The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance.”).

147. *Id.*

148. *Id.* at 1085–86.

149. *Id.* at 1086.

150. *Seremeth v. Bd. of Cty. Comm’rs*, 673 F.3d 333 (4th Cir. 2012).

was one of the first circuit courts to weigh in on the issue in *Rosen v. Montgomery County*, where it rejected Title II's application to arrests.¹⁵¹ In *Rosen*, it reasoned that "calling a drunk driving arrest a 'program or activity' of the County . . . strikes us as a stretch of the statutory language and of the underlying legislative intent."¹⁵² This decision was subject to criticism in light of later Supreme Court precedent in *Yeskey*, with one court noting that "the weight of subsequent authority, in the Supreme Court as well [as] the Fourth Circuit and other courts, calls into question the reliance on *Rosen*."¹⁵³ In *Seremeth*, the court clarified that *Rosen* was decided on narrow grounds and had not reached the holding many courts attributed to it.¹⁵⁴ *Seremeth* revisited the issue and definitively addressed whether Title II requires police to provide reasonable accommodations.

In *Seremeth*, police arrived at plaintiff Robert Seremeth's home because of allegations of domestic violence towards his children.¹⁵⁵ Seremeth and his children, who were at home at the time, were deaf.¹⁵⁶ Officers entered the home and placed Seremeth in handcuffs.¹⁵⁷ Despite knowledge that Seremeth was deaf and previous communication with him through notes, officers left him handcuffed and unable to communicate through writing, sign language, or hand gestures.¹⁵⁸ Over an hour into the encounter, officers determined no abuse had occurred and left.¹⁵⁹

151. *Rosen v. Montgomery Cty.*, 121 F.3d 154, 157 (4th Cir. 1997) ("The most obvious problem is fitting an arrest into the ADA at all.").

152. *Id.*

153. *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 381 (D. Md. 2011); *see also Calloway v. Boro of Glassboro Dep't of Police*, 89 F. Supp. 2d 543, 556 (D. N.J. 2000) (finding *Rosen* "discredited" in light of *Yeskey*).

154. *Seremeth*, 673 F.3d at 337–38 ("These glosses on *Rosen* assume that *Rosen* was decided on broader grounds than it was . . .").

155. *Id.* at 335.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 336.

The Fourth Circuit determined that the ADA applied to this investigation of criminal conduct.¹⁶⁰ The court did not determine *why* the ADA applied to arrests: whether arrests were a covered “program[], service[], or activity” or whether arrests were actionable under the second clause of Title II as “discrimination.”¹⁶¹ Instead, the court relied on *Yeskey*’s expansive interpretation to determine that Title II applied regardless of the specific theory imputing liability.¹⁶² Having determined that Title II applied to Seremeth’s claim, the court turned its attention to how Title II governed and whether there was a blanket exception in the face of exigent circumstances. The court declined to recognize such an exception and instead held that “while there is no separate exigent-circumstances inquiry, the consideration of exigent circumstances is included in the determination of the reasonableness of the accommodation.”¹⁶³ By adopting such an approach, the Fourth Circuit joined the Eleventh Circuit and applied Title II’s reasonable accommodation mandate in the face of an exigency but accounted for the presence of exigent circumstances as one factor in a determination of reasonableness.

Focusing this inquiry on the facts of *Seremeth*, the Fourth Circuit concluded that Seremeth’s proposed accommodation of waiting for a trained American Sign Language interpreter was not reasonable.¹⁶⁴ The court looked both to the accommodations that officers did attempt to make and the dangerous nature of domestic disturbance calls in general.¹⁶⁵ It found that “[u]nder the circumstances, it was reasonable for the deputies to attempt to accommodate Seremeth’s disability by calling . . . an ASL [American Sign Language] trainee, to assist in communication, and by attempting to use Seremeth’s father

160. *Id.* at 338.

161. *Id.* (quoting *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002)). The court noted, “[w]e need not pick sides in this dispute because, in light of *Yeskey*’s expansive interpretation, the ADA applies to police interrogations under either test.” *Id.*

162. *Id.*

163. *Id.* at 339.

164. *Id.* at 340–41.

165. *Id.* at 340 (“The deputies were responding to a domestic disturbance call, which Deputy Rohrer characterized as ‘some of the most dangerous calls that we ever go on.’”).

as an interpreter.”¹⁶⁶ The court was careful to note that this “was reasonable even though these accommodations were not best practices—practices that in other circumstances could be evidence of a failure to reasonably accommodate.”¹⁶⁷ Effectively, the court concluded that the accommodations provided to Seremeth may not have been reasonable in a controlled setting with no exigency present, but they were reasonable considering the unsecured scene and evolving situation.

The last circuit to adopt this approach was the Ninth in *Sheehan I*.¹⁶⁸ The Ninth Circuit recognized that it had “not previously addressed whether the ADA applies to arrests, and the question is a matter of some disagreement among other circuits.”¹⁶⁹ The court “agree[d] with the majority of circuits to have addressed the question that Title II applies to arrests.”¹⁷⁰ The Ninth Circuit rejected the Fifth Circuit’s holding in *Hainze* and agreed “with the Eleventh and Fourth Circuits that exigent circumstances inform the reasonableness analysis under the ADA.”¹⁷¹ In a subsequent case, the Ninth Circuit rejected the idea that reasonable accommodations were not required if officers did not provoke or initiate the confrontation and instead noted “the reasonableness of accommodation under the circumstances is an entirely separate fact question.”¹⁷²

Even under the same approach, *Sheehan I* came out very differently from either *Seremeth* or *Bircoll*. The court reversed the grant of summary judgment, holding that a reasonable juror “could find that the situation had been defused sufficiently, following the initial retreat from Sheehan’s room,” creating a triable issue of fact as to whether Sheehan’s proposed accommodations were reasonable.¹⁷³ With its holding in *Sheehan I*, the Ninth Circuit not only joined the Fourth and Eleventh Circuits in adopting a totality-of-the-circumstances based approach but also set the stage for the Supreme Court’s review in *Sheehan II*.

166. *Id.*

167. *Id.*

168. *See supra* Section II.B.

169. *Sheehan I*, 743 F.3d at 1231 (citation omitted).

170. *Id.* at 1232.

171. *Id.*

172. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1037 (9th Cir. 2018).

173. *Sheehan I*, 743 F.3d at 1233.

