Court of Appeals of the State of New York

JESUS FERREIRA,

Plaintiff-Appellant,

– against –

CITY OF BINGHAMTON, BINGHAMTON POLICE DEPARTMENT,

Defendants-Respondents.

-and-

POLICE OFFICER KEVIN MILLER et al.,

Defendants.

CERTIFIED QUESTION FROM UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
CTQ 2020-00007

BRIEF OF AMICUS CURIAE NEW YORK CIVIL LIBERTIES UNION

DANIEL R. LAMBRIGHT
CHRISTOPHER T. DUNN
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 BROAD ST., 19TH FLOOR
NEW YORK, NY 10004
TELEPHONE: (212) 607-3300
FACSIMILE: (212) 607-3318
Attorneys for Amicus Curiae

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DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

The New York Civil Liberties Union hereby discloses that it is a non-profit, 501(c)(4) organization, and is the New York State affiliate of the American Civil Liberties Union.

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PRELIMINARY STATEMENT

On the morning of August 19, 2011, Jesus Ferreira, an overnight guest at his friend's home, was awakened by the noises of someone attempting to break down the front door. A few seconds later, Mr. Ferreira was shot in the stomach, sustaining an injury that would require the removal of his spleen. Mr. Ferreira's ordeal resulted from a negligently planned no-knock raid targeting his friend conducted by the Binghamton Police Department's SWAT team. At issue in this case is whether Binghamton's negligence is sufficient to establish liability under New York law, as has been the case for nearly a century, or whether this Court should alter municipal-liability law to require that Binghamton have a "special duty" to Mr. Ferreira in order to be liable.

Amicus curiae the New York Civil Liberties Union urges this Court not to expand the special-duty doctrine to cases involving injuries inflicted by municipal employees, as happened here. Since 1929, when the legislature generally waived sovereign immunity from liability for the state and its municipalities, this Court consistently has held that municipalities are liable for negligent actions by their employees without any showing of a "special duty" to the injured person. By contrast, the requirement of a "special duty" has been limited to situations where the injury was caused not by a municipal employee but by a third party.

The importance of the long-standing, municipal-liability regime has become all the more important in recent decades as police departments across the state have created SWAT teams equipped with military-grade weapons for a wide range of

activities, including no-knock entries into homes. The rise of this style of policing has increased the risk of death and serious injury to innocent people like Mr. Ferreira.

While how often these aggressive tactics are used may be a source of debate, police departments and municipalities indisputably should exercise great care when using them, and tort liability provides an important incentive for exercising such care. That incentive would effectively be destroyed if this Court were to add a "special duty" requirement for municipal liability, which will virtually never be met in cases of government-inflicted injury. Such a dramatic change in the law also would place New York at odds with many other states.

INTEREST OF AMICUS CURIAE

Amicus Curiae the New York Civil Liberties Union ("NYCLU"), the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with more than 180,000 members and supporters. The NYCLU's mission is to defend and promote civil rights and liberties as embodied in the United States Constitution, the New York State Constitution, and state and federal law. Defending New Yorkers' rights to be free from government misconduct, and in particular police violence, is a core component of that mission. To that end, the NYCLU long has been involved in efforts to hold municipal governments accountable for the actions of their officials.

The NYCLU frequently has litigated issues concerning the right to be free from unlawful searches and seizures—particularly those resulting from municipal policies and practices. (*See e.g. People v Weaver*, 12 NY3d 433 [2009]) (holding that the placement of GPS tracking devices, and subsequent monitoring, constituted a search); *Ligon v City of New York*, 925 F Supp 2d 478 [SDNY 2013] (granting preliminary injunction in challenge to widespread practice of unlawful stops and searches of individuals at private apartment buildings by police officers); *Dinler v City of New York*, No. 4-cv-7921, 2012 WL 4513352 [SDNY Sept. 30, 2012]) (challenging mass arrests of protesters at 2004 Republican National Convention in New York City).) It has also long identified and spoken out against the particular dangers posed by no-knock raids, such as that which resulted in Mr. Ferreira's shooting. (*See e.g.* Christopher Dunn, Letter to Peter F. Vallone, Jr., Chair, Pub. Safety Comm., N.Y. City Council (June 6, 2003), https://www.nyclu.org/en/letter-nyclu-testifies-nypd-search-warrants (summarizing oral testimony at June 4, 2003 hearing); Christopher Dunn & Donna Lieberman, The NYPD Must Do More to Protect New Yorkers From Lethal Police Raids, N.Y. Daily News (June 5, 2003).)

