**No. 20-15381**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**GULSTAN E. SILVA, JR., as personal representative of the estate of Sheldon Paul Haleck; JESSICA Y. HALECK, individually and as guardian ad litem of J. M.V. H.; WILLIAM E. HALECK; and VERDELL B. HALECK,**

***Plaintiffs-Appellants*,**

**v.**

**CITY AND COUNTY OF HONOLULU; LOUIS M. KEALOHA, individually and in his official capacity; CHRISTOPHER CHUNG; SAMANTHA CRITCHLOW; and STEPHEN KARDASH,**

***Defendants-Appellees*.**

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**On Appeal from the United States District Court**
**for the District of Hawai‘i,**
**No. 15-cv-436 HG-KJM, Hon. Helen Gillmor**

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# BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF HAWAI‘I, AFRICAN AMERICAN LAWYERS ASSOCIATION OF HAWAI‘I, HAWAII DISABILITY RIGHTS CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS’ OPENING BRIEF

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*/s/* James Davy

James Davy

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*Amici Curiae* are legal organizations that work to protect civil rights and liberties through litigation and advocacy.

**American Civil Liberties Union of Hawai‘i Foundation**

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with over 1.8 million members dedicated to the principles of liberty and equality embodied in the Bill of Rights and the nation's civil rights laws. *Amicus curiae* the American Civil Liberties Union of Hawai‘i Foundation ("ACLU of Hawai‘i")—the state affiliate of the American Civil Liberties Union—has nearly 4,000 members in the State of Hawai‘i and is also dedicated to defending and protecting civil rights and civil liberties. Protecting against violations of constitutional rights is at the core of the ACLU of Hawai‘i's mission. And the ACLU of Hawai‘i has a long history of advocating around constitutional rights, including those of people harmed by law enforcement, as implicated in the present case. As recent examples, the ACLU of Hawai‘i has submitted multiple complaints about police abuse to the Honolulu Police Commission, advocated for the creation of the newly established Law Enforcement Standards Board, and filed an amicus brief in a police misconduct case involving Honolulu Police Department officers.

**African American Lawyers Association of Hawai‘i**

The African American Lawyers Association ("AALA") of Hawai‘i's purpose is "[t]o promote the advancement of human rights and justice." AALA is aware of many complaints about police brutality during the arrests and seizures of citizens in Hawai‘i. Some of its members litigate claims in federal court concerning the use of excessive force by police. The organization and its members have a strong interest in curbing the use of excessive force, and in appeals of cases from Hawai‘i on the use of excessive force by police.

**Hawaii Disability Rights Center**

The Hawaii Disability Rights Center ("HDRC") is a nonprofit organization that is part of the nationwide Protection and Advocacy system created by Congress. As such, HDRC is the state designated agency in Hawai‘i to advocate for the protection of persons with disabilities and protection of their legal rights. It is estimated that approximately 20-25% of people suffer from mental illness, and it is among the leading causes of ill health and disability worldwide. Protecting the rights of people who suffer from mental illness is one of the core functions of the HDRC. In particular, one of our highest priorities has been to advocate for the need for police training in de-escalation techniques in their interactions with a person with a mental illness. This case presents a glaring example of how important that is and

demonstrates how catastrophic it can be when police fail to employ appropriate de-escalation methods.

As legal organizations, *Amici* work to protect civil rights and liberties through litigation, advocacy, and education. One threat to those liberties is excessive force by police and law enforcement officers. When left unchecked by local police departments, government agencies, and legislatures, redressing civil liberties violations in court becomes even more vital. *Amici* write to urge this Court to remand this matter for a new trial.

*Amici Curiae* submit this brief Pursuant to Fed. Rule App. P. 29(a), and do not repeat arguments made by the parties. No party's counsel authored this brief, or any part of it. No party's counsel contributed money to fund any part of the preparation or filing of this brief. *Amici* file this brief with the consent of the parties.

## INTRODUCTION

*Amici* urge this Court to consider several fatal flaws at the jury trial below. First, the District Court prevented the jury from considering whether Mr. Haleck's evident mental health crisis should have elicited a different response from the police officer Defendants. When people experience mental health crises, officers should not quickly resort to force—and when they do, a victim's mental health crisis factors into the analysis of whether that force was excessive. Second, the District Court compounded that error by allowing in testimony about "excited delirium syndrome," an unvalidated theory that does not meet the reliability standard for expert testimony and exists solely to shield law enforcement misconduct from accountability. Third, *Amici* note that this Court should consider the Americans with Disabilities Act—which imposes a legal obligation on police to consider mental health before resorting quickly to force—for guidance in determining whether the force used against Mr. Haleck, a person with a mental disability, was reasonable. Ultimately, *Amici* urge this Court to reverse and order a new trial.

## ARGUMENT

### I. A New Trial Is Warranted Because The District Court Erroneously And Prejudicially Prevented The Jury From Considering Whether Police Officer Defendants' Use of Force Was Reasonable in Light of Mr. Haleck's Mental Health Crisis

When "mental illness" is present and apparent in a police encounter, it "*must* be reflected in any [Fourth Amendment] assessment of the government's interest in

the use of force." *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003) (emphasis added).[1] Specifically, when police officers perceive signs of a person's mental disability, they "should make a greater effort to take control of the situation through less intrusive means." *Crawford v. City of Bakersfield*, 944 F.3d 1070, 1078 (9th Cir. 2019) (citation omitted). That means de-escalating and pursuing alternatives before using, or escalating use of, force.