3. The Eighth Circuit Approach

The Eighth Circuit Approach is less delineated than that of the *Hainze* Approach and the Majority Approach but bears characteristics of both. This approach melds the deference to police found in the *Hainze* Approach with the reasonableness determination of the Majority Approach—finding it unreasonable to require accommodations when police face exigent circumstances. While the Eighth Circuit has adopted an approach for handling Title II claims in the context of arrests, it should be noted that it has never explicitly addressed whether arrests are a “covered service.”¹⁷⁴ This is important because to prevail on a Title II claim in this context, the Eighth Circuit requires “a plaintiff . . . demonstrate ‘that he is a qualified individual with a disability denied participation in, or the benefits of, the services, programs, or activities of a public entity because of his disability.’”¹⁷⁵ The Eighth Circuit has never explicitly recognized the broader “discrimination” clause of Title II as a means for imputing liability.¹⁷⁶ Were the court to determine that an arrest was not a covered service, it would preclude arrests from the protection of Title II altogether. Under current law, the Eighth Circuit has never definitively determined that the ADA is applicable to arrests.¹⁷⁷

Despite not formally recognizing Title II’s applicability to arrests, the Eighth Circuit formulated its own approach in *Bahl v. County of Ramsey*,¹⁷⁸ where a deaf motorist, Douglas Bahl, was pulled over for a traffic violation.¹⁷⁹ When the officer approached Bahl, Bahl shook his head “no” and pointed to his ear to indicate that he was deaf.¹⁸⁰ Bahl also gestured that he could communicate in writing.¹⁸¹

174. *Bahl v. County of Ramsey*, 695 F.3d 778, 784 (8th Cir. 2012) (“We need not decide whether the act of a law enforcement officer effecting a traffic stop is a covered service.”).

175. *De Boise v. Taser Int’l, Inc.*, 760 F.3d 892, 899 (8th Cir. 2014) (quoting *Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998)).

176. *See Bahl*, 695 F.3d at 784–86; *De Boise*, 760 F.3d at 899.

177. *See Sheeley v. City of Austin*, No. 12-2525 ADM/SER, 2015 WL 3576115, at *7 (D. Minn. June 5, 2015) (noting that “some ambiguity surrounds whether the ADA is applicable to an officers’ actions prior to an arrest”).

178. 695 F.3d at 784–86.

179. *Id.* at 781.

180. *Id.* at 781–82.

181. *Id.* at 782.

The officer attempted to mouth “driver[’]s license” before grabbing Bahl’s shoulder.¹⁸² Bahl reached for a pen and paper to write with in an attempt to indicate to the officer that he had sensitive joints and that the officer was hurting him.¹⁸³ The officer pepper-sprayed Bahl, pulled him out of his car, and placed his arms behind his back.¹⁸⁴ Bahl was transported to a hospital for treatment.¹⁸⁵

The district court granted summary judgment in favor of the county on Bahl’s ADA claim.¹⁸⁶ On appeal, Bahl argued that the means of communication employed by the officer was not a reasonable accommodation and that a triable issue of fact existed as to whether allowing Bahl to write was a reasonable accommodation.¹⁸⁷ Despite declining to “decide whether the act of a law enforcement officer effecting a traffic stop is a covered service,” the Eighth Circuit still found that “[e]ven if the ADA applied to the traffic stop . . . under the exigencies of the traffic stop, [the officer] was not required to honor Bahl’s request to communicate by writing.”¹⁸⁸

The Eighth Circuit recognized that “[t]he reasonable modification inquiry is highly fact-specific and varies depending on the circumstances of each case, including the exigent circumstances presented by criminal activity and safety concerns.”¹⁸⁹ Relying in part on the reasoning in *Hainze*, the court held that it would “not second guess [police] judgments, where, as here, an officer is presented with exigent or unexpected circumstances. In these circumstances, it would be unreasonable to require that certain accommodations be made in light of overriding public safety concerns.”¹⁹⁰

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 783.

187. *Id.* at 784.

188. *Id.*

189. *Id.* at 784–85.

190. *Id.* at 785.

Instead of joining the majority of the circuits and determining that exigency was one part of a totality-based reasonableness determination, the Eighth Circuit held that the presence of any exigent or unexpected circumstances made it unreasonable to require accommodations.¹⁹¹ The approach is similar to the *Hainze* Approach in that both decline to require accommodations in the presence of an exigency. However, under the *Hainze* Approach, Title II ceases to apply altogether. Under the Eighth Circuit Approach, Title II may still apply but accommodations are not required because they are unreasonable. These two approaches, as well as the Majority Approach, all suffer from various weaknesses and should not be adopted if the Supreme Court reconsiders the issue.

IV. THE CURRENT CIRCUIT APPROACHES ARE NOT VIABLE THEORIES UNDER TITLE II

None of the approaches to emerge from the circuit courts are viable, long-term solutions. They are incompatible with other areas of Supreme Court precedent, lack consistency in their application, and fail to give police sufficient guidance. Below is the first in-depth, critical analysis of the respective shortcomings of each approach.

A. Failure of the Hainze Approach

The *Hainze* Approach fails to adequately address Title II's applicability to police conduct. Not only is the "securing the scene" exception not grounded in any of Title II's regulatory or statutory language, but it also runs counter to Title II's regulations by shifting the burden of showing inapplicability from the public entity to the plaintiff. The Fifth Circuit has also failed to define what constitutes "securing the scene," resulting in overbroad discretion to police officers and no guidance to district courts applying this standard.

191. *Id.*

1. There Is No Textual Support for a “Securing the Scene” Exception

The *Hainze* Approach is the only circuit approach that renders Title II inapplicable in certain situations. Its “securing the scene” exception is a judicially-grafted exception to the statute that is not rooted in the language of the ADA or Title II. The “starting point in every case” involving the application of a statute is the language of the statute itself.¹⁹² Title II’s language prohibits public entities from discriminating against qualified individuals.¹⁹³ Under the ADA, discrimination encompasses a failure to make reasonable accommodations.¹⁹⁴ The statute’s plain language requires public entities to provide reasonable accommodations, and nothing in the ADA’s text supports an exception to Title II’s applicability prior to securing the scene or in the face of an exigency.¹⁹⁵

The Supreme Court has struck down similar judicially grafted exceptions to the applicability of a statute. In *Ross v. Blake*, the Supreme Court rejected an “unwritten ‘special circumstances’ exception” to a provision of the Prison Litigation Reform Act.¹⁹⁶ In doing so, the Supreme Court found that such an exception was “extra-textual” and a “freewheeling” approach to the statute, and the Court refused to “deviate from [the statute’s] textual mandate.”¹⁹⁷ The extra-textual “securing the scene exception” of the *Hainze* Approach, offered by the Fifth Circuit, is similarly incompatible with the plain language of Title II and should be rejected.

192. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

193. 42 U.S.C. § 12132 (2012).

194. *See id.* § 12111; *Williams v. Pa. Hous. Auth. Police Dep’t*, 380 F.3d 751, 771 (3d Cir. 2004).

195. *Seremeth v. Bd. of Cty. Comm’rs*, 673 F.3d 333, 339 (4th Cir. 2012) (rejecting an exigent-circumstances exception to the ADA because “[m]ost importantly, nothing in the text of the ADA suggests that a separate exigent-circumstances inquiry is appropriate”).

196. *Ross v. Blake*, 136 S. Ct. 1850, 1855 (2016).

197. *Id.* at 1853–57.

2. The *Hainze* Approach Constitutes Impermissible Burden Shifting

The *Hainze* Approach presumes that in cases of on-the-ground investigations and arrests by police, the ADA does not apply. This is inherent in its holding that “Title II does not apply . . . prior to the officer’s securing the scene and ensuring that there is no threat to human life.”¹⁹⁸ The *Hainze* Approach places the burden on the individual bringing the claim to plead and prove that the scene was secure, and therefore Title II should apply.¹⁹⁹ This effectively creates an additional element of proof for Title II claims brought in the Fifth Circuit regarding police conduct.²⁰⁰

This approach runs counter to Title II’s own textual exception for situations where the individual poses a risk to others: the direct threat exception.²⁰¹ Under the direct threat exception, Title II “does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.”²⁰² There is very little jurisprudence applying this regulation to police conduct. In *Sheehan II*, the municipality argued that, under the direct threat exception, it did not need to provide accommodations to Sheehan, but it never raised the argument in the Ninth Circuit.²⁰³

Although the case law on the direct threat exception has mostly emerged from the employment context, it is still clear that the defendant public entity bears the burden of proving “that a plaintiff poses a

198. *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000).