Additionally, the NYCLU has long been involved in advocacy and litigation to challenge and ultimately repeal Section 50 a of the civil rights law, which for decades maintained the secrecy of vast amounts of information related to police misconduct and discipline. (*See e.g. NYCLU v N.Y.C. Police Dep't*, 32 NY3d 556 [2018] (addressing application of section 50-a to NYCLU request for NYPD disciplinary decisions); *Victor*

v Office of Administrative Trials and Hearings, Index No. 100890/15 [NY Cnty Sup Ct June 4, 2018] (amicus curiae in dispute addressing application of section 50-a to disciplinary decisions involving Department of Correction officers); *see also e.g.* NYCLU, Testimony Before the New York State Senate Committee on Codes in Support of S.3695, Repealing Civil Rights Law Section 50-a (Oct. 17, 2019), https://www.nyclu.org/sites/default/files/field_documents/final_testimony_for_senate_codes_50a_hearing-2019.10.17.pdf.].)

ARGUMENT

I. EXPANDING THE SPECIAL DUTY RULE TO CASES INVOLVING GOVERNMENT-INFLICTED INJURY IS INCONSISTENT WITH SECTION 8 OF THE COURT OF CLAIMS ACT.

The historical context of the Court of Claims Act of 1929 and this Court's early interpretation of the Act make clear that expanding the special duty rule to apply to cases of government-inflicted injury such as Ferreira's contradicts—and indeed fundamentally undermines—Section 8 of the Act. That provision expresses the legislature's intent to expansively waive governmental immunity for the acts of public employees and to break decisively from the common-law regime of sovereign immunity that preceded it.

A. The Historical Context of New York's Waiver of Sovereign Nonliability from Suit Demonstrates the Legislature's Intent for That Waiver to Be Broad.

New York's waiver of sovereign immunity in 1929 signaled a strong intent for governmental entities to be liable for government-inflicted injuries like the one suffered here by Mr. Ferreira, and to break from the previous common law regime.

Prior to the enactment of Section 8 of the Court of Claims Act, during the Eighteenth and Nineteenth Centuries, New York courts held that sovereign immunity generally protected the state and municipalities from liability for the actions of public officials. (*Evans v Berry*, 262 NY 61, 67-68 [1933] (describing pre-Section 8 history).) This common law doctrine "was a rudimentary survival of the maxim, 'The King can do no wrong.'" (*Id.* at 68.) By the early Twentieth Century, however, state courts and legislatures across the country began to chip away at that immunity. (*See* Edwin M. Borchard, *Government Liability in Tort*, 34 Yale LJ 229 [1925) (cataloguing state and municipal liability rules based on government function, and praising trend toward broader acceptance of liability); *see also Augustine v Town of Brant*, 249 NY 198, 205 [1928] ("The modern tendency is against the rule of [government] nonliability.").)

In line with this national trend, the New York legislature in 1908 amended the jurisdiction of the Court of Claims in a manner that the Third Department concluded "inferentially made the state liable for torts where citizens would be liable." (*Babcock v State*, 190 AD 147, 153 [3d Dept 1919] (citing Ch. 519, 1908 N.Y. Laws (codified at Code Civ. Proc. § 264, later codified at N.Y. Ct. Cl. Act § 9 (McKinney)), *affd*, 231 NY

560 [1921].) This Court held, however, that this enlargement of jurisdiction did not itself provide a cause of action against the state for torts committed by its officers, requiring the legislature to "clearly express[]" any such "waiver of immunity from liability." (*Smith v State*, 227 NY 405 [1920].)

The legislature responded in 1929 by further amending the Act, expressly providing that the "state . . . waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations." (Act of April 10, 1929, ch. 467, § 12-a, 1929 N.Y. Laws 994 (later codified at N.Y. Ct. Cl. Act § 8 (McKinney)).)

The Court of Claims Act of 1929 was a clear, bold, and expansive statement of the legislature's intent for the state and municipalities[1] to be liable for the tortious conduct of their officers. As this Court observed soon after, Section 8 of the Act "declares that no longer will the state use the mantle of sovereignty to protect itself from such consequences as follow negligent acts of individuals," and that it will instead "voluntarily discharge its moral obligations in the same manner as the citizen." (*Jackson v State*, 261 NY 134, 138 [1933].)

