No. 18-1303

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUDITH GRAY,
Plaintiff - Appellant,

v.

THOMAS A. CUMMINGS;
TOWN OF ATHOL, MASSACHUSETTS,
Defendants - Appellees.

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

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BRIEF OF PLAINTIFF-APPELLANT JUDITH GRAY

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INTRODUCTION

This appeal presents a simple question: in May 2013, could a police officer tase a physically-subdued 57-year-old woman, knowing that she was experiencing non-combative symptoms of a mental illness, just to overcome her refusal to present her arms for handcuffing? The answer, clearly established by Fourth Amendment cases in May 2013, and amply reinforced by the aegis of the Americans with Disabilities Act, is no.[1] Yet, in a ruling that cited no cases, the district court held that clearly established law did not prohibit an officer from tasing someone for "non-violent, stationary[] resistance." Add. 32. And this unsupported holding was the court's sole articulated basis for entering summary judgment against appellant Judith Gray in her civil rights lawsuit against appellees the Town of Athol and Thomas Cummings. This ruling is incorrect.

On May 2, 2013, Gray wandered, barefoot, away from the hospital where she had been sent due to her bipolar disorder, and the hospital asked the police to bring her back. The hospital did not claim that Gray posed a threat, that she had committed any crime, or that she needed to be forcibly apprehended. RA 40, 197-98.[2]

Officer Cummings responded to this call. RA 197-98. He spotted Gray near the hospital and told her to return, but, experiencing active and obvious symptoms of her illness, she swore at him and kept walking. RA 40. Cummings then closed in on her.

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[1] *See infra*, Argument Part I.

[2] This brief presents the facts in the light most favorable to Gray, the nonmoving party below. *Asociacion De Periodistas De Puerto Rico v. Mueller*, 680 F.3d 70, 72, 82 (1st Cir. 2012).

RA 200. When Gray turned to walk toward him, he grabbed her by the shirt and took her to the ground. RA 40. Cummings told Gray to move her hands from under her chest so that she could be handcuffed, but she swore and refused. RA 40. Cummings, who outweighed Gray by 75 pounds and had just controlled Gray's entire body, did not simply grasp her wrists and handcuff her. RA 179, 201. Instead, he set his Taser to "drive-stun," placed the Taser on Gray's back, and tased her for four to six seconds. RA 201-202. Gray suffered significant pain and passed out. RA 178, 189, 224.

The district court took "no position" on whether tasing Gray was excessive, and was silent as to Gray's ADA claim. Add. 32. But, invoking qualified immunity, the court ruled there was no clearly established law protecting Gray—a subdued woman with a known illness—from being tased for nonviolent, stationary resistance. *Id.* As shown below, that decision is incorrect as a matter of law and worrying as a matter of safety. If upheld, it would especially imperil civilians whose disabilities diminish their capacity to immediately comply with police commands. The district court's ruling should, therefore, be reversed.

JURISDICTIONAL STATEMENT

Gray brought federal claims under 42 U.S.C. §§ 1983 and 1988, for violations of the Fourth and Fourteenth Amendments to the U.S. Constitution, and Title II of the Americans with Disabilities Act, 42 U.S.C § 12131. RA 14. Gray brought state claims under the Massachusetts Civil Rights Act, Mass. G.L. c. 12, §§ 11H-I, and Massachusetts common law. RA 15-16. The district court had jurisdiction under 28 U.S.C. §§ 1331,

1343, and 1367. That court entered a final judgment on March 15, 2018, disposing of all claims in Gray's amended complaint. Add. 35. Gray timely appealed on April 6, 2016. Add. 36. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Courts have repeatedly recognized that the Fourth Amendment prohibits police from tasing physically-subdued civilians offering passive resistance. The district court, however, ruled that Cummings was entitled to qualified immunity, reasoning that "the right not to be tased while offering non-violent, stationary, resistance to a lawful seizure was not clearly established." Was that ruling incorrect?

2. The Americans with Disabilities Act (ADA) prohibits discrimination against, and requires reasonable accommodations for, people with disabilities. Here, the district court's summary judgment order did not mention the ADA, and the magistrate judge had recommended granting summary judgment on the theory that Cummings was entitled to treat Gray—a woman conspicuously experiencing symptoms of a mental illness—just as he would have treated someone who was not so impaired. Was the summary judgment order erroneous?

STATEMENT OF THE CASE

I. Statement of Facts

In May 2013, police officer Thomas Cummings was dispatched to return Judith Gray to the hospital that had been treating her mental illness. She swore at him and refused to go with him. He closed in on her, and she turned toward him. He then

grabbed her by the shirt, took her to the ground, and tased her when she failed to submit her hands for handcuffing.

A. Gray's call for help and departure from the hospital

Gray, who in May 2013 was 57 years old, has been coping with bipolar disorder since she was 25. RA 179, 185. She has no history of injuring herself or others. RA 222. On May 2, 2013, Gray experienced a manic episode and called both her daughter and 911 for help. RA 171. Athol police officers arrived at Gray's home. RA 172. Although Gray was agitated, RA 172, she did not hurt or threaten anyone. RA 174. Athol police officers transported Gray to Athol Memorial Hospital without incident. RA 173-74. She arrived at approximately 4:00 a.m. RA 216. Gray was admitted under Massachusetts General Laws c. 123, § 12, which authorizes the emergency restraint and hospitalization of persons with mental illness who face a risk of serious harm. RA 197-98.

About six hours later, Gray left the hospital on foot. RA 40. Hospital staff called the Athol Police Department and explained that the hospital wanted Gray, "a section 12 patient," to be "picked up and brought back." RA 40. Hospital staff informed police that Gray was wearing a gray shirt, green pants, and "no shoes." RA 40; 197-98. The hospital did not dial 911. RA 40. It did not report that Gray presented any safety risk. RA 40, 197-98. Nor did it allege that Gray was armed or had committed a crime. *Id.* Officer Cummings responded to the hospital's request and located Gray within minutes. RA 40. Gray was walking barefoot along the sidewalk, less than a quarter of a mile from the hospital. RA 149, 199.

B. Cummings's training

The national standard for training police officers to interact with persons experiencing symptoms of mental illness or mental health crises is a 40-hour Crisis Intervention Training (CIT) training course. RA 161, 241-43, 245, 259-60, 277-78. This course generally covers how to recognize mentally ill persons, different types of mental illness, de-escalation techniques, and tactics for addressing the needs of persons experiencing mental health crises. *Id.* Gray also submitted evidence that annual retraining is necessary because interacting appropriately with persons who have mental illness is a perishable skill. RA 161, 240.

At the Police Academy in 2011, Cummings received six hours of training on "People with Special Needs," RA 57, which included training on interactions with individuals with mental illness, issues in treatment, the Department of Mental Health, forms of mental illness, assessment and response, and the ADA. RA 55-57, 79, 83-84, 93, 162 ¶55. Cummings also received 12 hours of training on "Crisis Intervention and Conflict Resolution," RA 55, some of which involved training on intervening and resolving situations with emotionally disturbed persons, people with mental illness, people with emotional illness and people with disorientation. RA 55-70, 162 ¶54. Before encountering Gray in May 2013, Cummings's comprehension of this training was never assessed, and he was never retrained. RA 161 ¶52C, 240.

As for the Taser, Cummings received training, testing, and annual re-certifications. RA 46, 96-103. Athol's policy is that Tasers should not be used on "[t]hose known to be suffering from severe mental illness." RA 158 ¶38A, 257.

C. Cummings's pursuit, takedown, and tasing of Gray

An officer who encounters someone experiencing a mental health crisis should call an ambulance or call for backup. RA 149-50, 226-27, 231-32, 235, 252, 260. But that is not what Cummings did; he stopped his cruiser and got out. RA 199. Gray swore at him, and Cummings responded, "You have to go back to the hospital." RA 199. Gray said, again using profanity, that she was not going back, and she continued to walk slowly away. RA 152, 199-200. Cummings then radioed for backup, but he did not wait for it to arrive. RA 199-200. Nor did he call an ambulance from the hospital that was less than a quarter of a mile away. RA 199-200. He did not attempt waiting, following from a distance, or any other form of de-escalation.

Instead, Cummings pursued Gray on foot, grabbed her, forced her to the ground, and tased her. RA 40, 200-201. Cummings began this pursuit about 100 feet from Gray, and in 25 to 30 seconds he closed to within five feet. RA 200-201. While pursuing Gray, Cummings told her that she had to return to the hospital, and she continued to swear at him. RA 200. After Cummings moved to within five feet of her, Gray stopped, turned

around, said "Fuck you," and began walking toward Cummings. RA 200-201.[3] Gray did not threaten Cummings or attempt to touch him. RA 200-201.

Cummings then reached out and grabbed Gray's shirt. RA 201. Cummings was six feet, three inches tall and weighed 215 pounds. RA 201. Gray was five inches shorter and, at 140 pounds, 75 pounds lighter. RA 179, 201. According to Cummings, he could feel Gray moving her body forward, and he then "took her to the ground." RA 201. At some point, while possibly "squatted down," RA 189, Gray did not immediately follow an order from Cummings to get on her knees because, due to prior injuries, she could not do so. RA 154 ¶ 25A, 189. Gray kept her arms beneath her chest. RA 201. But she did not actively resist Cummings. RA 40-41.

Cummings testified that he repeatedly told Gray to place her hands behind her back. RA 40. But, even if it had been appropriate to handcuff Gray, Cummings could have done so by forcibly controlling her wrists, as he had just done, without apparent difficulty, to her entire body. RA 40-41, 200-02.

Instead, with Gray on the ground, Cummings tased her after she "refused to listen." RA 40. According to Cummings, he told Gray that she was "going to get ta[s]ed" if she did not place her hands behind her back. RA 40. According to Gray, Cummings

[3] Cummings also offered subjective assessments of Gray's body. *See* RA 29, 200 (asserting that Gray "clinched [sic] her fists and teeth, flexed her body, and appeared to be 'looking right through' Cummings"). These observations should have further clued Cummings into Gray's disability. *See* Bengston, Michael, M.D., *Catatonic Schizophrenia*, at https://psychcentral.com/lib/catatonic-schizophrenia/ (discussing catatonic posturing).

said she would be tased if she stood up. RA 189. Cummings testified that Gray then said, "Fucking do it!" RA 201; 40. Cummings then gave Gray "one last chance," after which he undertook several steps so that he could tase her. RA 40-41, 202. Cummings pulled out his Taser, removed its cartridge to engage "drive stun" mode, placed it in the middle of Gray's back, and tased her continuously for four to six seconds. RA 40, 202. Gray then released her arms, and Cummings handcuffed her. RA 202. Gray testified that "[s]omething hurt really bad and I passed out." RA 189. The Taser left two burn marks in her back. RA 178, 224, 255.

Cummings's backup arrived shortly thereafter. RA 203. Cummings called an ambulance, which arrived within minutes and returned Gray to the hospital. RA 203-04. Cummings caused Gray to be summonsed to court for several criminal charges: (1) assault on a police officer (Mass G.L. c. 269 § 13a); (2) resisting arrest (Mass. G.L. c. 268, § 32); (3) disturbing the peace; (Mass. G.L. c. 272, § 53) and (4) disorderly conduct (Mass. G.L. c. 272, § 53). RA 41, 160 ¶49; 211-15. The charges were later dismissed. RA 160-61, 205-206.

II. Procedural History

Gray sued Cummings and the Town of Athol in February 2015. RA 2. Her amended complaint sought relief under 42 U.S.C. § 1983 against Cummings and the Town, asserted an ADA claim against the Town, and asserted state law claims against Cummings alleging a violation of the Massachusetts Civil Rights Act (MCRA), assault and battery, and malicious prosecution. RA 9-17. On March 1, 2016, the defendants

moved for summary judgment. RA 25-127. Gray filed her opposition on April 8, 2016. RA 128-283.

A. The Magistrate Judge's Report and Recommendation

On March 15, 2017, the magistrate judge (Hennessey, M.J.) signed a Report and Recommendation urging the district court to grant the defendants' motion for summary judgment. Add. 1. Although the district court did *not* adopt the magistrate judge's conclusion that Cummings used permissible force, the Report and Recommendation is summarized here for the sake of completeness.

With respect to Gray's § 1983 claim (Count I), the magistrate judge concluded that Cummings's use of the Taser did not constitute excessive force. Despite being required to view the facts in the light most favorable to Gray, and to leave all inferences and conclusions to the jury, the magistrate judge characterized the facts as an "assault" by Gray against Cummings. Add. 7-11, 14, 16, 18-19, 21-24, 28, 30. In the judge's view, Gray assaulted Cummings and resisted arrest by "turn[ing] to face Cummings" while "clenched," and by "approach[ing] Cummings in such a way that Cummings felt the need to assume a defensive posture." Add. 8. But the district court took no position on this characterization, and a reasonable jury could find that the magistrate judge had it exactly backwards.

The magistrate judge further characterized Gray as an immediate threat to Cummings, due in part to her "conspicuous signs of mental illness," Add. 9, as well as the judge's view that, after being taken down, Gray supposedly "could have obtained

control of [Cummings's] firearm," Add. 11. The magistrate judge also asserted that Gray had "actively resist[ed]" by refusing to present her arms for handcuffing. Add. 10. The magistrate judge did not say how Gray's non-movement while subdued could amount to "active" resistance. Nor did the magistrate judge show how these inferences took the facts in the light most favorable to Gray, as opposed to Cummings. Using these inferences, the magistrate judge concluded that Cummings was entitled to qualified immunity on Count I because it was not clearly established "that the single application of a Taser constituted excessive force against a person who had assaulted a police officer and when immediately brought to the ground by the officer actively resisted lawful arrest." Add. 15.

These same inferences led the magistrate judge to recommended summary judgment in favor of the defendants on Gray's *Monell* and state law claims. Add. 19 (Count II, alleging that the Town failed to train Cummings); Add. 25-30 (Counts IV, V, and VI, alleging assault and battery, violation of the MCRA, and malicious prosecution).

On Gray's ADA claim (Count III), the magistrate judge recommended summary judgment in favor of the Town. The magistrate judge acknowledged that the ADA's reasonable-accommodation requirement obliges police officers to modify their general practices when they interact with disabled civilians. Add. 20. Yet the judge asserted that Cummings could not prevail because, in the judge's view, Cummings was entitled to tase Gray so long has he also would have tased a non-disabled person who had behaved in the same way. *Id.* Thus, the judge seemed to conclude that Gray could not prevail on

her ADA claim because the police did *not* accommodate her disability. And on Gray's second ADA theory, which asserted that she was tased because her disability-related conduct was misperceived as criminal activity, Add. 20,[4] the magistrate judge concluded that Cummings's treatment of Gray could not be regarded as "misperceiv[ing]" her disability because Gray had committed "assault and battery" and "resist[ing] arrest." Add. 21-22. As shown below, these inferences were improper on a motion for summary judgment, as such questions of fact are properly reserved for the jury.

B. The District Court's Order

Gray filed objections to the Report and Recommendation with the district court (Hillman, J.), and requested oral argument. RA 7, 294-309. On March 15, 2018, exactly one year from the date of the Report and Recommendation, the district court issued a two-sentence order granting summary judgment to the defendants. Add. 32. It read:

> ELECTRONIC ORDER entered adopting Report and Recommendations re [51] Report and Recommendations and granting [40] Motion for Summary Judgment. I take no position on the Magistrate Judge's determination that the defendant Cummings employed reasonable force under all the circumstances because I agree that the right not to be tased while offering non-violent, stationary, resistance to a lawful seizure was not clearly established at the time of the confrontation between Ms. Gray and Officer Cummings.