Despite the Ninth Circuit's clarity on this issue—and despite undisputed evidence that Appellee Officers believed Mr. Haleck to be "mentally deranged" at the time they used force, ER 273-76; ER 412-14—the District Court, in two significant ways, erroneously limited the jury's consideration of Mr. Haleck's mental disability. *First*, the District Court prevented Appellant from presenting to the jury highly relevant testimony about appropriate and reasonable police practices in an encounter with a person exhibiting signs of mental disability or mental health crisis. *Second*, the District Court—contrary to precedent and this Circuit's model jury instructions—excluded from its excessive force-related jury instruction *any* consideration of mental disability. Together, these two erroneous decisions foreclosed any jury consideration of an essential aspect of the police encounter—Mr. Haleck's mental state—that culminated in Mr. Haleck's tragic and avoidable

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

death. By "undercut[ting] [Appellant]'s ability to prove a 'central component' of h[is] case[,]" these errors "more probably than not tainted the verdict." *Crawford*, 944 F.3d at 1079 (quoting *Wilkerson v. Wheeler*, 772 F.3d 834, 838, 841 (9th Cir. 2014)).

This Court should correct this serious error by ordering a new trial that allows the jury to fully consider the impact that Mr. Haleck's apparent mental health crisis has on the ultimate question of whether Appellee Officers' use of force was reasonable. People with serious mental illness are already 16 times more likely than other people to be killed when approached or stopped by law enforcement, and over 25 percent of all fatal law enforcement encounters involve someone with serious mental illness.[2] The District Court's erroneous handling of Mr. Haleck's mental health threatens the ability of people with mental disabilities to be free of police use of excessive force and to vindicate their constitutional rights in court. This Court should grant a new trial to protect those rights.

### A. Signs of a person experiencing a mental disability or mental health crisis play an essential role in the Fourth Amendment excessive force inquiry

[2] *See* Ruderman Foundation, *The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability*, at 1, 7-8 (Mar. 2016), http://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf.

Mr. Haleck's evident mental health crisis should have played an essential role in the jury's Fourth Amendment excessive force inquiry. Evident "mental illness" present during a police encounter "*must* be reflected in any assessment of the government's interest in the use of force." *Drummond*, 343 F.3d at 1058 (emphasis added); *see also Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001) ("[T]hat the individual involved is emotionally disturbed . . . must be considered in determining . . . the reasonableness of the force employed."); *Glenn v. Washington Cty.*, 673 F.3d 864, 875 (9th Cir. 2011).[3] This Circuit has affirmed that repeatedly, situating evident mental disability alongside the *Graham* factors. *See, e.g.*, *Vos v. City of Newport Beach*, 892 F.3d 1024, 1034 (9th Cir. 2018) ("[W]hether the suspect has exhibited signs of mental illness is one of the factors the court will consider in assessing the reasonableness of the force used, in addition to the *Graham* factors . . . ."), *cert. denied*, 139 S. Ct. 2613 (2019).

Specifically, when a suspect has evident mental disability or mental health issues, police must use force more carefully for that force to remain reasonable. When a person encountering law enforcement shows "indications of mental illness,"

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

the government's interest in using higher levels of force is "diminished." *Vos*, 892 F.3d at 1034. This is because, in such situations, "officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual." *Deorle*, 272 F.3d at 1283. Thus, where "officers believe a suspect is mentally ill, they 'should make a greater effort to take control of the situation through less intrusive means.'" *Crawford*, 944 F.3d at 1078 (quoting *Vos*, 892 F.3d at 1034 n.9); *see also Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010) (rejecting officer's argument that "use of the taser was justified because he believed [plaintiff] may have been mentally ill"). That means de-escalating or trying alternatives before using force. *See, e.g.*, *Deorle*, 272 F.3d at 1283 ("In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis." (citation omitted)). This rule makes sense because people with mental illnesses may react differently, through no fault of their own, to police during unexpected encounters, and are thus deserving of more care, patience, and caution. *See infra* Section III.

### B. The District Court severely and prejudicially limited the jury's consideration of Mr. Haleck's mental disability and mental health crisis in conducting the excessive force inquiry

The District Court improperly constrained the jury's consideration of Mr. Haleck's apparent mental disability in two ways.

### 1. The District Court prevented Appellants from presenting to the jury highly relevant testimony about appropriate police practices for responding to someone exhibiting Mr. Haleck's mental health issues

The District Court excluded entire categories of testimony about appropriate police practices during encounters with people exhibiting signs of mental disability by Plaintiff's policing expert, Richard Lichten. Mr. Lichten would have testified that, for example, "it's not simply permissible to use the force . . . that may result in serious harm" to people with mental health issues. ER 433. By cutting off and striking that testimony, the District Court erroneously prevented the jury from considering how prevailing police standards and norms require approaching people displaying signs of mental disabilities with "patience and timing," and "tak[ing] things slow" with the "understand[ing] that the person they are dealing with may not be able to process rational thought and may not be able to understand orders from the officers." ER 262-63. In cases where, as here, evident mental disability plays a key role in the excessive force question before the jury, excluding such testimony deeply prejudiced Appellants and amounts to reversible error.

The District Court's decision also reflects several serious misunderstandings about the interplay between mental disability and the excessive force inquiry. Those misunderstandings permeated the District Court's decisionmaking throughout trial.

*First*, the District Court misunderstood the level of knowledge Appellee Officers needed before Mr. Haleck's mental disability could influence the excessive

force inquiry—and, in doing so, it usurped the jury's role by erroneously resolving a key fact question. Specifically, the District Court believed the relevant question was whether Appellee "Officers had any prior knowledge that Haleck suffered from a mental illness" or whether they "were told that Haleck suffered from any illness before they encountered him." ER 60-61. And because the District Court believed that Appellee Officers did not definitively "know" that Mr. Haleck had a mental disability when they used force against Mr. Haleck, *see* ER 433 ("I've had the case where people know, but this isn't that case."); ER 429-30, it barred further testimony related to mental disability, taking this question away from the jury.

