IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10342

CHAD WILSON, Individually and as next friend of S.W.; MARTHA WILSON, Individually and as next friend of S.W.,
Plaintiff-Appellant,

v.

CITY OF SOUTHLAKE; SOUTHLAKE POLICE DEPARTMENT; RANDY BAKER, Individually
Defendant-Appellee,

On Appeal from the United States District Court
for the Northern District of Texas

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

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CERTIFICATE OF INTERESTED PERSONS

No. 18-10342

The undersigned counsel of record certifies that the following listed persons and entities have an interest in this amicus brief as required by Fifth Circuit Rule 29.2. This Statement of Interest is made so that the judges of this Court may determine possible disqualification or recusal.

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H. Federal Rule of Appellate Procedure 29(4)(A), (E) Statements

Amici have no parent corporations, subsidiaries, or affiliates that have issued shares to the public.

Amici have no direct or indirect interest associated with the parties to this matter, or to their attorneys or counsel, though *Amici* and their members have a general interest in the issue and outcome of the case.

No party's counsel authored this brief in whole or in part, nor has a party or their counsel contributed money to fund this brief.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

1. Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, Council of Parent Attorneys and Advocates, Inc. ("COPAA"), Disability Rights Texas ("DRTx"), National Center for Youth Law ("NCYL"), and Texas Appleseed move for leave to file a brief as *amici curiae* in support of Appellant.

2. The prospective *Amici* have sought consent for this filing from parties' counsels. Counsel for Appellants consents; counsel for Appellees does not consent. The proposed *amicus* brief is filed herewith.

3. This case presents an important question about the scope of the exception this Court created to the Americans with Disabilities Act ("ADA") in *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000). Whereas *Hainze* set aside ADA protections only in exigent circumstances involving a threat to human life, the district court's holding broadens that exception to far less severe circumstances—here, the response of school resource officers ("SROs") to the in-school behavior of an eight-year-old child with autism. An affirmance would not only eviscerate ADA protections for students with disabilities in schools but would also deepen an already existing circuit split on whether exigent circumstances excuse the ADA's application.

4. Prospective *Amici* are national and state organizations dedicated to protecting the rights of students with disabilities in this Circuit and beyond. *Amici* have extensive experience enforcing rights under the ADA and Section 504 in the school context. Based on their experience in this law and their work to further the

education and civil rights of students with disabilities, *Amici* are uniquely positioned to inform the Court of the wide-ranging implications the district court's application of *Hainze* could have for students with disabilities in this Circuit. Because of *Amici*'s commitment to enforcing rights under the ADA and Section 504, they are deeply invested in the reversal of the district court's misapplication of *Hainze*.

5. Consistent with Fifth Circuit Rule 29.2, the proposed brief "avoid[s] the repetition of facts or legal arguments contained in the principal brief and . . . focus[es] on points. . . not adequately discussed" therein. Whereas Appellant's brief focuses on the district court's misapplication of the summary judgment standard, the proposed *amicus* brief focuses on how the district court's misapplication of *Hainze* jeopardizes the rights of students with disabilities in this Circuit.

6. The prospective *Amici* are uniquely situated to assist with this issue, and for the foregoing reasons, COPAA, DRTx, NCYL, and Texas Appleseed respectfully request leave to file the attached *amicus curiae* brief.

Date: August 17, 2018

Respectfully Submitted,

/s/ Meagan D. Self

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CERTIFICATE OF CONFERENCE

In accordance with 5th Cir. R. 27.4, the undersigned certifies that on August 14, 2018, consent to file and *amici curiae* brief was sought from parties' counsel. Only counsel for Appellants consents.

/s/ Meagan D. Self
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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 32(g)(1) and 27(d)(2)(a) because it contains 416 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f) and the Rules of this Court.

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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond.

/s/ Meagan D. Self
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CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on August 17, 2018.

/s/ *Meagan D. Self*
Meagan D. Self

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FOR THE FIFTH CIRCUIT

No. 18-10342

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v.