199. *Rockwell v. City of Garland*, No. 3:08-cv-0251-M, 2013 WL 4223223, at *7 (N.D. Tex. Aug. 14, 2013) (“On these facts, the officers were justified in concluding the scene was not secure Accordingly, their decision to enter [the plaintiff’s] room does not give rise to a cause of action under the ADA.”).

200. *See DeLeon v. City of Alvin Police Dep’t*, No. H-09-1022, 2010 WL 4942648, at *4 (S.D. Tex. Nov. 30, 2010) (finding the plaintiff failed to establish “a viable claim for damages under the ADA” where “[g]iven . . . exigent circumstances, the police had a right to arrest her immediately and secure the scene”); *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 771, 776 (W.D. Tex. 2006) (finding the plaintiff may have a viable ADA claim because “[v]iewing the facts in the light most favorable to Plaintiff, the scene was secure shortly after the police arrived”).

201. 28 C.F.R. § 35.139 (2012).

202. *Id.* § 35.139(a).

203. *Sheehan II*, 135 S. Ct. at 1773.

direct threat of harm to others.”²⁰⁴ This regulation, which carries the force of law,²⁰⁵ creates an avenue through which a public entity can rebut the presumption of Title II’s applicability. This runs opposite to the *Hainze* Approach, which requires the plaintiff to rebut the presumption of Title II’s inapplicability. Instead of requiring a public entity to prove a direct threat, the *Hainze* Approach requires disabled individuals to prove they are *not* a direct threat, by proving the scene is secure, to receive Title II’s protection. The *Hainze* Approach amounts to impermissible burden shifting that runs opposite to the direct threat exception promulgated by the Department of Justice.

3. There Is a Lack of Clarity Surrounding the “Securing the Scene” Analysis

The *Hainze* Approach also suffers from a lack of clarity as to how courts should implement it. “Securing the scene” has never been defined. Absent a specific definition or guidance on how to apply its decision, later cases from the Fifth Circuit have referred to the *Hainze* Approach as an “exigent-circumstances exception.”²⁰⁶ Yet, in *Hainze*, the court was clear that this exception applies “in the presence of exigent circumstances *and* prior to securing the safety of themselves, other officers, and any nearby civilians.”²⁰⁷ The district courts have scrambled to apply the nebulous standard.

In *Hobart v. City of Stafford*, a police officer responded to a 9-1-1 call about a young man, Aaron Hobart, who had schizoaffective disorder.²⁰⁸ Hobart was shot and killed by the responding police officer.²⁰⁹ Hobart’s parents brought a Title II claim against the City ar-

204. *Sage v. City of Winooski*, No. 2:16-cv-116, 2017 WL1100882, at *4 (D. Vt. Mar. 22, 2017) (applying the direct threat exception in the context of Title II) (*citing* *Hargrave v. Vermont*, 340 F.3d 27, 35 (2d Cir. 2003) (“In the employment context, it is the defendant’s burden to establish that a plaintiff poses a ‘direct threat’ of harm to others.”)).

205. *Helen L. v. DiDario*, 46 F.3d 325, 332 (3d Cir. 1995) (“[B]ecause Congress mandated that the ADA regulations be patterned after the section 504 coordination regulations, the former regulations have the force of law.”).

206. *Windham v. Harris Cty.*, 875 F.3d 229, 235 n.4 (5th Cir. 2017).

207. *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) (emphasis added).

208. 784 F. Supp. 2d 732, 740–41 (S.D. Tex. 2011).

209. *Id.* at 743, 748.

guing that officers were required to provide reasonable accommodations.²¹⁰ The court denied the defendant's motion for summary judgment and found that a triable issue of fact existed as to whether the scene was secure, despite uncontested facts showing that Hobart was physically assaulting the police officer when he was shot and killed.²¹¹ Yet, in *DeLeon v. City of Alvin Police Department*, the court concluded that the scene was unsecured as a matter of law.²¹² Amber DeLeon, who was deaf, called 9-1-1 after her brother assaulted her.²¹³ When police arrived, her brother and cousin claimed that DeLeon had stabbed her brother.²¹⁴ Based on these accusations and her brother's statement "that if she were not arrested, she would assault him again," the court determined that the scene was unsecure.²¹⁵ That an actual assault of a police officer may not preclude liability, while the mere accusation of an assault does, demonstrates the lack of clarity of the *Hainze* Approach. The *Hainze* Approach does not give courts a framework from which they can make a uniform assessment as to which situations are grave enough to warrant suspension of ADA liability and which are not.

These two cases highlight another ambiguity in the *Hainze* Approach: whether the "securing the scene" approach is a factual inquiry. It would seem to be a factual inquiry, but no court has determined whether it is a question of pure fact or a mixed question of law and fact. Even where the factual situations seemed to constitute similar levels of exigency and were similarly uncontested, some courts have determined whether the scene was secure on summary judgment motions while others have declined to do so.²¹⁶

The Fifth Circuit has also remained silent on whether the inquiry is a subjective one or an objective inquiry more analogous to the

210. *Id.* at 756.

211. *Id.* at 757–58.

212. *DeLeon v. City of Alvin Police Dep't*, No. H-09-1022, 2010 WL 4942648, at *3 (S.D. Tex. Nov. 30, 2010).

213. *Id.* at *1.

214. *Id.*

215. *Id.* at *4.

216. *Compare id.* at *4–5, with *Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 739, 758 (S.D. Tex. Apr. 29, 2011).

direct threat exception.²¹⁷ In the eighteen years since the *Hainze* decision, there has been no further clarity on how courts should apply it. What began as a bright-line rule has emerged as a vague but over-inclusive standard.

4. Unintended Impact Outside of Failure to Accommodate Claims

The *Hainze* Approach is also vague as to which theories of liability it applies to. The *Hainze* Approach arose in the context of a reasonable accommodation claim, but the holding of *Hainze* was not limited to reasonable accommodation claims.²¹⁸ Instead, it broadly proclaims “Title II does not apply . . . prior to the officer’s securing the scene and ensuring that there is no threat to human life.”²¹⁹ This language precludes all Title II claims prior to securing the scene.²²⁰ The *Hainze* Approach not only absolves police who fail to provide reasonable accommodations but also grants them absolution for any type of liability under the ADA prior to securing the scene, including blatantly intentional discrimination and wrongful arrest claims. The implications of this have not been explored, as the Fifth Circuit is the only circuit to adopt this rule and the cases arising under it have been limited.

