NEW YORK STATE
COURT OF APPEALS

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JESUS FERREIRA,

Plaintiff-Appellant,

-against-

CITY OF BINGHAMTON, BINGHAMTON POLICE DEPARTMENT,

Defendant-Respondent,

-and-

POLICE OFFICER KEVIN MILLER et al.,

Defendants.

---x

CTQ 2020-00007

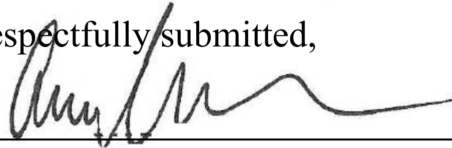
NOTICE OF MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

PLEASE TAKE NOTICE that, pursuant to the attached Affirmation of Ben Herrington-Gilmore and the proposed amicus curiae, dated December 21, 2021, the New York City Bar Association will move this Court at 20 Eagle Street, Albany, N.Y. 11207 on January 3, 2021, or as soon thereafter as counsel may be heard, for an order granting this motion for leave pursuant to this Court's Rule of Practice 500.23(a)(3) to appear as amicus curiae in the above-captioned case and file the proposed amicus curiae brief in support of the Plaintiff-Appellant.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 500.21(c), answering papers, if any, must be filed on or before the return date of this motion.

Dated: December 21, 2021
New York, NY

Respectfully submitted,



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NEW YORK STATE
COURT OF APPEALS

JESUS FERREIRA, *Plaintiff-Appellant*, -against- CITY OF BINGHAMTON, BINGHAMTON POLICE DEPARTMENT, *Defendant-Respondent*, -and- POLICE OFFICER KEVIN MILLER et al., *Defendants.*	:	Docket No. CTQ 2020-00007

AFFIRMATION OF BEN HERRINGTON-GILMORE IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*

BEN HERRINGTON-GILMORE, an attorney admitted to practice law in the courts of the State of New York, affirms the following to be true under penalty of perjury:

1. I am a member of the Civil Rights Committee of the New York City Bar Association (the "City Bar") and, on behalf of the City Bar, respectfully move this Court for an order granting the City Bar leave, pursuant to Rule 500.23(a)(1) of this Court, to appear *amicus curiae* on behalf of Plaintiff Jesus Ferreira.

2. This case concerns the ability to hold a municipality accountable for causing serious harm: Mr. Ferreira was shot in the stomach as a result of negligence by the City of Binghamton's police department. Unlike situations where a plaintiff is alleging that a municipality is liable for injuries caused by a third party, in this case, a municipal employee caused the harm.

3. The City Bar submits this *amicus curiae* brief, a copy of which is included in this submission, to assert that the special duty rule does not apply where government employees inflict injury. The brief presents issues not raised before the courts below.

4. The City Bar, founded in 1870, is a voluntary association of lawyers and law students whose mission is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest. The City Bar has long concerned itself with civil rights issues in the City and State of New York and drawing on its experience, can identify law and arguments arising from public policy that might otherwise escape the Court's consideration. The proposed *amicus curiae* brief reflects the thought and expertise of the City Bar's Civil Rights Committee and will be of assistance to this Court.

5. No party contributed content to the movant's brief. No party, party's counsel, person, nor entity other than movant contributed money to fund preparation or submission of the brief.

WHEREFORE, the City Bar respectfully requests that this Court grant its motion for leave to appear as *amicus curiae* on behalf of Plaintiff-Appellant.

Dated: December 21, 2021
New York, NY

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PROPOSED *AMICUS CURIAE* BRIEF

To be Submiited by:
AMANDA JOHNSON

CTQ 2020-00007

Court of Appeals
of the
State of New York

JESUS FERREIRA,

Plaintiff-Appellant,

– against –

CITY OF BINGHAMTON and BINGHAMTON POLICE DEPARTMENT,

Defendants-Respondents,

– and –

POLICE OFFICER KEVIN MILLER et al.,

Defendants.