The Act announced a new relationship between government and governed, in which, according to "the now declared public policy of the State . . .[,] persons damaged

[1] *See Bernardine v. City of New York*, 294 NY 361, 365 [1945] (concluding that waiver of immunity applies to municipalities and other state subdivisions).

by the torts of those acting as its officers and employees need not contribute their losses to the purposes of government." (*Sheehan v N. County Cmty Hosp*, 273 NY 163, 166 [1937]; *accord Becker v City of New York*, 2 NY2d 226, 236 [1957].) It also reflected the legislature's intent for New York to take a leading role in the development toward government liability in tort. By one account at the time, the Act "set an example which, according as it does with contemporary social and political theories, is sure to produce a more general sentiment in favor of state accountability." Note, *Administrative Phases of State Responsibility*, 44 Harv L Rev 432 [1931]; *see also* Note, *Administration of Claims Against the Sovereign: A Survey of State Techniques*, 68 Harv L Rev 506, 513 [1955] (describing Act as setting the outer range among states for waivers of sovereign immunity).

B. The Early Interpretation of Section 8 and the Development of the Special Duty Doctrine Show the Special Duty Doctrine Does Not Apply to Government-Inflicted Injury.

In certifying this appeal, the Second Circuit noted that "the longstanding practice of the Court of Appeals and the underlying rationale for the special duty rule . . . support Ferreira's reading of the [special duty] rule." *Ferreira v City of Binghamton*, 975 F3d 255, 287 [2d Cir 2020]; *see also id.* at 284–85 (collecting cases); *id.* at 283–84 (discussing rationale). In so noting, the Circuit focused on decisions after *Schuster v City of New York* (5 NY2d 75 [1958])—the first case where this Court appears to have used the term "special duty"—and in particular decisions from the past couple of decades. (*See Ferreira*, 975 F3d at 285–89.)

The Second Circuit's analysis is entirely correct and is further buttressed by earlier New York decisions. Prior to *Schuster* and after the passage of the Court of Claims Act of 1929, this Court and the Appellate Division consistently recognized negligence actions against the state and municipalities in cases of government-inflicted injury, without regard to the existence of a special duty or relationship between the plaintiff and the government. (*See e.g. Flamer v City of Yonkers*, 309 NY 114 [1955] (police shooting of man who made disturbance while intoxicated); *Wilkes v City of New York*, 308 NY 726 [1954] (police shooting of bystander); *McCrink v City of New York*, 296 NY 99 [1947] (negligent retention of police officer who shot and killed plaintiff's husband); *Robison v State of New York*, 292 NY 631 [1944] (patient injured by negligence of state physician); *Turack v State of New York*, 285 NY 737 [1941] (patient injured by negligence of state hospital employee); *Liubowsky v State*, 285 NY 701 [1941] (patient killed by state nurse's negligent injection of wrong drug); *Meistinsky v City of New York*, 285 AD 1153 [2d Dept 1955] (negligent failure to train police officer resulting in shooting of hostage), *affd mem*, 309 NY 998 [1956]; *McArdle v State*, 251 AD 773 [3d Dept 1937] (pedestrians struck by police car during vehicular pursuit).) In none of these cases did courts suggest that the defendant state or city might not be liable because it did not owe a particular duty toward the plaintiff.

By contrast, following the enactment of Section 8 the notion of municipal liability turning on the existence of a "special duty" was limited to the specific situation in which the person who caused the injury was not a municipal employee but instead a third

party. Thus, in *Schuster*, this Court addressed whether the estate of a highly-publicized informant, who was killed after receiving death threats and repeatedly seeking police protection, could sue the City of New York for negligently failing to provide such protection. (5 NY2d at 79.) The city argued that the plaintiff failed to state a claim, citing cases to the effect that individuals cannot sue municipalities for negligently failing to provide police and fire protection. (*Id.* at 80.) In an extensive opinion discussing its jurisprudence since the Court of Claims Act of 1929, the Court concluded that Schuster's estate did state a claim because while the city does not generally owe a duty to particular individuals when providing police protection, it "owes a special duty to use reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals." (*Id.*)

Even prior to *Schuster,* although not yet using the term "special duty," this Court applied the same limiting principle only with respect to failure-to-protect type claims arising from injuries inflicted by third parties. For example, in *Steitz v City of Beacon* (295 NY 51 [1945]), a plaintiff sued the City of Beacon for fire damage to his property. He did not allege that a city employee had started the fire, but rather that the city had negligently "fail[ed] to create and maintain a fire department" and to maintain a water system that provided sufficient water to fight the fire. (*Id.* at 54.) This court concluded that there was no liability for a city's failure to protect an individual from fire damage, unless such liability "has been assumed by agreement or imposed by statute." (*Id.* at 55; *cf. Applewhite v Accuhealth, Inc*, 21 NY3d 420, 135 [2013] (explaining special duty exists,

among other circumstances, where "the plaintiff belonged to a class for whose benefit a statute was enacted [or] the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally.").) *Steitz* noted that although the city's charter contained a general obligation to maintain a fire department, "[s]uch enactments . . . secure to all members of the community the enjoyment of the community the enjoyment of rights and privileges to which they are entitled only as members of the public," and thus "[n]eglect in the performance of such requirements creates no civil liability to individuals." (*Id.*; *cf. Cuffy v City of New York*, 69 NY2d 255, 260 [1987] (explaining special duty requirement "is derived from the principle that a municipality's duty to provide police protection is ordinarily one owed to the public at large and not to any particular individual").)