The Fifth Circuit attempts to alleviate these concerns by pointing to other remedies that may be available.²²¹ Many ADA cases also contain excessive force claims arising under 42 U.S.C. § 1983. These causes of action serve two different purposes. An individual officer’s subjective, discriminatory intent is not analyzed in an excessive force claim because if the officer’s use of force was *objectively* reasonable, the officer is not liable.²²² Even where an officer acts in a discrimina-

217. See *Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007) (In applying the direct threat exception in the employment context, “the fact-finder does not independently assess whether it believes that the [individual] posed a direct threat,” but “determine[s] [instead] whether the [entity’s] decision was objectively reasonable”).

218. *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Graham v. Connor*, 490 U.S. 386, 397 (1989) (“An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force . . .”).

tory manner, the court cannot take the officer's subjective intent into account when evaluating whether there was excessive force.²²³ The court can only look to the objective reasonableness. Where an officer acts with subjective, uncontested discriminatory intent but the force exerted is still found to be objectively reasonable, that officer will not be liable for excessive force. If the scene was unsecured, the officer would similarly avoid liability under the intended vehicle for such a claim: the ADA.

This assumes that the underlying conduct of an officer is the type that an excessive force claim could capture. Some conduct that arises during a reasonable accommodation claim may be the type of conduct that lends itself to an excessive force claim, but other conduct may not. Failing to provide a sign language interpreter during an arrest, such as in *Bahl*,²²⁴ would not be covered by the scope of an excessive force claim. It should be covered by the ADA.

B. Failure of the Majority Approach

The Fifth Circuit, in *Hainze*, at least attempted to give police a bright-line rule they could implement. The Majority Approach, on the other hand, suffers from a lack of easily administrable rules and offers no guidance on how police should implement its approach. It is also inconsistent with Supreme Court precedent governing the review of police conduct.

1. Lack of Easily Administrable Rules

The Majority Approach renders it virtually impossible for police to know whether they are in compliance with Title II because of the totality-of-the-circumstances based analysis and inconsistent application. The Majority Approach looks holistically at all the factors present to determine if, under the totality of the circumstances, a proposed accommodation is reasonable.²²⁵ The presence of exigent cir-

223. *Id.*

224. *Bahl v. County of Ramsey*, 695 F.3d 778, 788 (8th Cir. 2012); *see supra* notes 174–88 and accompanying text.

225. *Sheehan I*, 743 F.3d at 1232–33; *Seremeth v. Bd. of Cty. Comm'rs*, 673 F.3d 333, 340 (4th Cir. 2012); *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1085–86 (11th Cir. 2007).

cumstances is but one of the factors to be considered. Under this approach, a specific accommodation could be considered reasonable in one situation but not in another, which the *Seremeth* court acknowledged.²²⁶ This approach calls for police officers to speculate as to what accommodations will be considered reasonable as they respond to varying emergency situations.

It is unreasonable to expect police to implement procedures consistent with the Majority Approach because the very same circuit courts that adopted the approach have struggled to apply it consistently. In *Bircoll v. Miami-Dade County*, the Eleventh Circuit held that “given the exigent circumstances of a DUI stop,” providing an oral interpreter to an unarmed, unresisting deaf man was “per se not reasonable.”²²⁷ Yet in *Sheehan I*, faced with a woman armed with a knife who had already made several threats of physical violence towards police and third parties, the Ninth Circuit held that a triable issue of fact existed as to whether respecting her comfort zone was a reasonable accommodation.²²⁸

The Supreme Court has confronted the issue of regulating police conduct in the context of the Fourth Amendment and has consistently favored easily administrable rules that police can readily implement.²²⁹ The principle that rules governing police conduct must be “readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged,” is no less significant in the ADA context.²³⁰ The Majority Approach is not readily administrable and is the type of analysis disfavored by the Supreme Court for being “qualified by all sorts of ifs, ands, and buts.”²³¹ If the

226. *Seremeth*, 673 F.3d at 340 (finding attempted accommodations were “reasonable even though these accommodations were not best practices—practices that in other circumstances could be evidence of a failure to reasonably accommodate”).

227. 480 F.3d 1072, 1086 (11th Cir. 2007).

228. *Sheehan I*, 743 F.3d at 1217.

229. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (“[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.”).

230. *New York v. Belton*, 453 U.S. 454, 458 (1981) (citation omitted).

231. *Id.*

circuit courts struggle to consistently apply the Majority Approach, it is unreasonable to expect police officers to correctly anticipate how such an approach will be applied while making split-second decisions.

2. Inconsistency with Current Fourth Amendment Jurisprudence

The struggle of police attempting to anticipate how the Majority Approach will be applied is compounded by courts reviewing cases months, or even years, after the events have occurred. The Supreme Court has grappled with the challenge of reviewing police conduct years removed from when the conduct occurred. To avoid evaluating officer conduct in light of information that was unavailable to the officer at the time, the Court has rejected hindsight-laden arguments in relation to police conduct.²³² In an excessive force claim, the Supreme Court held that conduct “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”²³³

The Majority Approach runs antithesis to this idea by reviewing police conduct in light of information later made available to the court. For example, in *Sheehan I* the court evaluated the reasonableness of accommodations that were never requested or brought to the responding officers’ attention.²³⁴ Title II does allow such claims where the public entity has knowledge of an individual’s disability,²³⁵ but in the context of exigency, it runs counter to the Supreme Court’s precedent to evaluate the reasonableness of an accommodation based on information unavailable to the officer at the time.

C. Failure of the Eighth Circuit Approach

The Eighth Circuit does attempt to give police a bright-line, administrable rule: in the face of an exigency, an accommodation is unreasonable as a matter of law. What hampers the rule’s application

232. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

233. *Id.*

234. *See Sheehan I*, 743 F.3d at 1232–33.

235. *Robertson v. Las Animas Cty. Sheriff’s Dep’t*, 500 F.3d 1185, 1197–98 (10th Cir. 2007); *Chisolm v. McManimon*, 275 F.3d 315, 330 (3d Cir. 2001) (finding that a deaf inmate’s failure to request close captioning on television did not bar his Title II claim).

is the court's lack of instruction as to what constitutes "exigency" and broad deference to police decisions. In that regard, it is similar to the *Hainze* court's omission of a definition or standard for "securing the scene."²³⁶ In the absence of guidance as to what constitutes an exigency under Title II, courts within the Eighth Circuit have come to varying conclusions. In *Bahl*, the case that originally espoused the approach, the Eighth Circuit determined that a routine traffic stop where an unarmed, unresisting man was pulled over for running a red light constituted exigent circumstances.²³⁷ Subsequent cases involving reasonable accommodation claims arising out of arrests for more serious crimes did not warrant the same exigency analysis.²³⁸ Whether this is a reflection on the ambiguities surrounding the Eighth Circuit's approach in general or more specifically the lack of clarity as to what constitutes exigency is unclear. Regardless, the sweeping inclusion of a routine traffic stop as an exigency sets precedent excluding a large swathe of the disabled population from the protections of Title II and provides police with little clarity as to when they need to comply with the ADA. When inevitably confronted with this issue again, the Supreme Court should reject all three circuit court approaches and adopt a new approach instead.

