No. 22-17008

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN HART, individually and as co-successor-in-interest to decedent KYLE HART, et al.,

Plaintiffs–Appellees,

v.

CITY OF REDWOOD CITY, a municipal corporation, ROMAN GOMEZ, individually and in his official capacity as a police officer for the CITY OF REDWOOD CITY,

Defendants–Appellants.

On Appeal from an interlocutory order of the United States District Court for the Norther District of California
Case No. 4:21-cv-2653, Hon. Yvonne Gonzalez Rogers

BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REHEARING

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INTERESTS OF THE AMICI CURIAE[1]

The National Police Accountability Project was founded in 1999 by members of the National Lawyers Guild to address misconduct by law enforcement officers through coordinating and assisting civil-rights lawyers. NPAP has approximately 550 attorney members practicing in every region of the United States, including over one hundred in California. Every year, NPAP members litigate the thousands of egregious cases of law enforcement abuse that do not make news headlines as well as the high-profile cases that capture national attention. NPAP provides training and support for these attorneys and resources for non-profit organizations and community groups working on police and correction officer accountability issues. NPAP also advocates for legislation to increase police accountability and appears regularly as amicus curiae in cases, such as this one, presenting issues of particular importance for its members and their clients.

INTRODUCTION

This Court should grant rehearing because, as the Appellees have identified, the Panel opinion conflicts with this Court's decisions in cases like *Estate of Anderson v. Marsh*, 985 F.3d 726 (9th Cir. 2021) and, especially, *Nehad v. Browder*, 929 F.3d 1125 (9th Cir. 2019). The

[1] *Amicus* files this brief with the consent of only the Appellees. It has been authored entirely by *Amicus* and its counsel, and no Party or any other person has contributed money to fund the preparation of this brief.

existence of cases where similar fact patterns lead to different outcomes of the qualified immunity analysis presents a problem for district courts, attorneys, law enforcement officers, and the citizenry at large—and that problem is both compounded by how the panel here handled fact construction, and quite persistent. In an unpublished opinion almost a decade ago, this Court observed that "our case law has not been entirely consistent with regard to who may decide aspects of qualified immunity that involve disputes of material facts." *Figueroa v. Cnty. of Los Angeles*, 651 F.App'x 709 (9th Cir. 2016) (comparing *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993) with *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159 (9th Cir. 2013)). This Court should grant rehearing not only because of the panel's treatment of the facts in this case, but to provide better and clearer guidance on treatment of facts in qualified immunity cases generally.

Amicus writes separately, however, to urge the Court to grant rehearing because the Panel opinion conflicts with and would undermine this Court's decisions in *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), *Vos v. City of Newport Beach*, 892 F.3d 1024 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2613 (2019), and *Crawford v. City of Bakersfield*, 944 F.3d 1070 (9th Cir. 2019). The panel opinion here only briefly acknowledged the underlying mental disability of the decedent, devoting just one paragraph of analysis to quickly dismissing it. *See* Slip Op. at 24-25. But as this Court has explained in

those and other cases, "[w]hen "mental illness" is present and apparent in a police encounter, it "*must* be reflected in any [Fourth Amendment] assessment of the government's interest in the use of force." *Drummond*, 343 F.3d at 1058 (emphasis added). Put another way, this Court has clearly established that when police officers perceive signs of a person's mental disability, they "should make a greater effort to take control of the situation through less intrusive means." *Crawford*, 944 F.3d at 1078 (citation omitted). The District Court initially got this right; by reversing, the Panel opinion will sow seeds of confusion for district courts across the Circuit when they undertake the excessive force analysis in cases involving mentally disabled plaintiffs (or decedents). It would undermine this Court's clear line of cases from *Drummond* and *Crawford* to *Sheehan* and *Vos*. The Court should grant rehearing to forestall that confusion.

ARGUMENT

I. The panel opinion conflicts with and undermines this Court's line of cases about law enforcement's responsibilities to people with mental disabilities.