But the excessive force inquiry does not depend on an officer's prior knowledge that someone has a mental disability. Subjective belief or objective perception in the moment is enough to change the scope of reasonable force. *See Vos*, 892 F.3d at 1034 ("whether the suspect has *exhibited signs of* mental illness is one of the factors the court will consider" (emphasis added)); *Glenn*, 673 F.3d at 875 ("whether the officers were or *should have been aware* that [the person seized] was emotionally disturbed" (emphasis added)). Here, there was ample evidence of both. Subjectively, at least two Appellee Officers unambiguously testified that they suspected—or believed "it could be possible"—that Mr. Haleck was mentally ill *at the time they used force* against him. *See* ER 412-13 (Officer Kardash testifying that he checked off that Mr. Haleck was "mentally deranged" "[b]ased on [Mr. Haleck's]

behavior" and "based on [his] observations at the scene"); *see also* Dkt.[4] 387 (June 3 Tr. at 34) ("with respect to Officer Critchlow and Officer Kardash's testimony, they testified that there was a possibility that he was mentally deranged"). Those two officers also memorialized that observation in their use-of-force reports by checking off "mentally deranged." *See* ER 273-76.[5] Objectively, the officers testified that "[h]e was running erratically all over King Street," Dkt. 384 (Trial Day 3 Tr.) at 39, which was enough to raise their suspicion of mental illness. This is sufficient evidence for the jury to determine that the responding officers suspected or should have known that Mr. Haleck had a mental disability, and needed to act accordingly.

*Second*, having determined that the officers did not know about Mr. Haleck's mental state, the District Court misunderstood the role of expert testimony in providing context about reasonableness of police conduct when interacting with people exhibiting mental disabilities. The District Court prevented Mr. Lichten from testifying that Appellee Officers' conduct was "unreasonable" in light of Mr. Haleck's signs of mental illness, *see id.* at 71-80, 104, because it believed that

[4] "Dkt." Denotes filings on the District Court docket.

[5] The District Court again improperly resolved facts by decreeing that the use-of-force reports might not reflect what Appellee Officers knew at the time force was used. *See* ER 432 (after Appellant's counsel noted that several Appellee Officers had checked off "mentally deranged" in their use-of-force reports, the District Court stated, "I mean, they have no ability to know that" at the time force was used).

"[p]olice practices experts may not testify whether the officers' actions were 'reasonable' or 'excessive' because those are ultimate issues left to the trier of fact." ER 59-61. But expert testimony on the reasonableness of a police officer's conduct in light of specific facts provides important context for juries. *See, e.g.*, *Crawford*, 944 F.3d at 1074 ("Crawford's expert, Scott DeFoe, opined that Dozer's 'bizarre' behavior . . . would have led a *reasonable* officer to believe that Dozer was 'either mentally ill or experiencing a mental crisis.'" (emphasis added)). Moreover, even assuming that "reasonableness" is an ultimate issue, Fed. R. Evid. 704(a) permits opinions on such "ultimate" issues. *See id.*; *see also Davis v. Mason Cnty.*, 927 F.2d 1473, 1484 (9th Cir. 1991) (deeming as "without merit" county's Rule 704 objection to plaintiffs' police expert's testimony because "[Rule] 704 allows expert witnesses to express an opinion on an ultimate issue to be decided by the jury").

*Third*, the District Court erroneously misunderstood the scope of relevance of evidence of mental disability. In excluding such evidence because it would have been relevant to unpled claims subject to a motion-in-limine, the District Court revealed that it regarded that evidence as relevant *solely* to an unpled ADA claim. *See* ER 118-20; *see also* ER 425-34. As this Court has explained, whether a person has a mental illness is not only relevant, but *must* be considered as part of an excessive force claim. *See* section I.A., *supra.* Because both claims have similar factual predicates, *see Vos*, 892 F.3d at 1037 ("The same fact questions that prevent

a reasonableness determination [under the Fourth Amendment] inform an accommodation analysis [under the ADA]."), as further explained, *infra* Section III, disability evidence and the police's mandate to comply with the ADA inform an excessive force claim even absent a disability claim. When Appellant sought to present testimony about how officers should "us[e] the[ir] Tasers with respect to people who may be mentally disabled," ER 425, Appellant sought to support his Fourth Amendment claim. This misunderstanding erroneously limited Appellant's witnesses' testimony and the jury's consideration.

**2. The District Court erroneously excluded from the jury instructions consideration of whether Mr. Haleck had a psychiatric disability**

The District Court also erred in excluding from its jury instruction on excessive force any mention of mental disability. "Jury instructions must fairly and adequately cover the issues presented, must correctly state the law, and must not be misleading." *Hunter v. Cty. of Sacramento*, 652 F.3d 1225, 1232 (9th Cir. 2011) (quoting *Dang v. Cross*, 422 F.3d 800, 804 (9th Cir. 2005)). Here, the District Court's excessive-force instruction—which excluded Appellant's proposed language of "whether it should have been apparent to Officers Chung, Critchlow, and Kardash that the person they used force against was emotionally disturbed," ER 620-21—failed to do that. *See* ER 85-86. Because the trial revealed that most of Appellee Officers perceived, suspected, or should have known that Mr. Haleck was

"mentally deranged" or "disturbed" at the time they used force, the jury was *required* to consider that. *See supra* Section I.A. By omitting consideration of evidence highly relevant to excessive force, the District Court's "jury instruction [w]as an incomplete, and therefore incorrect, statement of the law." *Hunter*, 652 F.3d at 1232 (quoting *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010)).