BRIEF OF *AMICUS CURIAE* NEW YORK CITY BAR ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT

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Dated: December 21, 2021

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DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

Pursuant to Court of Appeals Rule 500.1(f), the Association of the Bar of the City of New York, also known as the New York City Bar Association, states that it is a voluntary bar association with no parent corporation or subsidiaries. The New York City Bar Association has one affiliate: the Association of the Bar of the City of New York Fund, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

PRELIMINARY STATEMENT 1

ARGUMENT

I. Expanding the Special Duty Rule Would Contradict New York's Longstanding Policy of Holding Municipalities Accountable for Wrongdoing 4

A. New York and Its Municipalities Are Subject to Broad Tort Liability 5

B. New York Courts Have Generally Refused to Expand the Special Duty Rule to Shield Municipalities from Liability Where Municipal Employees Inflict Harm 7

II. Expanding the Special Duty Rule is Contrary to the Purposes of New York Tort Law 8

A. Those Injured at the Hands of Government Employees Should Be Made Whole 8

B. Municipalities Should Be Deterred from Causing Harm 9

C. Tort Law's Deterrent Effect Should Extend to the Context of Policing 12

III. Expanding the Special Duty Rule Would Exacerbate Racial Injustice by Failing to Deter Police Violence and by Preventing Compensation for Victims of Police Violence 13

A. People of Color Are Disproportionately Victims of Police Violence 14

B. Victims of Police Violence Need an Avenue for Redress 19

C. Impunity for Police Violence Undermines Trust in the Rule of Law 21

CONCLUSION 22

CERTIFICATION PURSUANT TO RULE 500.13 24

TABLE OF AUTHORITIES

Page

Cases:

247-59 W., LLC v The State of NY,
27 Misc.3d 570 (Ct. Cl. 2010) 6

Adickes v. Kress & Co.,
398 U.S. 144 (1970) 11

Davis v. City of New York,
959 F.Supp.2d 324 (S.D.N.Y. 2013)...19

Enright v. Eli Lily & Co.,
77 N.Y.2d 377 (1991), cert. den. 502 U.S. 868 (1991).....................................9

Ferreira v. City of Binghamton,
975 F.3d 255 (2d Cir. 2020)...2, 5, 6, 8, 12

Floyd v. City of New York,
959 F. Supp. 2d 540 (S.D.N.Y. 2013)..15

Landon v. Kroll Lab. Specialists, Inc.,
91 A.D.3d 79 (2d Dep't 2011) 12

Minneci v. Pollard,
565 U.S. 118 (2012) 8

Owen v. City of Independence,
445 U.S. 622 (1980) 10

Rodriguez v. City of New York,
595 N.Y.S.2d 421 (App. Div. 1993) 7

Sorichetti v. New York,
65 NY2d 461 (N.Y. 1985)..7

Utah v. Strieff,
136 S. Ct. 2056 (2016) 15, 21

Rules, Laws and Statutes:

Court of Claims Act Section 8 ....3, 6

Other Authorities:

Andrew F. Popper, In Defense of Deterrence, 75 Alb. L. Rev. 181 (2011) 9

C. Elizabeth Hirsh, The Strength of Weak Enforcement: The Impact of Discrimination Charges, Legal Environments, and Organizational Conditions on Workplace Segregation, 74 Am. Soc. Rev. 245, 246 (2009) 10

John C. P. Goldberg, Who Feels Their Pain?: The Challenge Of Noneconomic Damages In Civil Litigation, 55 DePaul L. Rev. 435, 435 (2006) 8

John J. McNamara Jr., The Court of Claims: Its Development and Present Role in the Unified Court System, 40 St. John's L. Rev. 4, 12 (1965) 5

Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?, 140 U. Pa. L. Rev. 1147, 1150 (1992) 9

Michael L. Wells, Constitutional Remedies: Reconciling Official Immunity with the Vindication of Rights, 88 St. John's L. Rev. 713, 722 (2014) 8

Restatement (Third) of Torts: Liab. for Physical and Emotional Harm, § 3 (Am. Law Inst. 2010) 9

STATEMENT OF INTEREST

The New York City Bar Association (the "City Bar"), through its Civil Rights Committee, respectfully submits this *amicus curiae* brief to urge the Court not to expand the special duty tule to cases involving injuries inflicted by government employees. The City Bar is a professional organization of over 24,000 attorneys and law students who practice not only in the New York City metropolitan area, but also across the United States and internationally. The City Bar seeks to promote legal reform and improve the administration of justice through its more than 160 standing and special committees. The City Bar's Civil Rights Committee addresses issues pertaining to, *inter alia*, the civil rights of New Yorkers who interact with the police. Given our legal expertise in matters of civil remedies for state misconduct, and our interest in the administration of justice, the City Bar is well positioned to submit an *amicus curiae* brief in this matter. The Committee submits this brief on behalf of the City Bar, as *amicus curiae*, in support of Plaintiff-Appellant in this case.

