No. 20-11310

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KIRBY INGRAM

Plaintiff/Appellant,

v.

LOUIS KUBIK, et al.,

Defendants/Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, The Honorable Liles C. Burke, District Judge
Case No. 5:19-CV-00741

MOTION OF THE ALABAMA DISABILITIES ADVOCACY PROGRAM, THE NATIONAL POLICE ACCOUNTABILITY PROJECT, AND RIGHTS BEHIND BARS FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and this Court's Local Rule 26.1-1, Rights Behind Bars, the National Police Accountability Project, and the Alabama Disabilities Advocacy Program state that they have no parent corporation, nor have they issued shares or debt securities to the public. The organizations are not a subsidiary or affiliate of any publicly owned corporation, and no publicly held corporation holds ten percent of its stock. Undersigned counsel for *amici curiae* makes the following disclosure of interested parties:

- Alabama Disabilities Advocacy Program, *amicus curiae*
- Burke, Liles C., District Judge for the Northern District of Alabama;
- Canupp, David J., Attorney for Appellees Blake Dorning and Kevin Turner;
- Dorning, Blake, Appellee;
- Graham, Grace, Attorney for Appellee, Louis Kubik;
- Kubik, Louis, Appellee;
- National Police Accountability Project, *amicus curiae*
- Owens, J. Bentley, III, Attorney for Appellee, Louis Kubik;
- Popkin, Kelly Jo, Attorney for *amici curiae*
- Rights Behind Bars, *amicus curiae*
- Royer, George W., Jr., Attorney for Appellees, Blake Dorning and Kevin Turner;

- Sherrod, Henry F. (Hank), III, Attorney for Appellant, Kirby Ingram;
- Turner, Kevin, Appellee; and
- Weiss, Samuel, Attorney for *amici curiae*

Respectfully submitted,

/s/ Samuel Weiss
Samuel Weiss
Counsel for *Amici Curiae*

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF APPELLANT

Pursuant to Rule 29(a)(3) of the Federal Rules of Appellate Procedure, Rights Behind Bars moves for leave to file the attached proposed *amici curiae* brief in support of Plaintiff-Appellant.

1. Rights Behind Bars (RBB) legally advocates for people in prison to live in humane conditions and contributes to a legal ecosystem in which such advocacy is more effective. RBB seeks to create a world in which people in prison do not face large structural obstacles to effectively advocating for themselves in the courts. RBB helps incarcerated people advocate for their own interests more effectively and through such advocacy push towards a world in which people in prison are treated humanely.

2. RBB has filed amicus briefs or served as appellate counsel in many cases involving the rights of people's interactions with law enforcement. Recent examples include several amicus briefs in federal appellate courts on such issues in 2020. *See Mann v. Ohio Dep't of Rehabilitation and Corr.*, Doc. No. 22 (6th Cir. Case No. 19-4060) (amicus brief on behalf of medical experts and organizations); *Woodcock v. Correct Care Sols., LLC*, Doc. No. 14 (6th Cir. Case No. 20-5170) (same); *Stark v. Lee Cnty., Iowa* (8th Cir. Case No. 20-1606) (amicus brief on behalf of National Association for Public Defense); *Troutman v. Louisville Metro Dep't of Corr.*, Doc.

No. 14-2 (6th Cir. Case No. 20-5290) (amicus brief on behalf of civil and human rights organizations).

3. The Alabama Disabilities Advocacy Program (ADAP) is the state of Alabama's designated protection and advocacy (P&A) system under the Protection and Advocacy for Persons with Mental Illness Act of 1986 (the PAIMI Act), 42 U.S.C. §§ 10801 *et seq*., and the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (the PADD Act), 24 U.S.C. § 15041 *et seq*.; *see also Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr*., 97 F. 3d 492, 495 (11th Cir. 1996); *Alabama Disabilities Advocacy Program v. Wood*, 584 F. Supp. 2d 1314, 1315 (M.D. Ala. 2008). As Alabama's designated P&A, the PAIMI and PADD Acts authorize ADAP to pursue legal remedies involving system-wide change on behalf of identifiable groups of similarly situated persons with mental illness and with developmental disabilities, respectively. ADAP appears in this matter as *amicus curiae* to safeguard the rights of people with disabilities who may be subject to excessive force and discrimination by law enforcement agencies, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*.

4. The National Police Accountability Project (NPAP) is a nonprofit, public interest organization dedicated to protecting the rights of individuals in their encounters with law enforcement. NPAP was founded in 1999 by members of the National Lawyers Guild. NPAP has more than five hundred attorney members

throughout the United States who represent people in civil rights, police misconduct, and prison conditions cases. NPAP provides public education and information on issues relating to police misconduct and supports reform efforts aimed at increasing police accountability. NPAP often presents the views of victims of civil rights violations through *amicus curiae* filings in cases raising issues likely to have a broad impact beyond the interests of the parties before the Court. One of the central missions of NPAP is to promote the accountability of law enforcement and government officials for violations of the Constitution or laws of the United States.