Neither of the District Court's justifications for that omission withstands scrutiny. First, the Court thought that "[t]he instruction is confusing as to how the jury is to construe a possibility of emotional disturbance in a case alleging unreasonable force." ER 90. The instruction, however, came nearly verbatim from Ninth Circuit Model Civil Jury Instruction 9.25.[6] Regardless of wording, inclusion of Mr. Haleck's apparent emotional disturbance among the list of factors for the jury to consider was *mandatory* under Ninth Circuit precedent, *see supra* Section I.A. At worst, the District Court should have rephrased the instruction. Second, the District Court cited "a lack of evidence that had been put forward as to whether the Defendant Officers had knowledge or should have had knowledge that Haleck was 'emotionally disturbed.'" ER 62-63. As discussed, however, the trial record already contained plenty of evidence that they had or should have known. *See supra* Section I.B.1.[7] The District Court's erroneous misunderstanding that only the officers' prior

[6] http://www3.ce9.uscourts.gov/jury-instructions/model-civil.

[7] Incident-specific evidence that most of Appellee Officers believed Mr. Haleck was "mentally deranged" was sufficient to create a fact question. But broader

knowledge mattered, *see* Section I.B.1, ignored that other evidence and resolved a fact question that should have gone to the jury.

* * *

This Court has recently observed—in another police excessive force case involving someone with mental illness—that there is "little doubt" that, while the excessive force factors are "nonexclusive," the inclusion or exclusion of a single factor can "play[] an important role in the jury's verdict" and constitute "prejudicial" error. *Crawford*, 944 F.3d at 1079-80. The District Court's multiple errors relating to Mr. Haleck's mental health, and the appropriate responsive police practices, warrant a new trial.

## II. The District Court Compounded Its Error by Allowing Testimony About "Excited Delirium Syndrome"

The District Court's decisions regarding Mr. Haleck's mental disability warrant reversal on their own, but the error is more stark when juxtaposed with the District Court's decision to allow the jury to consider an unscientific theory that

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testimony that Mr. Haleck had been diagnosed with posttraumatic stress disorder, was suffering from anxiety, and was struggling with drug abuse only bolstered that. *See* Dkt. 382 (Trial Day 1 Tr.) at 64-65, 72. A reasonable jury could easily conclude that someone with longstanding mental health issues was manifesting those issues when the officers arrived, and that Appellee Officers realized that Mr. Haleck was emotionally disturbed upon encountering him. *See Crawford*, 944 F.3d at 1078-79 ("[W]hether [plaintiff] was *in fact* mentally ill that day is relevant to whether he would have *appeared* to be mentally ill, and thus to whether [the officer] knew or should have known that [plaintiff] was mentally ill[.]" (citation omitted)).

lacks reliability and explanatory power: "excited delirium." Testimony that Mr. Haleck experienced it while being pepper sprayed and Tased should not have been allowed. "Excited delirium" lacks clear diagnostic criteria, cannot be assessed at the moment that force is used, relies on racist stereotypes, and the common factor in its application is that a person has died at the hands of law enforcement. When combined with disallowing the jury to consider Mr. Haleck's emotional distress, the decision to allow "excited delirium" testimony amounted to an impermissible thumb on the scale and demands a new trial.

### A. "Excited delirium syndrome" does not meet the threshold of reliability required for expert testimony

"Excited delirium syndrome" testimony should never have been allowed at the trial below. Expert testimony offered at trial must meet baseline benchmarks for, among other things, reliability. *See White v. Ford Motor Co.*, 335 F.3d 833 (9th Cir. 2003). "Excited delirium syndrome" does not meet the reliability threshold for several reasons.

*First*, it has a short, checkered history and lacks peer reviewed validation. Even proponent forensic medical authorities describe its "continued controversy"[8] and its role in "a number of controversies [that have] raged around whether [it] can

[8] Deborah C. Mash, *Excited Delirium and Sudden Death: A Syndromal Disorder at the Extreme End of the Neuropsychiatric Continuum*, Front. Physiol. (Oct. 13, 2016), https://www.frontiersin.org/articles/10.3389/fphys.2016.00435/full

be considered a legitimate medical entity."[9] Although general delirium disorders have existed for years, "excited delirium" as an independent descriptor "was first used in the 1980s in Miami, where unexplained deaths of prostitutes found with cocaine or other drugs in their system were attributed to excited delirium by medical examiners."[10] Those very first post mortem attributions turned out to have erroneously covered up deaths of people whom later reviews revealed "were, in fact, asphyxiated." *Id.* Despite those ignominious misidentifications in the 1980s, its use has only grown. Some medical examiners now apply the concept to drug users and "people who died while being subdued by police." *Id*. But even while some medical examiners and police experts have urged its wider use, it has not increased in reliability or utility. Relevant medical entities like the American Medical Association and the American Psychological Association do not recognize it.[11] And even the chief proponent—a man who testifies across the country as a police expert and has literally written the book purporting to explain the syndrome, Dr. Vincent

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[9] Roger W. Byard, *Ongoing issues with the diagnosis of excited delirium*, Forensic Science, Medicne and Pathology (Aug. 3, 2017), https://link.springer.com/article/10.1007/s12024-017-9904-3

[10] *See id*.; Alessandro Marazzi Sassoon, *Excited delirium: Rare and deadly syndrome or a condition to excuse deaths by police?*, Florida Today, Oct. 24, 2019, https://www.floridatoday.com/in-depth/news/2019/10/24/excited-delirium-custody-deaths-gregory-edwards-melbourne-taser/2374304001/ (quoted text).