No party contributed content to the movant's brief. No party, party's counsel, person, nor entity other than movant contributed money to fund preparation or submission of the brief.

PRELIMINARY STATEMENT

Jesus Ferreira brought a negligence suit against the City of Binghamton related to an August 19, 2011 police raid of a private home where Mr. Ferreira was

an overnight guest. At trial, evidence showed that the police officers failed to take basic steps to prepare for the raid. They conducted almost no surveillance. They did not look for a blueprint or layout, and they failed to bring the appropriate equipment. Within seconds of entering the home, an officer shot the unarmed Mr. Ferreira in the stomach. The jury found that the City of Binghamton's carelessness resulted in Mr. Ferreira being shot and rendered a verdict in Mr. Ferreira's favor.

At issue in this case is whether, when municipal employees are negligent and inflict injury, the municipality can nevertheless avoid liability by virtue of the "special duty rule." The special duty rule requires a plaintiff to prove that the duty breached by a municipality was more than that owed the public generally. It typically applies when a *third party* commits the harm, and not where, as here, an agent of the municipality itself committed the harm. Nevertheless, the district court set aside the verdict, leaving Mr. Ferreira without compensation for the injuries he suffered.

On appeal, the Second Circuit certified the question as to whether the special duty rule applies to the circumstances of this case, though it noted that the Court of Appeals' "decades-long decisional pattern suggests that Ferreira's interpretation of the special duty rule is correct, and that there is no requirement to establish a special duty when the alleged injury is inflicted by a municipal employee." *Ferreira v. City of Binghamton*, 975 F.3d 255, 282 (2d Cir. 2020). We *amicus curiae* the New York

City Bar Association respectfully urge this Court to affirm this longstanding practice and not expand the special duty rule to cases involving injuries inflicted by government employees.

First, not expanding the special duty rule is consistent with New York's intentionally broad waiver of sovereign immunity. In 1929, with the passage of Section 8 of the Court of Claims Act ("Section 8"), New York waived the state's sovereign immunity and accepted tort liability on behalf of its employees and officers. Governor Smith had rejected legislation that narrowly chipped away at the state's immunity, vetoing 31 such bills, and instead signed into law Section 8, which provides a comprehensive and broad waiver. In certifying this appeal, the Second Circuit noted, "We would find it surprising that the New York Court of Appeals intends to shield municipalities from liability in these circumstances, which would go very far towards reinstituting the very immunity that New York's legislature disavowed in 1929."

Second, shielding municipalities from liability in these circumstances would undermine the primary purposes of New York tort law: just compensation and deterrence. Tort liability ensures that people like Mr. Ferreira, who are injured as a result of others' carelessness, are not left to bear the costs of medical bills and lost wages stemming from those injuries; instead, they have an avenue for being made whole. Tort liability also deters carelessness and ensures that incentives are in place

to minimize the risks of harm. This is especially important in contexts like policing where the potential harms are so grave.

Finally, this Court's decision will have profound practical effects for racial justice in New York. Expanding the special duty rule would weaken accountability for police violence, of which people of color are disproportionately the victims. Such a ruling would prevent those victims from obtaining redress and would further contribute to the public perception that the police are not accountable for the harm they cause, which in itself has deleterious effects on public safety.

For these reasons, we urge this Court not to expand the special duty rule to cases involving injuries inflicted by government employees.

ARGUMENT

I. Expanding the Special Duty Rule Would Contradict New York's Longstanding Policy of Holding Municipalities Accountable for Wrongdoing.

New York policy supports holding municipalities accountable when they violate their own policies and subsequently cause harm to individuals. Applying the special duty rule to instances where government actors inflict harm to citizens would amount to a rejection of this longstanding and purposefully preserved policy. In its decision certifying this issue to this Court, the Second Circuit strongly suggested that expanding the special duty rule to the circumstances of this case would contradict state policy, yet deferred to the Court given that "[t]he scope of municipal

liability is essentially a question of policy." *Ferreira v. City of Binghamton*, 975 F.3d 255, 291 (2d Cir. 2020). As discussed in detail below, this Court should adopt a rule that is consistent with New York's decades-long policy: municipalities should be liable for the harm their employees inflict.