Expanding the special duty rule to apply to cases of government-inflicted injury is thus inconsistent with the history and early interpretation of Section 8 of the Court of Claims Act. Such an interpretation of Section 8, which would result in impunity for the negligent conduct that led to the shooting of Mr. Ferreira, would "go very far towards reinstituting the very immunity that New York's legislature disavowed in 1929" (*Ferreira*, 975 F3d at 290), and would be wholly unrecognizable—if not shocking—to the legislature that passed it into law and the courts that applied it in the following decades.

II. EXPANDING THE SPECIAL DUTY RULE TO CASES INVOLVING GOVERNMENT-INFLICTED INJURIES WOULD MAKE NEW YORK AN OUTLIER AMONG THE JURISDICTIONS THAT RECOGNIZE SIMILAR DOCTRINES.

The majority of states allow individuals to hold municipalities liable for government-inflicted injuries, including most states that recognize doctrines similar to New York's special duty rule. It appears that none of the seventeen states that recognize doctrines similar to the special duty rule apply it to completely bar municipal liability for government-inflicted injuries when a special relationship has not been established. Echoing similar principles to those articulated in the early New York rulings interpreting the Court of Claims Act, some jurisdictions—like Illinois—have gone even further and completely abandoned doctrines similar to the special duty rule. Thus, a holding from this Court expanding the special duty rule to situations where a government employee inflicts injury would mark a radical departure from the country's municipal liability practices.

A. Several Jurisdictions Have Completely Rejected the Special Duty Rule.

Of the jurisdictions like New York that allow tort claims to be brought against municipalities, several have completely rejected the special duty rule or similar doctrines. These jurisdictions have generally found that the doctrine is inconsistent with their statutes abrogating sovereign immunity. (*See Fieck v Morken*, 685 NW2d 98, 107–08 [ND 2004] ("refus[ing] to adopt the public duty doctrine as part of North Dakota law" as state legislation limiting state liability "contains no exceptions for public duties, creates

no distinction between public duties and special duties"); *Natrona Cty. v Blake*, 2003 WY 170, 81 P3d 948 [Wyo 2003] (recognizing "[t]he public-duty/special-duty rule was in essence a form of sovereign immunity and viable when sovereign immunity was the rule… [t]he legislature has abolished sovereign immunity in this area…[t]he public duty only rule, if it ever was recognized in Wyoming, is no longer viable"); *Schear v Bd. of Cty. Comm'rs of Bernalillo Cty.*, 1984-NMSC-079, 101 NM 671, 676 [1984] (finding that New Mexico's Torts Claims Act abolished the "public duty-special duty distinction"); *Brennen v City of Eugene*, 285 Or 401, 411, 591 P2d 719 [1979] (holding "any distinction between 'public' and 'private' duty is precluded by statute in this state").) Similarly, the Wisconsin Supreme Court refused to apply the doctrine finding that the public duty and special duty dichotomy at the core of the duty is artificial. *See Coffey v City of Milwaukee*, 74 Wis 2d 526, 247 NW2d 132 [1976] (holding "[t]he 'public duty' 'special duty' distinction [is an] . . . artificial distinction . . . Any duty owed to the public generally is a duty owed to individual members of the public.").

Recently, the Illinois Supreme Court, which previously had applied the "public duty rule" to limit municipal liability, held that the rule was no longer viable. (*See Coleman v East Joliet Fire Prot. Dist.*, 2016 IL 117952 (Ill. 2016).) The court rejected the doctrine in part because: (1) it found that the application of the public duty rule and its special duty exception was "muddled and inconsistent" and (2) the court recognized that the "application of the public duty rule [was] incompatible with the legislature's grant of limited immunity." (*Id.* at ¶ 54.) As the Court stated, "[w]hen the public duty rule is

applied, however, a plaintiff is precluded from pursuing a cause of action for willful and wanton misconduct, in contravention of the clear legislative decision to allow recovery against the public entity in certain cases involving willful and wanton misconduct." (*Id.* at ¶ 59.[2])

B. Jurisdictions that Recognize Some Form of a Special Duty Rule Do Not Apply It to Municipal Torts Involving Government-Inflicted Injuries.