5. The *amici curiae* brief addresses two areas of great public concern. The first is whether public entities can be held liable for the illegal discrimination of their employees, with the district court having held that they cannot. Affirming the district court will render the ADA a nullity for many people with disabilities and create a circuit split. *See Reed v. Columbia St. Mary's Hosp.*, 782 F.3d 331, 334 (7th Cir. 2015); *Delano-Pyle v. Victoria Cty., Tex.*, 302 F.3d 567, 575 (5th Cir. 2002); *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1141 (9th Cir. 2001); *Rosen v. Montgomery Cty. Maryland*, 121 F.3d 154, 157 n.3 (4th Cir. 1997).

6. The second area the *amicus curiae* brief addresses is qualified immunity, a doctrine that has become subject to criticism among all levels of the judiciary and across the ideological spectrum largely because of applications of the doctrine like the district court's in the present case. *See, e.g.*, *Baxter v. Bracey*, 140 S. Ct. 1862

(2020) (Thomas, J., dissenting from denial of certiorari); *Kisela v. Hughes*, 138 S. Ct. 1148, 1161 (2018) (Sotomayor, J., dissenting); *Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting); *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part); *Horvath v. City of Leander*, 946 F.3d 787, 800–01 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part).

7. Appellant was contacted by undersigned counsel and consented to this motion. Appellees were contacted by undersigned counsel and they either opposed this motion or did not respond.

8. Proposed *amici curiae* respectfully request that this Court grant this motion for leave to file the attached brief in support of Plaintiff-Appellant and reversal.

Date: August 17, 2020

Respectfully submitted,

/s/ Samuel Weiss

Samuel Weiss

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Kelly Jo Popkin
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d), I certify as follows:

1. The foregoing motion complies with the type-volume Fed. R. App. P. 27(d)(2), because this motion contains 843 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f); and

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Office 365, the word processing system used to prepare the motion, in 14-point font in Times New Roman font.

Date: August 17, 2020

s/ Samuel Weiss
Samuel Weiss

CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on August 17, 2020, I electronically filed the foregoing Motion with the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: August 17, 2020

s/ Samuel Weiss
Samuel Weiss

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- Dorning, Blake, Appellee;
- Graham, Grace, Attorney for Appellee, Louis Kubik;
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- Rights Behind Bars, *amicus curiae*
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- Sherrod, Henry F. (Hank), III, Attorney for Appellant, Kirby Ingram;
- Turner, Kevin, Appellee; and
- Weiss, Samuel, Attorney for *amici curiae*

Respectfully submitted,

/s/ Samuel Weiss
Samuel Weiss
Counsel for *Amici Curiae*

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Alabama Disabilities Advocacy Program (ADAP) is the state of Alabama's designated protection and advocacy (P&A) system under the Protection and Advocacy for Persons with Mental Illness Act of 1986 (the PAIMI Act), 42 U.S.C. § 10801 *et seq*., and the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (the PADD Act), 24 U.S.C. § 15041 *et seq*.; *see also Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr*., 97 F. 3d 492, 495 (11th Cir. 1996); *Alabama Disabilities Advocacy Program v. Wood*, 584 F. Supp. 2d 1314, 1315 (M.D. Ala. 2008). As Alabama's designated P&A, the PAIMI and PADD Acts authorize ADAP to pursue legal remedies involving system-wide change on behalf of identifiable groups of similarly situated persons with mental illness and with developmental disabilities, respectively. ADAP appears in this matter as *amicus curiae* to safeguard the rights of people with disabilities who may be subject to excessive force and discrimination by law enforcement agencies, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*.

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the *amici* or their counsel, contributed money that was intended to fund preparation or submission of this brief. Plaintiff-Appellant consented to the filing of this brief. Defendants-Appellees refused consent.

The National Police Accountability Project (NPAP) is a nonprofit, public interest organization dedicated to protecting the rights of individuals in their encounters with law enforcement. NPAP was founded in 1999 by members of the National Lawyers Guild. NPAP has more than five hundred attorney members throughout the United States who represent people in civil rights, police misconduct, and prison conditions cases. NPAP provides public education and information on issues relating to police misconduct and supports reform efforts aimed at increasing police accountability. NPAP often presents the views of victims of civil rights violations through *amicus curiae* filings in cases raising issues likely to have a broad impact beyond the interests of the parties before the Court. One of the central missions of NPAP is to promote the accountability of law enforcement and government officials for violations of the Constitution or laws of the United States.

Rights Behind Bars (RBB) legally advocates for people in prison to live in humane conditions and contributes to a legal ecosystem in which such advocacy is more effective. RBB seeks to create a world in which people in prison do not face large structural obstacles to effectively advocating for themselves in the courts. RBB helps incarcerated people advocate for their own interests more effectively and through such advocacy push towards a world in which people in prison are treated humanely.