V. RESOLVING THE CIRCUIT SPLIT

As increased numbers of Americans are diagnosed with mental health disorders, resulting in increased interactions between police and individuals with disabilities, the Supreme Court will have to revisit Title II's applicability to police conduct. When it does, the Court should reject the three approaches that have emerged from the circuit courts and instead hold that Title II always applies to police conduct, but accommodations are per se unreasonable if police prove the existence of exigent circumstances during the interaction.

236. *See supra* Section IV.A.3.

237. *Bahl v. County of Ramsey*, 695 F.3d 778, 788 (8th Cir. 2012).

238. *Abney v. City of St. Charles*, No. 414CV01330 AGF, 2015 WL 164040, at *3–4 (E.D. Mo. Jan. 13, 2015) (analyzing a case where a deaf plaintiff was arrested for assaulting a police officer); *McDonald v. Weissenborn*, No. 4:11-CV-768-SPM, 2013 WL 121430, at *2 (E.D. Mo. Jan. 9, 2013) (analyzing a case where police officers arrived at a scene where a five-year-old daughter told police her father had sexual contact with her).

A. *The Inevitability of the Supreme Court Revisiting the Issue*

While the Supreme Court did not adopt any of the circuit approaches in *Sheehan II*, the individual weaknesses of the various approaches are still pertinent because it is inevitable that the Court will revisit the issue in a subsequent case. As *Sheehan* and *Hainze* illustrate, a common theme to emerge from ADA cases concerning law enforcement is the intersection of police and individuals in the midst of a mental health crisis. As rates of mental illness and suicide increase in the United States, so too will the number of encounters between the police and those with a mental health disorder.

Nationally, the suicide rate has risen by 25% since 1999 and continues to climb each year.²³⁹ Suicide is the tenth leading cause of death in the United States, and one of the only leading causes that is on the rise.²⁴⁰ Forty three million Americans have mental health or substance abuse conditions, yet over half do not receive treatment.²⁴¹ On the front lines of this increasing health crisis are the police, who are frequently called to respond to and transport individuals in the throes of a mental health crisis.

Although less than 4% of the population has a severe mental illness, individuals with mental illness generate no less than 10% of calls for police services.²⁴² Roughly one-third of all individuals transported to hospital emergency rooms in psychiatric crisis are taken there by police.²⁴³ Individuals with a mental illness are far more likely to be hurt or killed at the hands of police officers.²⁴⁴ At least one in four individuals shot and killed by police displayed signs of

239. Benedict Carey, *How Suicide Quietly Morphed into a Public Health Crisis*, N.Y. TIMES (June 8, 2018), <https://www.nytimes.com/2018/06/08/health/suicide-spade-bordain-cdc.html>.

240. *Suicide Rates Rising Across the U.S.*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 7, 2018), <https://www.cdc.gov/media/releases/2018/p0607-suicide-prevention.html>.

241. MENTAL HEALTH AMERICA, THE STATE OF MENTAL HEALTH IN AMERICA 2018, at 5 (2017), <https://www.mentalhealthamerica.net/sites/default/files/2018%20The%20State%20of%20MH%20in%20America%20-%20FINAL.pdf>.

242. FULLER ET AL., *supra* note 34, at 1.

243. *Id.*

244. *Id.*

mental illness.²⁴⁵ Those with a mental illness are approximately sixteen times more likely than the rest of the population to be killed during an incident with police, despite the majority of such encounters occurring as a result of nuisance behavior or low-level, misdemeanor crime.²⁴⁶

News stories reporting individuals with mental illness who were shot and killed by police have unfortunately become commonplace. As the rate of occurrence for mental health disorders increases without a commensurate increase in the rate of treatment, violent encounters between police and individuals with mental illness will continue to climb. Articles have emerged addressing ways to avoid or mitigate interactions, such as through increased officer training and preventative mental health care.²⁴⁷ Preemptive training and prophylactic solutions alone are not enough. Individuals with mental illness should be protected by Title II's reasonable accommodation mandate *during* an interaction with police, and police officers need clearly delineated guidance on what the law requires from them in such interactions.

B. The Supreme Court Should Hold that Title II Applies to Police Conduct but All Accommodations Are Per Se Unreasonable when Exigent Circumstances Are Present During an Interaction with Police

If the Supreme Court revisits the issue it dismissed in *Sheehan II*, it should hold that Title II always applies to police conduct and requires police to provide reasonable accommodations during investigations and arrests. It should also adopt a rule that all accommodations are per se unreasonable in the face of exigent circumstances, where exigency is analyzed under established Fourth Amendment precedent and must be proven by the public entity. This rule, which would find accommodations unreasonable only in a narrow set of strictly pre-

245. *Id.*

246. *Id.*

247. See Nils Rosenbaum et al., *Collaboration to Reduce Tragedy and Improve Outcomes: Law Enforcement, Psychiatry, and People Living with Mental Illness*, 174 AM. J. PSYCHIATRY 513 (2017); William G. Brooks III, *Police Need More Mental Health Training*, THE HILL (Feb. 22, 2018, 11:30 AM), <http://thehill.com/opinion/healthcare/375040-police-need-more-mental-health-training>.

scribed circumstances, ensures that individuals with disabilities are protected during their encounters with police yet still allows officers to make instantaneous decisions when necessary. Unlike the Eighth Circuit or *Hainze* Approach, this approach creates clear limits on exigency by using existing Fourth Amendment precedent to constrict what can be considered exigent circumstances and by placing the burden of proving exigency on the public entity. This rule ensures broader application of Title II and therefore broader protection for individuals with disabilities.

The Supreme Court has previously adopted similar bright-line rules regarding the reasonableness of police conduct. In *Tennessee v. Garner*, the Court held that using deadly force to prevent the escape of all felony suspects is unreasonable.²⁴⁸ In *Katz v. United States*, the Court reiterated the principle that a search conducted by police outside the judicial process is per se unreasonable.²⁴⁹ In *Florida v. Jardines*, the use of a device not in public use to explore details of a home without a warrant was held to be presumptively unreasonable.²⁵⁰ Adopting an “Unreasonable Per Se” Approach to Title II is consistent with the Supreme Court’s longstanding approach of striking an appropriate balance between protecting liberty interests while ensuring the continued functionality of law enforcement by giving police a bright-line, easily administrable rule.

C. Implementing an Unreasonable Per Se Approach

The Unreasonable Per Se Approach effectively balances the competing interests of public safety and the welfare of police with the necessity of providing reasonable accommodations to individuals with disabilities during police encounters. It places the burden of proving the existence of an exigency on the public entity, consistent with Title II’s direct threat exception. The existence of an exigency would be analyzed under existing Fourth Amendment jurisprudence, ensuring both a high threshold for the exception’s application and that Title II exigency is consistent with current Supreme Court precedent

248. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

249. *Katz v. United States*, 389 U.S. 347, 357 (1967) (recognizing that there are “a few specifically established and well-delineated exceptions” to the rule).

250. *Florida v. Jardines*, 569 U.S. 1, 14–15 (2013) (citing *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

on exigent circumstances. The Unreasonable Per Se Approach would ensure that courts review police conduct in Title II cases in a manner that is consistent with Supreme Court precedent on the use of excessive force by not engaging in hindsight-laden review.²⁵¹ This approach also addresses significant policy interests by promoting techniques to make all parties safer during interactions between police officers and individuals with disabilities.