CITY OF SOUTHLAKE; SOUTHLAKE POLICE DEPARTMENT; RANDY BAKER, Individually
Defendant-Appellee,

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BRIEF OF COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.; DISABILITY RIGHTS TEXAS; THE NATIONAL CENTER FOR YOUTH LAW AND TEXAS APPLESEED AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND URGING REVERSAL

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STATEMENT REGARDING ORAL ARGUMENT

This case presents an important question about the scope of the exception this Court created to the Americans with Disabilities Act ("ADA") in *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000). Whereas *Hainze* set aside ADA protections only in exigent circumstances involving a threat to human life, the district court's holding broadens that exception to far less dire circumstances—here, the response of school resource officers ("SROs") to the in-school behavior of an eight-year-old child with autism. *Amici* are four organizations dedicated to protecting the rights of students with disabilities and ensuring that they obtain a free and appropriate public education ("FAPE"). Counsel for *Amici* respectfully request leave to participate in oral argument to assist the Court in considering the impact the misapplication of *Hainze* could have on students with disabilities and their access to FAPE within the Fifth Circuit.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities have an interest in this amicus brief as required by Fifth Circuit Rule 29.2. This Statement of Interest is made so that the judges of this Court may determine possible disqualification or recusal.

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No party's counsel authored this brief in whole or in part, nor has a party or their counsel contributed money to fund this brief.

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INTEREST OF AMICI CURIAE

Amici are national and state organizations dedicated to protecting the rights of students with disabilities in this Circuit and beyond. *Amici* have extensive experience enforcing rights under the ADA and Section 504 in the school context. Based on their experience in these laws and their work to further the education and civil rights of students with disabilities, they are uniquely positioned to inform the Court of the wide-ranging implications the district court's application of *Hainze* could have for students with disabilities in this Circuit.

Council of Parent Attorneys and Advocates, Inc. ("COPAA") is a nonprofit organization for parents of children with disabilities, their attorneys and advocates. COPAA provides training and resources for advocates and attorneys to help each child obtain a free, appropriate public education, and meaningful access to services and supports guaranteed by Section 504, the ADA, and other statutes.

Disability Rights Texas ("DRTx") is the federally-designated legal protection and advocacy agency for people with disabilities in Texas. DRTx's mission is to help people with disabilities understand and exercise their rights under the law and ensure their full and equal participation in society. DRTx accomplishes its mission by providing direct legal assistance to people with disabilities, protecting the rights of people with disabilities through the courts and justice system, and educating and informing policy makers about issues that impact the rights and services for people with disabilities. A significant portion of DRTx's work is representing students with

disabilities and their families throughout the state of Texas to secure appropriate education services from public schools.

The National Center for Youth Law ("NCYL") is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities necessary for healthy and productive lives. NCYL provides representation to children and youth in cases that have a broad impact and has represented many children with disabilities in litigation and class administrative complaints to ensure their access to appropriate and non-discriminatory services. NCYL engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL pilots collaborative reforms with state and local jurisdictions across the nation to improve educational outcomes of children in the foster care and juvenile justice systems, with a particular focus on improving education for system-involved children with disabilities.

Texas Appleseed is a non-profit public interest law center that advocates for systemic reforms to address unjust laws and policies that impact Texans. Appleseed has worked to enact local- and state-level reforms that ensure children are not pushed out of their classrooms and into the "school-to-prison pipeline" through the use of punitive and harmful school discipline and policing practices. In addition to engaging in legislative and legal advocacy, and providing resources and assistance to support community-based advocacy, Texas Appleseed has researched and published reports

related to exclusionary discipline, school policing, and the disproportionate impact that these approaches have on children of color and students with disabilities.

SUMMARY OF ARGUMENT

In *Hainze v. Richards*, this Court drew a line on when Title II of the Americans with Disabilities Act ("ADA") requires police to make reasonable accommodations for people with disabilities: it does not apply in exigent, life-threatening circumstances. The district court's holding now moves that line substantially, denying the protections of Title II in a broad range of circumstances far beyond what this Court contemplated in *Hainze*.

There is already a significant circuit split between this Court and at least three other circuits, all of which hold that Title II still applies even in exigent circumstances, but that such, circumstances should be considered in the "reasonableness" determination. This disagreement is not a distinction without difference courts may dismiss Title II claims on summary judgment (as here) if Title II does *not* apply, but a jury must decide what are reasonable accommodations if Title II *does* apply. Saving for another day whether the Court should retain *Hainze v. Richards* as its controlling precedent, the district court's expansion of the *Hainze* exception exacerbates the circuit split.