INTRODUCTION

Kirby Ingram alleges that he was peacefully cooperating with the police in the midst of a mental health crisis when an officer, annoyed with Ingram's erratic behavior, body-slammed him, leaving him in the hospital requiring the fusion of two of his vertebrae and the replacement of another. The complaint alleges both excessive force and disability discrimination twice over—both a failure to accommodate his disability as well as intentional discrimination on the basis of it. The district court held that even if Ingram *was* discriminated against due to his disabilities and even if the officer *did* commit excessive force, due to the doctrines of qualified immunity and vicarious liability he does not have a remedy.

Fortunately, the law does not mandate such an unjust result. As several circuit courts have held, Title II of the Americans with Disabilities Act (ADA) permits people with disabilities to bring claims against government entities for the illegal disability discrimination of their employees without requiring a demonstration that the entity itself was deliberately indifferent to the discrimination. The ADA is a broad remedial statute, intended to be read robustly, and the unavailability of such suits would leave many victims of disability discrimination, especially by police officers and prison officials, without a remedy. Additionally, qualified immunity does not require precedent with identical facts, particularly when any reasonable officer would know his conduct was illegal.

ARGUMENT

I. Title II of the ADA is Meant to Be Read Broadly in Order to Remedy Persistent and Pervasive Discrimination Against People With Disabilities.

Every circuit court to consider the question has held that Title II of the ADA holds government entities liable for the illegal actions of their employees. *Reed v. Columbia St. Mary's Hosp.*, 782 F.3d 331, 334 (7th Cir. 2015);[2] *Delano-Pyle v. Victoria Cty., Tex.*, 302 F.3d 567, 575 (5th Cir. 2002); *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1141 (9th Cir. 2001); *Rosen v. Montgomery Cty. Maryland*, 121 F.3d 154, 157 n.3 (4th Cir. 1997). The holdings rely largely on the basis that because the text does not decisively state either way whether discrimination by individual employees is actionable, reading the statute to permit for liability for the discriminatory acts of individual officers is most consistent with the express goal of the ADA in eradicating the rampant discrimination that exists against people with disabilities. *See, e.g.*, *Delano-Pyle*, 302 F.3d at 575 (holding that the historical justification for exempting employers from liability for the actions of their employees does not apply to the ADA and the doctrine would be inconsistent with

[2] *Reed* does not explain the rule it is establishing but it is clear that the court in *Reed* holds a public entity liable under Title II not for its policies but for the discriminatory actions of its line-level staff. *See Field v. Hous. Auth. of Cook Cty.*, No. 17-CV-02044, 2018 WL 3831513, at *8 (N.D. Ill. Aug. 13, 2018); *Mapp v. Bd. of Trustees of Cmty. Coll. Dist. No. 508*, No. 15 C 3800, 2016 WL 4479560, at *4 (N.D. Ill. Aug. 25, 2016).

the purpose of the ADA, which was eliminating discrimination against people with disabilities); *Duvall*, 260 F.3d at 1141 (explaining that holding entities liable for the actions of individual employees is "entirely consistent with the policy of [the ADA], which is to eliminate discrimination against the handicapped.").

The anti-discriminatory remedial purpose of the ADA is intended to aggressively remedy the persistent and acute discrimination faced by people with disabilities. While choosing to engage in legal action is a complex decision, research indicates that "it is a powerful way for people with disabilities to respond to discrimination." Sarah Parker Harris & Rob Gould, ADA Nat'l Network*, Experience of Discrimination and the ADA*, at 6 (2019), https://adata.org/sites/adata.org/files/files/ADA%20Research%20Brief_Discrimination%20and%20the%20ADA_FINAL.pdf. As the U.S. Supreme Court has recognized, "civil rights statutes vindicate public policies of the highest priority, yet depend heavily upon private enforcement. Persons who bring meritorious civil rights claims, in this light, serve as private attorneys general." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 635–36 (2001). The remedies offered by the ADA, including the award of compensatory damages and fee-shifting statutes, deter discrimination by encouraging covered entities to comply with legislatively mandated requirements. *See, e.g., Barnes v. Gorman*, 536

U.S. 181, 184–88 (2002) (explaining the availability of compensatory, but not punitive, damages under Title II of the ADA).

The ADA was enacted out of recognition that individuals with disabilities continually encounter various forms of discrimination, including "outright intentional exclusion, the discriminatory effects of architectural, transportation and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(5). To address this discrimination, the ADA evinces a clear national purpose—to provide "a clear comprehensive national mandate" with "clear, strong, consistent, enforceable standards addressing discrimination." 42 U.S.C. §§ 12101(b)(1), (2).

Congress has designed the reach of the ADA to be purposefully broad in order to effectuate its bipartisan mandate against disability-based discrimination in all forms of public settings. The ADA applies to private employers, public entities, and private entities offering public services. 42 U.S.C §§ 12112, 12132, 12182. It also applies to state prisons and jails. *See Pa. Dep't of Corr. V. Yeskey*, 524 U.S. 206 (1998). In 2008, Congress rejected the Supreme Court's narrow interpretation of "disability," explicitly overturning precedent and expanding the categories of individuals protected by the ADA. *See* ADA Amendments Act of 2008, Pub. L. No.