A. New York and Its Municipalities Are Subject to Broad Tort Liability.

Nearly a century ago, the New York State Legislature made it clear that citizens like Mr. Ferreira could seek compensation for harms suffered at the hands of the government by passing Section 8 of the Court of Claims Act ("Section 8"). Section 8 waived the state's sovereign immunity and accepted tort liability on behalf of its employees and officers. *See* John J. McNamara Jr., *The Court of Claims: Its Development and Present Role in the Unified Court System*, 40 St. John's L. Rev. 4, 12 (1965).

Prior to the passage of Section 8, individual legislators petitioned to expand liability in a piecemeal fashion by passing bills seeking to waive sovereign immunity in individual cases. Governor Smith, however, who eventually signed Section 8 into law, vetoed 31 such bills, arguing that one's ability to hold the government accountable should not be premised on lobbying legislators to pass bills limited to specific circumstances. *See* Public Papers of Governor Alfred E. Smith 196-02 (1928). Through vetoing the bills, Governor Smith sought "to call attention to the need of the adoption of a new policy … and pass the necessary amendments to the

General Laws so that [granting access to the Court of Claims] may be handled in the future in a logical, fair and orderly way, in place of the haphazard, careless and discriminating procedure which has obtained up to this time." *Id.*

Governor Smith thus clarified the need for a broad waiver of immunity, and in 1929, the State Legislature passed Section 8. *See 247-59 W., LLC v The State of NY*, 27 Misc.3d 570, 575 (Ct. Cl. 2010). This section established a general and comprehensive waiver of immunity: "[t]he state hereby 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." N.Y. Ct. Cl. Act § 8.

Expanding the special duty rule to shield the government from liability for the injuries that its own employees inflict would effectively reinstate a policy of immunity that the Legislature explicitly rejected. The Second Circuit observed the same. *See Ferreira*, 975 F.3d at 290 ("We would find it surprising that the New York Court of Appeals intends to shield municipalities from liability in these circumstances, which would go very far towards reinstituting the very immunity that New York's legislature disavowed in 1929."). Indeed, this Court should honor the Legislature's intent in passing an explicit and intentionally broad waiver of sovereign immunity by declining to expand the special duty rule here.

B. New York Courts Have Generally Refused to Expand the Special Duty Rule to Shield Municipalities from Liability Where Municipal Employees Inflict Harm.

While there are some exceptions to New York's waiver of immunity, the exceptions should not be read to swallow the rule. As noted by the Second Circuit, New York courts have primarily applied the exception at issue here, the special duty rule, in cases where a *third party* has committed the harm and the government is alleged to have failed to sufficiently protect the plaintiff. *Id.* at 284-85 (collecting cases). In the context of police protection, this application of the rule guards against the concern that imposing tort liability for police inaction "could and would inevitably determine how the limited police resources of the community should be allocated and without predictable limits." *Sorichetti v. New York*, 65 NY2d 461, 468 (N.Y. 1985). It "springs from a recognition that the City has limited resources and cannot be in all places at one time." *Rodriguez v. City of New York*, 595 N.Y.S.2d 421, 425 (App. Div. 1993). However, such concerns are not present where, like here, a municipal employee and not a third party commits the harm.

According to the facts adduced at trial, the Binghamton Police Department carelessly planned and executed a raid that resulted in an officer shooting the unarmed Mr. Ferreira in the stomach. Declining to apply the special duty rule under such circumstances does not subject municipalities to liability for actions of third parties "without predictable limit." Nor would it require municipal employees to

"be in all places at one time." This case is simply about holding municipalities accountable when their own employees carelessly inflict harm. For these reasons, New York courts have generally declined to apply the special duty rule where, like here, the injury is government-inflicted. *See Ferreira*, 975 F.3d at 284-285 (collecting cases).