1. The Public Entity Bears the Burden of Proving the Existence of the Exigency

There are several ways to ensure that courts apply this approach in a consistent manner that still comports both with current Supreme Court precedent and Title II's regulations. First, the Unreasonable Per Se Approach would function as an affirmative defense that the public entity could assert. The public entity would bear the burden of proving the existence of an exigency during the interaction. Under this rule, once a plaintiff pleads facts sufficient to make a prima facie reasonable accommodation claim,²⁵² Title II applies even if the claim arises out of exigent circumstances. The public entity could then challenge the claim by showing the existence of an exigency. If the public entity successfully proved that exigent circumstances existed, that would render all accommodations per se unreasonable. This would preclude a finding that the public entity should have provided accommodations under Title II during the exigency. This would not be an exception to Title II's applicability. Title II would still apply during the exigency and the defense would be limited to a reasonable accommodation theory of liability. Even where exigency is present, this approach would not apply to any other theory of Title II liability, such as a wrongful arrest claim.

Placing the burden on the public entity to prove exigency not only would limit the scope of the Unreasonable Per Se Approach's

251. See *Graham v. Connor*, 490 U.S. 386, 396 (1989).

252. To make a prima facie case under Title II, the plaintiff would have to show: "(1) he is a qualified individual; (2) with a disability; (3) he was excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or was subjected to discrimination by any such entity; (4) by reason of his disability." *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 553 n.32 (3d Cir. 2007); *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1083 (11th Cir. 2007).

application but also would ensure that it comports with Title II's direct threat exception. Under this regulation, the public entity bears the burden of proving that the individual bringing the claim was a direct threat to the health or safety of others.²⁵³ This presumes that Title II requires a public entity to comply unless the public entity can meet its burden of proof under the direct threat exception. This is consistent with how the Unreasonable Per Se Approach would be implemented.

The Unreasonable Per Se Approach is not duplicative of the direct threat exception. There is doubt as to whether the direct threat exception applies to reasonable accommodation claims at all. Most circuit courts currently recognize two paths to prove discrimination under Title II: an individual was "excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity"; or an individual was "subjected to discrimination by any such entity."²⁵⁴ The direct threat exception functions by letting public entities exclude individuals from "participat[ing] in or benefit[ing] from the services, programs, or activities of that public entity" if they are a direct threat.²⁵⁵ The plain text of the regulation does not give a defense to the discrimination clause, only to a denial of participation or benefits. It is currently undetermined if reasonable accommodation claims rely on both clauses, or only the latter. If reasonable accommodation claims are rooted solely in Title II's discrimination clause, then the direct threat exception may not apply, and the Unreasonable Per Se Approach becomes even more necessary.

Even assuming that the direct threat exception does apply to reasonable accommodation claims, the Unreasonable Per Se Ap-

253. *Sage v. City of Winooski*, No. 2:16-cv-116, 2017 WL 1100882, at *4 (D. Vt. Mar. 22, 2017) ("[I]n the employment context, . . . [i]t is the defendant's burden to establish that a plaintiff poses a direct threat of harm to others.") (*citing* *Hargrave v. Vermont*, 340 F.3d 27, 35 (2d Cir. 2003)) (applying direct threat exception in context of Title II); *see* 28 C.F.R. § 35.139 (2012).

254. 42 U.S.C. § 12132 (2012); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44–45 (2d Cir. 1997) ("[T]he language of Title II's anti-discrimination provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of the City. Rather, it is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context, and that should avoid the very type of hair-splitting arguments the City attempts to make here.").

255. 28 C.F.R. § 35.139(a) (2012).

proach is necessary as there are key differences between a direct threat under the regulation and exigent circumstances. While this Article discusses what constitutes an exigency under the Unreasonable Per Se Approach in greater detail below,²⁵⁶ circumstances that could constitute a direct threat may not rise to the level of an exigency. In *Kelly v. City of Eugene*, a woman was a direct threat to the health and safety of others because she was driving a vehicle with windows that were overly tinted.²⁵⁷ Overly tinted windows would not constitute exigent circumstances.

Unlike the Unreasonable Per Se Approach, the direct threat exception does not release public entities from providing reasonable accommodations. The regulation specifically requires public entities, when determining if an individual poses a direct threat, to consider “whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.”²⁵⁸ This means that under the direct threat exception, if a reasonable accommodation would mitigate the risk an individual poses, it could still be required. Under the Unreasonable Per Se Approach, the existence of exigency is a complete bar to requiring the provision of accommodations.

Notably, the Unreasonable Per Se Approach covers situations where an individual poses a threat to himself. The direct threat exception does not. A public entity may assert the direct threat exception where an individual posed “a direct threat to the health or safety of *others*.”²⁵⁹ The direct threat exception formerly included “danger to self” in the regulation’s language, but that language was omitted in 2011.²⁶⁰ As it stands now, the direct threat exception does not apply

256. See *infra* Section V.C.2.

257. No. 6:15-cv-00875-JR, 2017 WL 1659061, at *10 n.11 (D. Or. Mar. 2, 2017).

258. 28 C.F.R. § 35.139(b) (2012).

259. *Id.* § 35.139(a) (emphasis added).

260. *Disability Rights N.J., Inc. v. Velez*, 974 F. Supp. 2d 705, 738–39 (D. N.J. 2013) (finding that the explicit definition of the direct threat exception does not cover situations where an individual is only a danger to himself); see Thomas Grace & Edward J. Smith, Sr., *Self-Endangering Students: The Public Policy Conundrum*, NASPA (Jan. 29, 2014), <https://www.naspa.org/rpi/posts/self-endangering-students-the-public-policy-conundrum>.

where an individual only poses a threat to himself.²⁶¹ Yet officers are far more likely to encounter mentally ill individuals who are a danger to themselves than to encounter those who are a direct threat to others.²⁶² Unlike the direct threat exception, circuit courts have unanimously accepted situations where an individual is a danger to himself as constituting exigency.²⁶³ In a case where an individual does not pose a direct threat to officers or third parties but does pose a direct threat to himself, the Unreasonable Per Se Approach would allow officers to intervene where the direct threat exception would not. The Unreasonable Per Se Approach and the direct threat exception would both be narrow exceptions to Title II's reasonable accommodations mandate that work together to allow police to respond quickly and fluidly when necessary.

2. Exigent Circumstances Should Be Analyzed Under Current Fourth Amendment Precedent

To ensure that the Unreasonable Per Se Approach remains a narrow exception, the definition of exigency under the approach has to be constrained and consistent. Current Title II cases involve liberal applications of a doctrine typically used as a narrow exception to the requirement that police officers obtain a warrant.²⁶⁴ Under Title II jurisprudence, one court considered a routine traffic stop for running a red light, where the unarmed motorist was not resisting, an exigency.²⁶⁵

261. See generally Paul G. Lannon, Jr., *Direct Threat and Caring for Students at Risk for Self-Harm: Where We Stand Now*, NACUANOTES, Sept. 3, 2014, <https://www.smu.edu/-/media/Site/LegalAffairs/NACUANOTES/selfharm.ashx?la=en&la=en>.

262. MELISSA REULAND ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., LAW ENFORCEMENT RESPONSES TO PEOPLE WITH MENTAL ILLNESSES: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE 6 (2009).