110-325, 122 Stat. 3553 (2008). The Supreme Court has noted that the broad application of the ADA's protection is "consistent with the statutory purpose of ridding the Nation of discrimination." *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440, 446 (2003).

It is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Courts have therefore been extremely deferential in giving effect to the broad remedial purpose of the ADA and the Rehabilitation Act. 29 U.S.C. § 794. *See, e.g., Henrietta D. v. Bloomberg*, 331 F.3d 261, 279 (2d Cir. 2003) (finding that a narrow construction of the ADA should be avoided given that it is a remedial statute); *Dudley v. Hannaford Bros. Co*., 333 F.3d 299, 307 (1st Cir. 2003) ("Given the remedial purpose underlying the ADA, courts should resolve doubts about such questions [about whether plaintiffs have shown a real and immediate threat of ongoing discriminatory harm] in favor of disabled individuals."); *Steger v. Franco, Inc*., 228 F.3d 889, 894 (8th Cir. 2000) ("[T]he ADA is a remedial statute and should be broadly construed to effectuate its purpose . . . ."); *Disabled in Action of Pennsylvania v. Se. Pennsylvania Transp. Auth*., 539 F.3d 199, 208 (3d Cir. 2008) (noting that the ADA is a remedial statute that must be broadly construed to effectuate its purpose of "eliminat[ing] discrimination against the disabled in all facets of society . . . .") (quotations omitted); *Hason v. Med. Bd. of California*, 279

F.3d 1167, 1172 (9th Cir. 2002) (concluding that courts must construe the language of the ADA broadly in order to effectively implement the ADA's fundamental purpose of "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.").

Disability discrimination remains a pervasive and serious matter of public concern. Both outright prejudice and broader structural barriers impede individuals with disabilities from full participation and equal opportunity in society. A study conducted by the ADA National Network, a federally-funded national organization that provides guidance on implementing the ADA's anti-discrimination mandate, found that individuals with disabilities experience discrimination in nearly all aspects of public life, from workplace harassment, to inaccessible housing, to barriers in accessing services within the community. ADA Nat'l Network Report at 3–4. Individuals with intellectual disabilities, for example, continue to be institutionalized in settings that are isolating, invasive, and overly restrictive for their needs. *Id.* at 4–5.

In the current COVID-19 crisis, individuals with significant mental disabilities have been placed at heightened risk of facing discrimination in Alabama. On March 23, 2020, for example, ADAP filed a complaint against the Alabama State Department of Health with the U.S. Department of Health and Human Services Office for Civil Rights on the basis that the state's policy regarding the rationing of

medical resources during the COVID-19 pandemic explicitly discriminated against individuals with disabilities. Rhonda Brownstein, et al., *Letter from Ala. Disabilities Advoc. Program and the Arc of the U.S. to Roger Severino, Dir., Off. for Civ. Rts.* ADAP (Mar. 24, 2020), https://adap.ua.edu/uploads/5/7/8/9/57892141/al-ocr-complaint_3.24.20.pdf. The complaint alleged that the Alabama Department of Public Health's Emergency Operations Plan, which excludes children and adults with intellectual disabilities from access to ventilators in the event of rationing, encourages discrimination against individuals with significant disabilities, stating that, "treatment allocation decisions cannot be made based on misguided assumptions that people with intellectual and cognitive disabilities experience a lower quality of life, or that their lives are not worth living." *Id.* at 2.

Discrimination has significant mental and physical health consequences for individuals living with disabilities. Research suggests that the history of discrimination renders individuals with disabilities especially susceptible to disease and untimely death. Gloria L. Krahn et al., *Persons with Disabilities as an Unrecognized Health Disparity Population*, 105 Am. J. Pub. Health 198, 200 (Supp. 2, 2015). Individuals with severe mental illnesses are at particular risk for violence, being over ten times more likely to become victims of violent crime than the general population. Linda A. Teplin, et al., *Crime Victimization in Adults with Severe Mental Illness*, 62 Arch. Gen. Psychiatry (Aug. 2005)

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1389236/. The U.S. Supreme Court has also acknowledged the wide-ranging effect of discrimination on individuals with disabilities who have been segregated in institutions, noting that "confinement . . . severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601 (1999).

In denying liability for the Title II ADA violations of individual employees, the court below ran counter to the several circuit courts that have long recognized the breadth of the ADA's reach. The ADA is intended to be read robustly, yet the district court's narrow reading of the statute would render vicarious liability suits unavailable and would leave many victims of disability discrimination without a remedy. It is unlikely that such a large and hitherto unstated carve-out is consistent with the statutory purpose of the ADA and its "clear, strong, consistent, enforceable standards addressing discrimination." 42 U.S.C. § 12101(b)(2).