Most would agree that truly life-threatening circumstances call for a different response by law enforcement than more typical interactions. The outcome in *Hainze* thus may have been the same even if it were analyzed under Title II consistent with the other circuits' approach. That cannot be said here. The district court's holding moves the line this Court drew in *Hainze* from protecting human life to, now,

depriving Title II protection for an eight-year-old child with autism acting out at school. In doing so, the district court necessarily expands the *Hainze* exception to encompass all circumstances in between. The result is a blanket exclusion of Title II protections for individuals with disabilities of any age in almost any interaction with law enforcement, and an even wider split between this Court and its sister circuits.

While threatening Title II rights in all contexts, the district court's extension of the *Hainze* exception would have an especially disastrous impact in schools. Data suggests that the increased presence of school resource officers ("SROs")[1] in schools (who often lack training about the needs of students with disabilities) is already causing students with disabilities to be arrested at a rate disproportionate to their peers without disabilities. If SROs are not required to comply with the ADA during school-related arrests, schools and law enforcement will have little incentive to ensure that SROs do not criminalize school-related behavioral problems resulting from a student's disability. The more time students with disabilities spend dealing with the juvenile justice system, the less time they spend in classrooms receiving an education and the support needed to address problem behaviors. In short, the district court's opinion threatens to eviscerate ADA protections for children with disabilities where they need them the most—in schools.

[1] In this brief, *Amici* use the term "SRO" or to refer, generally, to any school police officer, whether they are employed by a school district, school district police department, or other law enforcement agency.

ARGUMENT

I. The District Court's Decision Widens The Existing Circuit Split Concerning This Court's Decision In *Hainze v. Richards*.

The district court interpreted this Court's holding in *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) in determining that Title II of the ADA, 42 U.S.C. § 12131 *et seq.,* which "impose[s] upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals,"[2] applies to an SRO's in-school arrest of an eight-year-old child with autism. In holding it does not, the district court broadened the exception this Court established in *Hainze* in a way that, if affirmed, would widen the split between this Court and other circuits.

There is no question that *Hainze* has been the controlling precedent in this Circuit since this Court was among the first to address the issue almost twenty years ago. Other circuits that have addressed the issue since then, however, have disagreed and there is now a circuit split with at least three other federal appellate courts.

The disagreement is fundamental. In *Hainze*, the Court held that Title II of the ADA has no application in life-threatening exigent circumstances:

> 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.

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[2] *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 n.11 (5th Cir. 2005) (citing 42 U.S.C. § 12131).

207 F.3d at 801. The Fourth, Ninth, and Eleventh Circuits all disagree.[3] *See Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part on other grounds, cert. dismissed in part sub nom. City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765 (2015); *Seremeth v. Bd. of Cty. Comm'rs Frederick Cty.*, 673 F.3d 333, 339 (4th Cir. 2012); *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1085 (11th Cir. 2007). Instead, those Circuits hold that Title II applies to *all* arrests of disabled individuals, and that "exigent circumstances inform the reasonableness analysis under the ADA . . . ." *Sheehan v. City & Cty. of San Francisco*, 743 F.3d at 1232.; *see also Bircoll*, 480 F.3d at 1085 ("The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance."); *Seremeth*, 673 F.3d at 339 ("We find that while there is no separate exigent-circumstances inquiry, the consideration of exigent circumstances is included in the determination of the reasonableness of the accommodation.").

While *Hainze* remains the applicable law of this Court in the absence of *en banc* review or an intervening Supreme Court decision, there is no need to widen the circuit split by expanding the *Hainze* exception. This Court's precedent currently provides that Title II does not apply to police responses in life-threatening circumstances, but

[3] In 2016, the United States Supreme Court granted certiorari to address this circuit split, but then dismissed the writ as improvidently granted because the parties had failed to address it in briefing or oral argument. *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1773–74 (2015).

allows for Title II's application otherwise. Accordingly, exigent but non-life-threatening circumstances can be considered as part of Title II's reasonableness inquiry, consistent with the other circuits. The district court's holding would change that, making clear that Title II does not apply in *any* exigent circumstances (regardless of whether there is any threat to human life) while also expanding what constitutes an exigent circumstance to include even the response of SROs to the in-school outbursts of an eight-year-old child. *See infra* Section II. The range of other circumstances that would likewise be stripped of Title II protection under the district court's approach is practically limitless. Accordingly, while this Court is presently bound by *Hainze*, it should nonetheless be mindful of the state of the current circuit split on this issue and not unnecessarily widen that split.