II. Expanding the Special Duty Rule is Contrary to the Purposes of New York Tort Law.

A. Those Injured at the Hands of Government Employees Should Be Made Whole.

A basic purpose of tort law is to provide just compensation, to make the plaintiff whole, or otherwise provide recompense for injuries. *See, e.g.*, John C. P. Goldberg, *Who Feels Their Pain?: The Challenge Of Noneconomic Damages In Civil Litigation*, 55 DEPAUL L. REV. 435, 435 (2006); *see also* Michael L. Wells, *Constitutional Remedies: Reconciling Official Immunity with the Vindication of Rights*, 88 St. John's L. Rev. 713, 722 (2014) ("From *Carey*, decided in 1978, through *Minneci v. Pollard*, decided in 2012, the [United States Supreme] Court has asserted that compensation and deterrence are the aims of constitutional tort law.").

Expanding the special duty rule to shield municipalities from liability when the municipality itself inflicts injury would undermine the compensatory principle of tort law. It would strip a means of recompense from victims of municipal negligence, like Mr. Ferreira, and would instead force them to cover all the costs

associated with their government-inflicted injuries, such as medical bills, lost wages, and all other expenses. This Court should maintain an avenue to recourse and honor long-held principles: that victims of negligence deserve to be made whole.

B. Municipalities Should Be Deterred from Causing Harm.

Another central purpose of New York tort law is to deter harmful conduct. *See Enright v. Eli Lily & Co.*, 77 N.Y.2d 377, 386 (1991), *cert. den*. 502 U.S. 868 (1991) (stating that "imposition of liability on a negligent tort-feasor is . . . based in part on a policy of deterrence"); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. Pa. L. Rev. 1147, 1150 (1992) (stating that "deterring behavior that presents risks that exceed their social value" is among the most prominent social purposes of tort law); Restatement (Third) of Torts: Liab. for Physical and Emotional Harm, § 3 (Am. Law Inst. 2010) ("The balancing approach to the negligence concept is generally supported by scholars who justify the rule of negligence liability by relying on considerations of deterrence or safety incentives."). Deterrence both undergirds legislation that subjects different actors to tort liability in New York courts and animates plaintiffs' suits which often seek to prevent future occurrences of the harm at issue. *See generally* Andrew F. Popper, *In Defense of Deterrence*, 75 Alb. L. Rev. 181 (2011).

When municipalities are held liable for their harmful conduct, they are incentivized to prevent harm from occurring in the first place. The threat of legal liability has a clear deterrent effect that extends beyond the particular defendant. *See, e.g., id.* at 187-188. Other municipalities, and leaders within the municipality at issue, assess such findings and either reconfigure their behavior or risk downstream liability. *Id.* at 183-184. Put simply, when entities are subject to costly sanctions, they take steps to prevent the outcomes that can result in imposition of those sanctions. *See* C. Elizabeth Hirsh, *The Strength of Weak Enforcement: The Impact of Discrimination Charges, Legal Environments, and Organizational Conditions on Workplace Segregation*, 74 Am. Soc. Rev. 245, 246 (2009).

Maintaining a narrow special duty rule allows tort law's purpose of deterrence to reach municipalities. As the United States Supreme Court noted in the context of Section 1983 suits:

> The knowledge that a municipality will be liable for all of its injurious conduct . . . should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.

Owen v. City of Independence, 445 U.S. 622, 651-52 (1980) (holding that municipalities are not entitled to qualified immunity in federal civil rights lawsuits). The Court emphasized that these incentives might be particularly effective in

"preventing those 'systemic' injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith." *Id.*

Consistent with tort law's purpose of deterrence, municipalities have the power to significantly limit their downstream liability by taking actions that make it less likely that their employees will harm others. They can, for example, adopt policies and practices aimed at achieving public safety goals while minimizing harm in hiring, training, supervising, auditing, disciplining, and terminating their employees. Maintaining tort liability for municipalities for the conduct of their own employees allows municipalities to retain decision-making power over how to allocate their resources with an incentive to avoid causing harm and without implicating the risks of liability for injuries caused by unrelated third parties that the special duty rule is meant to guard against.

Expanding the special duty rule would create a vacuum of accountability in local governments — democratic structures that are specifically designed to be accountable to the people. Local governments play a special and pivotal role in democratic society. It would be a perverse policy if the government itself, "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct," were permitted to disavow liability for the injuries its own employees inflict. *See Adickes*

v. Kress & Co., 398 U.S. 144, 190 (1970). Instead, municipalities should be liable for the injuries their employees cause, and consequently, incentivized to adopt policies and practices that would deter their employees from causing such injuries.