[4] The magistrate judge asserted that Gray did not timely raise the "misperception" theory, but nevertheless addressed it. Add. 21.

SUMMARY OF THE ARGUMENT

I. Cummings is not entitled to summary judgment on Gray's excessive force claim. Cummings's tasing of Gray, which caused her to lose consciousness, was a significant use of force. RA 189. A jury could find that this force violated the Fourth Amendment because Cummings had controlled Gray and called for backup, and because Gray was physically subdued, was offering at most nonviolent and stationary resistance, and was experiencing obvious symptoms of a known mental illness. Cummings is not entitled to qualified immunity for his violation of Gray's rights because, by May 2013, its illegality had been clearly established. This Court's cases had established that significant uses of force, including Tasers, were not justified against individuals who nonviolently disobeyed police commands. *Ciolino v. Gikas*, 861 F.3d 296, 304 (1st Cir. 2017) (reviewing law as of June 2013); *Parker v. Gerrish*, 547 F.3d 1, 9 (1st Cir. 2008). Out-of-circuit cases also confirmed that, once someone was subdued, and especially in cases involving mental illness, tasing her to overcome stationary resistance was unconstitutional. *See, e.g.*, *Cyrus v. Town of Mukwonago*, 624 F.3d. 856 (7th Cir. 2010).

The district court's contrary ruling was its sole basis for granting summary judgment against Gray on her excessive force claim under § 1983, as well as her municipal liability claim under § 1983 and her state law claims. Add. 32. The summary judgment order should therefore be reversed as to those claims.

II. The Town of Athol is not entitled to summary judgment on Gray's ADA claim. Title II of the ADA bars public entities from denying benefits to or discriminating against people with disabilities, and most courts of appeals (though not yet this one) have held that it applies to police encounters. *See, e.g.*, *Roberts v. City of Omaha*, 723 F.3d 966, 973 (8th Cir. 2013). A public entity violates Title II by failing to reasonably accommodate someone's disability, or by misperceiving its symptoms as crimes.

A jury could find that the Town of Athold, through its actions and those of its agent Cummings, committed both types of violations. First, a jury could find that the Town failed to reasonably accommodate Gray's disability. Although Cummings could have accommodated Gray's symptoms—by keeping his distance, calling for an ambulance, waiting for the backup that he had called, or simply grasping Gray's wrists—Cummings chose to take her down and tase her. Second, a jury could find that, in arresting her on misdemeanor charges that were later dropped, Cummings treated obvious symptoms of mental illness as though they were undertaken with criminal intent. Moreover, on both theories, the record supports a finding that the Town and Cummings acted with deliberate indifference sufficient to support an award of damages as well as injunctive relief. *See Delano-Pyle v. Victoria County, Tex.*, 302 F.3d 567, 570-71, 575-76 (5th Cir. 2002) (evidence sufficient to support a finding of deliberate indifference where officer persisted with oral commands in interacting with and arresting a hearing-impaired individual).

ARGUMENT

I. The district court's grant of qualified immunity is erroneous and warrants reversal on all claims connected to Gray's allegations of excessive force (Counts I, II, IV, V, and VI).

Contrary to the district court's ruling, Cummings is not entitled to qualified immunity on Gray's § 1983 claim alleging that he used unconstitutionally excessive force. In evaluating qualified immunity, this Court considers "'(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation.'" *Glik v. Cunniffe*, 655 F.3d 78, 81 (1st Cir. 2011) (quoting *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009)). Here, a jury could find that Cummings used excessive force by tasing Gray while she was subdued and offering only nonviolent, stationary resistance, and the case law protecting Gray from that force was clearly established.

A. The standard of review requires drawing inferences in Gray's favor.

This Court reviews *de novo* a denial of summary judgment on qualified immunity grounds. *Asociacion De Periodistas De Puerto Rico v. Mueller*, 680 F.3d 70, 72, 82 (1st Cir. 2012). The Court views all facts "in the light most favorable to the plaintiff[]," and "'draw[s] all reasonably supported inferences in [her] favor." *Id.* at 72; *see also Stamps v. Town of Framingham*, 813 F.3d 27, 30 (1st Cir. 2016). Under these standards, the magistrate judge's characterizations of the record carry no weight on appeal. Indeed, the district court did *not* accept the magistrate judge's core view, namely, that

Cummings's tasing of Gray did not constitute excessive force. Add. 32. But even if it had, this Court's review would be *de novo*.

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

The district court took "no position" on whether Cummings used excessive force, Add. 32, but a jury could find that he did. Using a Taser in stun mode, as Cummings did, is significant force. *Mattos v. Agarano*, 661 F.3d 433, 443 (9th Cir. 2011) (en banc), *aff'd in part, dismissed in part sub nom. Garcia v. Sistarenik*, 603 F. App'x 61 (2d Cir. 2015). It can cause "extreme[] pain," and its use has preceded civilian deaths. *Garcia v. Dutchess Cty.*, 43 F. Supp. 3d 281, 290, 295, 298 (S.D.N.Y. 2014). Gray's expert described the Taser as "an intermediate weapon" that, in stun mode, "typically causes burns and abrasion injuries or 'signature marks' that may resemble surface burns." RA 254-55. Here, by tasing Gray, Cummings caused her to suffer significant pain and lose consciousness. RA 189. A jury could find that this significant use of force violated the Fourth Amendment because Gray had committed no crime, was subdued, offered only nonviolent and stationary resistance, and was in need of health-improving treatment rather than life-threatening electricity.

To determine whether force was excessive, courts consider both what force was used and what force was justified. *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 7 (1985); *Alexis v. McDonald's Restaurants of Mass., Inc.*, 67 F.3d 341, 352-53 (1st Cir. 1995). To do so, courts apply the three "*Graham* factors": (1) the severity of the civilian's crime, if any; (2) whether the civilian posed an immediate safety threat; and (3) whether the civilian

was actively resisting arrest or attempting to flee. *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Ciolino v. Gikas*, 861 F.3d 296, 302 (1st Cir. 2017). Applying those factors, this Court has repeatedly made clear that officers may not react violently to a civilian's nonviolent refusal to follow police commands. *See, e.g.*, *Ciolino*, 861 F.3d at 299-300, 302-06 (affirming a district court's denial of qualified immunity where officer forcefully took down civilian who disobeyed order to disperse); *Alexis*, 67 F.3d at 345-46, 353 (reversing order granting summary judgment to defendants where, after civilian refused officer's repeated commands to leave a restaurant, she "was abruptly pulled from the booth, and across the table, with sufficient force to bruise her legs, then handcuffed with her hands behind her back and dragged and carried to a police cruiser and pushed inside"). Consistent with those cases, this Court has also made clear since at least 2008 that "a reasonable officer would not discharge his taser simply because of insolence," *Parker v. Gerrish*, 547 F.3d 1, 10 (1st Cir. 2008). *Parker* upheld a jury's finding that an officer used excessive force by tasing a man that police sought to handcuff, despite the officer's testimony that the man had made movements suggesting he was about to swing his arm. *Id.* at 4-5. Here, Cummings stated that he tased Gray after she was insolent—that is, "refused to listen"—and a jury could find that he tased her for that reason. RA 40.

Although additional cases are discussed below at Part I.C, two specific cases—where people died after officers tased them in stun mode—illustrate how a jury could

find that Cummings used excessive force: *Cyrus v. Town of Mukwonago*, 624 F.3d. 856 (7th Cir. 2010), and *Garcia v. Dutchess County*, 43 F. Supp. 3d 281 (S.D.N.Y. 2014).

In *Cyrus*, the Seventh Circuit reversed an order granting summary judgment to defendants sued by the estate of a mentally ill man who died after a police officer repeatedly tased him. The incident began after emergency dispatchers received a call from a property owner who reported that a man, Cyrus, had trespassed on his property. The officer dispatched to the scene tased Cyrus once after he ran back toward the owner's home, which was under construction, and tased him again after Cyrus tried to get up. Cyrus tried to roll away, but officers caught up with him and "commanded that he show his hands for handcuffing." *Id.* at 860. Cyrus kept his hands underneath his body, and officers were unable to "forcibly remove" them. *Id.* One officer then tased Cyrus several times in drive-stun mode, over the course of a minute, "to force compliance with the arrest." *Id.* at 858. Cyrus died. *Id.* at 860.

The Seventh Circuit held that the *Graham* factors favored Cyrus. The court reasoned that a jury could conclude that "Cyrus had, at most, committed a misdemeanor" like trespassing or resisting arrest. *Id.* at 863 & n.7. He "was not exhibiting violent behavior." *Id.* at 863. And although Cyrus either could not or would not "release his arms," there was "no evidence suggesting that [he] violently resisted the officers' attempts to handcuff him." *Id.* Thus, a jury could find that "once Cyrus was on the ground, unarmed, and apparently unable to stand up on his own," tasing him was excessive. *Id.*

Likewise, in *Garcia*, the district court denied the defendants' motion for summary judgment on an excessive force claim brought by the estate of a man who died from being tased in stun mode. The incident occurred after a woman called 911 to report that she was concerned about a family member, James Healy, who was "ranting" and "running" after using cocaine. *Id.* at 285. When police arrived, they decided to detain Healy under a state law authorizing detention for mental health reasons. *Id.* at 286. Healey was opening kitchen drawers and talking about knives, so officers forced him to the floor, where he "kept 'tugging' his own arms underneath his body." *Id.* at 285-87. While Healy was on the ground struggling with other officers, an officer tased him twice in stun mode—for roughly 10 seconds—but stopped after realizing that Healy was not relenting. *Id.* Other officers then handcuffed Healey by controlling his arms without using Tasers. *Id.* Healy, meanwhile, stopped breathing and never recovered. *Id.* at 288.

The district court ruled that each *Graham* factor favored Healy. First, the nature and severity of the offense "provide[d] virtually no support for [the officer's] use of the taser," because a jury could find that Healy was being detained solely for his safety. *Id.* at 291. Second, a jury could find that Healy did not pose an immediate safety threat because he had no weapon while on the ground, he "was no longer resisting the officers when he was tased," and that active "combative[ness]" ceased after he was brought to the ground. *Id.* at 292. Thus, the district court ruled that a jury could find that the officer's use of the Taser violated the Fourth Amendment, noting a "consensus among

those federal courts of appeals to have reached the issue that it is 'generally . . . unreasonable for officers to deploy a taser against a misdemeanant who is not actively resisting arrest." *Id.* at 295 (citing *Abbott*, 705 F.3d at 730, and collecting cases).

Here, too, a jury could find that Cummings's tasing of Gray constituted significant use of force that was not justified by the three *Graham* factors.

First, as in *Garcia*, police sought custody of Gray under a civil statute for her own protection. RA 40; *Garcia*, 43 F. Supp. 3d at 285. Viewing the facts in the light most favorable to Gray, a jury could find that she did not resist arrest merely by walking away from Cummings or by supposedly moving her body forward after he grabbed her. RA 201. But even if Gray had resisted arrest, it would have been a misdemeanor no worse than the offenses at issue in *Cyrus*, and it would have ended when Cummings took Gray to the ground. *Compare Cyrus*, 624 F.3d at 863 & n.7, *with* Mass. G.L. c. 268, § 32B; RA 39.

Second, a jury could find that Gray posed no safety threat to Cummings or others. She was a 57-year-old woman shuffling barefoot down a sidewalk. Viewing the facts in the light most favorable to Gray, a jury would be hard-pressed to find that she could hurt anyone, let alone the 215-pound officer who had just forced her to the ground. *See* RA 201; *Garcia*, 43 F. Supp. 2d at 292; *Cyrus*, 624 F.3d at 863. True, due to her illness, Gray was swearing. But that did not make her dangerous. *See Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010) (explaining that, despite civilian's unusual behavior, "it should have been apparent that he was unarmed").

Third, consistent with the district court's view that Gray's resistance was "non-violent" and "stationary," a jury could find that she was not actively resisting or attempting to flee when Cummings tased her. There is no evidence that Gray struggled against Cummings after he forced her to the ground. *See Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005) (finding that failure to produce arms when ordered was passive and not "particularly bellicose"). Stationary resistance triggers "a commonsense need to mitigate force," especially when a suspect "is known to have diminished capacity." *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 526 (7th Cir. 2012). Yet Cummings tased Gray, even though it was obvious that her mental illness was compelling her noncompliance. Worse, unlike in *Garcia* and *Cyrus*, where Tasers were deployed *after* officers were initially unable to forcibly apply handcuffs, Cummings did not even try to grasp and secure Gray's wrists before tasing her. *Garcia*, 430 F. Supp. 2d at 287; *Cyrus*, 624 F.3d at 860. Nor did he bother to wait for the backup that he himself had called. RA 199-200. On that remarkable record, a jury could find that Cummings easily could have handcuffed Gray, with or without that backup, *but chose instead to hurt her*.

The magistrate judge's contrary contention did not take the facts in the light most favorable to Gray, was not accepted by the district court, and could be rejected by a jury. The magistrate judge contended that Gray assaulted Cummings by walking toward him, swearing, and being "clenched." Add. 8. This is, to say the least, a thin theory of assault. In Massachusetts, assault is an attempted or threatened battery. *Commonwealth v. Porro*, 458 Mass. 526, 530 (2010). Attempted battery requires an ""inten[t] to commit

battery" and an overt step that came reasonably close to accomplishing the battery. *Id.* (citing *Commonwealth v. Melton*, 436 Mass. 291, 295 (2002)). Threatened battery requires objectively threatening conduct and "inten[t] to place the victim in fear of an imminent battery." *Id.* at 530-31. Here, a jury could find that Gray took neither an "overt step" toward battering Cummings nor any action threatening such a battery. *See Estate of Saylor v. Regal Cinemas, Inc.*, No. cv-13-3089, 2016 WL 4721254, at *7-8 (D. Md. Sept. 9, 2016), *aff'd sub nom. Estate of Saylor v. Rochford*, 698 F. App'x 72 (4th Cir. 2017) ("One could conclude that, like the mentally disabled individual who was suddenly grabbed by a police officer in *Rowland*, Mr. Saylor did not resist arrest but was simply frightened and 'instinctively tried to free himself.'" (citing *Rowland v. Perry*, 41 F.3d 167, 172 (4th Cir. 1994))). But even if Gray had undertaken the requisite physical acts, a jury could find that her illness rendered her incapable of forming the necessary intent, *see Commonwealth v. McHoul*, 352 Mass. 544, 547 (1967), or that Gray intended only to tell Cummings that she did not want to return to the hospital.[5]

Cummings pursued Gray. He grabbed her. He took her to the ground. Although he wanted to handcuff her, he declined to grasp her wrists or to wait for backup. Instead, he tased her. And he did so despite knowing that Gray was a 57-year-old

[5] There is also no merit to the magistrate judge's speculation that Gray could have seized Cummings's firearm. Add. 11. Gray is alleged to have kept her hands under her chest, which is the opposite of reaching anywhere.

woman in distress due to the very disability that occasioned the call to the police.[6] Viewing those facts in the light most favorable to Gray, a jury could find that Cummings used excessive force.