When "mental illness" is present and apparent in a police encounter, it "must be reflected in any [Fourth Amendment] assessment of the government's interest in the use of force." *Drummond*, 343 F.3d at 1058 (emphasis added).[2] This Court has emphasized that time and time again,

[2] This brief may refer to "mental disability," "psychiatric disability," or "mental health crisis," but uses terms like "mental illness" or "mentally deranged" when quoting sources of authority.

across fact patterns. *See, e.g.*, *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001) ("[T]hat the individual involved is emotionally disturbed . . . must be considered in determining . . . the reasonableness of the force employed."); *Glenn v. Washington Cnty.*, 673 F.3d 864, 875 (9th Cir. 2011).[3] And this Circuit has repeatedly situated evident mental disability alongside the traditional *Graham* factors. *See, e.g.*, *Vos*, 892 F.3d at 1034 ("[W]hether the suspect has exhibited signs of mental illness is one of the factors the court will consider in assessing the reasonableness of the force used, in addition to the *Graham* factors . . . .").

In this context, when a suspect has evident mental disability or mental health issues, police must exercise greater caution in using force to remain reasonable. Police officers who perceive signs of (or are called to a scene already knowing of) a person's mental disability "should make a greater effort to take control of the situation through less intrusive means." *Crawford*, 944 F.3d at 1078 (quoting *Vos*, 892 F.3d at 1034 n.9); *see also Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010) (rejecting officer's argument that "use of the taser was justified because he believed

[3] This is not solely a Ninth Circuit line of case law. *See, e.g.*, *Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 900 (4th Cir. 2016) ("Armstrong's mental health was . . . a fact that officers must account for when deciding when and how to use force."); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004) ("[T]hat the police were confronting an individual whom they knew to be mentally ill . . . must be taken into account when assessing the amount of force exerted.").

[plaintiff] may have been mentally ill"). This is because, in such situations, "officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual." *Deorle*, 272 F.3d at 1283. Notably, given the disputes of fact in this case: the excessive force inquiry does not depend on an officer's prior knowledge that someone has a mental disability. Subjective belief or objective perception in the moment is enough to change the scope of reasonable force. *See Vos*, 892 F.3d at 1034 (discussing "whether the suspect has exhibited signs of mental illness is one of the factors the court will consider"); *Glenn*, 673 F.3d at 875 (addressing "whether the officers were or should have been aware that [the person seized] was emotionally disturbed"). Ultimately, all this case law points toward police having a responsibility to de-escalate situations and pursue alternatives before using, or escalating use of, force, when encountering people they know or perceive may have a mental disability.

Indeed, this is not solely a matter of clearly established excessive force case law. Besides the mandatory role that mental disability plays in the excessive force analysis, police have affirmative responsibilities toward people they encounter with mental disability under federal statute. Congress enacted the Americans with Disabilities Act to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II proscribes disability-related discrimination in the

provision of public accommodations, *see id.* § § 12182, 12184, providing that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id.* § 12132. Committee reports on the ADA confirm Congress's intent to cover all police agency activities, including arrests. *See* House Comm. Judiciary, H.R. Rep. No. 101 485, pt. 3, at 50 (1990), *reprinted* in 1990 U.S.C.C.A.N. 445, 473.[4] The Department of Justice has issued and interpreted implementing regulations that confirm Title II's application to arrests and detention. *See* 28 C.F.R. § 35.130(b)(7) (2016); 28 C.F.R. pt. 35, app. B (2014) ("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."). Reflecting those laws and regulations, this Court has long since agreed with "the majority of circuits to have addressed the question that Title II [of the ADA] applies to arrests." *Sheehan v. City & Cnty. of S.F.,* 743 F.3d 1211, 1231-33 (9th Cir. 2014), *rev'd on other grounds*, 575 U.S. 600 (2015); *accord Vos*, 892 F.3d at 1036 (noting that *Sheehan* controls). And as Title

[4] "[T]o comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training . . ."