[11] Eric Dexheimer and Jeremy Schwartz, *In fatal struggles with police, a controversial killer is often blamed*, Austin American-Statesman, May 27, 2017, https://www.statesman.com/news/20170527/in-fatal-struggles-with-police-controversial-killer-is-often-blamed

Di Maio—acknowledges that "there is no known anatomical evidence of it."[12]

*Second*, it lacks usefulness as a diagnostic tool because it does not have clear diagnostic criteria and can describe a virtually limitless set of situations. Law enforcement experts have taken advantage of that absence of definitive evidence by expanding the list of characteristics that they ascribe to "excited delirium." Different medical examiners and law enforcement experts have described excited delirium as being characterized by such disparate and wide-ranging symptoms as: acidosis, agitation, aggression, acute distress, bizarre behavior, cardiopulmonary arrest, confusion and disorientation, drug-induced delirium, excitability, non-drug-induced delirium, hallucinations, hyperthermia, immunity to pain, manic excitement, paranoia, psychomotor agitation, removal of clothing, sudden death, superhuman strength, and sweating profusely.[13] Befitting a purported condition that apparently presents in so many ways, different law enforcement experts have described "excited delirium" as stemming from underlying conditions as varied and disconnected as: use of cocaine, use of methamphetamine, use of LSD, use of marijuana, having an enlarged heart, infections, obesity, diabetes, physical overexertion, psychostimulant

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[12] Christopher Baxter, *What is excited delirium?*, NJ Advance Media, Oct. 1, 2014, https://www.nj.com/projects/excited-delirium/sidebar.html ("Identifying the syndrome relies almost entirely on symptoms and behavior exhibited before death because there is no known anatomical evidence of it, Di Maio said.")

[13] *See Extreme End*; *Ongoing issues*; *Condition to excuse deaths*, notes 8-10, *supra*; *see also Mann v. Taser Int'l*, 588 F.3d 1291, 1299 n.4 (11th Cir. 2009); *see also Hoyt v. Cooks*, 672 F.3d 972, 975 (11th Cir. 2012).

intoxication, mental illness, schizoaffective disorder, alcohol intoxication, and autism.[14] As a result, a law enforcement expert may describe virtually anyone with a wide variety of common underlying conditions, who police observe exhibiting a wide variety of symptoms shared by many common conditions, as having died from "excited delirium."

*Third*, and most concerningly, because of the timing of its application, the sole common criterion in its actual or proposed application is that someone has died in police custody as a result of police force. Proponents themselves note that "excited delirium" may be identified only after the fact because it is a "diagnosis of exclusion," or a potential explanation for deaths "when there are no other explanations."[15] *See also* ER 397. Medical examiners who apply the description now typically overlook one particular explanation: "the only common denominator in virtually every case was the involvement of law enforcement."[16] Police experts in cases across the country also regularly overlook force-based explanations to apply

[14] *See Extreme End*; *Ongoing issues*; *Condition to excuse deaths*; notes 8-10, *supra*; *see also Mann*, 588 F.3d at 1299; *Hoyt*, 672 F.3d at 975; *Weigel v. Broad*, 544 F.3d 1143, 1165 (10th Cir. 2008); *Lee v. Metropolitan Gov't of Nashville*, 432 F. App'x 435, 440 (6th Cir. 2011); *Cook v. Bastin*, 590 F. App'x 523, at *4 (6th Cir. 2014) (attributing an in-custody death to "autism-induced excited delirium during prone restraint."); *Roell v. Hamilton Cty*, 870 F.3d 471 (6th Cir. 2017); *see also* ER 397.

[15] *Fatal struggles*, *supra* note 11.

[16] *Condition to excuse deaths*, *supra* note 10.

"excited delirium."[17] No matter the underlying condition that purportedly gives rise to it or the outward symptoms with which it purportedly manifests, "the term appears almost exclusively on medical reports for deaths in custody or that otherwise involve law enforcement."[18] "Excited delirium syndrome has raised continued controversy regarding the cause and manner of death of some highly agitated persons held in police custody" because it requires ignoring that many of those people were, like Mr. Haleck, "restrained or incapacitated by electrical devices."[19]

### B. Even beyond reliability, excited delirium testimony should not have been allowed because it relies on racist stereotypes and excuses police violence against people of color after the fact

"Excited delirium" poses independent problems even aside from its status as unreliable junk science. Two recurring features of "excited delirium" expert testimony, including that offered here, undermine our constitutional promise of a racially equitable justice system. First, testimony about and application of "excited delirium" relies on racist stereotypes about minorities, about whom medical

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[17] *See Weigel*, 544 F.3d at 1165 (ignoring that officers had "appl[ied] weight to the back of a face down individual handcuffed behind his back" before that man died, and asserting that the cause of death was not asphyxia because he "failed to respond to resuscitation," *id.* at 1166 n.7); *see also Lee*, 432 F. App'x at 440 (same); *Mann*, 588 F.3d at 1304 (attributing death to "excited delirium by excluding use of Taser, despite allowing "that the use of the Taser probably made the situation worse").

[18] *Condition to excuse deaths*, *supra* note 10.

[19] *Extreme end*, *supra* note 8.

examiners most commonly and disproportionately apply the description. Second, because of its root in racial stereotypes and the manner in which law enforcement officers rely on it, "excited delirium" exists mainly to absolve police of excessive force against mainly people of color after the fact. Given these features, "excited delirium" testimony should not have been allowed here.