II. Denying Vicarious Liability for Title II ADA Violations Would Particularly Undercut the Effectiveness of the Statute in the Context of Policing and Prisons.

A combination of the decrease in the use of institutionalization for the mentally ill and a lack of outpatient services has led to a large increase in encounters between the seriously mentally ill and the police. *See* Steven K. Hoge et al., Am.

Psychiatric Ass'n, *Task Force Report: Outpatient Services for the Mentally Ill Involved in the Criminal Justice System* (Oct. 2009), https://www.psychiatry.org/File%20Library/Psychiatrists/Directories/Library-and-Archive/task-force-reports/tfr2009_outpatient.pdf. The same lack of outpatient services has led to an accompanying increase in the seriously mentally ill being housed in prisons and jails. *See* Timothy Williams, *Jails Have Become Warehouses for the Poor, Ill and Addicted, a Report Says*, N.Y. Times, Feb. 11, 2015, at A19; Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America*, at 12–13, Vera Inst. of Justice (Feb. 2015), http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf. Calls like the one in this case, where the police are summoned not to the scene of a crime but instead to that of a mental health crisis, are increasingly common. *See* Fernanda Santos & Erica Goode, *Police Confront Rising Number of Mentally Ill Suspects*, N.Y. Times, Apr. 2, 2014, at A1; Kelli E. Canada, et al., *Intervening at the Entry Point: Differences in How CIT Trained and Non-CIT Trained Officers Describe Responding to Mental Health-Related Calls*, 48 Community Mental Health J. 746 (2012).

In both contexts, policing and incarceration, line-level government officials regularly make decisions about whether or not to accommodate disabilities, the consequences of which are important or even life-or-death for people with

disabilities. Removing those cases from the ambit of the ADA absent a showing that policymakers—often several levels up the organizational chart from the officers actually interacting with people with disabilities—permitted the discrimination to occur would render the ADA null in protecting many victims of disability discrimination by police officers or prison staff.

Hundreds of Americans with disabilities die every year in police encounters, and many more are seriously injured. *See, e.g.*, Alex Emslie & Rachael Bale, *More Than Half of Those Killed by San Francisco Police Are Mentally Ill*, KQED (Sep. 30, 2014), https://www.kqed.org/news/147854/half-of-those-killed-by-san-francisco-police-are-mentally-ill (finding that of the San Francisco officer-involved shootings between 2005 and 2013, 58 percent of the individuals killed by police had a mental illness that was a contributing factor in the incident); Treatment Advocacy Center, *Overlooked in the Undercounted: the Role of Mental Illness in Fatal Law Enforcement Encounters* (Dec. 2015), https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf (estimating a minimum of 1 in 4 fatal police encounters ends the life of an individual with severe mental illness). Scholars have estimated that the risk of being killed during a police incident is 16 times greater for individuals with untreated mental illness than for other civilians approached or stopped by officers. *Id.*

Many of these deaths and injuries can be avoided with simple accommodations, ones that do not require officers to act with pinpoint precision in high-stakes situations. Short and basic trainings inform police officers of the difference between symptoms of mental illness and erratic signs of dangerousness. *See, e.g.*, Mass. Dep't of Mental Health Forensic Services, *Pre-Arrest Law Enforcement-Based Jail Diversion Program Report, July 1, 2011 to January 1, 2014*, at 8 (2014), http://www.mass.gov/eohhs/docs/dmh/forensic/jail-diversion-program-2014.pdf; Mental Health First Aid, http://www.mentalhealthfirstaid.org/cs/ (last visited Aug. 17, 2020). They are also taught which stereotypes about people with mental illness, such as that they are unusually violent, are untrue. Council of State Gov'ts, *Criminal Justice/Mental Health Consensus Project* 46 (June 2002), https://www.ncjrs.gov/pdffiles1/nij/grants/197103.pdf. Police officers are also informed of the mental health resources available to a community, so that they know which institutions to contact in a situation better handled by a social worker than a police officer. *See* Canada, 48 Community Mental Health J. at 750. They learn as well the basics about subgroups of people with disabilities that need to be accommodated, learning the special needs of groups of people with disabilities like the deaf as well as distinguishing between intoxication or disobedience and the symptoms of a disability. *See, e.g.*, U.S. Dep't of Justice, *Communicating with People Who Are Deaf or Hard of Hearing: ADA Guide for Law Enforcement*

Officers (2020), https://www.ada.gov/lawenfcomm.htm. These practices are widely understood and widely used in police encounters to protect officers, the public, and people with disabilities. Yet if the district court is affirmed, should an officer ignore these practices there will likely be no remedy for disability discrimination. [3]