While states like Montana, Utah, Georgia, Minnesota, Washington, Nevada, and California, differ from Illinois in that they recognize the special duty rule, these states would not bar Mr. Ferreira's claim. These jurisdictions apply the doctrine narrowly to claims where the injury arises from a third party and the state has failed to protect the harmed party. (*See Kent v City of Columbia Falls*, 379 Mont 190 [2015] (holding that the public duty/special duty rule did not apply where the state was negligent in building a skatepark that lead to the plaintiff's injury); *Cope v Utah Valley State Coll.*, 2014 UT 53, ¶2, 342 P.3d 243 [2014] (holding the public duty doctrine only applies to omissions); *Stevenson v City of Doraville*, 294 GA 220 [2013] (holding "the public duty doctrine does not apply to limit liability where a claim of active negligence (misfeasance), rather than

[2] Unlike New York, certain jurisdictions completely bar municipal liability for all torts. These jurisdictions are the states of Colorado, Connecticut, Maryland, Michigan, Missouri, North Carolina, South Carolina, Texas, Vermont, and Virginia, and the commonwealths of Massachusetts, and Pennsylvania. Importantly, none of these jurisdictions have enacted statutes with broad language generally waiving sovereign immunity like the New York Court of Claims Act. For example, Colorado by statute states that "sovereign immunity shall be a bar to any action against a public entity for injury which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant." (C.R.S § 24-10-108 [2020].)

a mere failure to act (nonfeasance) is alleged."); *Domagala v Rolland*, 805 NW2d 14, 23 [Minn 2011] (finding that where "the [government's] own conduct creates a foreseeable risk of injury to a plaintiff," Minnesota courts do not require a special duty); *Neveda. Coty v Washoe Cty.*, 108 Nev 757, 760–61 [1992] (holding that its special duty requirement does not apply when an officer affirmatively causes a harm).

This is especially the case when police officers have negligently inflicted injuries. (*See Mancini v City of Tacoma*, 188 Wash App 1006, at *17 [Wash Ct App 2015] (holding "every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others… this [] applies in the context of law enforcement and encompasses the duty to refrain from directly causing harm to another through affirmative acts of misfeasance").) In California, courts assess first whether there was a duty as a threshold matter, and second whether immunity is a defense. (*See Whitcombe v County of Yolo*, 73 Cal App 3d 698, 141 Cal Rptr 189 [Cal Ct App 1977].) In terms of the threshold duty question, where the injury is inflicted by a private actor, courts require the plaintiff to demonstrate a special relationship with the government or its agent. (*See Zelig v County of Los Angeles*, 27 Cal4th 1112, 1129 [2002] ("in most instances, [special relationship rules apply] when plaintiffs, having suffered injury from third parties… claim that their injuries could have been prevented").) By contrast, where government actors engage in affirmative acts which "contribute[] to, increase[], and change the risk which would otherwise have existed" (*Benavidez v San Jose Police Dep't*, 71 Cal App 4th 853, 84 Cal Rptr 2d 157 [Cal Ct App 1999]), there is no special relationship requirement.

(*Grudt v Los Angeles*, 2 Cal 3d 575, 468 P2d 825 [1970] (liability against a municipality proper with no mention of special duty rule where officers specifically approached a man in a car with shotguns and, when the man tried to flee, shot him).)

In sum, numerous jurisdictions that, like New York, have generally abrogated sovereign immunity for themselves and their municipalities would not bar a claim like Mr. Ferreira's where the government has negligently inflicted an injury. This is generally because these jurisdictions have either abolished the special duty rule, finding that it is inconsistent with state statutes, or have significantly narrowed the rule to only apply to cases involving an injury caused by a third party by the state's failure to act.

III. MUNICIPAL LIABILITY FOR GOVERNMENT-INFLICTED INJURIES INCENTIVIZES MUNICIPALITIES TO EXERCISE DUE CARE, PARTICULARLY WHEN USING DANGEROUS POLICING TECHNIQUES, AND FOSTERS PUBLIC ACCOUNTABILITY.

Developments in policing since New York generally abrogated sovereign immunity have made municipal liability for government-inflicted injuries only more urgent. As Mr. Ferreira's case illustrates, modern policing practices create substantial risks for personal injury and even death. In practice, municipal liability helps create incentives to ensure that care will be taken when using such dangerous tactics.