Descriptions of how "excited delirium" manifests in people allegedly experiencing it cause racial inequities in the legal system. Two of the most commonly cited symptoms of people experiencing "excited delirium" are imperviousness to pain and superhuman strength. *See, e.g. Mann*, 588 F.3d at 1299 n.4 (citing "great strength" and "imperviousness to pain"); *Cook*, 590 F. App'x at *4 (describing man purportedly experiencing "excited delirium" picking "himself and everybody off the ground with one hand"); *Waters v. Coleman*, 632 F. App'x 431, *2 (10th Cir. 2015) ("It is often impossible to control individuals experiencing excited delirium using traditional pain compliance techniques"); *Callwood v. Jones*, 727 F. App'x 552 (11th Cir. 2018) ("Multiple officers testified that Illidge exhibited 'superhuman' strength").

Both of those physical characteristics have a long and sordid history of being attributed to people of color—and specifically Black people—without supporting evidence. This "history of the super-humanization of blacks go[es] all the way back

to slavery."[20] Back then, otherizing Black people helped preserve a racist institution. But even since slavery ended, the underlying perception issues have not gone away, instead manifesting in new ways. Racial bias in perception of strength manifests as perceiving heightened threat from people of color, especially Black people.[21] Perception of threat posed matters not just for real-time police encounters, but even infects formal proceedings in the legal system—racist perceptions of Black juveniles having enhanced strength "significantly more similar to adults in their inherent culpability" has led to harsher sentences for the same crimes.[22] Most relevant to this brief, racially biased perceptions of people of color having superhuman strength or being impervious to pain drive officers to use more force against people of color. If an officer believes that a person he or she encounters possesses superhuman strength and cannot feel pain, the amount of force that he or she uses to subdue that person

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[20] Eric Westervelt, *Examining the Myth of the 'Superhuman' Black Person*, NPR, Nov. 30, 2014, https://www.npr.org/2014/11/30/367600003/examining-the-myth-of-the-superhuman-black-person; *see also* Adam Waytz, Kelly Marie Hoffman, and Sophie Trawalter, *A Superhumanization Bias in Whites' Perceptions of Blacks*, Social Psycholigcal and Personality Science (Mar. 2014), https://www.researchgate.net/publication/268802283_A_Superhumanization_Bias_in_Whites%27_Perceptions_of_Blacks

[21] Catherine A. Cottrell and S.L. Neuberg, *Different Emotional Reactions to Different Groups: A Sociofunctional Threat-Based Approach to "Prejudice,"* Journal of Personality and Social Psychology, 88(5) (2005), https://psycnet.apa.org/record/2005-04675-004

[22] Aneeta Rattan, Cynthia S. Levine, Carol S. Dweck, and Jennifer L. Eberhardt, *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, PLoS ONE 7:5 (May 23, 2012), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0036680

rises.[23] When officers use more force, "they use ['excited delirium'] as an excuse after an arrest turns deadly."[24] And the cases in which they cite "excited delirium" as requiring excessive force disproportionately involve "black and Hispanic men d[ying] in custody." *Id*.

As discussed in section II.A., *supra*, the common denominator of deaths attributed to "excited delirium" is not any particular underlying condition or medical cause, but rather, involvement of law enforcement. Even proponents of "excited delirium" describe it as a diagnosis of exclusion—a cause to rely on when no other explanations fit. *See* Section II.A., *supra*. But in attributing deaths to "excited delirium" despite force used by law enforcement—whether hog-tying, physical body pressure, or, as here, tasers—medical examiners and police experts must exclude that force.[25] One coroner recently attributed a death to "excited delirium" despite

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[23] Beyond direct force, officers also use it to justify asking paramedics to impose heart-stopping medical interventions like ketamine even absent immediate danger. *See* Andy Mannix, *At urging of Minneapolis police, Hennepin EMS workers subdued dozens with a powerful sedative*, Minneapolis Star Tribune, June 15, 2018, https://www.startribune.com/at-urging-of-police-hennepin-emts-subdued-dozens-with-powerful-sedative/485607381/

[24] Alysia Santo, *As George Floyd Died, Officer Wondered About "Excited Delirium,"* The Marshall Project, June 4, 2020, https://www.themarshallproject.org/2020/06/04/as-george-floyd-died-officer-wondered-about-excited-delirium

[25] The seminal text on "excited delirium" suggests a bias to do so. Dr. Vincent Di Maio and his wife, as co-authors, dedicated the book to "all law enforcement and medical personnel who have been wrongfully accused of misconduct and deaths due to excited delirium syndrome." Theresa G. De Maio and Vincent J.M. Di Maio, *Excited Delirium Syndrome: Cause of Death and Prevention*, 1 (2006).

"various abrasions and contusions, injuries from the taser barbs, and four broken ribs." *Roell*, 870 F.3d at 478. "The report, however, did not find that any of these injuries contributed to Roell's death." *Id*. Even officers who "did not follow every [department] protocol" saw their actions excused because training materials noted that "the use of a taser might be effective in controlling an individual suffering from excited delirium." *Id*. at 486.