II. This Court's *Hainze* Exception Is Narrow and Designed to Protect Police Officers and the Public In Life-Threatening Situations.

There is no question that this Court's decision in *Hainze* was narrow and created an exception to Title II of the ADA that applies only in truly extenuating, life-or-death circumstances. The district court's application of the *Hainze* exception here, however, is a substantial expansion of this narrow exception. This Court's affirmance of that expansion on appeal would eliminate Title II protections in most if not all interactions between police and individuals with disabilities—effectively overruling this Court's prior opinions extending Title II to such interactions. *See Windham v.*

Harris Cty., Tex., 875 F.3d 229, 235–36 (5th Cir. 2017) (collecting cases going back to 2002).

Hainze presented an extreme situation completely unlike the circumstances here. In *Hainze*, police officers responded to a 911 call that an armed, mentally-ill and intoxicated adult was threatening to kill himself or commit "suicide by cop." 207 F.3d at 797. On arrival at a convenience store parking lot, officers spotted the subject standing by an occupied vehicle with one hand on the door and the other hand holding a knife. *Id.* When an officer ordered him to step away from the vehicle, he responded with obscenities and walked toward the officer, still holding the knife and ignoring repeated orders to stop. *Id.* The officer shot him when he was within four to six feet. *Id.* Approximately 20 seconds elapsed from the time the officers pulled into the parking lot until the officer shot the subject. *Id.*

This Court held that Title II did not apply in those circumstances, stressing that the officer's action was "*a quick discretionary decision made in self-defense* and for the safety of those at the scene," where hesitation "in the course of making such split-second decisions" could result in the loss of human life. *Id.* at 801–02 (emphasis added). In establishing this exception, the Court did not identify a textual basis for the exception but reasoned that Congress did not intend to fulfill the ADA's objective "at the expense of the safety of the general public." *Id.* at 801. It follows that this exception

does *not* apply—and officers *are* required to comply with Title II—when no imminent threat to human life exists.[4]

Until now, district courts in this Circuit have applied the *Hainze* exception only in situations presenting an imminent threat to human life. These truly life-threatening situations have included a man lunging towards police officers with two knives when police broke through his barricaded door, *Rockwell v. City of Garland, Tex.*, No. 3:08-CV-0251-M, 2013 WL 4223223, at *2 (N.D. Tex. Aug. 14, 2013), and another man stealing a gun and engaging in a standoff with SWAT officers, *Lincoln v. City of Colleyville, Tex.,* No. 4:15-CV-918-A, 2016 WL 8710478, at *6 (N.D. Tex. Mar. 1, 2016), *aff'd sub nom. Lincoln v. Barnes*, 855 F.3d 297 (5th Cir. 2017). This Court, meanwhile, has clarified that officers' on-site investigation of a man who had just caused a car accident and "appeared to be under the influence of drugs or alcohol" would not have presented sufficiently "exigent circumstances" for the exception to apply. *Windham*, 875 F.3d at 232, 235 n.4. This Court and district courts applying its precedent have thus consistently confined the *Hainze* exception to only those circumstances involving imminent, life-threatening harm.

The district court below, however, has now expanded this narrow exception to apply to an eight-year-old child with autism standing in a school hallway holding a

[4] Notably, the outcome in *Hainze* would likely have been the same even if the Court had taken the approach adopted by other circuits, in which exigency is evaluated under Title II's reasonableness prong. Instead, however, the Court set aside Title II altogether in these circumstances, as noted above.

jump rope with no other students around. The district court's expansion not only stretches the exception far beyond the life-threatening circumstances for which the Court created it, but, by extending all the way to a young child in school, also dramatically expands the meaning of exigent circumstances in an unwieldy, unpredictable way. *See United States v. Menchaca-Castruita*, 587 F.3d 283, 289 (5th Cir. 2009) (providing that "[a]s a general rule, exigent circumstances exist when there is a genuine risk that officers or innocent bystanders will be endangered, that suspects will escape, or that evidence will be destroyed"). If an eight-year-old child threatening to use a jump rope as a weapon while isolated from others in a school hallway presents sufficient exigent circumstances to disregard all Title II protections, it is hard to contemplate any meaningful limit on this exception. Likewise, future plaintiffs will be hard-pressed to overcome summary judgment in any Title II case involving interactions with police.