A. Modern Policing Techniques, Like Those Used Here by the Binghamton Police Department, Create Substantial Risks of Personal Injury and Property Damage.

Law-enforcement equipment and practices radically changed during the last half of the Twentieth Century and now pose greater risks to the public. Over the last 40 years, police departments across the state and country have been outfitted with weapons developed for use by the United States military and have implemented aggressive techniques like using SWAT teams to conduct no-knock raids. Regardless of the propriety of these developments, the militarization of police departments indisputably has increased the risks of serious injury and property destruction for citizens on the other end of police activities.

In response to the racial unrest of the late 1960s, the modern SWAT team was developed by the Los Angeles Police Department. (*See* Clyde Haberman, *The Rise of the SWAT Team in American Policing*, N.Y. TIMES (Sept. 7, 2014), https://www.nytimes.com/2014/09/08/us/the-rise-of-the-swat-team-in-american-policing.html.) America's drug war hastened the spread of these units across the country. (*See* Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police* Policing (2007) at 6.) From the 1980s to the 2000s "the number of SWAT teams in small towns grew from 20 percent . . . to 80 percent" and approximately 90 percent of large cities had SWAT teams. (ACLU Foundation, *War Comes Home: The Excessive Militarization of American Policing* (2014) at 19.) Accordingly, SWAT team deployments increased by over 1,500 percent. (*See* Matthew Fleischer, *50 years ago, LAPD raided the*

Black Panthers. SWAT teams have been targeting Black communities ever since, L.A. TIMES (Dec. 8, 2018), https://www.latimes.com/opinion/story/2019-12-08/50-years-swat-black-panthers-militarized-policinglos-angeles.) The drastic rise in deployments reflects the reality that SWAT teams are now used for routine police practices. In large cities, approximately 75 percent of SWAT team deployments are used to execute search warrants and in small towns that number is approximately 80 percent. (Radley Balko, *Overkill The Rise of Paramilitary Raids in America*, CATO INSTITUTE (2006) at 11.[3])

To effectuate the drug war, SWAT teams began using no-knock warrants to enter into the homes of individuals. (*See* Balko at 18.) A no-knock search warrant authorizes an executing officer's entrance of premises without giving notice of his authority and purpose. (N.Y. CRIM. PROC. LAW § 690.35(4)(b) [McKinney 2017]). During the execution of no-knock warrants "[p]olice generally break open doors with a battering ram, or blow them off their hinges with explosives. Absent either, police have pried doors open with sledgehammers or screwdrivers, ripped them off by attaching them to the back ends of trucks, or entered by crashing through windows or balconies." (Balko

[3] The militarization of police equipment and tactics was further driven by federal agencies' collaboration with local law enforcement to halt the use and sale of narcotics. *Id.* at 7-8. In the early 1990s the federal government authorized the Department of Defense to transfer military equipment to local law enforcement agencies. *See* ACLU Foundation at 24. As a result, local police departments have stockpiled military-grade weapons and equipment. Police departments within New York have received at least $26,498,384.00 in equipment since the program's inception. Shawn Musgrave, Tom Meagher and Gabriel Dance, *The Pentagon Finally Details its Weapons-for-Cops Giveaway*, https://www.themarshallproject.org/2014/12/03/the-pentagon-finally-details-its-weapons-for-cops-giveaway. For example, the Broome County Sheriff's Department received fifteen 7.62mm assault rifles, a combat weapon used by US troops, from the program. *Id.*

at 5.) Upon entry into the home, "police sometimes detonate a flashbang grenade or a similar device designed to disorient the occupants in the targeted house" and "quickly and forcefully incapacitate[]" the occupants of the home, "generally at gunpoint." (*Id.*)

Errors in the deployment of these tactics have produced countless tragedies in New York, including the death of Alberta Spruill. (*See* William K. Rashbaum, *Woman Dies After Police Mistakenly Raid Her Apartment*, NY. TIMES, May 17, 2003, https://www.nytimes.com/2003/05/17/nyregion/woman-dies-after-police-mistakenly-raid-her-apartment.html.) Ms. Spruill was a churchgoing 57-year-old grandmother who lived in an apartment in Harlem. (*Id.*) Relying on an uncorroborated and erroneous tip from an informant, the NYPD executed a no-knock warrant on her apartment and set off a flash grenade. (*Id.*) The noise from the grenade stunned Ms. Spruill causing her to go into cardiac arrest and die several hours later. (*Id.*) Her story is not uncommon. In 2006 there were more than one thousand complaints filed against the NYPD for botched raids. (*See* ABA Journal*,* 10 Police Raids Gone Wrong, https://www.abajournal.com/gallery/warrior_cops/776.) SWAT team raids across the

state have been responsible for traumatizing families[4], killing family pets[5], and extensive property damage.[6]