C. Cummings violated clearly established law.

Contrary to the district court's ruling, it was clearly established in May 2013 that an officer may not tase a subdued suspect for "non-violent, stationary[] resistance." Add. 32. The "clearly established" inquiry considers: (1) "whether the contours of the relevant right were clear enough to signal to a reasonable official that his conduct would infringe that right"; and (2) "'whether a reasonable defendant would have understood that his conduct violated the plaintiff['s] constitutional rights.'" *MacDonald v. Town of Eastham*, 745 F.3d 8, 12 (1st Cir. 2014) (quoting *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009)). In the Fourth Amendment context, the Supreme Court has held that "[s]pecificity is especially important." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152-53 (2018). Here, the relevant right was clearly and specifically established, any reasonable officer in Cummings's shoes would have known he was violating it, and qualified immunity should have been denied.

[6] *See Saylor,* 2016 WL 4721254, at *9 ("[Mr. Saylor's] mental disabilities were a significant part of the 'totality of the circumstances' confronting the Deputies and their conduct must be assessed in light of their awareness of those disabilities.").

1. In May 2013, clearly established law prohibited tasing a subdued, mentally ill woman offering only nonviolent, stationary resistance.

Law is "'clearly established' if courts have ruled that 'materially similar conduct was unconstitutional,' or if there is a previously identified general constitutional principle that applies 'with obvious clarity to the specific conduct at issue.'" *Cortes-Reyes v. Salas-Quintana*, 608 F.3d 41, 52 (1st Cir. 2010) (quoting *Jennings v. Jones*, 499 F.3d 2, 16 (1st Cir. 2007)). In assessing whether law is clearly established, this Court considers "all available case law," *Suboh v. Dist. Attorney's Office of Suffolk Dist.*, 298 F.3d 81, 93 (1st Cir. 2002), including "authorities both in circuit and out of circuit." *Bergeron v. Cabral*, 560 F.3d 1, 11 (1st Cir. 2009), *abrogated on other grounds by Maldonado v. Fontanes,* 568 F.3d 263, 269 (1st Cir. 2009)). But, of course, the emphasis is on "controlling authority . . . at the time of the incident," *Wilson v. Lane*, 526 U.S. 603, 617 (1999), which here is the law of this Circuit. Applying these tests, the law in May 2013 clearly established that tasing Gray, a subdued person offering no active resistance and experiencing obvious symptoms of mental illness, was unlawful.

This Court has repeatedly held that police officers may not resort to violence when someone has "disobeyed a police order but showed no inclination to resist arrest or to attempt to flee from arrest." *Ciolino v. Gikas*, 861 F.3d 296, 304 (1st Cir. 2017). In *Ciolino*, this Court affirmed a district court's denial of qualified immunity where, in June 2013, an officer forcefully took down an individual who had disobeyed a police order to disperse and had instead taunted a police dog. *Id.* at 298-300. In other cases, this

Court has similarly drawn a clear line against hurting people for disobedience. *See Raiche v. Pietroski*, 623 F.3d 30, 33-34 (1st Cir. 2010) (affirming denial of qualified immunity where officer tackled motorcyclist who had not immediately stopped when ordered to do so); *Alexis*, 67 F.3d at 345-46, 353 (reversing order granting summary judgment to defendants where officer abruptly grabbed, pulled, and handcuffed civilian who refused officer's repeated commands to leave a restaurant). Although these cases do not involve Tasers, they involve comparable uses of force and apply with "obvious clarity" to Cummings's violent actions against Gray. *See Cortes-Reyes*, 608 F.3d at 52.

What is more, case law involving Tasers, in both this Circuit and others, had clearly established by May 2013 that police officers could not tase a subdued, unarmed civilian offering nonviolent, stationary resistance. *See* Add. 32. In *Parker*, this Court affirmed a jury's finding that an officer used excessive force when, in 2008, he tased an unarmed arrestee who was offering "no significant 'active resistance'" by clasping his own wrist while officers tried to apply handcuffs. 547 F.3d at 9-10. *Parker* is consistent with the decisions of other courts of appeals, which made clear by May 2013 that "*active resistance* . . . marks the line between reasonable and unreasonable tasing." *Hagans v. Franklin Cty. Sheriff's Office*, 695 F.3d 505, 509-10 (6th Cir. 2012) (emphasis added) (citing, among other cases, *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 665 (10th Cir.

2010).[7] In *Hagans*, the Sixth Circuit held that an officer was entitled to qualified immunity because the suspect "struggled with" officers—he "lay down on the pavement and locked his arms tightly under his body, kicking his feet and continuing to scream"—and thus was *both* "actively resisting arrest and refusing to be handcuffed." 695 F.3d at 507, 509. Numerous additional cases also distinguish between active (non-stationary) and passive (stationary) resistance.[8]

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[7] *Compare Lash v. Lemke*, 786 F.3d 1, 7 (D.C. Cir. 2015) (determining that, in 2012, it was not "clearly established that the single use of a Taser by arresting officers violated the Fourth Amendment rights of a person actively resisting arrest").

[8] *See, e.g.*, *Meyers v. Baltimore Cty. Md.*, 713 F.3d 723, 733-35 (4th Cir. 2013) (clearly established by 2007 that it was excessive to tase an arrestee multiple times after he had been subdued, despite evidence that the arrestee "'stiffened' his body," because he had dropped his baseball bat and "ceased actively resisting"); *Goodwin v. City of Painesville*, 781 F.3d 314, 328 (6th Cir. 2015) (affirming denial of summary judgment on excessive force claim where, in 2010, "Mr. Nall had a clearly established constitutional right not to be tasered when he was at most offering passive resistance"); *Abbott v. Sangamon Cty., Ill.*, 705 F.3d 706, 732-33 (7th Cir. Jan. 29, 2013) (explaining, in case involving the dart-mode tasing of a "noncompliant, nonmoving misdemeanor arrestee who had already been immobilized by an initial taser jolt," that it had been "well-established in this circuit that police officers could not use significant force on nonresisting or passively resisting suspects"); *Cyrus*, 624 F.3d at 863 (holding that jury could find excessive force where suspect "refused to release his arms for handcuffing"); *Brown v. City of Golden Alley*, 574 F.3d 491, 497, 499 (8th Cir. 2009) (concluding that an arrestee's refusal to end a phone call did not justify tasing even though the officer was concerned that the arrestee could kick him or use glass tumblers as weapons); *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. Sept. 6, 2013) (holding, in case involving the use of a Taser in dart mode, that "[t]he right to be free from the application of non-trivial force for engaging in mere passive resistance was clearly established prior to 2008"); *Bryan v. MacPherson*, 630 F.3d 805, 830 (9th Cir. 2010) (holding that an officer used excessive force by tasing arrestee whose conduct was "closer to . . . passive resistance" than "to truly active resistance," where suspect failed to follow an order to remain in his car and was "shouting gibberish and hitting himself in the quadriceps"); *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1279, 1285 (10th Cir. 2007) (clearly established by 2003 that it was excessive force to tase

This line is especially clear when officers tase people with mental impairments. The Fourth Circuit has held that it was clearly established by 2007 that an officer could not repeatedly tase a subdued man agitated due to a known mental illness, despite evidence that the man "'stiffened' his body," because he had dropped his baseball bat and "ceased actively resisting." *Meyers v. Baltimore County*, 713 F.3d 723, 733-35 (4th Cir. Feb. 1, 2013); *see also Cyrus*, 624 F.3d at 863 (*see* Part I.B, *supra*); *Cabral v. Cty. of Glenn*, 624 F. Supp. 2d 1184, 1192 (E.D. Cal. 2009) (law was clearly established that officer could not tase a naked, unarmed mentally impaired person who hid behind jail cell's toilet instead of complying with officers' commands).

This rule is not undermined by the district court's two-sentence order, which cited no cases, nor by the magistrate judge's recommendations, which relied on improper factual findings to invoke cases involving resistance that was violent and active rather than nonviolent and stationary. Add. 15, 32. The magistrate judge also cited out-of-circuit cases involving individuals who were arguably nonviolent, but the individuals in those cases were not subdued by the police before being tased. In *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir. 2004), the Eleventh Circuit held that an officer had not used excessive force by tasing a "belligerent" and "uncooperative" man who exited his truck, "gestured animatedly," and "continuously paced" during a traffic stop. *Id.* at 1273, 1278. The Court reasoned that "a verbal arrest command accompanied by

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arrestee who did not pose immediate threat to officer safety and was not actively resisting arrest, even where there was "a struggle" between officers and arrestee).

attempted physical handcuffing" could have triggered "a serious physical struggle in which" someone "would be seriously hurt." *Id.* at 1278. In *Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst*, 810 F.3d 892 (4th Cir. 2016), the Fourth Circuit held an officer had violated the Fourth Amendment—but not clearly established law as of April 2011—by tasing a man who had wrapped himself so tightly around a post that officers had been unable to "pry [his] arms and legs off the post." *Id.* at 896, 900-01. Neither *Draper* nor *Estate of Armstrong* undermine the clear rule that, in May 2013, officers could not tase civilians after subduing them.[9]

2. A reasonable person would have known that tasing Gray was a constitutional violation under the circumstances.

Any reasonable officer in Cummings's position would have known that tasing Gray violated clearly established case law prohibiting officers from tasing a subdued civilian offering nonviolent, stationary resistance. A reasonable officer would not have perceived any threat from a barefoot 57-year-old woman he outweighed by 75 pounds and had forced to the ground. A reasonable officer, like the district court, would have perceived Gray's behavior on the ground as nonviolent and stationary. Add. 32. And a reasonable officer would have understood that tasing a woman experiencing obvious

[9] A recent Fifth Circuit decision likewise saw a lack of clarity when the police tased someone they had been unable to physically subdue. *Samples v. Vadzemnieks*, --- F.3d ----, 2018 WL 3955462, at *2, **4-5 (5th Cir. Aug. 17, 2018) (No. 17-20350) (holding that officer had violated the Fourth Amendment, but not clearly established Fifth Circuit case law, when in 2014 he tased a man he believed to be intoxicated who "was wandering around when the officers found him, declined to heed their requests, and tensed up when [an officer] grabbed him" by the arm).

symptoms of mental illness, after she "refused to listen," would amount to tasing her for insolence. RA 40; *see Ciolino*, 861 F.3d at 304; *Parker*, 547 F.3d at 10.

A reasonable officer could not have mistaken the circumstances of this case for those present in *Estate of Armstrong* or *Draper*. Unlike in *Estate of Armstrong*, where the civilian was tased after three officers tried and failed to pull him from a post, 810 F.3d at 896, a reasonable officer who had just forced Gray to the ground would have understood that he could forcibly handcuff her. RA 199-200. And unlike in *Draper*, a reasonable officer who had subdued Gray could not have believed that an "attempted physical handcuffing" could get someone "seriously hurt." 369 F.3d at 1278.

D. In the alternative, qualified immunity should be modified or overruled.

Under binding Supreme Court and Circuit case law, Cummings is not entitled to qualified immunity. However, merely to preserve the issue for potential Supreme Court review, Gray contends that the qualified immunity doctrine should be modified or overruled. *Cf. United States v. Edwards*, 857 F.3d 420, 422 (1st Cir.) (acknowledging an argument raised "only to preserve it for possible Supreme Court review"), *cert. denied*, 138 S. Ct. 283 (2017).

When it applies, qualified immunity makes public officials unaccountable to the people whose rights they violate. As a result, the doctrine undermines public confidence in those officials, especially police officers, and with it the ability of those officials to keep the trust of the people they serve. Yet the doctrine's unfortunate consequences

are unnecessary. As members of the Supreme Court have recognized, qualified immunity jurisprudence represents a departure from the customary approach to interpreting statutes.[10] In fact, the text of § 1983 says nothing whatsoever about immunity, qualified or otherwise. This doctrine needlessly denies justice to victims of unconstitutional misconduct, and Gray respectfully submits that it should be reconsidered. *See* Pet. for a Writ of Certiorari, *Allah v. Milling*, No. 16-1443 (U.S. filed Apr. 23, 2018) (calling for qualified immunity to be modified or overruled); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018).

E. Reversal is warranted on Gray's § 1983 claims and all state law claims (Counts I, II, IV, V, and VI).

Because Cummings is not entitled to qualified immunity as to Gray's § 1983 claim for excessive force, reversal is warranted on both that claim (Count I) and Gray's various state law claims against Cummings (Counts IV, V, and VI). *See Hunt v. Massi*, 773 F.3d 361, 371 (1st Cir. 2014) ("The plaintiffs' MCRA claim is subject to the same standard of qualified immunity for police officers that applies for § 1983 claims."); *Rivera v. Murphy*, 979 F.2d 259, 264 (1st Cir. 1992) ("Because we hold that Murphy was

[10] *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute."); *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume."); *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity . . . we have diverged to a substantial degree from the historical standards.").

not entitled to qualified immunity and that summary judgment on Count I should not, therefore, have been granted in his favor, we also hold that the court erred in granting summary judgment on Rivera's pendent state law claims.").

Reversal is also warranted on Gray's § 1983 claim against the Town. The magistrate judge's view that Cummings used reasonable force was its sole rationale for recommending summary judgment for the Town on that claim. Add. 19. As shown above, the district court did not accept the magistrate judge's view on excessive force, and a reasonable jury could reject it. Nevertheless, the district court gave no rationale for dismissing Gray's claim against the Town for excessive force, which does not hinge on whether Cummings is entitled to qualified immunity. Add. 32. Gray has entered expert testimony about appropriate police practices, and that evidence, coupled with the facts of the encounter, create questions of material fact as to whether the Town failed to properly train Cummings. RA 195-206, 225-61.

II. The district court erroneously granted summary judgment to the Town of Athol on Gray's ADA claim (Count III).

The district court's grant of summary judgment to the Town on Gray's ADA claim is erroneous. Because the district court's order neither mentioned the ADA nor explained that court's view of the record, this Court could remand for reconsideration because "it is impossible to tell what arguments the district court found persuasive." *Rodi v. S. New England Sch. of Law*, 389 F.3d 5, 9, 11 (1st Cir. 2004). But given that this Court's review is *de novo*, with the facts viewed in Gray's favor, *Colon-Fontanez v.*

Municipality of San Juan, 660 F.3d 17, 27 (1st Cir. 2011), the district court's ADA ruling should be reversed outright and remanded for trial rather than reconsideration. On this record, a jury could find that the Town violated the ADA when Cummings failed to reasonably accommodate Gray's disability, and when he misperceived her symptoms as crimes.