III. The District Court Erred In Determining the *Hainze* Exception Barred Appellant's ADA Claim.

The district court erred in applying the *Hainze* exception here, because the record, viewed in the light most favorable to the Appellant, does not establish that the harm posed by S.W. was either imminent or life-threatening. S.W. was an eight-year-old boy with autism, separation anxiety disorder, and oppositional defiant disorder, who was brought to the ground and then arrested and handcuffed at his elementary school by Officer Baker, an SRO. ROA. 18-10342.591, 593. Officer Baker forced

S.W. into a chair while he was still handcuffed, sat "close to and directly facing the student," and engaged in a shouting match with S.W. until his parents arrived twenty minutes later. *Id.*

Relying on this Court's decision in *Hainze*, the district court concluded that, as a matter of law, S.W. was not entitled to ADA protection because before the SRO had arrived, S.W. had struck a teacher, thrown coffee, and was holding a lightweight school-provided jump rope (which S.W. had called "home built nun-chucks") when the SRO approached him. ROA.18-10342.593. The district court rejected Appellant's argument that "an eight year old child with a jump rope can hardly create the level of life-threatening and imminent concern" required under *Hainze*, and instead found that, even viewing the facts in the light most favorable to Appellant, the case fell within "the type of police enforcement that the Fifth Circuit originally carved out the exception to address." ROA.18-10342.750. To the extent S.W.'s actions required some sort of response, those facts could have been properly considered in a jury's analysis of whether Officer Baker's actions included reasonable Title II accommodations for S.W.'s disabilities. Instead, the district court denied the application of Title II at the outset and dismissed the claim altogether.

The district court's opinion misapplied *Hainze* in two significant ways. First, the option lacks any analysis of whether S.W.'s conduct was life threatening or even likely to cause serious bodily harm. Any threat posed by an eight-year-old hitting an adult or twirling a jump rope is significantly less than the apparent threat posed by the

suicidal adult in *Hainze* who was armed with a knife. 207 F.3d at 797. Unlike a knife, the record lacks any evidence to suggest that the jump rope or "home built nun-chucks" could cause life-threatening harm. ROA.18-10342.593. The district court's analysis also ignores that S.W. was a child small enough to be carried out of the school building by his father. ROA.18-10342.594. It is therefore questionable whether S.W. could cause the SROs any serious harm—much less life-threatening harm.[5]

Second, the district court's opinion fails to consider whether any threat posed by S.W. was imminent. S.W. had retreated into the hallway at the time of the arrest. ROA.18-1034.593. The record is silent on whether anyone else was present in the hallway besides S.W., Officer Baker, and another SRO. In *Hainze*, the Court found the harm to be clearly imminent, as the individual with a disability continued approaching the officer with a knife, despite repeated commands to stop, until he was within four to six feet. 207 F.3d at 797. Here, there is no indication in the record that at the time of the arrest, S.W. was advancing towards the SROs or anyone else with the jump rope. The record lacks any evidence indicating whether—at the time of the arrest—the scene in the hallway needed to be immediately secured. *Id.* at 802. Moreover, no witnesses stated that at the time of the arrest they feared for their lives or that any other students were at risk. The absence of this record evidence requires

[5] In fact, just weeks earlier one of the SROs had a similar encounter with S.W., but S.W. was not arrested. ROA.18-10342.592-593.

reversal because it was Appellees' burden at summary judgment to show that the *Hainze* exception applies under the undisputed facts.