Ultimately, "excited delirium" exists to excuse deaths of people at the hands of law enforcement.[26] And they are, disproportionately, people of color: "Medical examiners are more likely to determine black and Hispanic subjects died of excited delirium than white subjects."[27] Hawai'i is not immune to such racial bias—anti-Blackness exists here in its own pernicious form.[28] And the anti-Blackness that exists elsewhere extends here to Native Hawaiians, Samoans, Micronesians, and other Pacific Islanders, who "assume the role of blackness."[29] These groups suffer

[26] *See McCue v. City of Bangor*, 838 F.3d 55, 59-60 (1st Cir. 2016) (involving audio of officers discussing how "the last thing we need is for [the decedent] to die from excited delirium in the back of the car," about an already-unconscious man who they had subjected to "prolonged prone restraint").
[27] *Fatal struggles*, *supra* note 11.
[28] *See, e.g.*, Anita Hofschneider, *HPD Chief Says There's Less Racial Bias in Hawaii. She's Wrong*, Honolulu Civil Beat (June 29, 2020), https://www.civilbeat.org/2020/06/what-implicit-bias-looks-like-in-hawaii.
[29] Charles R. Lawrence III, *Local Kine Implicit Bias: Unconscious Racism Revisited (Yet Again)*, 37 U. Haw. L. Rev. 457, 468 (2015).

stereotyping as violent, hypermasculine, and warrior-like.[30] Unsurprisingly, that manifests in "disproportionately high rates of Pacific Islander arrest and detention and police assaults on unarmed or minimally armed Samoan adults" in Hawai'i.[31] Given that Mr. Haleck was Samoan, *see* Dkt. 382 at 61, the application of "excited delirium" implicates exactly that issue in this case.

* * *

For all these reasons, "excited delirium" does not meet the reliability standard for expert testimony and this Court should not countenance the use of such a racially-biased post-hoc justification for state violence.

## III. The ADA Applies to the Arrest and Detention of People With Disabilities, and Should Have Informed Appelant Officers' Response to Mr. Haleck's Mental Health Crisis

Although Appellants did not plead a claim under the Americans with Disabilities Act ("ADA"), the legal duties that police have to people with disabilities are directly relevant to this case. Anything this Court says about this case must reflect those duties, and the disproportionate share of police encounters involving people with disabilities. About half of all fatal police interactions involve persons

[30] *E.g.*, April K. Henderson, *Fleeting Substantiality: The Samoan Giant in US Popular Discourse*, 23 The Contemporary Pacific 269, 292 (2011), https://core.ac.uk/download/pdf/10598727.pdf; Katherine Irwin & Karen Umemoto, *Being Fearless and Fearsome: Colonial Legacies, Racial Constructions, and Male Adolescent Violence*, Race and Justice (2012), https://journals.sagepub.com/doi/abs/10.1177/2153368711436014.
[31] Henderson, *supra* note 30, at 289.

with psychiatric disabilities.[32] Because 26 percent of adults in the United States have a disability,[33] police departments must adopt and implement practices that consider disabilities during all police interactions. Here, the need for de-escalation and an appropriate response to Mr. Haleck was so obvious that Appellees' failure to provide them violates not only the ADA but also his constitutional rights. While police must sometimes confront immediate threats or make split-second judgments, this was not such a case. When the officers encountered someone in the throes of a mental health crisis, they deployed a Taser three times and sprayed him with pepper spray twelve to fourteen times. When someone like Mr. Haleck is unarmed, and multiple officers believe him to be experiencing a mental health crisis, *see* ER 265-78, the law and constitution require de-escalation instead of overwhelming force.

### A. The ADA plainly applies to arrests and detentions

Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II proscribes disability-related discrimination in the provision of public accommodations, *see id.* § § 12182, 12184, providing that "no

[32] Kelley Bouchard, *Across Nation, Unsettling Acceptance When Mentally Ill in Crisis are Killed*, Portland Press Herald, Dec. 9, 2012, https://www.pressherald.com/2012/12/09/shoot-across-nation-a-grim-acceptance-when-mentally-ill-shot-down.

[33] *Disability Impacts All of Us*, Cntrs. for Disease Control & Prevention (Sept. 9, 2019), https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html.

qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id*. § 12132. Committee reports on the ADA confirm Congress's intent to cover all police agency activities, including arrests. *See* House Comm. Judiciary, H.R. Rep. No. 101 485, pt. 3, at 50 (1990), *reprinted* in 1990 U.S.C.C.A.N. 445, 473.[34] The Department of Justice has issued and interpreted implementing regulations that confirm Title II's application to arrests and detention. *See* 28 C.F.R. § 35.130(b)(7)(2016); 28 C.F.R. pt. 35, app. B (2014) ("The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities.").

The Ninth Circuit has already agreed with "the majority of circuits to have addressed the question that Title II applies to arrests." *Sheehan v. City & Cnty. of S.F.,* 743 F.3d 1211, 1231-33 (9th Cir. 2014), *rev'd on other grounds*, 575 U.S. 600 (2015); *accord Vos*, 892 F.3d at 1036 (noting that *Sheehan* controls). The ADA unambiguously applied to Appellee Officers' arrest and detention of Mr. Haleck.

### B. Although Appellees suspected Mr. Haleck had a mental disability, they did not provide reasonable modifications to Mr. Haleck

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

As Title II of the ADA applies to law enforcement activities, the reasonable modification requirement applies to arrests. *See* 27 C.F.R. § 35.130(b)(7); *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004); *Olmstead v. L.C. ex rel. Zimring,* 527 U.S. 581, 591-92 (1999). Purportedly "exigent circumstances" do not excuse police officers of the responsibility to consider them. *See Waller ex rel. Estate of Hunt v. City of Danville*, *Va.*, 556 F.3d 171, 172, 175 (4th Cir. 2009) (explaining that exigency is merely "one circumstance that bears materially on the inquiry into the reasonableness under the ADA."). Instead, courts examine the factual circumstances of an arrest to determine whether the accommodations provided or demanded were reasonable. *Sheehan*, 743 F.3d at 1232 (determining that exigent circumstances merely "inform the reasonableness analysis under the ADA."); *see also Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.*, 673 F.3d 333, 339 (4th Cir. 2012) (holding that "the consideration of exigent circumstances is included in the determination of the reasonableness of the accommodation.")