A. The ADA protects people with disabilities during police encounters.

Title II of the ADA provides vital protections to people with disabilities when they encounter public entities. It guarantees 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 subjected to discrimination by any such entity." 42 U.S.C. § 12132. "Public entit[ies]" include state and local governments. *Id.* § 12131(1). Under controlling Title II regulations, discrimination based on disability includes a public entity's failure to make reasonable modifications to generally applicable policies and procedures, which amounts to failing to accommodate the needs of persons with disabilities. 28 C.F.R. § 35.130(b)(7). A Title II claim against such an entity requires a plaintiff to show: (1) that she is a qualified individual with a disability; (2) that she was excluded from participation in or denied the benefits of the public entity's services, programs, or activities or was otherwise discriminated against; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability. *Buchanan v. Maine*, 469 F.3d 158, 170-71 (1st

Cir. 2006). Although this Court has not decided whether the ADA applies to police encounters, most courts of appeals have held that it does.[11]

And for good reason. The ADA's text unambiguously encompasses arrests or detention by police officers. 28 C.F.R. § Pt. 35, App. B ("[T]itle II applies to anything a public entity does."); *see also Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998) ("[T]he plain text of Title II of the ADA unambiguously extends to state prison inmates[.]"). And the ADA's protections are crucial during those encounters, particularly for people with psychiatric disorders who can be seriously harmed when they cannot follow police commands. According to one estimate, between 18 and 25

[11] *Haberle v. Troxell*, 885 F.3d 170, 180 (3d Cir. 2018) (holding that "failing to provide reasonable accommodations for a qualified arrestee's disability" amounts to "discrimination."); *Sheehan v. City & Cty. of S.F.*, 743 F.3d 1211, 1232 (9th Cir. 2014) ("The ADA applies broadly to police 'services, programs, or activities.'"), *rev'd in part and remanded in part on other grounds and cert. dismissed in part as improvidently granted*, 135 S. Ct. 1765 (2015); *Roberts v. City of Omaha*, 723 F.3d 966, 973 (8th Cir. 2013) ("[T]he ADA and the Rehabilitation Act apply to law enforcement officers taking disabled suspects into custody."); *Seremeth v. Bd. of Cty. Comm'rs*, 673 F.3d 333, 338 (4th Cir. 2012) ("[T]he ADA applies to police interrogations . . . ."); *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1084-85 (11th Cir. 2007) (noting that the final clause of § 12132 "is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.") (citation omitted); *Anthony v. City of New York*, 339 F.3d 129, 140-41 (2d Cir. 2003) (applying ADA to police seizure and involuntary hospitalization); *Delano-Pyle v. Victoria Cty.*, 302 F.3d 567, 574-76 (5th Cir. 2002) (applying ADA to sobriety test of deaf driver suspected of intoxication); *Thompson v. Williamson Cty.*, 219 F.3d 555, 558 (6th Cir. 2000) (applying ADA to police response to 911 call); *Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999) ("[A] broad rule categorically excluding arrests from the scope of Title II . . . is not the law."); *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1214-15 (D.C. Cir. 1997); *see also Chisolm v. McManimon*, 275 F.3d 315, 324-29 (3d Cir. 2001) (applying ADA to jail intake procedure). *But see Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) (holding that Title II does not apply to police encounters "prior to the officer's securing the scene and ensuring that there is no threat to human life").

percent of fatal police encounters since 2015 have involved persons exhibiting signs of mental illness.[12] Thus, if people with disabilities are not reasonably accommodated when they encounter the police, as the ADA requires, they may be killed.

B. A jury could find that Gray was tased in violation of the ADA because the Town failed to accommodate her disability or misperceived its symptoms as crimes.

A jury could find that the Town of Athol discriminated against Gray or caused her to be excluded from or denied the Town's services by reason of her disability, in violation of Title II of the ADA. For police encounters, courts have accepted two theories of ADA liability. Gray could prevail under either one.

1. Gray has presented triable evidence that the Town failed to accommodate her disability.

Under a reasonable-accommodation theory, a public entity violates the ADA when it fails to reasonably modify generally applicable policies to accommodate a person's disability. *Haberle*, 885 F.3d at 180; *Montae v. American Airlines, Inc.*, 757 F. Supp. 2d 47, 52 (D. Mass. 2010). Liability for such a failure can arise from the entity's own policies and practices or from its officers' actions or inactions.[13]

As applied to policing, the ADA requires officers to modify customary practices when interacting with people who have disabilities. For example, the Ninth Circuit

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[12] *See Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.e4548089d440 (estimating fatal police encounters by year since 2015, with option of filtering by "mental illness").

[13] *See Fortin ex rel. T.F. v. Hollis Sch. Dist.*, No. 15-cv-179-JL, 2017 WL 4157065, at *5 (D.N.H. Sept. 18, 2017) (collecting cases holding that municipalities are vicariously

reversed an order granting summary judgment for San Francisco on an ADA claim asserting that officers failed to account for a civilian's mental illness and should have respected her comfort zone, engaged in non-threatening communications, employed less confrontational tactics, waited for backup, or simply waited for time to defuse the situation. *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1233 (9th Cir. 2014), *rev'd in part and remanded in part on other grounds and cert. dismissed in part as improvidently granted, City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765 (2015). Similarly, the Fifth Circuit saw sufficient evidence of an ADA violation where an officer arrested a hearing-impaired man for driving while intoxicated after the officer orally administered sobriety tests, which the man did not pass because he did not understand what the officer said. *Delano-Pyle v. Victoria County, Tex.*, 302 F.3d 567, 570-71, 575-76 (5th Cir. 2002). The court noted that, when the man failed to follow instructions, the officer responded not by "trying a more effective form of communication," but instead by "bec[oming] annoyed and continu[ing]" oral commands. *Id.* at 575. In contrast, when an armed man experiencing mental illness was killed by police after he took a hostage in an apartment, the Fourth Circuit held that any duty to accommodate his disability had been satisfied because, among other things, the police explored multiple options and "wait[ed] at least

liable under the ADA for their employees' actions); *cf. Glanz v. Vernick*, 756 F. Supp. 632, 636 (D. Mass. 1991) (citing cases holding that "that vicarious liability is appropriate in an action brought under § 504" of the Rehabilitation Act, 29 U.S.C. § 794).

two hours before entering the apartment." *Waller ex rel. Estate of Hunt v. Danville, Va.*, 556 F.3d 171, 177 (4th Cir. 2009).

Evidence that police treated a person with a disability worse than they would have treated a person without a disability may, of course, support a failure-to-accommodate claim. But it is unnecessary. A reasonable-accommodation claim is not a disparate-treatment claim and does not require a plaintiff to show that the entity "treated [her] differently and less favorably than other, non-disabled [people]." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 275 (2d Cir. 2003) (quoting *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1283 (7th Cir. 1996)).[14] Rather, failure to accommodate occurs when "a public entity refuses to 'make reasonable modifications . . . when . . . necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.'" *Pollack v. Reg'l Sch. Unit 75*, 886 F.3d 75, 80 (1st Cir. 2018).

Here, a jury could find that Gray's disability was not remotely accommodated, let alone reasonably accommodated. Gray presented evidence of a forceful arrest, where she was pursued, grabbed, taken down, and tased while exhibiting "conspicuous" symptoms of a known mental illness. Add. 9. Gray also presented expert evidence of

[14] *Cf. U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) ("By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.,* preferentially."); *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1166 (1st Cir. 2002) (recognizing that the reasonable-accommodation requirement in Title I of the ADA is "[i]n addition to" its prohibition against disparate treatment).

the accepted procedures that the Town should have implemented through policies and training, and which Cummings should have employed, including time, patience, nonthreatening communication, monitoring from a distance, and contacting and waiting for assistance such as an ambulance or a mental health care professional. RA 251-60; *cf. Waller*, 556 F.3d at 176-77 (noting that police called a hostage negotiator and "attempt[ed] to calm the situation by waiting at least two hours before entering the apartment"). Yet there is no evidence that, despite knowing of Gray's disability, Cummings met his legal obligation to modify his general practice. 28 C.F.R. § 35.130(b)(7). A jury could find that Cummings simply refused to implement obvious accommodations, such as keeping his distance, calling an ambulance, waiting for the backup that Cummings himself called, or just waiting for Gray to calm down. RA 253 (expert's conclusion that Cummings's conduct was "unnecessarily escalative"). And once he took Gray down, Cummings deployed the Taser instead of waiting forcibly handcuffing her. Thus, unlike the officers who waited two hours in *Waller*, 556 F.3d at 176-77, and instead resembling the impatient officer in *Delano-Pyle*, Cummings tased Gray after attempting precisely zero alternatives to "instruct[ing] [her] through verbal communication." 302 F.3d at 575.

Moreover, although Gray need not demonstrate that Cummings treated her worse than he would have treated a 57-year-old woman without a known and obvious mental illness, a jury could find that Cummings did exactly that. The record supports a finding that, by declining to help Gray calm down, or to wait for his back-up, or to

grasp Gray's wrists, Cummings tased Gray not because that is what he normally would have done to a civilian, but instead because he had "bec[o]me annoyed" with the obvious symptoms of her mental illness. *Id.*

What happened to Gray is flatly inconsistent with the ADA. A jury should have been permitted to say so.

2. Gray has presented triable evidence that the Town misperceived her symptoms as crimes.

Under a misperception theory, a public entity violates the ADA when its officers arrest a disabled person for perceived criminal activity that is actually the result of her disability. *Lum v. Cty. of San Joaquin*, 756 F. Supp. 2d 1243, 1251-52 (E.D. Cal. 2010); *Lewis v. Truitt*, 960 F. Supp. 175, 178 (S.D. Ind. 1997). In *Lewis*, the district court found an ADA violation after police officers beat a man and arrested him for resisting their commands. In fact, the man never heard them because he was deaf. *Id.* at 176; *see also McCray v. City of Dothan*, 169 F. Supp. 2d 1260, 1276 (M.D. Ala. 2001), *aff'd in part, rev'd in part*, 67 F. App'x 582 (11th Cir. 2003) (denying summary judgment where questions of fact existed regarding whether police had arrested a deaf man based on his disability where he failed to cooperate with law enforcement).

Here, a jury could find that Gray's capacity to comply with Cummings's commands was just as nonexistent as it would have been if she were experiencing hearing loss rather than bipolar disorder. Even if Gray had engaged in *physical acts* resembling a misdemeanor—though, as shown above, a jury could find that she did

not—the record supports a finding that Cummings arrested Gray because he unreasonably misperceived her as having the *mental state* required to turn those acts into crimes. In rejecting this view, the magistrate judge simply asserted that Gray really did commit crimes. Add. 21-22. But that reasoning rests on the very same misperception that afflicted Cummings. Under the misperception theory, the question is whether conduct that may *resemble* a crime was really *not* a crime because the civilian lacked the requisite capacity or intent. That question was for the jury to answer.

C. Gray should be permitted to seek both injunctive relief and damages.

The ADA violations described above, together with Gray's ongoing mental illness, present a "real and immediate threat" of repeated future harm that supports her request for injunctive relief. *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 305-06 (1st Cir. 2003) (holding that plaintiff had shown a real and immediate threat of ongoing harm that, due to his disability, he would continue to be misperceived as being drunk). But Gray has also presented triable evidence of intentional discrimination sufficient to support an award of damages.

Although this Court has not specified what sort of evidence establishes "intentional discriminatory animus" capable of supporting an ADA claim for

damages,[15] most circuit courts have held that "deliberate indifference" will suffice.[16] Deliberate indifference, in turn, "does not require a showing of personal ill will or animosity toward the disabled person[.]" *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011). Rather, it exists when a plaintiff shows "(1) knowledge that a harm to a federally protected right is substantially likely, and (2) a failure to act upon that . . . likelihood." *Barber ex rel. Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1229 (10th Cir. 2009) (cleaned up); *see Crane v. Lifemark Hosps., Inc.,* No. 16-17061, 2018 WL 3654427, at *4 (11th Cir. Aug. 2, 2018) (reversing summary judgment on plaintiff's ADA claim based on ineffective communication during involuntary commitment

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[15] *Carmona-Rivera v. Puerto Rico*, 464 F.3d 14, 17 (1st Cir. 2006); *see also Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 127 (1st Cir. 2003) (referencing "animus toward the disabled" but permitting damages claim to proceed in case alleging denial of sign language interpreter).

[16] *See S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 263 (3d Cir. 2013) ("We now follow in the footsteps of a majority of our sister courts and hold that a showing of deliberate indifference may satisfy a claim for compensatory damages under . . . § 202 of the ADA"); *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 345 (11th Cir. 2012) ("a plaintiff may demonstrate discriminatory intent through a showing of deliberate indifference"); *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011) (concluding that "deliberate indifference [is] the appropriate standard for showing intentional discrimination"); *Barber ex rel. Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1228-29 (10th Cir. 2009) ("'[I]ntentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights.'"); *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001), *as amended on denial of reh'g* (Oct. 11, 2001) ("[T]he deliberate indifference standard applies."); *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 115 (2d Cir. 2001) (holding that money damages are available under Title II against non-state governmental entities "upon a showing of a statutory violation resulting from 'deliberate indifference'").

proceeding, where doctor knew plaintiff was having difficulty understanding and expressing himself).

Here, Cummings's knowledge of Gray's disability, his testimony about his motivations, his violent behavior toward Gray, and the Town's failure to assure better treatment of a resident experiencing obvious symptoms of mental illness would permit a jury to find intentional discrimination as the case law has defined it. In *Delano-Pyle*, the Fifth Circuit held that the officer was deliberately indifferent to an individual's hearing impairment by persisting with oral instructions and then arresting the individual for supposedly failing sobriety tests that he could not understand. 302 F.3d at 575. Cummings's actions were not meaningfully different. He had been told that Gray was mentally ill and had seen obvious symptoms of her illness. He knew that oral commands were not working. He knew that he had called for backup. But he took down and tased Gray anyway. And the Town put Cummings in a position to make this fateful decision, even though its own policies prohibited tasing people in mental health crisis. RA 257. A jury could find that Cummings and the Town were deliberately indifferent to Gray's disability.

CONCLUSION

This Court should reverse the district court's summary judgment order and remand the case for trial.

Dated: August 30, 2018

Respectfully submitted,

/s/ Matthew R. Segal

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

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

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,135 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. All of the following participants in this case are registered CM/ECF users, so they will be served by the appellate CM/ECF system:

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Dated: August 30, 2018

ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JUDITH GRAY, Plaintiff, v. THOMAS A. CUMMINGS, et al. Defendants.	)	**CIVIL ACTION** **NO. 15-10276-TSH**

REPORT AND RECOMMENDATION

March 15, 2017

Hennessy, M.J.

By Order of Reference dated May 15, 2015, pursuant to 28 U.S.C. § 636(b)(1)(B) (Docket #16), this case was referred to me for a report and recommendation on all dispositive motions. (Docket #16). On March 1, 2016, Defendants Thomas A. Cummings and the Town of Athol filed a motion for summary judgment. (Docket #40). Plaintiff Judith Gray filed an opposition to the motion on April 8, 2016 (Docket #48), to which Defendants responded on April 28, 2016 (Docket #49). This matter is now ripe for adjudication. For the reasons that follow, I RECOMMEND that the motion for summary judgment be ALLOWED.

I. BACKGROUND

As a preliminary matter, "[e]vidence that would be inadmissible at trial cannot be considered on a motion for summary judgment." Taylor v. Erna, No. 08-10534-DPW, 2009 U.S. Dist. LEXIS 61612, at *12 (D. Mass. July 14, 2009). Against that backdrop, Plaintiff contends

that Officer Cummings's police report is inadmissible hearsay,[1] and thus challenges Defendants' reliance on that report as admissible evidence supporting their statement of material facts. (See, e.g., Docket #48-1 at 2-5). As Defendants highlight in their reply, (Docket #49 at 1-3), it is well settled that a police report is admissible as a public record pursuant to Fed R. Evid. 803(8), see Taylor, 2009 U.S. Dist. LEXIS 61612, at *20-21 ("A police report is a public record or report for the purposes of Rule 803(8)(B)."); Bolduc v. United States, 265 F. Supp. 2d 153, 164 (D. Mass. 2003) ("[A]s this is a civil trial, the police reports, which recorded first-hand observations of officers, are admissible under the 'public records and reports' exception to the hearsay rule.") (citing Parsons v. Honeywell, Inc., 929 F.2d 901, 907 (2nd Cir. 1991) (stating that in civil trials "it is well established that entries in a police report which result from the officer's own observations and knowledge may be admitted")). Accordingly, Plaintiff's objections to Defendants' reliance on Officer Cummings's police report are without merit.