Mr. Ferreira's case is all too similar to these tragic botched raids. Under the assumption that the target of their investigation was possibly armed, the Binghamton Police Department activated a SWAT team unit and obtained a no-knock warrant. (*Ferreira*, 975 F3d at 263.) The unit decided to do a dynamic entry which requires "speed and surprise to secure an area before occupants have time to access weapons or otherwise resist." (*Id.*) However, on the morning of the raid the officers brought a battering ram that was too light to immediately knock down the door. (*Id.*) Further, the SWAT team had done insufficient surveillance beforehand and did not know if anyone

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[4] *See e.g.* Noah Goldberg, *They destroyed everything': Brooklyn family left traumatized by no-knock police raid*, NEW YORK DAILY NEWS (Aug. 31, 2020), https://www.nydailynews.com/new-york/ny-brooklyn-family-no-knock-warrant-raid-lawsuit-nypd-east-new-york-20200831-f5hxcaebrnexzhf5v4zhkoufpu-story.html; T.J. Pignataro, *Police batter their way into wrong house Family of 8 traumatized by officers' behavior; officials admit error made but defend actions*, THE BUFFALO NEWS (Aug. 16, 2008), https://buffalonews.com/news/police-batter-their-way-into-wrong-house-family-of-8-traumatized-by-officers-behavior-officials/article_62266d0d-ea6f-5d38-8d40-b569a69161d1.html ("Armed with a battering ram and shotguns, Buffalo police looking for heroin broke down the door and stormed the lower apartment of a West Side family of eight. The problem is that the Wednesday evening raid should have occurred at an apartment upstairs.").

[5] *See e.g.* Danny Spewak, *Collateral Damage: Police shooting dogs in line of duty*, https://www.wgrz.com/article/news/local/buffalo/collateral-damage-police-shooting-dogs-in-line-of-duty/71-272860383 (reporting that the Buffalo Police Department shot at 92 dogs from Jan. 1, 2011 through Sept. 2014, killing 73.).

[6] *See e.g.* Brendan J. Lyons, *Search warrants: Shopped, signed and sealed*, ALBANY TIMES UNION, May 13, 2013, https://www.timesunion.com/local/article/Search-warrants-Shopped-signed-and-sealed-4508559.php (detailing how police officers "ransacked [Ronita McColley's] tidy apartment, dumping drawers, flipping mattresses, tearing apart closets, punching holes in ceilings and breaking picture frames" but did not find drug because they had the wrong house);

else was in the house besides the target. As soon as the officers entered the home, or shortly thereafter, they unexpectedly encountered Mr. Ferreira who was visiting, and had been sleeping on the couch. (*Id.* at 263.) Mr. Ferreira, like Ms. Spruill before, was startled by the commotion of the dynamic entry and sat up. (*Id.*) The officer who first entered the house shot Mr. Ferreira apparently believing that a close-by white-gray X-Box controller was a gun. *Id.* Mr. Ferreira was not the target of the raid, he was not armed, yet he still ended up being shot in the stomach and having his spleen removed. (*See Ferreira v City of Binghamton*, No 3:13-CV-107, 2017 WL 4286626, at *1 [NDNY. Sept. 27, 2017].)

In sum, modern police tactics have become very dangerous. While such tactics are sometimes justified in extraordinary circumstances, they have bled into routine policing producing tragic consequences when errors have occurred.

B. Municipal Liability Can Provide Incentives for Police Departments to Reform their Practices to Exercise Due Care and Can Further Public Accountability for Practices.

The imposition of liability plays an important role in inducing police departments to exercise care. As this Court recognized in *Sheehan v N. County Cmty. Hosp.*, "[T]o impose liability is to beget careful management." (273 NY 163, 164 [1937].) Specifically, the use of insurance and risk pools to cover the costs of liability develops informal regulation of municipalities or police departments, and liability fosters public accountability when elected officials have to sign off on settlements and judgments.