S.W.'s conduct most closely aligns with cases where courts have declined to apply the *Hainze* exception as a matter of law. In *Hobart v. City of Stafford*, for example, an officer shot an adult plaintiff having a schizoaffective episode, after the plaintiff allegedly ran toward the officer and then made contact with the officer while flailing his arms. 784 F. Supp. 2d 732, 742 (S.D. Tex. 2011). The court noted that the plaintiff was smaller in size and stature than the officer, and the officer had been informed that the plaintiff did not have a weapon. *Id.* at 742–43. The court, therefore, concluded that fact questions existed regarding whether plaintiff's conduct "could reasonably have been interpreted to present any serious threat, let alone 'threat of human life,' and whether there was any need for the officer to 'secur[e] the scene.'" *Id.* at 757–58; *see also Sullivan v. City of Round Rock,* No. A-14-CV-349-LY, 2015 WL 11439070, at *6 (W.D. Tex. Dec. 10, 2015), *rev'd on other ground sub nom. Bros v. Zoss*, 837 F.3d 513, 518 (5th Cir. 2016), *cert denied*, 137 S. Ct. 1229 (2017) (denying summary judgment where factual questions existed as to whether plaintiff's actions posed a "threat to human life").

Moreover, viewing all the evidence and reasonable inferences drawn from those facts in the light most favorable to the Appellant, a jury could find that Officer Baker's decision to arrest S.W. was not prompted by an imminent threat to human life but to punish S.W. for his behavior. Among the relevant circumstances that would

support such a conclusion are that Officer Baker kept S.W. in handcuffs, forced him into a chair, sat "close to and directly facing" him, and engaged in a shouting match with him for approximately twenty minutes, ROA.18-10342.594. A reasonable jury could also find that an eight-year-old with a jump rope—without any evidence that anyone feared for their lives or that other students were at risk—simply does not pose imminent, life-threatening harm. The Court should therefore reverse the district court's grant of summary judgment based on the *Hainze* exception.

IV. Under the District Court's Approach, the *Hainze* Exception Will Swallow the Rule.

It is well established in this Circuit that Title II of the ADA applies to arrests. *See Windham*, 875 F.3d at 235–36 ("We have also recognized Title II claims in the specific context of police officers who fail reasonably to accommodate the known limitations of disabled persons they detain."); *see also Delano-Pyle v. Victoria Cty, Tex.*, 302 F.3d 567, 570–71, 575–76 (5th Cir. 2002) (affirming jury verdict that police officers discriminated against deaf arrestee by failing to accommodate the limitations arising from his inability to hear). Even *Hainze* held that the officers would have been "under a duty to reasonably accommodate Hainze's disability" once "the area was secure and there was no threat to human safety." *Hainze*, 207 F.3d at 802.

This Court's holding in *Hainze* was only intended to create a narrow exception to this general rule to protect officers and the public from imminent, life-threatening situations. But if this Court does not reverse the district court's application of *Hainze*,

the exception will swallow the rule and will undermine this Court's long-standing precedent extending Title II to police interactions with individuals with disabilities. Simply put, if the *Hainze* exception applies to these facts, courts and litigants will be hard-pressed to find *any* situation where the exception does not apply to the arrest or detention of individuals with disabilities.

That S.W. engaged in aggressive behavior with school staff prior to Officer Baker arriving on the scene was central to the district court's decision to apply *Hainze*. ROA.18-10352.750. In fact, there is little discussion in the district court's opinion or in the record about what transpired in the moments before S.W's arrest, once he retreated into the hallway and encountered Officer Baker. Even ignoring that S.W. was eight years old and too young to commit a crime in Texas,[6] the district court's analysis conflates probable cause to make an arrest with the exigent circumstances required for the *Hainze* exception to exempt the arrest from the ADA's requirement of reasonable accommodation. Probable cause to believe that criminal or delinquent behavior had occurred ought to always precede an arrest, and the ADA would never apply to the arrest of an individual with disability if the *Hainze* exception applied whenever such probable cause existed.

It is critical that courts reserve the *Hainze* exception (to the extent it should continue to exist at all) only for those cases where imminent, life-threatening conduct requires officers to act immediately without regard to the individual's disability.

[6] TEX. FAM. CODE ANN. § 51.02 (West).

Anything less would create uncertainty among the courts and law enforcement about when the ADA applies and would contravene Congress's intent that the ADA carry "clear, strong, consistent, enforceable standards." 42 U.S.C. § 12101(b)(2).

V. A Broad Application of *Hainze* Will Eviscerate Protections for Students With Disabilities Where They Need Them The Most—In Schools.

This case presents the Court with a matter of first impression: whether and how the *Hainze* exception should apply to SROs, who by definition work primarily, if not exclusively, with children in public schools. Resolution of this issue requires the Court to consider not only the safety concerns highlighted in *Hainze* but also Congress's mandate that all students with disabilities receive FAPE. 20 U.S.C. § 1400(d)(1)(A).