II. FACTS

Judith Gray was diagnosed with bipolar disorder when she was 25 years old, and also suffers from manic depression. (PF 1A, 2C).[2] In the early morning hours of May 2, 2013, Gray, who was 57 years old at the time, suffered a manic episode at her home in Athol, Massachusetts. (PF 1A, 2E). After Gray called the Athol Police Department, three police officers responded and she was brought to the Athol Memorial Hospital. (PF 2E, 2H).

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[1] Plaintiff also argues that the police report is not authenticated, but on April 28, 2016 Officer Cummings submitted an affidavit verifying his report. (See Docket #49-1 at 1-8).

[2] The term "PF" refers to Plaintiff Judith Gray's facts which can be found in her Response to the Town of Athol's Statement of Undisputed Material Facts. (Docket #48-1). The term "DF" refers to the Defendants' facts which can be found in their Statement of Undisputed Material Facts. (Docket #42). The Defendants' facts are incorporated only to the extent they are admitted by Gray. (See Docket #48-1).

At 10:17 a.m. that same day, Athol Memorial Hospital informed the Athol Police Department that Gray, a Section 12 patient, had left the hospital and needed to be returned.[3] (DF 4). Cummings later deposed that he understood a Section 12 patient to mean "that the person is a danger to either themselves or others." (DF 6; Docket #42-3 at 3). The Athol Police Department dispatched Officer Thomas Cummings to the area to look for Gray.[4] (DF 7). A short time later, Cummings observed Gray walking barefoot on the sidewalk along Main Street. (DF 5, 8). Cummings radioed to the dispatcher that he had made contact with Gray and gave the location. (DF 8). Cummings pulled over and began to step out of his cruiser. (DF 9). Gray yelled "Fuck you" to Cummings immediately after he got out of the car. (DF 10). After Cummings informed Gray that she must return to the hospital, Gray responded "I'm not fucking going back," at which point Cummings called for backup. (DF 11-13).

Cummings then followed Gray, walking westbound on the sidewalk of Main Street, for approximately twenty to twenty-five seconds while she repeatedly shouted obscenities at him.[5] (DF 14, 16, 18). Gray then stopped and faced Cummings from a distance of approximately five feet with her fists, teeth, and body clenched. (DF 20-21). Gray appeared to be "looking right through" Cummings. (DF 21). Gray yelled "fuck you" to Cummings and started walking towards him. (DF 22-23). As Gray approached Cummings, Cummings grabbed her shirt and took Gray to the ground where she tucked her arms underneath her chest. (PF 24A, 26A-B; DF 25, 27).

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[3] A "Section 12" patient is a person who was civilly committed for either being a danger to themselves or others. (DF 6).

[4] Cummings had two prior encounters with Gray when he was employed as a police dispatcher, the first on May 12, 2009 and the second on July 22, 2010. (PF 1C).

[5] At the time of the incident Gray was five foot ten and weighed approximately 140 pounds while Cummings was six foot three and weighed approximately 215 pounds. (PF 5A-5B).

Cummings ordered Gray to stop resisting and place her hands behind her back and warned her that she would be "tased" if she did not place her hands behind her back immediately.[6] (DF 28, 32). Gray replied, "fucking do it!" (DF 33). Cummings then pulled out his department issued Taser, removed the cartridge so that it was in the drive stun mode, placed the Taser in the middle of Gray's back, and pulled the trigger.[7] (DF 36). Cummings held the Taser on Gray's back for about four to six seconds and Gray released her arms from underneath her chest and placed them behind her back. (DF 38). Cummings holstered the Taser and placed Gray in handcuffs. (DF 39). Once Gray was secured in handcuffs, Cummings used no further force. (DF 40). A back-up officer then arrived. (DF 41).

While Gray was handcuffed, Cummings picked her up off the ground, walked her to a stone sculpture at the Common, had her take a seat, and then called an ambulance at 10:32 a.m. to respond. (DF 42). At 10:33 a.m., approximately ten minutes after Cummings first saw Gray, the ambulance arrived on the scene. (PF 38B). Gray was then returned to Athol Memorial Hospital. (DF 48).

Cummings caused Gray to be summonsed to court for the following criminal charges: (1) assault on a police officer; (2) resisting arrest; (3) disturbing the peace; and (4) disorderly person. (DF 49). These charges were later either dropped or dismissed. (PF 49A).

Lastly, with regard to Cummings's training and experience, Cummings graduated from the Boylston Regional Police Academy in 2011. (DF 50). At the academy, Cummings received

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[6] Cummings was certified on the Taser on September 7, 2012, after completing eight hours of instruction. (DF 57-58).

[7] The drive stun mode is a less painful mode of the Taser causing only localized pain and not muscular incapacitation. (DF 60).

training on interacting with people with mental illness, including twelve hours of training in "Crisis Intervention and Conflict Resolution" and six hours of training in "People with Special Needs." (DF 52-55).

III. STANDARD OF REVIEW

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Once a party has properly supported its motion for summary judgment, the burden shifts to the non-moving party, who "may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." Barbour v. Dynamics Research Corp., 63 F.3d 32, 37 (1st Cir. 1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)). Moreover, the Court is "obliged to []view the record in the light most favorable to the nonmoving party, and to draw all reasonable inferences in the nonmoving party's favor." LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993). Even so, the Court is to ignore "conclusory allegations, improbable inferences, and unsupported speculation." Sullivan v. City of Springfield, 561 F.3d 7, 14 (1st Cir. 2009) (quotation omitted).

IV. ANALYSIS

Defendants seek summary judgment on all of the claims in Gray's Amended Complaint: (I) excessive force against Cummings under 42 U.S.C. § 1983; (II) failure to train against the Town under 42 U.S.C. § 1983; (III) violation of the Americans with Disabilities Act ("ADA") against the Town; (IV) assault and battery against Cummings; (V) violation of the MCRA against Cummings; and (VI) malicious prosecution against Cummings.

A. Qualified Immunity

Qualified immunity protects police officers "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable

person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The doctrine provides public officials "breathing room to make reasonable but mistaken judgments about open legal questions." Ashcroft v. Al-Kidd, 563 U.S. 731, 743 (2011). However, "qualified immunity does not shield public officials who, from an objective standpoint, should have known that their conduct was unlawful." Haley v. City of Boston, 657 F.3d 39, 47 (1st Cir. 2011) (internal quotations and citations omitted).

Courts use a two-part test to determine whether qualified immunity applies: (1) whether the facts alleged by the plaintiff make out a violation of a constitutional right; and, if so, (2) whether the right was clearly established at the time of the alleged violation. MacDonald v. Town of Eastham, 745 F.3d 8, 12 (1st Cir. 2014). Under the second prong of the test, the analysis involves two questions: (1) whether the legal contours of the constitutional right were sufficiently clear; and (2) whether in the specific factual context of the case, the violation would have been clear to a reasonable official. Id. "[A] defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it[;] [i]n other words, 'existing precedent must have placed the statutory or constitutional question' confronted by the official 'beyond debate.'" Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014) (quoting Ashcroft, 563 U.S. at 741).

1. Violation of a Constitutional Right

Turning to the first part of the qualified immunity test, "[t]o establish a Fourth Amendment excessive force claim, a plaintiff must show that the defendant employed force that was unreasonable under all the circumstances." Morelli v. Webster, 552 F.3d 12, 23 (1st Cir. 2009). A claim, as here, that a law enforcement officer used excessive force in making an arrest or seizure is "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard."

Graham v. O'Connor, 490 U.S. 386, 388 (1989). Whether force was reasonable "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Id., at 396. To guide this balancing, the Graham Court expressly identified three factors to consider: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. (citation omitted). Whether the force used to effect a particular seizure is reasonable must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Id. "The calculus of reasonableness also must make allowance for the need of police officers to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving – about the amount of force that is necessary in a particular situation." See Parker v. Gerrish, 547 F. 3d 1, 9 (1st Cir. 2008) (citations and internal quotations omitted). Applying Graham factors I find that the single deployment of a taser in drive stun mode in these particular circumstances was reasonable. See Morelli v. Webster, 552 F.3d at 24 ("By definition, excessive force is unreasonable force. But reasonable people sometimes make mistaken judgments, and a reasonable officer sometimes may use unreasonable force. In that event, qualified immunity gives an officer the benefit of a margin of error. Thus, defeating a qualified immunity defense requires a showing of an incremental degree of error -- an incommensurate use of force beyond that needed to establish a garden-variety excessive force claim and, further, beyond the 'hazy border' noted by the [Court in Saucier v. Katz, 533 U.S. 194 (2001)].") (internal citations omitted).

The Severity of the Crime at Issue

While a close call, I find that the first Graham factor favors Defendants. As argued by Defendants, the record supports a finding that Ms. Gray assaulted Officer Cummings and, in doing

so, also resisted a lawful arrest.[8] "The classic definition of assault and battery is 'the intentional and unjustified use of force upon the person of another, however slight.'" Commonwealth v. Welch, 16 Mass. App. Ct. 271, 273 (1983) (quoting Commonwealth v. McCan, 277 Mass. 199, 203 (1931)). As such, it is an offense that is serious because of the potential for violence and injury. Parker, 547 F.3d at 9 ("Though driving while intoxicated is a serious offense, it does not present a risk of danger to the arresting officer that is presented when an officer confronts a suspect engaged in an offense like robbery or assault.") (citations omitted). It jeopardized the safety of Cummings, and it threatened the safety of the community as well, should a successful assault result in the attacker taking the officer's firearm. In this case, it is undisputed that after Cummings followed Gray on foot and closed within five feet behind her, Gray turned to face Cummings, her hands, teeth and body clenched, and then approached Cummings in such a way that Cummings felt the need to assume a defensive posture, including extending his arm to stop her or grab her. (DF 19-25). Moreover, it is clear that Cummings, who had just exited his police cruiser, was a police officer, with authority to make a lawful seizure. (DF 9-10). Given this record, the crime was serious in that it presented a risk of danger to Cummings and the public, and demonstrated Gray's refusal to comply with lawful authority.

In her opposition, Ms. Gray denies that there was a crime. See Opp. pp. 5-6. This argument ignores the facts which are recited in the previous paragraph and, arguably her own complaint. Gray has no recollection of the incident, and the undisputed evidence shows that Gray turned on Cummings and approached him in a threatening manner. While it is true that when Officer

[8] While the court does not wish to place too much on the allegations in the amended complaint, a fair reading of paragraph 48 is a concession by Ms. Gray that she assaulted Cummings, albeit that Cummings precipitated the assault. (See Docket #27 ¶ 48) ("Officer Cummings should have respected her comfort zone . . . rather than precipitating an assault and battery.").

Cummings first approached Gray no crime had been committed, in the short time before Cummings brought Gray to the ground and tased her, an objectively reasonable assessment of the circumstances establishes that Gray had committed a serious offense.

The Suspect Poses an Immediate Threat to the Safety of the Officer and Others

The second Graham factor is whether the person posed "an immediate threat to the safety of the officers and others." Id., at 396. I find that this factor also marginally favors Defendants.

At the time that Officer Cummings deployed a taser, "a reasonable officer on the scene," Graham, 490 U.S. at 396, could consider Gray's mental state. Gray was the subject of an involuntary commitment order, pursuant to Mass. Gen. Laws ch. 123, § 12, and therefore actually or potentially posed "a likelihood of serious harm by reason of mental illness." See Mass. Gen. Laws ch. 123, § 12(a), (b). Here, moreover, Gray showed conspicuous signs of mental illness. She was emotionally distraught, apparently sufficiently disoriented to be walking barefoot (on a morning in early May), and was fleeing mental health care it had been determined that she needed. Gray failed to comply with every request or directive Cummings had issued, responding to Cummings with profanities and profanity-laced statements of defiance ("fuck you"; "I'm not fucking going back."). (DF 10, 12). Even before Gray turned on Cummings, Cummings was confronted with circumstances which would "lead an officer to be wary." Bryan v. MacPherson, 630 F.3d 805, 826 (9th Cir. 2010).

However, quite apart from circumstances relevant to and evidencing Ms. Gray's state of mind, was an act of violence toward Officer Cummings. As discussed above, it is undisputed that Gray reversed course when being followed by Cummings, and with actions that could reasonably interpreted as threatening, such as clenching her fist and body, approached Cummings. At the time of the tasing, Gray and Cummings were still in physical contact that, reading the record in

the light most favorable to Gray, Cummings initiated to defend himself. This is unlike cases where a person may exhibit volatile and erratic behavior, but the behavior was not directed toward the officer, and thus not found to pose or convey a threat. Cf. Bryan, 630 F.3d at 827-28. Lastly, consistent with Gray's defiance of Cummings's other requests and directives, Gray refused to surrender her arms for handcuffing, even after Cummings threatened to use a taser, but before ever doing so. Gray's refusal not only escalated and prolonged any struggle with Cummings, but it could reasonably be understood to convey to Cummings that force, at some greater level than the use of hands, was going to be necessary to return Gray to the hospital. See Draper v. Reynolds, 369 F.3d, 1270, 1278 (11th Cir. 2004) ("[A] verbal arrest command accompanied by attempted physical handcuffing in these particular circumstances, may well have, or would likely have, escalated a tense and difficult situation into a serious physical struggle in which either [the motorist or the officer] would be seriously hurt. Thus, there was a reasonable need for some use of force in this arrest"). This second factor favors Defendants.

Whether Gray Resisted Seizure

The last Graham factor is whether the person actively resisted arrest. I find this factor favors Defendants. At the time of deployment of the taser, as argued by Defendants, Gray was actively resisting by refusing to release her arms to be handcuffed. Her resistance was consistent with her defiance of Cummings throughout this encounter.

Ms. Gray argues that "by the time Cummings had [Gray] on the ground, there was no evidence there was an immediate danger and her mere refusal to pull her arms out and put them behind her back could not justify use [of] a Taser on her." (See Docket #48 at 7). This argument ignores the larger factual context for the struggle between Cummings and Gray: Gray had engaged in assaultive behavior; she was violent in both her language and actions, such that Cummings felt

the need to defend himself. Once Gray was on the ground, any reasonable officer would be justified, indeed obligated, to consider Gray's assaultive conduct and offensive language in assessing whether Gray's refusal to surrender her arms posed an immediate danger, including the prospect of an escalation in her resistance. Contrary to Gray's argument, I find that it could. Cummings was armed and Gray and Cummings were in close physical contact. If that contact escalated into a further struggle, it is plausible that Gray could have obtained control of Cummings firearm, or another weapon on his person, thereby threatening his safety, Gray's and the public's. See Bryan, 630 F.3d at 830 ("Resistance, however, should not be understood as a binary state, with resistance being either completely passive or active.... [T]he level of force an individual's resistance will support is dependent on the factual circumstances underlying the resistance."); Parker, 547 F. 3d at 9 ("The calculus of reasonableness also must make allowance for the need of police officers to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving – about the amount of force that is necessary in a particular situation.").

Failure to Warn and Use Alternatives to Effect Arrest

Two other considerations which courts have factored into whether a use of force is reasonable are a failure to warn before the use of force and the failure to use alternatives to effect arrest. See Bryan, 630 F.3d at 831 (discussing factors and cases). I consider both here.

First, as noted above, it is undisputed that Officer Cummings warned Ms. Gray that her failure to comply with his order to release her arms for handcuffing would result in her being tased. This warning was issued as Gray and Cummings remained in physical contact. Gray precipitated such contact by turning on Cummings and approaching him with hands and body clenched. Moreover, there is no question that Gray heard and understood Cummings's warning: she responded, "Fucking do it!" (DF 33). Cf. Bryan, 630 F.3d at 827-28 (discussing whether motorist

stopped for seat belt violation even heard or understood officer's commands). This factor supports a finding that Cummings's deployment of the taser was reasonable. Gray demonstrated that she was not going to comply with lawful orders without some increase of force beyond the use of hands. Moreover, as Defendants note, once Gray complied, there was no further deployment of the taser.