Many smaller jurisdictions use public-risk pools or private insurance to satisfy judgements and settlements. (Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, And Police Reform*, 63 UCLA L. Rev. 1144, 1156-57, 1164 (2016) ("One report estimates that 85 percent of all public entities are members of a risk pool to protect against some manner of liability.").) Public-entity risk pools are relatively new but are similar to private insurance in that "members pay premiums into a central fund used to satisfy settlements and judgments." *(Id.* at 1163.) The risk pools return dividends to members if they spend less than expected on lawsuits. (*Id.*) Risk pools allow municipalities to share the cost of risk while easing the burdens of potentially volatile differences in claims per year. (*See* Association of Governmental Risk Pools, *PR Toolkit for Public Entity Pools* https://higherlogicdownload.s3.amazonaws.com/AGRIP/613d38fc-c2ec-4e1a-b31f-03fa706321aa/UploadedImages/documents/PR_Toolkit_Messaging_Document.pdf.[7])

Risk pools and insurers are incredibly valuable in that the insurer-insuree relationships create a bond where such risk pools and insurance agencies can act as informal regulators of police departments. (John Rappaport, *How Private Insurers Regulate*

[7] One such risk pool is the New York Municipal Insurance Reciprocal (NYMIR) which was founded in 1993 and now has 1,600 members in New York State. NYMIR, NYMIR at 25 Years, https://nymir.org/about/intro-to-nymir.html. Members of NYMIR include approximately 31 of the state's counties, and many towns and cities including the town of Binghamton. NYMIR, Current Members, https://nymir.org/about/19-current-members/11-current-members.html. NYMIR offers coverage for "law enforcement liability" including "[a]llegations of false arrest, excessive force, malicious prosecution and unlawful search and seizure" and "[v]iolations of civil rights." NYMIR, Keeping You Covered, https://nymir.org/who-we-are/keeping-you-covered.html.

Public Police, 130 Harvard Law Review 1539 (2017).) Because insurers bear the risk of loss resulting from litigation, it is in their economic interest to prevent this loss. Rappaport at 1595.

To prevent loss from police lawsuits, insurers actively try to shape police department practices. In some circumstances insurers, working with expert consultants, will review police policies and provide suggestions, or draft model policies which they provide to departments. (*Id.* at 1574.) Insurers also audit police departments to determine if they are implementing policies and procedures to limit liability as well as encourage police departments to get accredited by offering premium discounts for departments that are accredited. (*Id.* at 1582-83.) As New York's Department of Criminal Justice Services (DCJS) explains, "Accreditation is a progressive and contemporary way of helping police agencies evaluate and improve their overall performance." (DCJS, *Accreditation Program*, https://www.criminaljustice.ny.gov/ops /accred/.) The New York accreditation program involves the implementation of 110 administration, training, and operational standards. (*See* New York State Law Enforcement Accreditation Program, *Standards And Compliance Verification Manual*, 8th Edition (September 2015) at 10.) In more drastic cases insurers will even requested that a police department terminate the employment of particularly bad officers, or will threaten to drop a police department from coverage unless it makes structural reforms to reduce the tortious conduct of officers. (*Id.* at 1585-86.)

Not all jurisdictions rely on risk pools or insurance; rather, some larger jurisdictions like New York City self-insure. (*See* Schwartz*, supra*, at 1163.) "Self-insurance involves setting aside an amount of money calculated much like a premium - sufficient to cover future potential losses, and engaging in proactive risk management just like insurers encourage their policyholders to do." (Rappaport, *supra*, at 1561.)

Even though many large cities, like New York City, forego risk pools and private insurance, payments of settlements and judgments still have an impact. For jurisdictions that pay settlements out of a general fund, the processes needed to authorize payouts often produce public scrutiny. As Schwartz points out, "Current and former government officials in jurisdictions that pay settlements and judgments out of general funds have reported that city and county councils sometimes question and criticize law enforcement officials and government attorneys when asked to approve settlements," and "[l]egislators and other government officials may also question law enforcement practices in response to large aggregate expenditures on litigation." (Schwartz, *supra*, at 1175.) Such payouts can thus "serve as a form of information regulation," by "draw[ing] governmental attention and agency attention to the amount spent on suits." (*Id.* at 1179.)

Thus, liability and the methods used to satisfy settlements and judgments play an important role in incentivizing police departments to exercise careful practices. Expanding the special duty rule to eliminate liability for government-inflicted injuries

would only work to impede these care-inducing relationships and undermine the incentive structure for instituting model policies and practices.

CONCLUSION

For the reasons stated above, we ask this Court to find that the special duty rule does not apply to claims such as Mr. Ferreira's, which involve injury inflicted by government officials.

Respectfully submitted,

DANIEL R. LAMBRIGHT
CHRISTOPHER T. DUNN
New York Civil Liberties Union Foundation
125 Broad Street, 19th Floor
New York, NY 10004
(212) 607-3300
dlambright@nyclu.org

Counsel for Amicus Curiae

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