263. See *Rice v. ReliaStar Life Ins. Co.*, 770 F.3d 1122, 1131 (5th Cir. 2014) (“[T]he threat an individual poses to himself may create an exigency that makes the needs of law enforcement so compelling that a warrantless entry is objectively reasonable”); *Fitzgerald v. Santoro*, 707 F.3d 725, 731 (7th Cir. 2013); *Roberts v. Spielman*, 643 F.3d 899, 906 (11th Cir. 2011); *Ziegler v. Aukerman*, 512 F.3d 777, 786 (6th Cir. 2008).

264. See *Mincey v. Arizona*, 437 U.S. 385, 390 (1978).

265. *Bahl v. County of Ramsey*, 695 F.3d 778, 784–86 (8th Cir. 2012).

Implementing a narrower standard of exigency would not be difficult because there is an extensive body of precedent available in the Fourth Amendment context. The exigency exception under the Fourth Amendment is a more scrupulous standard intended to protect against unconstitutional searches and seizures and would provide more protection than the current exigent circumstances analysis under Title II. This would not only ensure that an exigency is more circumscribed but also would provide principles and structure to guide an exigent circumstances analysis in the context of Title II.

Specifically, the Supreme Court held in *Welsh v. Wisconsin* that the severity of the offense at issue is directly related to a finding of exigency in warrantless arrests.²⁶⁶ The Court held that “an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made.”²⁶⁷ This idea that a less serious offense suggests a lack of exigency is a significant principle in the context of Title II because the majority of calls to police concerning individuals with mental illness are for non-criminal or misdemeanor behavior.²⁶⁸ At the circuit court level alone, multiple cases have emerged out of traffic stops.²⁶⁹ In the context of Title II, where police respond to an individual with a disability who is not engaged in criminal behavior, or where the criminal behavior is for a less serious crime, the situation is less likely to be considered exigent. Considering the severity of the offense as a factor towards exigency would severely limit the invocation of exigent circumstances as a defense, allowing a broader requirement of reasonable accommodations.

This does not mean that a situation that begins without criminal conduct or exigency could not escalate. In *Kentucky v. King* the Supreme Court recognized that the exigent circumstances doctrine can apply even where police create an exigency.²⁷⁰ In *Hainze* the original 9-1-1 dispatch call was primarily for non-criminal conduct

266. *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

267. *Id.* at 753.

268. REULAND ET AL., *supra* note 262, at 5.

269. *See, e.g.*, *Windham v. Harris Cty.*, 875 F.3d 229, 234–35 (5th Cir. 2017); *Bahl v. County of Ramsey*, 695 F.3d 778, 784–88 (8th Cir. 2012); *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1085 (11th Cir. 2007).

270. *See Kentucky v. King*, 563 U.S. 452, 461–62 (2011).

related to the plaintiff's deteriorating mental health.²⁷¹ It escalated into a situation where Hainze was four to six feet away from police and brandishing a knife.²⁷² What may not have begun as an exigency could devolve into one.

This works both ways. The Supreme Court recognized that situations de-escalate, and that where initially there may have been exigent circumstances, that exigency does not remain indefinitely.²⁷³ In *Sheehan II*, there may have been exigent circumstances when officers initially tried to enter Sheehan's room.²⁷⁴ The police then retreated.²⁷⁵ With Sheehan locked in her room on the other side of a door, back-up on its way, and no one in danger,²⁷⁶ a court could find the exigency receded.

Implementing such an approach would not mean that if there is no exigency, any accommodation would be considered reasonable. If the public entity could not prove the existence of an exigency, reasonableness would remain a factual inquiry and a jury could still ultimately find an accommodation unreasonable.

Police need to be able to act quickly in situations of true exigency where lives are at risk. The Supreme Court recognized that review of police conduct "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."²⁷⁷ In dangerous, chaotic situations where an individual is armed and third parties are directly in danger, responding officers should not have "to hesitate to consider other possible actions in the course of making such split-second decisions."²⁷⁸ Any alteration to Title II's coverage based on a recognition of the life-threatening situations police are forced to confront must be severely limited to situations that truly present such a risk. The Supreme Court's holding in *Brigham City v.*

271. See *Hainze v. Richards*, 207 F.3d 795, 800–01 (5th Cir. 2000).

272. *Id.* at 797.

273. See *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

274. See *Sheehan I*, 743 F.3d at 1232.

275. *Id.* at 1232–33.

276. *Id.* at 1233. Neither *Sheehan I* nor *Sheehan II* indicate whether police were concerned that Sheehan was a danger to herself, which would be a relevant factor in determining exigency.

277. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

278. *Hainze v. Richards*, 207 F.3d 795, 801–02 (5th Cir. 2000).

Stuart, which recognized “the need to assist persons who are seriously injured or threatened with such injury” as an exigency, ensures this.²⁷⁹

This principle would have only affected the outcome of Title II cases where an exigency was found for less dire circumstances. The presence of a stabbing victim in *DeLeon v. City of Alvin Police Department*²⁸⁰ could have constituted exigent circumstances under *Brigham City*, resulting in the same affirmation that *DeLeon* received applying the *Hainze* Approach. On the other hand, the lack of any present or imminent injury in *Seremeth v. Board of County Commissioners* would have precluded a finding of exigency. The police then may have been in violation of Title II for failing to provide a reasonable accommodation, instead of the Fourth Circuit finding compliance with Title II, despite the police’s “not best practices,” because an exigency existed.²⁸¹

Not only would individuals with disabilities receive increased protection under these tenets of exigency, but they would also create clearer lines for police in administering such rules. As the Fifth Circuit recognized in *Hainze*, “[l]aw enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations.”²⁸² To determine whether their actions comply with Title II, there needs to be a rule that gives police clarity as to when they are required to provide reasonable accommodations. Exigent circumstances in the context of the Fourth Amendment is something that the courts already expect police to comply with. By adhering to these well-established principles, Title II becomes consistent with law that police already understand and implement.

3. This Approach Is Consistent with Supreme Court’s Current Precedent Governing Review of Police Conduct

Not only would the Unreasonable Per Se Approach comport with precedent for exigent circumstances, it also complies with precedent governing review of police conduct. The Supreme Court has

279. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

280. *See DeLeon v. City of Alvin Police Dep’t*, No. H-09-1022, 2010 WL 4942648, at *3–4 (S.D. Tex. Nov. 30, 2010).

281. *Seremeth v. Bd. of Cty. Comm’rs*, 673 F.3d 333, 340–41 (4th Cir. 2012).

282. *Hainze*, 207 F.3d at 801.

routinely rejected a requirement of clairvoyance from police and recognized that police conduct “must be judged from the perspective of a reasonable officer on the scene.”²⁸³ Consistent with this, a determination of exigency under Title II would look to what officers actually knew at the time they arrived at the scene, not information later made available to the court.