I consider also whether alternatives to force were available, particularly because Ms. Gray's opposition (and her expert) make much of the availability of de-escalation techniques. Gray's over-arching argument is that Officer Cummings precipitated the struggle and, in effect, violated Gray's Fourth Amendment rights by failing to employ de-escalation techniques, wait for the back-up, and call for an ambulance. (See Docket #48 at 5). In support of this argument, Gray relies on Stamps v. Town of Framingham, 813 F.3d 27 (1st Cir. 2016), for the proposition that the creation of conditions that may result in the use of excessive force violates the Fourth Amendment. (See Docket #48 at 5). This is a thoughtful argument, but I recommend that the court reject it here.

Stamps is inapposite. There, a SWAT team executed a warrant at Stamps' residence to locate Stamps' son and others suspected of drug dealing. See Stamps, 813 F.3d at 30. Stamps, who was not suspected of unlawful conduct, was ordered to the floor. Id. at 31 . Stamps complied, lying on the floor with hands raised above his head. Id. Stamps was guarded by an officer who with finger on the trigger and the safety disabled, pointed a loaded rifle at Stamps' head. Id. The officer accidentally fired the weapon killing Stamps. Id. The Court of Appeals found that "[w]here an officer creates conditions that are highly likely to cause harm and unnecessarily so, and the risk so created actually, but accidentally, causes harm, the case is not removed from Fourth Amendment scrutiny." Id. at p. 35. Indeed, the Court of Appeals determined that the constitutional violation, quite apart from the tragic shooting of Stamps, was the creation of such a high risk

condition. See id. ("[D]efendants' [argument that the Fourth Amendment does not apply in these circumstances because the shooting itself was unintentional] has the perverse effect of immunizing risky behavior only when the foreseeable harm of that behavior comes to pass."). Apart from the shooting, such conduct was objectively unreasonable and excessive.

Officer Cummings's conduct, on the other hand, did not create an unnecessary, high risk of harm to Ms. Gray. He did no more than follow Gray on foot and communicate a lawful and necessary order: that she return to the hospital. Such conduct cannot be likened to the conduct in Stamps, and, more importantly, cannot be said to be objectively unreasonable or excessive.

Courts have recognized that in the totality of the circumstances calculus, the availability of other, less intrusive, tactics is a factor. See e.g. Bryan, 630 F.3d at 831 ("[W]e have held that police are required to consider what other tactics if any were available to effect the arrest.") (internal quotations and citations omitted). However, it is also clear that alternatives to the force used is only one factor among others in the ultimate objective reasonableness analysis, and alone is not dispositive. See id. ("[T]hus, while by no means dispositive . . . failure to consider less intrusive means factor significantly in our Graham analysis"). Indeed, in considering whether alternatives to deal with persons who exhibit signs of mental illness should be employed, courts "have refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals." Id. at 829 (citations omitted); Doerle v. Rutherford, 272 F.3d 1272, 1283 (9th Cir. 2001) ("We do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead we emphasize that where . . . the individual is emotionally disturbed, that is a factor that must be considered in determining, under Graham, the reasonableness of the force employed."). Martin v. City of Broadview Heights, 712 F.3d 951, 958 (6th Cir. 2013) (when officer "encountered a naked man making nonsensical

statements and asking to be taken to jail . . . the question is not whether any force was justified. It is, instead whether [the officer] . . . could reasonably use the degree of force employed") (emphasis in original). See Estate of Armstrong v. Village of Pinehurst, 810 F 3d 892, 900 (4th Cir. 2016) ("Mental illness . . . does not dictate the same police response in all situations."). The analysis remains, under Graham, the reasonableness of the force used.

Here, I disagree with Ms. Gray that the failure to employ de-escalation techniques alters the reasonableness calculus. While Officer Cummings had received training in dealing with persons with disabilities he could have used, (DF 52-55), this was a rapidly unfolding situation. Gray responded to nothing more than the arrival of Cummings with profanities. She ignored or failed to comply with each request and order that he issued and fairly conveyed that she was not going to cooperate. In response to Cummings doing no more than following her, she turned and assaulted him. Finally, she refused to surrender her arms for handcuffing, conveying to Cummings that something more than the use of hands was going to be necessary to return her to Athol Memorial. It is not clear that in such circumstances alternatives to Cummings's escalating, but measured use of force were available. To the extent they were, I find that this factor does not significantly impact the core Graham factors and the overall reasonableness assessment.

Based on the foregoing analysis, I find that that the undisputed record establishes that in the circumstances that confronted Officer Cummings, the single deployment of a taser in drive stun mode did not violate Ms. Gray's Fourth Amendment rights, and that Defendants are entitled to summary judgment as a matter of law on Count I.

2. Clearly Established Right

Notwithstanding my conclusion that, as a matter of law, the undisputed facts demonstrate that there was no constitutional violation, I further find that even if there was a constitutional

violation, Cummings would nonetheless be entitled to qualified immunity because his actions did not violate any clearly established right. This inquiry into whether the constitutional right was clearly defined involves a two-part inquiry: (1) whether the legal contours of the constitutional right were sufficiently clear; and (2) whether in the specific factual context of the case, the violation would have been clear to a reasonable official. As the First Circuit has explained, the "salient question is whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional." Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009); see Mullinex v. Luna, 136 S. Ct. 305, 308 (2015) (noting that a right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates the right") (quoting Reichle v. Howards, 132 S. Ct. 2088 (2012)).

With these precedents as guidance, the question is whether at the time of the incident in May 2013, it was clearly established that the single application of a taser constituted excessive force against a person who had assaulted a police officer and when immediately brought to the ground by the officer actively resisted lawful arrest. "The law is clearly established when the plaintiff can point either to cases of controlling authority in his jurisdiction at the time of the incident, or a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." See Kent v. Oakland County, 810 F.3d 384, 395 (6th Cir. 2016) (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999) (citations omitted)). Case law in and outside the First Circuit is such that a reasonable officer in Cummings's position would not have understood that the single deployment of a taser in these particular circumstances violates Ms. Gray's Fourth Amendment rights.

In the First Circuit, as of 2008, it was clearly established that a person arrested for an offense that does not present a risk of danger, who offered no significant active resistance to being handcuffed, and who posed no threat to the safety of officers could not be tased without warning. See Parker, 547 F.3d at 9-11. However, the reasoning of Parker would not extend to the instant case where the use of taser was preceded by an assault on the arresting officer, resistance to arrest and a warning that a taser would be deployed if resistance persisted. See Id. at 10 ("We do not hold that the officers would have been required to physically wrestle Parker to the ground without recourse to the Taser. Rather, we find that the jury could have concluded that such a struggle would not have been necessary -- that in the absence of the Taser, Parker would have submitted to cuffing without presenting a risk to the officers."). Beyond cases which stand for the more general proposition, not disputed by any party here, that force employed must be reasonable, there is no clear First Circuit precedent on what circumstances justify use of a taser.

There is a consensus of cases from other circuits which similarly would have caused Officer Cummings to understand that his use of a taser on Ms. Gray in the circumstances of this case was constitutional. In Hagans v. Franklin County Sheriff's Office, 695 F.3d 505 (6th Cir. 2012), the Appeals Court undertook a review of cases from the Sixth Circuit and other courts as of approximately 2007. It found "[c]ases from this circuit and others, before and after May 2007 adhere to this line: If a suspect actively resists arrest and refuses to be handcuffed, officers do not violate the Fourth Amendment by using a taser to subdue him." Id. at 509.

Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004), involved the use of a taser during the arrest of an aggressive, argumentative motorist who had been stopped for a license plate light violation. Id. at 1273. Following the stop of Draper's truck and Draper's meeting the officer at the back of the truck, the officer asked Draper four times to retrieve paperwork from the cab of his

truck. Id. Draper failed to comply with each request, and became more confrontational and belligerent, accusing the officer of harassing and disrespecting him. Id. At the fifth request, Draper again refused, yelled at the officer and approached him with such agitation that the officer deployed his taser. Id. The Eleventh Circuit upheld the determination that the force was not excessive, finding that an attempt to handcuff Draper would have or might have escalated into a serious struggle which threatened the safety of Draper and the officer. Id. at 1278.

In Estate of Armstrong, Armstrong suffered from a bipolar disorder and paranoid schizophrenia. 810 F.3d at 896. In April 2011, he had been off his medications and was poking holes in his skin to "let the air out." Id. Armstrong's sister persuaded Armstrong to check into a hospital, but Armstrong became frightened while in the emergency room and fled. Id. Armstrong was determined by a doctor to be danger to himself, and officers were called to return Armstrong. Armstrong was located at a busy traffic intersection nearby. Id. Three officers approached Armstrong, who reacted by grabbing a 4x4 post that supported a traffic sign. Id. An attempt to pry him away was unsuccessful. Id. at 897. By this time two security guards and Armstrong's sister were present. Id. After 30 seconds or so, Armstrong was warned that he would be tased if he did not release the post. Id. Refusing to cooperate, an officer tased Armstrong five times, none of which succeeded in obtaining Armstrong's compliance. Id. Then the officers and two security guards physically pried Armstrong from the post. Id. The Fourth Circuit found that the use of the taser was excessive force. Id. at 906. Nevertheless, the Appeals Court affirmed finding that the officers were entitled to qualified immunity. Id. at 907.

> Armstrong's right not to be tased while offering stationary and non-violent resistance to a lawful seizure was not clearly establish on April 23, 2011. Indeed, two months after Appellees' conduct in this case, one of our colleagues wrote, "the objective reasonableness of the use of Tasers continues to pose difficult challenges to law enforcement agencies and courts alike…'That the law is still evolving is illustrated in cases granting qualified immunity for that very reason.'"

Id. at 909.

Based on this state of the law, which by no means is exhaustive, but merely representative, I find that a reasonable officer in Cummings's position would not have understood that using a taser in the circumstances of this case was unlawful. Not only was Ms. Gray resisting arrest, but her arrest occurred within the context of her assaults, physical and verbal, on Cummings.

In her opposition, Ms. Gray cites to cases that stand for the unremarkable proposition that it is unlawful to deploy a taser on a misdemeanant who is not actively resisting arrest and who does not pose a danger. (See Docket #48 at 7 (citing cases)). That statement of the law possibly represents another somewhat settled proposition about the use of tasers. However, Gray's citations are unhelpful since it is clear that Gray resisted arrest and it is undisputed that what precipitated her contact with Officer Cummings was her own aggressive, assaultive conduct.

I recognize that even looking to these precedents invites fair argument whether the facts are sufficiently analogous to the situation confronting Officer Cummings on May 2, 2013. To be sure, a small change in facts can lead to a very different result. See e.g. Meyers v. Baltimore Cnty, Md., 713 F.3d 723 (4th Cir. 2013) (officers responding to domestic call encountered bi-polar person holding bat authorized to use taser three times to disable individuals but once officers were laying on top of individual, additional seven deployments were excessive force). However, a fair assessment of case law as of 2013 supports the dichotomy drawn by the Sixth Circuit in Hagans, authorizing the use of a taser when a person subject to lawful arrest refuses to be handcuffed, at least insofar as a taser is used to achieve compliance, and no more. Moreover, I am persuaded by the finding of the Fourth Circuit in Armstrong, that the right not to be tased while offering non-violent and stationary resistance to a lawful seizure was not clearly established in April 2011, particularly because, unlike Armstrong, Ms. Gray was offering resistance, and her resistance to

being handcuffed immediately followed her assault on Cummings. As the Fourth Circuit recognized only last year, the law regarding the use of tasers is still evolving. Armstrong, 810 F.3d at 909. That is precisely what reduces the clarity of the contours of the right asserted here.

Accordingly, I recommend that even if the reviewing court determined that the force used here was excessive, the contours of the constitutional right was not sufficiently clear, and in the specific factual context of this case, the violation would not have been clear to a reasonable official. Thus I recommend that the motion for summary judgment be granted as to Count I.

B. Count II – Section 1983 against the Town

In her amended complaint, Ms. Gray also asserts a § 1983 claim against the Town, alleging that the policies and customs of the Town caused Cummings to violate Gray's constitutional rights. (Docket #27 ¶ 41). A municipality cannot be held liable pursuant to § 1983 for a failure to train unless the plaintiff has first established a constitutional violation by one of the Town's officers. See Rivera v. City of Worcester, No. 12-40066-TSH, 2015 U.S. Dist. LEXIS 19251, at *14 (D. Mass. Feb. 18, 2015) (citing Evans v. Avery, 100 F.3d 1033, 1040 (1st Cir. 1996) (holding that "the City cannot be held liable absent a constitutional violation by its officers"). In light of my finding that there has been no constitutional violation, I recommend that the Court grant summary judgment as to Count II.

C. Count III – Americans with Disability Act

In Count III of the amended complaint, Gray makes a claim pursuant to the ADA, 42 U.S.C. § 12101, alleging that "the Town of Athol failed to provide a reasonable accommodation for [Gray's] disability when Officer Cummings used excessive force against her and brought criminal charges against her without taking her mental illness into account." (Docket #27 ¶ 47). Plaintiff also contends that "Officer Cummings should have respected [Gray's] comfort zone,

engaged in nonthreatening communications, and used the passage of time to defuse the situation and contact an ambulance rather than precipitating an assault and battery." (Docket #27 ¶ 48).

"To state a claim under Title II of the ADA, the plaintiff must allege that 1) she is a qualified individual with a disability,[9] 2) she was either excluded from participation in or denied the benefits of a public entity's services or programs and 3) such exclusion was by reason of her disability." Montae v. Am. Airlines, Inc., 757 F. Supp. 2d 47, 52 (D. Mass. 2010) (citing 42 U.S.C. § 12132). In cases involving an alleged wrongful arrest, other circuits have relied on two general theories of liability: "(1) where the police wrongfully arrest someone with a disability because they misperceive the effects of that disability as criminal activity and (2) where police fail reasonably to accommodate a person's disability during the investigation or arrest, *causing the person to suffer greater injury than otherwise would occur*." Patino v. City of Revere, No. 13-11114-FDS, 2014 U.S. Dist. LEXIS 5639, at *21 (D. Mass. Jan. 16, 2014) (quoting Montae, 757 F. Supp. 2d at 52) (emphasis added); see Gohier v. Enright, 186 F.3d 1216, 1220-21 (10th Cir. 1999). Notably, it appears that the First Circuit has not ever adopted these theories of liability under the ADA; however, other courts in this Circuit have nonetheless undertaken such an analysis, and this Court will therefore similarly follow suit. Cf. Buchanan v. Maine, 469 F.3d 158, 177 (1st Cir. 2006).

As an initial matter, Gray's complaint very clearly proceeds solely on the basis of the second theory of liability—that is, an alleged failure to reasonably accommodate. (Docket #27 ¶ 47) ("Specifically, the Town of Athol failed to provide a reasonable accommodation for [Gray's] disability . . . ."); (Docket #27 ¶ 48) (listing ways officer allegedly should have accommodated Plaintiff). However, in her opposition to the motion for summary judgment, Gray, for the first time, outlines an argument relating to the first theory of liability, stating that Gray "is entitled to

[9] Defendants do not argue that Plaintiff is not a qualified individual for purposes of the ADA.

proceed on the first theory because the jury could find that Cummings used excessive force against [Gray] and brought criminal charges against her because he 'misperceived' the effects of [Gray's] disability as 'criminal activity.'" (Docket #48 at 11).