C. Tort Law's Deterrent Effect Should Extend to the Context of Policing.

In other contexts where the costs of impropriety are high, New York courts have recognized the importance of traditional, common law tort liability. *See, e.g.*, *Landon v. Kroll Lab. Specialists, Inc.*, 91 A.D.3d 79, 89 (2d Dep't 2011) ("Given the importance drug testing holds in the management of modern affairs and the costs that inaccuracies may exact on society, it is paramount that incentives exist to minimize the risk of erroneous test results."). As with the testing of pharmaceutical drugs, negligence in policing also has potentially "far-reaching, permanent, and devastating costs." *Id*. Police negligence can proximately cause property damage, personal injury, and death, as well as diminish societal trust in government and chill cooperation with law enforcement. It is therefore of paramount importance that proper incentives exist in policing to minimize the risks of harm.

Conversely, expanding the special duty rule would allow municipalities to avoid accountability for dangerous conduct that causes harm, undermining the deterrent purpose of tort law. Here, a jury found that the municipality was negligent in planning the raid of a private home. *See Ferreira*, 975 F.3d at 262. Evidence at trial suggested that the police department conducted only minimal surveillance of

the location prior to the raid, failed to obtain a blueprint or layout of the location, and did not bring the appropriate equipment to the raid – all of which were contrary to both department protocol and generally accepted practices around police raids. *See id.* at 263. This negligence proximately caused the unarmed Mr. Ferreira to be shot by a Binghamton police officer, leaving him permanently injured. *See id.* at 264. While a prima facie negligence claim was established, applying the special duty would require Mr. Ferreira to prove what he cannot: that he is not just an ordinary citizen, but rather that he has a "special relationship" with the police such that he is owed a duty. Expanding the special duty rule would permit such negligently planned raids to occur without accountability and would remove the threat of liability as an incentive to prevent harm.

III. Expanding the Special Duty Rule Would Exacerbate Racial Injustice by Failing to Deter Police Violence and by Preventing Compensation for Victims of Police Violence.

Expanding the special duty rule would not only contravene the goals of tort law; it would also exacerbate racial injustice at a historical moment demanding increased accountability for police. Communities of color — Black communities in particular — have long borne a disproportionate toll of police misconduct and violence. In the summer of 2020, the widely publicized killings of George Floyd and Breonna Taylor shook the nation and ignited a nationwide conversation about structural racism, particularly with respect to policing. The widespread protests

brought into stark relief the racial disparities that permeate policing and intensified the longstanding demands to hold police departments accountable for the harms they cause.[1] Recognizing these pressing needs, the New York State Court system recently reaffirmed its commitment to uprooting obstacles that people of color face in the path of equal justice as vital to preserving the rule of law and the functioning of the judicial system.[2]

Expanding the special duty rule to apply to all police negligence claims would be a significant move in the opposite direction. Such a ruling would cut off an avenue for recovery that would disproportionately harm people of color, who are far more likely to be victims of police negligence. And it would fail to incentivize prevention of police violence by effectively immunizing many instances of police-caused harm.

A. People of Color Are Disproportionately Victims of Police Violence.

Policing in America has, from its very beginning, been used as a tool to control and oppress Black communities, dating back to slave patrols and continuing through the violence that led to uprisings during the Jim Crow era to the "War on Drugs"

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[1] *See, e.g.,* Dionne Searcey and David Zucchino, *Protests Swell Across America as George Floyd Is Mourned Near His Birthplace,* N.Y. Times (June 6, 2020) https://www.nytimes.com/2020/06/06/us/george-floyd-memorial-protests.html

[2] Press Release, New York State Unified Court System, "Aiming to Advance Equal Justice in the Courts, Chief Judge DiFiore Announces Independent Review of Court System Policies, Practices and Initiatives," June 9, 2020, https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR20_24.pdf.