The police often, for example, fail to follow widely accepted and basic accommodations in the course of arresting deaf people, misperceiving their actions as a failure to cooperate. *See*, *e.g.*, *McCray v. City of Dothan*, 169 F. Supp. 2d 1260, 1269–70, 1275–76 (M.D. Ala. 2001) (officers knew plaintiff was deaf and could not read lips, but perceived him as uncooperative and slammed his head on a restaurant table hard enough to break it, used a painful chokehold on him, forcibly removed him from the restaurant, and arrested him), *aff'd in part, rev'd in part, on other grounds*, 67 F.App'x 582 (11th Cir. 2003). Police officers often make it difficult for deaf or hard of hearing people to communicate by handcuffing their hands behind their backs. *See* Scott Sandlin, *APD, Jail Change Handling of Deaf*, Albuquerque J., Sept. 2, 1995, at A1. Officers may mistake deaf individuals' use of sign language for threatening behavior. *Meister v. City of Hawthorne*, No. CV-14-1096-MWF, 2014

[3] The present case is also the unusual policing case where in addition to a failure to accommodate claim there is also an intentional discrimination claim, as Ingram alleges he was assaulted because his mental illness was frustrating Defendant. Affirming the district court will therefore sanction the actual assault of people with disabilities not merely in spite of but because of their disability unless the municipality had a policy or practice permitting such attacks.

WL 3040175, at **1, 6 (C.D. Cal. May 13, 2014) (denying a motion to dismiss when the police grabbed a deaf man and, when he attempted to free his hands to communicate with them through sign language, kneed him in the abdomen, tasered him, kicked him in the stomach, and placed him in a chokehold).

For virtually every major category of disability, there are ways that police encounters can go horribly wrong if the disabilities are not given basic accommodations. *Graham v. Connor* involved a man whose erratic though entirely legal behavior was due to a diabetic episode. 490 U.S. 386, 390 (1989). The police attacked him, leaving him with a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and permanent ringing in his right ear. *Id.* Similar incidents occur regularly with people whose disabilities are mistaken for intoxication. *See, e.g., Schreiner v. City of Gresham*, 681 F. Supp. 2d 1270, 1279 (D. Or. 2010) (denying summary judgment where police tasered a woman with known diabetes multiple times in situation where plaintiff, as a result of a dangerously low blood sugar, was incoherent and unable to respond to orders); *McAllister v. Price*, 615 F.3d 877, 886 (7th Cir. 2010) (denying summary judgment where plaintiff with diabetes and wearing a medical alert necklace, in a severe hypoglycemic state and unresponsive to officer's order, was thrown and kneed to the ground and handcuffed, resulting in broken hip and bruised lung); *Jackson v. Inhabitants of Town of Sanford*, Civ. No. 94-12-P-H, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994) (denying

defendant's motion for summary judgment where plaintiff, who had a physical disability resulting from a stroke, was pulled over and arrested by police officers because they perceived his disability-related conduct to be the result of drug or alcohol abuse).

Police officers can mistake the symptoms of autism spectrum disorder for disobedience or aggression, and some autistic persons when confronted with the sensory overload of a police encounter can scream or attempt to flee. *See Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 900–09 (6th Cir. 2004) (upholding jury verdict against officers whose forceful restraint caused death of the autistic Calvin Champion). People with intellectual disabilities may not understand police commands. *See Fonseca v. City of Fresno*, No. 1:10-cv-00147 LJO DLB, 2012 WL 44041, at **1, 8, 12 (E.D. Cal. Jan. 9, 2012) (describing violent encounter with police that occurred after man with an intellectual disability did not follow verbal commands); s*ee also Estate of Saylor v. Regal Cinemas, Inc.*, Civ. Action No. WMN-13-3089, 2014 WL 5320663, at *1–2 (D. Md. Oct. 16, 2014) (describing an incident where police officers, ignoring the advice of the full-time aide of a man with Down Syndrome, forcibly dragged him from a movie theater where he had failed to purchase a ticket, killing him).

Most common of all, however, as in the present case, is the failure to accommodate psychiatric disabilities. Up to half of all people killed by the police

have psychiatric disabilities. *See, e.g.*, Kelley Bouchard, *Across Nation, Unsettling Acceptance When Mentally Ill in Crisis are Killed*, Portland Press Herald (Dec. 9, 2012), https://www.pressherald.com/2012/12/09/shoot-across-nation-a-grim-acceptance-when-mentally-ill-shot-down/ ("[A] review of available reports indicates that at least half of the estimated 375 to 500 people shot and killed by police each year in this country have mental health problems.").