This Court notes that a plaintiff is "not entitled to raise new and unadvertised theories of liability for the first time in opposition to a motion for summary judgment." Calvi v. Knox County, 470 F.3d 422, 431 (1st Cir. 2006). Nonetheless, the undersigned will consider the merits of such argument given that the Defendants addressed the theory in cursory fashion, stating that "Officer Cummings did not wrongly arrest the Plaintiff because he misperceived the effects of the Plaintiff's disability as criminal activity. Rather, he seized the Plaintiff because she committed an assault and battery on a police officer." (Docket #41 at 16).

With regard to the first theory, Gray's chief argument is that Plaintiff's "inability to comply with [Officer Cummings's] instructions was plainly one effect of her disability, as were her staring at him and using loud and vulgar language." (Docket #48 at 11). Contrary to Plaintiff's contentions, and as the Defendants argue, Gray's disability was not misperceived as criminal conduct; rather, it was her assault and battery upon Officer Cummings that was perceived as—and in fact was—criminal conduct, resulting in the use of force by Officer Cummings to defend himself. To be sure, Plaintiff has no recollection of the incident, (DF 2-3), and is therefore unable to offer any evidence to controvert the allegation that she assaulted Cummings. Because Plaintiff's assaultive behavior principally precipitated her arrest, her argument pursuant to the first theory under the ADA must fail. See Gohier, 186 F.3d at 1221 (holding that "[the officer] did not use force on Mr. Lucero because he misconceived the lawful effects of his disability as criminal activity, inasmuch as Lucero's assaultive conduct was not lawful. Neither did [the officer] fail to accommodate Lucero's disability while arresting him for 'some crime unrelated to his disability.'

Instead, [the officer] used force on Lucero while Lucero was committing an assault related to his disability.") (internal citation omitted); see also Hainze v. Richards, 207 F.3d 795, 801-02 (5th Cir. 2000) ("We are not persuaded that requiring [the officer] and other similarly situated officers to use less than reasonable force in defending themselves and others, or to hesitate to consider other possible actions in the course of making such split-second decisions, is the type of 'reasonable accommodation' contemplated by Title II."). Moreover, the first theory is further unavailing because Officer Cummings undoubtedly knew that Plaintiff was mentally ill, given that he was responding to her escape from a mental hospital; knew she was a Section 12 patient at that mental hospital; and had previous encounters with Plaintiff relating to her mental health history. (DF 4, 6; PF 1C).

To the extent that Officer Cummings's use of force should be bifurcated into the use of force to take down Plaintiff as she assaulted him and the use of the taser to further defend himself and effectuate arrest while she resisted, Plaintiff's argument under the first theory still fails. The uncontroverted record evidence establishes that after Plaintiff assaulted Cummings a struggle ensued whereby Cummings attempted to arrest Plaintiff but she resisted arrest. (DF 26-35). To that end, Plaintiff refused to take her arms out from under her body, and was warned that her failure to comply would result in her being tasted. In this light, Officer Cummings used force against the Plaintiff as part of a spectrum of self-defense measures given that the struggle was ongoing, and even if the use could not be construed as self-defense it was nonetheless to alleviate the threat posed by a suspect—albeit smaller in size and stature than Cummings—who was actively resisting arrest immediately after having assaulted the officer.

With regard to the second theory, Plaintiff must show that the "police fail[ed] reasonably to accommodate [her] disability during the investigation or arrest, *causing [her] to suffer greater*

injury than otherwise would occur." Patino v. City of Revere, No. 13-11114-FDS, 2014 U.S. Dist. LEXIS 5639, at *21 (D. Mass. Jan. 16, 2014) (quoting Montae, 757 F. Supp. 2d at 52) (emphasis added). To that end, Plaintiff asserts that "Cummings never would have tased [Plaintiff] if she were not disabled. . . . After approaching her in entirely the wrong way, Cummings escalated the situation, came within five feet of [Plaintiff], and threw her to the ground when he allegedly felt she was going to come at him. Then, while he had her on the ground face down, Cummings ordered Gray to bring her hands behind her back and her disability prevented her from complying . . . ." (Docket #48 at 12).

Defendants miss the mark with their argument that Plaintiff's ADA claim pursuant to the second theory fails "because [Plaintiff] cannot show that the Taser caused her to be injured to a greater extent than a non-disabled person." The inquiry is not whether the use of a taser would hurt a disabled person more than a non-disabled person; rather, the question is whether the disability resulted in the misapplication of force or caused a "greater indignity in the process than other arrestees." See Gohier, 186 F.3d at 1220-21.

In that light, the crux of the issue is whether, as Plaintiff alleges, she would not have been tased if she was not disabled. (Docket #48 at 12). Contrary to Plaintiff's contention, I find that the officer justifiably could and would have used a taser against the Plaintiff regardless of her mental illness because his use of force was the result of her assault on him and continued resistance to arrest immediately following that combative behavior. (DF 26-35). In assessing that contention, I find particularly instructive the Fifth Circuit's discussion in Hainze, 207 F.3d at 801, reasoning 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. Law 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. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents. While the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public.

Id. The facts underlying the court's discussion in Hainze are distinguishable from the instant case such that that case involved an officer using deadly force in response to a mentally-ill person wielding a knife and coming toward the officer. Id. Notwithstanding that difference however, Hainze is instructive with regard to the second theory because it is illustrative of the notion that officers can use the appropriate level of force in response to an ongoing threat. Here, the threat was not a deadly weapon, but a threat nonetheless existed jeopardizing the safety of Officer Cummings in the wake of Plaintiff's assault and battery on him and the ensuing struggle. Indeed, in that respect this case is more akin to the Tenth Circuit's decision in Gohier v. Enright, 186 F.3d 1216, 1220-21 (10th Cir. 1999) (holding that "[the officer] did not use force on Mr. Lucero because he misconceived the lawful effects of his disability as criminal activity, inasmuch as Lucero's assaultive conduct was not lawful. Neither did [the officer] fail to accommodate Lucero's disability while arresting him for 'some crime unrelated to his disability.' Instead, [the officer] used force on Lucero while Lucero was committing an assault related to his disability.") (internal citation omitted); see Higgins v. Bubar, No. 1:11-cv-00148-NT, 2012 U.S. Dist. LEXIS 108054, at *39 (D. Me. Aug. 2, 2012). I therefore recommend that the Court grant Defendants' motion for summary judgment as to Count III because both of Plaintiff's theories under the ADA fail as a matter of law.

D. Count IV – Assault and Battery

As the First Circuit explained, the determination of the reasonableness of the force used under § 1983 also "controls [the] determination of the reasonableness of the force used under . . . common law assault and battery claims." Hunt v. Massi, 773 F.3d 361, 372 (1st Cir. 2014) (citing Raiche v. Pietroski, 623 F.3d 30, 40 (1st Cir. 2010)). Because I have already concluded that Officer Cummings did not use excessive force, I similarly conclude that Officer Cummings must not have used "intentional and unjustified . . . force upon the person of another," as required to satisfy Plaintiff's claim for assault and battery, see Commonwealth v. Porro, 458 Mass. 526, 939 N.E.2d 1157, 1162 (Mass. 2010) (citation omitted) (internal quotation marks omitted).

E. Count V – Massachusetts Civil Rights Act

I recommend granting the Defendants' Motion for Summary Judgment (Docket #41) as to Count V of the amended complaint, alleging a violation of the Massachusetts Civil Rights Act by Officer Cummings.

The Massachusetts Civil Rights Act ("MCRA") is the state analog to § 1983 and prohibits persons from "interfer[ing] by threats, intimidation or coercion, or attempt[ing] to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth." Mass. Gen. Laws ch. 12, § 11H; see Mass. Gen. Laws ch. 12, § 11I (providing a civil cause of action for aggrieved persons based on section 11H). "To establish a claim under the [MCRA], the plaintiffs must prove that (1) their exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) have been interfered with, or attempted to be interfered with, and (3) that the interference or

attempted interference was by threats, intimidation or coercion." Muldoon v. Dep't of Corr., No.: 15-cv-13892-DJC, 2017 U.S. Dist. LEXIS 17105, at *7-8 (February 7, 2017) (quoting Do Corp. v. Town of Stoughton, No. 13-cv-11726-DJC, 2013 U.S. Dist. LEXIS 172199, at *12 (D. Mass. Dec. 6, 2013)) (alteration in original).

Pursuant to the MCRA, a threat is "the intentional exertion of pressure to make another fearful or apprehensive of injury or harm." Muldoon v. Dep't of Corr., No.: 15-cv-13892-DJC, 2017 U.S. Dist. LEXIS 17105, at *9 (D. Mass. February 7, 2017) (quoting Ayasli v. Armstrong, 56 Mass. App. Ct. 740, 750 (2002)). Intimidation means putting someone "in fear for the purpose of compelling or deterring conduct." Id. (quoting Ayasli, 56 Mass. App. Ct. at 750). Finally, coercion is "the application to another of such force, either physical or moral, as to" make someone do something against his or her will. Ayasli, 56 Mass. App. Ct. at 750.

The Massachusetts Supreme Judicial Court has held that MCRA claims are subject to the same standard of qualified immunity for police officers that applies to § 1983 claims. See Raiche, 623 F.3d at 40 (citing Duarte v. Healy, 537 N.E.2d 1230 (Mass. 1989)); see also Hunt, 773 F.3d 371-72; Spencer v. Roche, 755 F. Supp. 2d 250, 263 (D. Mass. 2010) ("When it enacted the MCRA, the Massachusetts legislature intended to adopt the standard of immunity for public officials developed under 42 U.S.C. § 1983."). Thus, Plaintiff's MCRA claim is necessarily precluded because I have already determined that Officer Cummings is protected by qualified immunity. See, e.g., Meagher v. Andover Sch. Comm., 94 F. Supp. 3d 21, 44-45 (D. Mass. 2015) (concluding that because defendant officer was entitled to qualified immunity, defendant was also immune from MCRA claim); Stull v. Town of Weymouth, No. 11-11549-JLT, 2013 U.S. Dist. LEXIS 146058 (D. Mass. Oct. 9, 2013) ("Because the Officer Defendants are entitled to qualified immunity for Plaintiffs' § 1983 claims, they are also immune to Plaintiffs' MCRA claims.")

(footnote omitted); Spencer, 755 F. Supp. 2d at 264 (concluding that defendant nurse immune from MCRA claim based on qualified immunity determination).

F. Count VI – Malicious Prosecution

In the final count of her amended complaint, Gray asserts a claim of malicious prosecution against Cummings, alleging that he caused criminal charges to be brought against her without probable cause and with malice. (Docket #27 at ¶¶ 56-58). Here, a criminal complaint was issued against Plaintiff based on Officer Cummings's application for a complaint for the following four offenses: (1) assault on a police officer, Mass. Gen. Laws ch. 265, §§ 13A, 13D; (2) resisting arrest, Mass. Gen. Laws ch. 268, § 32B; (3) disturbing the peace, Mass. Gen. Laws ch. 272, § 53; and (4) disorderly person, Mass. Gen. Laws ch. 272, § 53. (Docket #27 ¶ 30). Defendants argue that summary judgment should enter for Cummings because there is no evidence of malice and there was probable cause for Gray's arrest and the criminal charges asserted against her. (Docket #44 at 18).

"To prevail on a claim for malicious prosecution, a plaintiff must establish that he was damaged because the defendant commenced the original action without probable cause and with malice, and that the original action terminated in his favor." Chervin v. Travelers Ins. Co., 448 Mass. 95, 103 (2006). Here, the key inquiry is whether Officer Cummings had probable cause for each offense because malice can be inferred from the lack of probable cause, id. at 109, and because there is no dispute that the criminal proceedings terminated in Plaintiff's favor, (see Docket #27 ¶ 31).

Probable cause exists when the "facts and circumstances within the officer's knowledge [] are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an

offense." Michigan v. DeFillippo, 443 U.S. 31, 37 (1979); Acosta v. Ames Dep't Stores, Inc., 386 F.3d 5, 11 (1st Cir. 2004) ("The test for probable cause does not require the officers' conclusion to be ironclad, or even highly probable. Their conclusion that probable cause exists need only be reasonable.").

1. Assault and Battery

An assault and battery is "the intentional and unjustified use of force upon the person of another, however slight." Commonwealth v. Porro, 939 N.E.2d 1157, 1162 (Mass. 2010). To qualify as an assault and battery upon a police officer, the victim-officer must be "engaged in the performance of his duties at the time of such assault and battery." Mass. Gen. Laws ch. 265, § 13D. Here, Officer Cummings had probable cause to believe that Plaintiff had committed an assault and battery on him. The uncontroverted facts establish that Plaintiff turned around and looked at Cummings with clenched teeth and a clenched fist before coming at him, at which point he used force to take her down. (DF 18-35). A fair reading of Plaintiff's argument is not that she did not attack Officer Cummings, but rather that his actions catalyzed his own attack. (See Docket #27 ¶ 48) ("Officer Cummings should have respected her comfort zone . . . *rather than precipitating an assault and battery*.") (emphasis added). On a related note, Plaintiff also argues that her mental illness would have resulted in a finding that she lacked substantial capacity either to appreciate the criminality of her conduct or to conform to the requirements of the law. (Docket #48 at 14). This argument is unpersuasive because even if there was such a finding at a later date, that would not negate probable cause at the time of arrest. To that end, Plaintiff fails to offer any authority that a prospective defense of a lack of criminal responsibility could undermine an officer's determination of probable cause.

2. Resisting Arrest

"A person commits the crime of resisting arrest if he knowingly prevents or attempts to prevent a police officer, acting under color of his official authority, from effecting an arrest of the actor or another, by: (1) using or threatening to use physical force or violence against the police officer or another; or (2) using any other means which creates a substantial risk of causing bodily injury to such police officer or another." Mass. Gen. Laws ch. 268, § 32B. Probable cause for resisting arrest existed here because Plaintiff tucked her arms underneath her chest and flexed tightly in an effort to resist being handcuffed. (DF 26-35). Officer Cummings ordered Plaintiff to stop resisting and warned her she would be tased if she did not comply, to which she replied "fuck you" and "fucking do it!" (DF 28-33). Additionally, given my earlier finding that Cummings did not use excessive force, Gray's argument that she had the right to resist arrest is without merit. Thus, probable cause existed for Plaintiff's charge of resisting arrest. See Commonwealth v. Lender, 847 N.E.2d 350, 353 (Mass. 2006) ("The defendant's resistance to being handcuffed and placed in the cruiser is sufficient resistance to amount to . . . a means creating a substantial risk of causing bodily injury to the arresting officer.").

3. Disturbing the Peace

Breach of peace is an elastic concept. Commonwealth v. Baez, 678 N.E.2d 1335, 1338 (Mass. 1997). "To find a breach of the peace . . . an act must at least threaten to have some disturbing effect on the public." Id. An officer may make a warrantless arrest for a breach of the peace where it "(1) involves a breach of the peace, (2) is committed in the presence or view of the officer . . . and (3) is still continuing at the time of the arrest or only interrupted, so that the offen[s]e and the arrest form parts of one transaction." Commonwealth v. Conway, 316 N.E.2d 757, 759 (Mass. 1974). The record evidence demonstrates the Officer Cummings had probable cause to

arrest Plaintiff for disturbing the peace because she was continually screaming profanities at Officer Cummings and passersby. (See, e.g., DF 10, 12, 18, 22, 29). Plaintiff continued using vulgarities as she assaulted Cummings and resisted arrest. (DF 25-36). Probable cause therefore existed as to Plaintiff's alleged breach of the peace.