that spurred the explosion of the criminal justice system in the 1980s and 1990s.[3] Far from being a past shameful chapter of our history, the targeting and brutalization of people of color at the hands of the police continues. Racial disparities persist at every level of law enforcement — from stops to arrests to uses of force.[4] New York City's infamous "stop-and-frisk" program was emblematic of the unfair targeting of minority communities by the police. A federal court found the practice "intentionally discriminates based on race" and that its method of targeting individuals "depends on express racial classifications." *Floyd v. City of New York*, 959 F. Supp. 2d 540, 663 (S.D.N.Y. 2013). Indeed, over 80% of those stopped pursuant to the program were Black or Latino. *Id.* at 556.[5]

Across the state of New York, as throughout the nation, people of color continue to be stopped, questioned, arrested, and charged at rates higher than white residents. The Suffolk County Police Department, following a Department of

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[3] *See, e.g.,* Jill Lepore, "The Invention of the Police," The New Yorker, July 13, 2020, https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police.

[4] *See Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor dissent) ("[I]t is no secret that people of color are disproportionate victims of this type of scrutiny.").

[5] *See also*, NYC Bar Association, *Report On The NYPD's Stop-and-Frisk Policy*, 1 (May 2013) (finding that 85% of those stopped through the program were Black and Latino and "even controlling for neighborhood demographics, black and Latino individuals [were] stopped more often."); New York State Office of Attorney General, *A Report on Arrests Arising from the New York City Police Department's Stop-and-Frisk Practices*, 16 (November 2013) (analysis showing that racial disparities for those stopped as part of stop-and-frisk continue at the arrest, disposition, and sentencing phase: "As is true for persons stopped, about one half of [stop-and-frisk] arrests are of black individuals, about one third are of Hispanics, and one in ten are of white individuals.").

Justice investigation into allegations of discriminatory policing against Latinos, commissioned an independent study on racial bias that revealed its officers were more than twice as likely to search the vehicles of Black drivers and that Latinos were 32% more likely to be ticketed compared with white drivers.[6] In New York City in 2018, Black residents were 5.8 times more likely to be the subjects of police enforcement than white residents.[7] And in Buffalo, 52% of those arrested between 2013 and 2015 were Black, despite making up only 38% of the population.[8]

People of color are not only more likely to be targeted by police action and enforcement; they are far more likely to be subjected to police force and misconduct. Black and Latino individuals are 50% more likely to have any level of force used against them in an interaction with the police.[9] Even in instances where no arrest is made and the officer reports that the civilian was compliant, Black people are significantly more likely to experience physical force.[10] Data from the Suffolk

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[6] Robert E. Worden, Kenan M. Worden, & Hannah Cochran, *Traffic Stops by Suffolk County Police*, John F. Finn Institute for Public Safety, Inc., 49 (Sept. 2020) (also noting Latinos 16% more likely to be arrested compared with white drivers).

[7] *See,* Data Collaborative for Justice (DCJ), John Jay College of Criminal Justice, *Tracking Enforcement Trends in New York City: 2003-2018*, 1 (Sept. 2020).

[8] Anjana Malhotra, *Unchecked Authority without Accountability in Buffalo, New York: The Buffalo Police Department's Widespread Pattern and Practice of Unconstitutional Discriminatory Policing, and the Human, Social and Economic Costs*, SUNY Buffalo Law School, 4 (Aug. 30, 2017).

[9] Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127:3 J. of Pol. Econ., 6 (July 2017).

[10] *Id.*

County Police Department showed that their officers were *three* times more likely to use physical force during traffic stops against Black drivers compared with white drivers.[11] Another study found that in western New York, 86% of the victims of police brutality since 2006 have been people of color.[12] Tragically, Black people nationally are more than three times as likely to be killed during police encounters as white people.[13] This inequity is even more severe in the New York City metropolitan area, which ranks as the third worst in the country for Black-white disparities in fatal police shootings.[14]

Racial disparities are particularly pronounced among young people. Police are 13 times more likely to kill an unarmed and young Black man than an unarmed and young white man.[15] In New York City, children of color accounted for approximately two-thirds of the complaints of youth-directed police misconduct that were reported to the New York City Civilian Complaint Review Board.[16]

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[11] Robert E. Worden, Kenan M. Worden, & Hannah Cochran, *Traffic Stops by Suffolk County Police*, John F. Finn Institute for Public Safety, Inc., 47 (Sept. 2020).

[12] Charlie Specht, *15 Cases of Alleged Police Brutality, Excessive Force in WNY Since 2006*, WKBW Buffalo (June 2, 2020), https://www.wkbw.com/news/i-team/15-cases-of-alleged-police-brutality-excessive-force-in-wny-since-2006.