Like the everyday people who often require that line police officers comply with the ADA—and not merely that police departments have formally enacted ADA-compliant policies—to stay alive, prisoners need line-level prison staff to actually accommodate their disabilities. People in state and federal prisons are nearly three times as likely to report having a disability as the nonincarcerated population, while those in jails are more than four times as likely. Steven K. Hoge, et al., *Disabilities Among Prison and Jail Inmates, 2011-2012*, Bureau of Justice Statistics (Oct. 2009), https://www.bjs.gov/content/pub/pdf/dpji1112.pdf. One in five prisoners is seriously mentally ill. American Psychiatric Association, *Psychiatric Services in Jails and Prisons*, at xix (2nd ed. 2000). And unlike people outside of prison, "society takes from prisoners the means to provide for their own needs," making them utterly reliant on individual staff members. *Brown v. Plata*, 563 U.S. 493, 510 (2011). Nevertheless, correctional facilities and their staff members across the country have failed to provide reasonable accommodations for prison and jail

inmates. *See generally,* Rachel Seevers, *Making Hard Time Harder: Programmatic Accommodations for Inmates with Disabilities Under the Americans with Disabilities Act*, (June 22, 2016), http://avidprisonproject.org/Making-Hard-Time-Harder/assets/making-hard-time-harder---pdf-version.pdf.

Prison and jail inmates with disabilities are particularly vulnerable to discriminatory treatment by individual prison employees. In a 2015 report by Human Rights Watch, researchers describe the ways in which individual staff members of correctional facilities "routinely, maliciously, and even savagely abuse . . . inmates with mental health problems, using force, fear, reprisal, and retaliation to control them." *See* Human Rights Watch, *Callous and Cruel: Use of Force against Inmates with Mental Disabilities in U.S. Jails and Prisons*, at V (2015), https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and. Though agency policies, professional standards, and constitutional jurisprudence routinely condemn these horrific tactics, individual officers repeatedly use unwarranted force for purposes of punishment or retaliation. *Id.*

Inmates with disabilities have challenged the actions of individual corrections officers under the ADA for failing to accommodate their disabilities. In *Kiman v. New Hampshire Department of Corrections*, for example, a prisoner with amyotrophic lateral sclerosis (ALS) requested a shower chair so he could shower

without risk of injury, and one was brought for his use, "but corrections officers would sit on the chair and refuse to allow him to use it despite his repeated requests." 451 F.3d 274, 287 (1st Cir. 2006). In *Phelan v. Thomas*, a mentally disabled prisoner faced retaliation from a corrections officer for attempting to file a grievance against a prison psychologist who refused to treat him, who told him that "they don't allow retards to file grievances." 439 F. App'x 48, 51 (2d Cir. 2011). In *Grant v. Schuman*, a prisoner who was partially paralyzed was placed in a cell too far from the dining hall, resulting in him being unable to eat food other than that prepared for him by other prisoners in their cells. 151 F.3d 1032 (7th Cir. 1998). In *Hargrove v. Carney*, a prisoner was fired from his work assignment for ignoring an order from a prison loudspeaker when he had a hearing disability and was unable to hear it. No. 20-CV-0610, 2020 WL 1939696, at *2 (E.D. Pa. Apr. 22, 2020).

The plaintiffs in these cases did not challenge the discrimination of the entire departments of corrections—and doing so as *pro se* plaintiffs would have been nearly impossible—but instead they sued the individual officers who engaged in the discrimination. Affirming the district could would leave analogous victims of discrimination without a remedy.

III. Qualified Immunity Does Not Require Precedent with Identical Facts, Especially When Any Reasonable Officer Would Know His Conduct Was Illegal.

In the aftermath of the Civil War, Congress passed the Klu Klux Klan Act, which included what is now codified as 42 U.S.C. § 1983, a provision that allows plaintiffs to sue state defendants for violations of their constitutional rights. For the first time in 1967, the Supreme Court identified a good-faith defense to a § 1983 false arrest suit on the narrow rationale that "the defense of good faith and probable cause" applied to the analogous "common-law action for false arrest and imprisonment." *Pierson v. Ray*, 386 U.S. 547, 556–57 (1967). But the Court soon began applying a qualified immunity defense to all § 1983 suits, without investigating whether any corresponding common law claim included such a defense. The Court revised its approach repeatedly, expanding the doctrine to protect an ever-broadening array of official misconduct, until it reached its current formulation of the "objective test" in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[4]

[4] A growing body of scholarship suggests that the invention and then expansion of qualified immunity rests on multiple fundamental errors. The language of § 1983 "is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Independence*, 445 U.S. 622, 635 (1980). Qualified immunity cannot be defended on the basis that it effectuates background immunities that existed in the common law in 1871 because "lawsuits against officials for constitutional violations did not generally permit a good-faith defense during the early years of the Republic." William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 55-58 (2018). Strict official accountability for public officials began at the founding and persisted through Reconstruction, both before and after the enactment of § 1983. *See, e.g.*, Joseph Story, *Commentaries on the Constitution of the United States* § 1676 (4th ed. 1873) ("If the oppression be in the exercise of unconstitutional powers, then the

In *Hope v. Pelzer*, the Supreme Court denied qualified immunity to prison guards who punished a prisoner by attaching him to a "hitching post" in the hot sun for seven hours, denying him food and water and taunting him. 536 U.S. 730, 733 (2002). In addition to holding that precedent on these subjects clearly established the unconstitutionality of the conduct, the Court also held that the "obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment." *Id.* at 745. This Court has referred to this principle as the "obvious-clarity case." *Stephens v. DeGiovanni*, 852 F.3d 1298, 1317 (11th Cir. 2017). *Hope* remains good law but there is no need to think of "obviousness" as an exception to the *Harlow* test rather than merely another articulation of it: any reasonable officer would know that obvious constitutional violations violate the law whether or not past case law had addressed identical facts.