Determining whether an officer realized an individual was disabled would function similarly. Although the definition of “disabled” under Title II is specific, it also includes individuals who receive unlawful treatment because of a perception of them as disabled.²⁸⁴ This means that Title II does not require police to be correct or precise in assessments of individuals with disabilities. If an officer perceives someone as having a disability and discriminates against him or her based on that disability, that discrimination is actionable under Title II. If an officer never realized that an individual was disabled, then the individual would not have a Title II claim because he or she could not have been discriminated against “by reason of his disability” where the officer had no knowledge of the disability.²⁸⁵

The Title II cases involving police interactions show that the concern that police may not know they are dealing with someone without a disability is largely unfounded. During many interactions police know they are responding to a mental health crisis, either from the 9-1-1 dispatch call, physical manifestations the police recognize, or prior knowledge of the individual.²⁸⁶ Physical disabilities may present more obviously, but even where they do not, police may be made aware by the individual they are responding to, family members, or

283. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

284. 42 U.S.C. § 12102(3)(A) (2012).

285. Title II liability requires a showing of intentional discrimination. The majority of the circuits to address the issue authorize plaintiffs to establish intentional conduct through a showing of deliberate indifference. *Haberle v. Troxell*, 885 F.3d 170, 181 (3d Cir. 2018); *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 263 (3d Cir. 2013); *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 348 (11th Cir. 2012); *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999); *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 156 F.3d 321, 331 (2d Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999).

286. *See Sheehan I*, 743 F.3d at 1232; *Hainze*, 207 F.3d at 801.

previous interactions with the person.²⁸⁷ Title II does not require police to be mental health experts or to be able to diagnose subtle, nuanced mental health disorders. It does require officers to provide reasonable accommodations to a disabled individual if they think that individual has a disability.

4. This Approach Advances the Policy Interests of Both Individuals with Disabilities and Police

Requiring the provision of reasonable accommodations would promote the use of non-violent means during interactions between police officers and individuals with disabilities. Crisis Intervention Teams (“CIT”) are one such example of non-violent means. Rooted in a problem-solving approach, CIT’s goal is to avoid “simply incapacitating the individual or removing him or her from the community.”²⁸⁸ Instead, police officers provide the first-line response to people with a mental illness through tools such as de-escalation and negotiation. CIT encourages partnerships with local advocacy groups and mental health providers that can be used as resources.²⁸⁹ Roughly 1,050 such programs are currently in use in the United States.²⁹⁰ CIT training has been shown to reduce the stigmatization individuals with mental disabilities and mental illness often face from police.²⁹¹

Interactions between police and the mentally ill are not isolated, uncommon occurrences: Individuals with a mental illness generate one out of every ten calls for police services.²⁹² Requiring officers to provide reasonable accommodations in the form of officers specifically trained to respond to individuals with mental disabilities has the

287. See *Seremeth v. Bd. of Cty. Comm’rs*, 673 F.3d 333, 337 (4th Cir. 2012); *Bahl v. County of Ramsey*, 695 F.3d 778, 784 (8th Cir. 2012); *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1085–86 (11th Cir. 2007).

288. Amy C. Watson et al., *Improving Police Response to Persons with Mental Illness: A Multi-Level Conceptualization of CIT*, 31 INT’L J.L. & PSYCHIATRY 359, 361 (2008) (citing Larry Thompson & Randy Borum, *Crisis Intervention Teams (CIT): Considerations for Knowledge Transfer*, MENTAL HEALTH L. & POL’Y FAC. PUBLICATIONS 1, 6 (2006)).

289. *Id.*

290. REULAND ET AL., *supra* note 262, at 9.

291. *Id.* at 12.

292. FULLER ET AL., *supra* note 34, at 1.

potential to make everyone safer. A police department in California that began using CIT reported a 32% decrease in officer injuries following program implementation.²⁹³ A police department in Tennessee reported an even higher decrease in officer injuries.²⁹⁴

Decreased reliance on use of force will obviously benefit the individuals whom the police respond to; the use of specialized response teams also benefits individuals with mental disabilities by providing increased access to medical treatment and decreasing subsequent interactions with police. Multiple studies across six different cities show that the use of CIT-trained officers resulted in an increased rate of referral or transportation to mental health services.²⁹⁵ A separate study analyzing outcomes one year post arrest found individuals diverted to mental health services spent more time in the community without a related increase in arrests.²⁹⁶

Although there would be upfront costs for public entities in providing CIT training to officers, such training has been shown to alleviate long-term costs by avoiding escalated responses, such as the use of Special Weapons and Tactics (“SWAT”) teams. A police department in Tennessee saw a 50% decrease in their use of a SWAT-type team after implementing a CIT program.²⁹⁷ A police department in New Mexico saw an even higher decrease of 58%.²⁹⁸ Overall, individuals with mental illness who were diverted to mental health treatment incurred lower criminal justice costs than those who were not diverted.²⁹⁹

The Unreasonable Per Se Approach requires the provision of reasonable accommodations during police interactions without exigency. Doing so has the potential to increase officer safety and the safety of disabled individuals, decrease violent confrontations between mentally ill individuals and the police, and increase access to treatment for individuals with disabilities. Yet the approach also recognizes that there are rare outlying cases where exigent circumstances require police to be able to react immediately to ensure the safety of

293. REULAND ET AL., *supra* note 262, at 11.

294. *Id.*

295. *Id.*

296. *Id.* at 12.

297. *Id.*

298. *Id.*

299. *Id.*

all, and in such situations no accommodation could be considered reasonable. The Unreasonable Per Se Approach best balances current precedent, Title II's regulations, and diverging policy interests to ensure fulfillment of Title II's mandate and the protection of individuals with disabilities.

VI. CONCLUSION

There are many reasons why interactions between police and individuals with disabilities are so frequent and why they often end so tragically. As many have noted, improving the mental health-care system in the United States is one tactic to prevent such interactions from ever occurring.³⁰⁰ With mental-health issues on the rise, officers increasingly become the front line in dealing with individuals in the throes of a mental health crisis.³⁰¹ Deborah Danner, in an essay penned before her death, drew specific attention to this: "We are all aware of the all too frequent news stories about the mentally ill who come up against law enforcement instead of mental health professionals and end up dead."³⁰² Training officers to handle such situations, through crisis intervention teams or other means focused on de-escalation and mediation, has shown to be effective.³⁰³

Unfortunately, there will inevitably be interactions between people with disabilities and police. Title II of the ADA should apply to those interactions, and it should protect individuals who are subject to discrimination at the hands of law enforcement. Balancing that protection with ensuring that police are still able to readily respond to emergency situations is not an easy balance to strike. The circuit courts have struggled with the issue, as evidenced by the three different approaches to emerge.

Adopting the Unreasonable Per Se Approach, where Title II always applies to police conduct, but accommodations are per se unreasonable if police prove the existence of exigent circumstances, strikes that balance. It requires that officers make reasonable accommodations during their interactions, but in the face of exigency allows

300. See, e.g., Rosenbaum et al., *supra* note 247, at 516.

301. See Brooks, *supra* note 247; Rosenbaum et al., *supra* note 247, at 513.

302. Danner, *supra* note 1, at 4.

303. Watson et al., *supra* note 288, at 361.

them to act quickly and immediately. Mr. Saylor was killed trying to see a movie. Ms. Danner was killed after dropping a pair of scissors. Mr. Vassell was killed holding a metal pipe. All were individuals police knew had a mental illness. All should have been protected by the ADA.