A. The IDEA Affords Students with Disabilities Additional Protections At School.

Congress enacted the IDEA in response to concern that many children with disabilities "were either totally excluded from schools" or were "sitting idly in regular classrooms awaiting the time when they were old enough to drop out." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 179 (1982) (internal quotation and citation marks omitted). The IDEA requires schools to provide FAPE to students with disabilities, including students like S.W., whose disabilities may manifest in challenging behaviors. *See* 20 U.S.C. § 1415(k)(4); 34 C.F.R. § 300.523(a) (requiring a "manifestation determination review" before a

disciplinary removal that changes a placement). The IDEA statute therefore includes "a number of provisions that require school officials to take proactive measures to address the needs of students with behavioral issues."[7]

The IDEA establishes protocols to improve student behavior and to appropriately respond to disruptive or dangerous conduct. For example, if a student exhibits disruptive behavior, then the Individualized Education Program ("IEP") team must consider the use of positive behavioral interventions and supports to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). Generally, this involves conducting a Functional Behavioral Assessment to determine the root cause of a behavior and create interventions to extinguish and replace that behavior. For example, some students with disabilities have serious communication difficulties and use behaviors to communicate. For such a student, a behavior plan might require teaching the student how to communicate through assistive technology so that the student can communicate appropriately.

Inappropriate police involvement, however, short-circuits a student's IEP and leads to students being arrested because of their disability. Schools have an obligation to provide a continuum of services to meet the needs of every special education student that includes everything from positive behavior supports in a regular

[7] Letter from Kenneth R. Warlick, Director, Office of Special Education Programs, United States Department of Education, to David P. Osterhout (Jul. 25, 2000), *available at* https://www2.ed.gov/policy/speced/guid/idea/letters/2000-3/osterhout72500mdreviewsec.pdf

classroom to residential placement when necessary. Instead of involving the police, the IEP team should determine on an individualized basis where the student should be placed on that continuum of education, and properly implement the student's IEP. *See* 20 U.S.C. § 1412 (a)(5). The IEP team can use experts in behavior, such as certified behavior analysts, to identify whether a student needs increased services or different services. The more time students with disabilities spend dealing with unnecessary arrests by SROs, without the reasonable accommodations required by the ADA, the less time they spend in the classroom receiving FAPE and receiving the behavioral supports and training they need to improve their behavior.

B. SROs Play A Unique Role in Law Enforcement.

SROs are not traditional law enforcement officers. They are a constant presence in schools, serving as a hybrid educational, correctional, and law enforcement officer.[8] The use of SROs has increased exponentially since the 1990s.[9]

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[8] Nathan James & Gail McCallion, CONG. RESEARCH SERV. R43126, *School Resource Officers: Law Enforcement Officer In Schools* 2 (2013); Spencer C. Weiler & Martha Cray, *Police at School: A Brief History and Current Status of School Resource Officers*, 84 CLEARING HOUSE 160, 161 (2011).

[9] Weiler & Cray, *supra*, at n.8; *To Protect & Educate: The School Resource Officer and the Prevention of Violence in Schools*, NAT'L ASS'N SCH. RES. OFFICERS 9 (2012), https://nasro.org/cms/wp-content/uploads/2013/11/NASRO-To-Protect-and-Educatenosecurity.pdf. According to 2007 estimates, more than 17,000 SROs are assigned to schools nationwide. Jason B. Langberg & Barbara A. Fedders, *How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients' Education Histories and Records into Delinquency Representation*, 42 J.L. & EDUC. 653, 656 (2013).

Even though students with disabilities account for 12 percent of overall school enrollment, SROs often lack training on special education issues.[10] Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 156, 170 (2015). According to one study of 130 SROs, more than half had never received either academic training or in-service training about special education students. *Id.* The same SROs also estimated that 36.75 percent of the law-related incidents they responded to at school involved special education students. *Id.* Of particular concern is that almost 85 percent "at least somewhat agreed" that students receiving special education services used their special education status as an excuse for their behavior to avoid accountability for their actions. *Id.* This highlights a lack of awareness of the nature of students' disabilities and proper strategies for meeting the special needs of students with disabilities.