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functionaries who wield them, are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed."); *see also Mitchell v. Harmony*, 54 U.S. 115, 133–35, 137 (1851) (upholding a monetary award against a U.S. colonel for seizing property in Mexico during the Mexican-American War, despite the defendant's "honest judgment" that the seizure was justified by wartime emergency). Instead, a subjective good faith test existed for only some claims, and even that subjective test bears no relation to the objective test invented by *Harlow*. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1802 (2018).

In resolving this case, the Court should hold true to *Hope*—recognizing that cases need not be factually identical in order to defeat a claim of qualified immunity. In *Cole v. Carson*, for example, the en banc Fifth Circuit denied qualified immunity to police officers when the facts read in the light most favorable to the plaintiffs made it "an obvious case." 935 F.3d 444, 453 (5th Cir. 2019). The same result here is especially warranted in light of the sustained criticism qualified immunity has drawn in recent years.

As Justice Thomas flatly put it, "[t]here likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe." *Baxter v. Bracey*, 590 U.S. ___ (2020), (slip op., at 4) (Thomas, J., dissenting from denial of certiorari); *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."). Justice Sotomayor, joined by Justice Ginsburg, has written in dissent that the Court has erred in granting qualified immunity "on a faulty premise: that [past] cases are not identical to this one. But that is not the law, for [the Court has] never required a factually identical case to satisfy the 'clearly established' standard." *Kisela v. Hughes*, 138 S. Ct. 1148, 1161 (2018) (Sotomayor, J., dissenting); *see also Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) (explaining that qualified immunity jurisprudence has "sanction[ed] a

'shoot first, think later' approach to policing [and] render[ed] the protections of the Fourth Amendment hollow.").

Judge Willett of the Fifth Circuit wrote separately in *Zadeh v. Robinson* to "add [his] voice to a growing, cross-ideological chorus of jurists and scholars urging recalibration" of qualified immunity. 928 F.3d 457, 480 (5th Cir. 2019) (concurring in part and dissenting in part). "To some observers," he wrote, "qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly." *Id.* at 479 (emphasis in original). Judge Ho of the Fifth Circuit wrote separately in *Horvath v. City of Leander* to explain that the "clearly established" prong "lacks any basis in the text or original understanding of § 1983. Nothing in the text of § 1983—either as originally enacted in 1871 or as it is codified today—supports the imposition of a 'clearly established' requirement. …. Nor is there any other basis for imputing such a requirement to Congress, such as from the common law of 1871 or even from the early practice of § 1983 litigation. In sum, there is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases." 946 F.3d 787, 800–01 (5th Cir. 2020). In *Stewart v. City of Euclid*, Judge Donald of the Sixth Circuit wrote separately to explain that "[t]he sole purpose of the clearly-established prong, as created and announced by the Supreme Court, is to protect officials from unforeseeable or unknowable developments in the law. It is

not a blank check to engage in specific acts that have not previously been considered by a court of controlling authority . . . . [W]e must have in the forefront of our mind this question: would a reasonable officer have known that his actions were unconstitutional?" No. 18-3767, 2020 WL 4727281, at *9 (6th Cir. Aug. 14, 2020) (Donald, J., concurring in part and dissenting in part).

Numerous district courts have explained that qualified immunity read too strictly, or in existing at all, leads to unjust results inconsistent with the text and purpose of § 1983. *See Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723, at *29 (S.D. Miss. Aug. 4, 2020) ("Overturning qualified immunity will undoubtedly impact our society. Yet, the status quo is extraordinary and unsustainable"); *Ventura v. Rutledge*, 2019 WL 3219252, at *10 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a complete reexamination of the doctrine which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases."); *Quintana v. Santa Fe Cty. Bd. of Comm'rs*, 2019 WL 452755, at *37 n.33 (D.N.M. 2019) ("Factually identical or highly similar factual cases are not . . . the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way."); *Thompson v. Clark*, 2018 WL 3128975, at *10 (E.D.N.Y. 2018) ("The legal precedent for qualified immunity, or its lack, is the subject of intense scrutiny.").

Here, "any reasonable officer" would understand that body-slamming a compliant man in the midst of a mental health crisis because his behavior is annoying to the officer is "excessive force;" indeed, they would likely find offense in the notion that there is ambiguity on the question.

CONCLUSION

This Court should reverse the district court and remand for further proceedings.

Date: August 17, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because it contains 5,792 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Date: August 17, 2020

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I hereby certify that I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system on August 17, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: August 17, 2020

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