II of the ADA applies to law enforcement activities, the reasonable modification requirement—including, in this context, by potentially not using force in the same manner or to the same degree on someone exhibiting mental disability—applies to arrests. *See* 27 C.F.R. § 35.130(b)(7); *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004). While the existence of the ADA does not conclusively resolve an excessive force analysis, it bears upon it because it speaks to law that officers must follow—and the Panel here did not address it at all.[5]

The stakes of getting this right could not be higher. People with mental disabilities are "16 times more likely to be killed during a police encounter than other civilians approached or stopped by law enforcement." Overlooked in the Undercounted – The Role of Mental Illness in Fatal Law Enforcement Encounters, Treatment Advocacy Center (Dec. 2015).[6] The news media has covered numerous high-profile examples of police killing people during wellness checks. *See* Doug Criss

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[5] To the extent the Panel opinion dismissed disability as a factor, it purported to do so because it "refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals." Slip Op. at 24. Of course, many people against whom police use force who fall into neither of those categories. And in any event, the rule from *Drummond*, *Crawford*, *Vos*, and other cases does not create two tracks; the cases hold that mental disability is simply one fact to be considered in the (fact-intensive) qualified immunity analysis in force cases.

[6] *Available at*: https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf.

and Leah Asmelash, *When a police wellness check becomes a death sentence*, CNN (Oct. 19, 2019) (collecting some notable incidents).[7] And people with mental disabilities face danger even when not in an acute episode, or when they have rare conditions; that heightened risk applies to, for example, people on the autism spectrum, as well. *E.g.* Jamiles Lartey, *When Police Encounters With Autistic People Turn Fatal*, The Marshall Project (Mar. 16, 2024).[8] In light of this, police officers must implement practices that improve safety in police encounters with people with disabilities, particularly psychiatric disabilities. Because people with psychiatric disabilities may not understand police commands or what is happening, properly trained police should expect to encounter people who do not respond or comply quickly. And de-escalation or other responsive tactics and strategies have a proven track record of success in these very situations.[9]

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[7] *Available at*: https://www.cnn.com/2019/10/19/us/wellness-check-police-shootings-trnd.

[8] *Available at*: https://www.themarshallproject.org/2024/03/16/california-police-autism-disability.

[9] Crisis Intervention Training models advocate for de-escalation even with, as here, armed individuals, and they succeed. *See, e.g.,* Betsy Vickers, *Memphis, Tennessee, Police Crisis Intervention Team* 4, 10 (U.S. Dep't of Justice, Bureau of Justice Assistance, Practitioner Perspectives Ser. No. NCJ 182501, 2000) (crisis intervention in Memphis led to reduced use of deadly force, and fewer officer injuries); Paul Davis, *Crisis Intervention. Law Enforcement,* Providence Journal, Jan. 18, 2015, at 1 (CIT training involving persons with weapons); Jennifer Skeem & Lynne

This Court not long ago observed—in another police excessive force case involving someone with mental illness—that there is "little doubt" that, while the excessive force factors are "nonexclusive," the inclusion or exclusion of a single factor can "play[] an important role in the jury's verdict." *Crawford*, 944 F.3d at 1079-80. By giving it short shrift here, the Panel opinion created intra-Circuit conflict; risked confusion in the law going forward for courts, officers, and others; and reached the wrong result. This Court should grant rehearing en banc and ensure that its precedent in this regard remains cognizant of the role that mental disability plays in encounters between police and civilians, and stays in harmony with the substantial caselaw, statutes, and regulations that bear upon this issue.

CONCLUSION

For these reasons, in addition to the reasons raised by the *Hart* Appellees, this Court should grant rehearing en banc.

Respectfully submitted,

Bibeau, *How Does Violence Potential Relate to Crisis Intervention Team Responses to Emergencies?*, Psychiatric Services (Feb. 2008) at 203 (CIT officers used force conservatively, even with armed subjects).

/s/ Jim Davy

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(g)(1), I certify that this brief:

(i) complies with the type-volume limitation of Circuit Rule 29-2 because it contains 2,194 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 16.75, set in Century Schoolbook 14-point type.

/s/ Jim Davy
Jim Davy

CERTIFICATE OF SERVICE

I certify that on June 13, 2024, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Jim Davy
Jim Davy