In the present case, facts demonstrate that Appellees could easily have modified their usual practices. When Appellee Officers arrived on scene and encountered Mr. Haleck, he was unarmed and not committing (nor even suspected of committing) any crimes. Appellees realized that Mr. Haleck might have been experiencing a mental health crisis. ER 266-78. Not only was Mr. Haleck

experiencing a mental health crisis after years with a mental disability,[35] Mr. Haleck did not threaten violence. Mr. Haleck responded to the officers with respect and repeated "I'm sorry, I'll listen." ER 497-98. Nevertheless, within approximately three minutes of arriving on scene, Officers Critchlow and Chung pulled out pepper spray and Tasers. *Id*. at 265-78. The officers declined de-escalation or non-violent crisis intervention. They did not consider the effect that would have on someone in Mr. Haleck's state, use nonthreatening communications, or use time and space "to diffuse the situation rather than precipitating a deadly confrontation." *Sheehan,* 743 F.3d at 1232 (describing crisis intervention tactics). Instead, the officers deployed twelve to fourteen shots of pepper spray directly at Mr. Haleck's face, forcing Mr. Haleck to move around in the street in an unpredictable and disoriented fashion. ER 265-78. Mr. Haleck remained unthreatening to the officers despite being disoriented by both the pepper spray and his mental health crisis when Officer Chung deployed his Taser directly at Mr. Haleck's chest while Mr. Haleck continued saying "I'm sorry" with both hands raised. ER 275.

[35] Although the Court erroneously barred the jury from considering that, *see* section I., *supra*, the record makes clear that Mr. Haleck suffered PTSD and suffered with mental health issues for years. Mr. Haleck was a disabled veteran that deployed repeatedly in the National Air Guard to disaster sites and war zones, and was diagnosed with a posttraumatic stress disorder disability upon return. He struggled for years with mental health issues.

Appellee Officers undertook use of force apparently without considering reasonable modifications at all. If the Officers thought traffic posed a dangerous threat—despite all three testifying that traffic was "at a standstill" or stopped when they arrived, ER 273, 275-78, 414, 477—they could have directed traffic to manage the situation. Even while engaging Mr. Haleck directly, officers bypassed less dangerous crisis intervention and de-escalation tactics as reasonable modifications instead of quickly using force. Those decisions exemplify a common problem: officers rarely consider accommodations that could prevent calamity. When officers have "the time and opportunity to assess the situation and potentially employ. . . accommodations . . . including de-escalation, communication, or specialized help," police should engage in the reasonable modifications process that is required by law to avoid the unnecessary deaths of hundreds of Americans with disabilities in police encounters. *Vos*, 892 F.3d at 1037.

### C. Police officers detaining or arresting people with disabilities must account for disability, as failing to consider disability in arrest and detentions often has deadly consequences

Police officers must implement practices that improve safety in police encounters with people with disabilities, particularly psychiatric disabilities. Because people with psychiatric disabilities may not understand police commands or what is happening, properly trained police should expect to encounter people who do not respond or comply quickly. An individual apparently resisting detention by

slowly evading officers, *especially* when unarmed, does not excuse a failure to engage in de-escalation or other responsive tactics. In fact, such strategies have a proven track record of success in these very situations.[36]

Police officers' responsibility under the ADA does not depend on particularized knowledge of an individual's disability before arriving at a scene either. Given the large percentage of the general population that has one or more disabilities, and the rates with which those people encounter police, police know the clear likelihood that someone they encounter has a disability and must routinely consider de-escalation accommodations. This obligation matters even more where, as here, officers suspect a mental health or disability issue upon arrival. Resorting to force without attempting proven de-escalation techniques is unreasonable and violates the law.

Mr. Haleck's death, like many untimely deaths of people with disabilities in police encounters—not to mention non-fatal injuries—could have been avoided.

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[36] Crisis Intervention Training models advocate for de-escalation even with armed individuals, and succeed. *See, e.g.,* Betsy Vickers, *Memphis, Tennessee, Police Crisis Intervention Team* 4, 10 (U.S. Dep't of Justice, Bureau of Justice Assistance, Practitioner Perspectives Ser. No. NCJ 182501, 2000) (crisis intervention in Memphis led to reduced use of deadly force, and fewer officer injuries); Paul Davis, *Crisis Intervention. Law Enforcement,* Providence Journal, Jan. 18, 2015, at 1 (CIT training involving persons with weapons); Jennifer Skeem & Lynne Bibeau, *How Does Violence Potential Relate to Crisis Intervention Team Responses to Emergencies?*, Psychiatric Services (Feb. 2008) at 203 (CIT officers used force conservatively, even with armed subjects).

Experts across the country have outlined safe and effective ways for officers to do their jobs while accounting for common disabilities. To ensure safe and nondiscriminatory interactions with persons with disabilities, police departments must employ these crisis intervention and de-escalation strategies, and the failure to do so not only violates the ADA, but also constitutes excessive force.

## CONCLUSION

*Amici* ask the Court to reverse the District Court and remand for a new trial that allows the jury to consider Mr. Haleck's mental and emotional state, and excludes evidence and testimony concerning "excited delirium."

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I, Jim Davy, hereby certify as follows:

(1) the Brief of Amicus Curiae complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 14 point Times New Roman font;

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Dated: July 17, 2020

/s/ James Davy

James Davy, Esq.

**CERTIFICATE OF SERVICE**

I, Jim Davy, certify that on July 17, 2020, I caused a copy of this Brief of Amicus Curiae to be filed with the Clerk of Court and served on all counsel of record using the CM/ECF system.

Dated: July 17, 2020

/s/ James Davy

James Davy, Esq.