[10] Recognizing the necessity of specific, youth-focused training for school-based police officers, the Texas Legislature enacted a new statutory requirement in 2015 for officers working in school districts larger than 30,000 students to receive 16 hours of youth-focused training, including training on the mental and behavioral health needs of children with disabilities. H.B. 2684, 2015 Leg., 84(R) Sess. (Tex. 2015) (creating TEX. EDUC. CODE § 37.0812 and TEX. OCC. CODE § 1701.262). The legislation was not meant to expand the duties of officers nor was it meant to encourage them to address student behaviors when other non-law enforcement approaches and trained professionals are more appropriate. However, S.W.'s arrest occurred before this requirement was enacted, and this requirement does not apply to school districts with fewer than 30,000 students such as Carroll ISD where the arrest occurred.

C. Relieving SROs of Their Obligation to Comply with the ADA Eliminates All Protections for Students With Disabilities At School.

Because SROs are primarily trained as law enforcement officers, they often view the behavior of a student with a disability through a police lens—without accounting for a student's age or needs as a student with a disability. This can result in SROs responding to routine school disciplinary matters using law enforcement tactics. Valerie Strauss, *Why Are We Criminalizing Behavior of Children with Disabilities?* WASH. POST, Apr. 25, 2017, *available at* https://tinyurl.com/yd7lthkx. Further, SROs are rarely trained in how to de-escalate the behaviors of students with disabilities and instead some provoke further misbehavior.

Recent data suggests that an increased police presence in schools and the inappropriate use of law enforcement to handle discipline issues has a disproportionate impact on students with disabilities. Nationwide, while students with disabilities represent only 12 percent of overall student enrollment, they account for 28 percent of students arrested or referred to law enforcement. Office for Civil Rights, U.S. Dep't of Ed., *2015-2016 Civil Rights Data Collection: Data Highlights on School Climate and Safety in Our Nation's Public Schools* (April 2018), https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf. In Texas, of districts that could report school-based arrests and use-of-force incidents by student's disability, students with disabilities represented 9 percent of overall student

enrollment but accounted for 24 percent of students arrested and 16 percent of use-of-force incidents at school. Deborah Fowler et al., TEXAS APPLESEED & TEXANS CARE FOR CHILDREN, *Dangerous Discipline: How Texas Schools are Relying on Law Enforcement, Courts, and Juvenile Probation to Discipline Students* (2016), http://stories.texasappleseed.org/dangerous-discipline. Although few school districts are able to report this data, the reported data are consistent with anecdotal reports from students, parents and attorneys for students with disabilities statewide. Deborah Fowler et al., TEXAS APPLESEED, *Texas' School-to-Prison Pipeline: Ticketing, Arrest & Use of Force in Schools, How the Myth of the "Blackboard Jungle" Reshaped School Disciplinary Policy* 95, 100, 113 (2010), *available at* https://texasappleseed.org/sites/default/files/03-STPPTicketingandArrests.pdf.

To strike an appropriate balance between this Court's reasoning in *Hainze* and Congress's intent that students with disabilities receive FAPE, even if they have engaged in misbehavior, it is imperative that the ADA apply to SROs without exception in schools. If SROs are not required to comply with the ADA by providing reasonable accommodations during school-related arrests, schools and law enforcement will have less incentive to ensure that on-campus officers do not criminalize school-related behavioral problems arising from a disability that should be addressed through a student's IEP. If an SRO arrests a student with a disability, courts should apply the ADA and factor any exigent circumstances into the

reasonable accommodation analysis. *Cf. Sheehan v. City & Cty. of San Francisco*, 743 F.3d at 1232; *Bircoll v. Miami–Dade Cty*, 480 F.3d 1072, 1084-85 (11th Cir. 2007).

If this Court believes that *Hainze* should apply to SROs' arrests of students with disabilities at school, it should be reserved for truly imminent, life-threatening situations. Otherwise, students with disabilities will be summarily deprived of ADA protection in the place where they spend the majority of their waking hours—schools.

CONCLUSION

For the all foregoing reasons, *Amici* request that this Court reverse the district court's grant of summary judgment based on its misapplication of the *Hainze* exception.

Date: August 17, 2018

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,025 words, excluding the parts of the brief exempted by Red. R. App. P. 32(f) and the Rules of this Court.

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond.

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CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on August 17, 2018.

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