4. Disorderly Conduct

Section 53 of Chapter 272 of the Massachusetts General Laws permits the punishment of "persons who with offensive and disorderly acts or language accost or annoy another person[.]" Mass. Gen. Laws ch. 272, § 53(a); see Philbrook v. Perrigo, 637 F. Supp. 2d, 53-54 (D. Mass. 2009). Here, probable cause could have been based on Plaintiff's loud and offensive language, coupled with her assault and battery and subsequent refusal to comply with Officer Cummings's lawful orders. (DF 25-36). Because I find that probable cause existed as to all four charges, I recommend that this Court grant summary judgment as to Count VI of the amended complaint.

V. CONCLUSION

For the foregoing reasons, I hereby RECOMMEND that the motion for summary judgment (Docket #40) be ALLOWED.[10]

[10] The parties are hereby advised that any party who objects to these proposed findings and recommendations must file a written objection thereto within 14 days of receipt of this Report and Recommendation. The written objections must identify with specificity the portions of the proposed findings, recommendations, or report to which objection is made, and the basis for such objections. See Fed. R. Civ. P. 72(b)(2). The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Rule 72(b) will preclude further appellate review of the District Court's order based on this Report and Recommendation. See Keating v. Sec'y of Health & Hum. Servs., 848 F.2d 271, 275 (1st Cir. 1988); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); see also Thomas v. Arn, 474 U.S. 140 (1985).

/S/ David H. Hennessy
David H. Hennessy
UNITED STATES MAGISTRATE JUDGE

From: ECFnotice@mad.uscourts.gov
To: CourtCopy@mad.uscourts.gov
Subject: Activity in Case 4:15-cv-10276-TSH Gray v. Cummings et al Order on Report and Recommendations
Date: Thursday, March 15, 2018 4:52:27 PM

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United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was entered on 3/15/2018 at 4:51 PM EDT and filed on 3/15/2018
Case Name: Gray v. Cummings et al
Case Number: 4:15-cv-10276-TSH
Filer:
Document Number: 65(No document attached)

Docket Text:
District Judge Timothy S. Hillman: ELECTRONIC ORDER entered adopting Report and Recommendations re [51] Report and Recommendations and granting [40] Motion for Summary Judgment. I take no position on the Magistrate Judge's determination that the Defendant Cummings employed reasonable force under all of the circumstances because I agree that the right not to be tased while offering non-violent, stationary, resistance to a lawful seizure was not clearly established at the time of the confrontation between Ms. Gray and Officer Cummings. (Castles, Martin)

4:15-cv-10276-TSH Notice has been electronically mailed to:

Richard L. Neumeier rneumeier@morrisonmahoney.com, dachille@morrisonmahoney.com, jbriefel@morrisonmahoney.com, pwhittaker@morrisonmahoney.com

Leonard H. Kesten lkesten@bhpklaw.com, dcorbett@bhpklaw.com

Thomas R Donohue tdonohue@bhpklaw.com, nsilberman@bhpklaw.com

Matthew Segal msegal@aclum.org, waltshuler@aclum.org

4:15-cv-10276-TSH Notice will not be electronically mailed to:

03/20/2017	53	District Judge Timothy S. Hillman: ELECTRONIC ORDER entered granting 52 Motion for Extension of Time to April 7, 2017 to file objections to magistrate judge report. (Castles, Martin) (Entered: 03/20/2017)
04/10/2017	54	MOTION for Extension of Time to April 10, 2017 to File Response/Reply as to 51 REPORT AND RECOMMENDATIONS re 40 MOTION for Summary Judgment filed by Thomas A. Cummings, Town of Athol, Massachusetts Recommendation: That it be ALLOWED by Judith Gray. (Attachments: # 1 Exhibit Objection)(Neumeier, Richard) (Entered: 04/10/2017)
04/10/2017	55	OBJECTION to 51 Report and Recommendations filed by Judith Gray. (Neumeier, Richard) Modified docket text on 4/11/2017 (Burgos, Sandra). (Entered: 04/10/2017)
04/12/2017	56	District Judge Timothy S. Hillman: ELECTRONIC ORDER entered granting 54 Motion for Extension of Time to File objection re 51 REPORT AND RECOMMENDATIONS re 40 MOTION for Summary Judgment filed by Thomas A. Cummings, Town of Athol, Massachusetts. Response due by 4/10/2017. (Castles, Martin) (Entered: 04/12/2017)
04/14/2017	57	Assented to MOTION for Extension of Time to May 1, 2017 to File Response/Reply as to 55 Reply to Objection to Report and Recommendations by Thomas A. Cummings, Town of Athol, Massachusetts.(Donohue, Thomas) (Entered: 04/14/2017)
04/14/2017	58	District Judge Timothy S. Hillman: ELECTRONIC ORDER entered granting 57 Motion for Extension of Time to File Reply to objection re 51 REPORT AND RECOMMENDATIONS re 40 MOTION for Summary Judgment filed by Thomas A. Cummings, Town of Athol, Massachusetts Recommendation: Replies due by 5/1/2017. (Castles, Martin) (Entered: 04/14/2017)
05/01/2017	59	Response by Thomas A. Cummings, Town of Athol, Massachusetts to 55 Reply to Objection to Report and Recommendations . (Donohue, Thomas) (Entered: 05/01/2017)
05/08/2017	60	Assented to MOTION for Leave to File *Plaintiff's Reply to Defendants' Response* by Judith Gray. (Attachments: # 1 Supplement Reply to defendants' response)(Neumeier, Richard) (Entered: 05/08/2017)
05/12/2017	61	District Judge Timothy S. Hillman: ELECTRONIC ORDER entered granting 60 Motion for Leave to File reply. Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. (Castles, Martin) (Entered: 05/12/2017)
05/12/2017	62	REPLY to Response to 60 Assented to MOTION for Leave to File *Plaintiff's Reply to Defendants' Response* filed by Judith Gray. (Neumeier, Richard) (Entered: 05/12/2017)
09/25/2017	63	NOTICE of Withdrawal of Appearance by Sarah R. Wunsch (Wunsch, Sarah) (Entered: 09/25/2017)
10/03/2017	64	NOTICE of Appearance by Matthew Segal on behalf of Judith Gray (Segal, Matthew) (Entered: 10/03/2017)
03/15/2018	65	District Judge Timothy S. Hillman: ELECTRONIC ORDER entered adopting Report and Recommendations re 51 Report and Recommendations and granting 40 Motion for Summary Judgment. I take no position on the Magistrate Judge's determination that the Defendant Cummings employed reasonable force under all of the circumstances because I agree that the right not to be tased while offering non-violent, stationary, resistance to a lawful seizure was not clearly established at the time of the confrontation between Ms. Gray and Officer Cummings. (Castles, Martin) (Entered: 03/15/2018)
03/15/2018	66	Case no longer referred to Magistrate Judge David H. Hennessy. (Castles, Martin) (Entered: 03/15/2018)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Judith Gray,
Plaintiff,

v.

CIVIL ACTION
NO. 15-10276-TSH

Thomas A. Cummings and
Town of Athol,
Defendants,

JUDGMENT

Hillman, D.J.

In accordance with the Court's Order dated 3/15/18, approving the Report and Recommendation and granting the defendants' motion for summary judgment, it is hereby ORDERED that judgment be and hereby is entered for the defendants.

By the Court,

3/15/18
Date

/s/ Martin Castles
Deputy Clerk
508-929-9904

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JUDITH GRAY, Plaintiff, v. THOMAS A. CUMMINGS AND TOWN OF ATHOL, Defendants.	)	Civ. No. 15-10276-TSH

NOTICE OF APPEAL

Notice is hereby given that Judith Gray, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the First Circuit from the magistrate judge's Report and Recommendation dated March 15, 2017, the district court's electronic order dated March 15, 2018, and the district court's judgment entered on March 15, 2018.

Dated: April 6, 2018

Respectfully submitted,

Plaintiff,
Judith Gray,
By her attorneys,

Richard L. Neumeier (BBO # 369620)
Morrison Mahoney LLP
250 Summer Street
Boston, MA 02210
617-439-7569
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/s/ *Matthew R. Segal*
Matthew R. Segal (BBO # 654489)
American Civil Liberties Union
Foundation of Massachusetts
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed through the Electronic Court Filing system on April 6, 2018, and a copy thereof will be sent electronically to the registered recipients as identified on the Notice of Electronic Filing.

/s/ *Matthew R. Segal*
Matthew R. Segal

tion under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

(Pub. L. 101–336, title I, §107, July 26, 1990, 104 Stat. 336.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (a), was in the original ''this Act'', meaning Pub. L. 101–336, July 26, 1990, 104 Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of this title and Tables.

The Rehabilitation Act of 1973, referred to in subsec. (b), is Pub. L. 93–112, Sept. 26, 1973, 87 Stat. 355, as amended, which is classified generally to chapter 16 (§701 et seq.) of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 701 of Title 29 and Tables.

SUBCHAPTER II—PUBLIC SERVICES

PART A—PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY APPLICABLE PROVISIONS

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term ''public entity'' means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4)[1] of title 49).

(2) Qualified individual with a disability

The term ''qualified individual with a disability'' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

(Pub. L. 101–336, title II, §201, July 26, 1990, 104 Stat. 337.)

[1] See References in Text note below.

REFERENCES IN TEXT

Section 24102 of title 49, referred to in par. (1)(C), was subsequently amended, and section 24102(4) no longer defines ''commuter authority''. However, such term is defined elsewhere in that section.

CODIFICATION

In par. (1)(C), ''section 24102(4) of title 49'' substituted for ''section 103(8) of the Rail Passenger Service Act'' on authority of Pub. L. 103–272, §6(b), July 5, 1994, 108 Stat. 1378, the first section of which enacted subtitles II, III, and V to X of Title 49, Transportation.

EFFECTIVE DATE

Section 205 of Pub. L. 101–336 provided that:

''(a) GENERAL RULE.—Except as provided in subsection (b), this subtitle [subtitle A (§§201–205) of title II of Pub. L. 101–336, enacting this part] shall become effective 18 months after the date of enactment of this Act [July 26, 1990].

''(b) EXCEPTION.—Section 204 [section 12134 of this title] shall become effective on the date of enactment of this Act.''

EX. ORD. NO. 13217. COMMUNITY-BASED ALTERNATIVES FOR INDIVIDUALS WITH DISABILITIES

Ex. Ord. No. 13217, June 18, 2001, 66 F.R. 33155, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to place qualified individuals with disabilities in community settings whenever appropriate, it is hereby ordered as follows:

SECTION 1. *Policy*. This order is issued consistent with the following findings and principles:

(a) The United States is committed to community-based alternatives for individuals with disabilities and recognizes that such services advance the best interests of Americans.

(b) The United States seeks to ensure that America's community-based programs effectively foster independence and participation in the community for Americans with disabilities.

(c) Unjustified isolation or segregation of qualified individuals with disabilities through institutionalization is a form of disability-based discrimination prohibited by Title II of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 [12131] *et seq*. States must avoid disability-based discrimination unless doing so would fundamentally alter the nature of the service, program, or activity provided by the State.

(d) In *Olmstead v. L.C.*, 527 U.S. 581 (1999) (the ''*Olmstead* decision''), the Supreme Court construed Title II of the ADA [42 U.S.C. 12131 et seq.] to require States to place qualified individuals with mental disabilities in community settings, rather than in institutions, whenever treatment professionals determine that such placement is appropriate, the affected persons do not oppose such placement, and the State can reasonably accommodate the placement, taking into account the resources available to the State and the needs of others with disabilities.

(e) The Federal Government must assist States and localities to implement swiftly the *Olmstead* decision, so as to help ensure that all Americans have the opportunity to live close to their families and friends, to live more independently, to engage in productive employment, and to participate in community life.

SEC. 2. *Swift Implementation of the Olmstead Decision: Agency Responsibilities*. (a) The Attorney General, the Secretaries of Health and Human Services, Education, Labor, and Housing and Urban Development, and the Commissioner of the Social Security Administration shall work cooperatively to ensure that the *Olmstead* decision is implemented in a timely manner. Specifically, the designated agencies should work with States to help them assess their compliance with the *Olmstead* decision and the ADA [42 U.S.C. 12101 et seq.] in providing services to qualified individuals with disabilities in

community-based settings, as long as such services are appropriate to the needs of those individuals. These agencies should provide technical guidance and work cooperatively with States to achieve the goals of Title II of the ADA [42 U.S.C. 12131 et seq.], particularly where States have chosen to develop comprehensive, effectively working plans to provide services to qualified individuals with disabilities in the most integrated settings. These agencies should also ensure that existing Federal resources are used in the most effective manner to support the goals of the ADA. The Secretary of Health and Human Services shall take the lead in coordinating these efforts.

(b) The Attorney General, the Secretaries of Health and Human Services, Education, Labor, and Housing and Urban Development, and the Commissioner of the Social Security Administration shall evaluate the policies, programs, statutes, and regulations of their respective agencies to determine whether any should be revised or modified to improve the availability of community-based services for qualified individuals with disabilities. The review shall focus on identifying affected populations, improving the flow of information about supports in the community, and removing barriers that impede opportunities for community placement. The review should ensure the involvement of consumers, advocacy organizations, providers, and relevant agency representatives. Each agency head should report to the President, through the Secretary of Health and Human Services, with the results of their evaluation within 120 days.

(c) The Attorney General and the Secretary of Health and Human Services shall fully enforce Title II of the ADA, including investigating and resolving complaints filed on behalf of individuals who allege that they have been the victims of unjustified institutionalization. Whenever possible, the Department of Justice and the Department of Health and Human Services should work cooperatively with States to resolve these complaints, and should use alternative dispute resolution to bring these complaints to a quick and constructive resolution.

(d) The agency actions directed by this order shall be done consistent with this Administration's budget.

SEC. 3. *Judicial Review*. Nothing in this order shall affect any otherwise available judicial review of agency action. This order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

GEORGE W. BUSH.

§ 12132. Discrimination

Subject to the provisions of this subchapter, 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.

(Pub. L. 101–336, title II, § 202, July 26, 1990, 104 Stat. 337.)

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

(Pub. L. 101–336, title II, § 203, July 26, 1990, 104 Stat. 337.)

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for ''program accessibility, existing facilities'', and ''communications'', regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to ''program accessibility, existing facilities'', and ''communications'', such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

(Pub. L. 101–336, title II, § 204, July 26, 1990, 104 Stat. 337.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b), was in the original ''this Act'', meaning Pub. L. 101–336, July 26, 1990, 104 Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of this title and Tables.

EFFECTIVE DATE

Section effective July 26, 1990, see section 205(b) of Pub. L. 101–336, set out as a note under section 12131 of this title.

PART B—ACTIONS APPLICABLE TO PUBLIC TRANSPORTATION PROVIDED BY PUBLIC ENTITIES CONSIDERED DISCRIMINATORY

SUBPART I—PUBLIC TRANSPORTATION OTHER THAN BY AIRCRAFT OR CERTAIN RAIL OPERATIONS

§ 12141. Definitions

As used in this subpart:

(1) Demand responsive system

The term ''demand responsive system'' means any system of providing designated public transportation which is not a fixed route system.

(2) Designated public transportation

The term ''designated public transportation'' means transportation (other than pub-