[13] Schwartz & Jahn, *Mapping fatal police violence across U.S. metropolitan areas: Overall rates and racial/ethnic inequities, 2013-2017*, Harvard T.H. Chan School of Public Health, 5 (June 24, 2020).

[14] *Id.* at 7, Table 2.

[15] Ulrich Schimmack & Rickard Carlsson, *Young unarmed nonsuicidal male victims of fatal use of force are 13 times more likely to be Black than White*, (Jan. 21, 2020).

[16] *See* NYC Civilian Complaint Review Board, *Report on Youth and Police*, 7 (June 8, 2020).

After the murder of George Floyd in May 2020, horror and outrage over the unconscionable racial injustices and abuses at every level of the criminal justice system reached a tipping point, galvanizing widespread momentum for reform and accountability. Against the backdrop of the growing momentum to uproot these and other forms of racial oppression in this country, the New York State Unified Court system acknowledged its responsibility to advance racial justice:

> The death of George Floyd, and the issues it has brought into harsh focus, are a painful reminder of the repeated injustices and institutional racism that have long undermined the values and unity of our nation. The court system's commitment to these values is especially vital. Their preservation is a cornerstone of the rule of law, the subject of sacred oaths taken by all judges and lawyers, and the daily endeavors of the thousands of court employees around the State who work tirelessly to advance the cause of justice.[17]

The court system swiftly launched an independent review of institutional racism within the state judiciary as part of its "commitment to the core values of equal and just treatment under the law — and spurred by the tragic death of George Floyd."[18] A ruling here requiring a bystander like Mr. Ferreira to prove a "special duty" to sustain a tort claim against a municipality for the negligent actions of the municipality's employees would be a stark move against the tides of progress toward racial justice.

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[17] Press Release, New York State Unified Court System, "Aiming to Advance Equal Justice in the Courts, Chief Judge DiFiore Announces Independent Review of Court System Policies, Practices and Initiatives," June 9, 2020, https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR20_24.pdf.

[18] *Id.*

B. Victims of Police Violence Need an Avenue for Redress.

The mechanisms for police accountability and oversight are already too often limited, weak, and ineffective for people of color. Internal investigation and disciplinary systems frequently fail to take action against police misconduct — and these failings are particularly pronounced for alleged misconduct against people of color.[19] In New York City, for example, the NYPD Internal Affairs Bureau substantiated *zero* of the 2,947 civilian complaints of "race and biased-based policing" between 2014 and 2019, according to a court-appointed independent monitor.[20] In Buffalo, between 2014 and 2016 the Buffalo Police Department Internal Affairs Division took disciplinary action in only 4 of the 62 excessive force complaints — clearing officers of wrongdoing in more than 90% of the cases.[21]

Given the ineffectiveness of other forms of oversight, it is imperative that civil litigation provide a robust mechanism for holding police accountable for wrongdoing. Requiring a plaintiff to prove "special duty" for negligence claims would leave many, like Mr. Ferreira — a police shooting victim who suffers

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[19] *See, e.g.*, Jacob William Faber & Jessica Rose Kalbfeld, *Complaining While Black: Racial Disparities in the Adjudication of Complaints Against the Police*, City and Community, Vol. 18 (May 2019) (finding complaints of police misconduct by Black and Latino residents against the Chicago Police Department less likely to be sustained than complaints alleged by white residents).

[20] Tenth Report of Independent Monitor, *Davis v. City of New York*, No. 10-CV-0699, Dkt. No. 496, at 73.

[21] Daniela Porat, *Scant Oversight of Buffalo Police*, Investigative Post (Feb. 15, 2016), https://www.investigativepost.org/2017/02/15/scant-oversight-of-buffalo-police/.

permanent injuries as the result of Binghamton's negligence — without any recourse.

Significant racial gaps in access to justice, as well as structural obstacles and biases, make it even harder for people of color to seek and obtain fair redress for their injuries. While the New York state court system has made some progress in addressing racial inequities within the judicial system, litigants of color continue to face well-documented obstacles standing in the way of equal access and fair resolution of their grievances.[22] And even plaintiffs of color who obtain successful jury verdicts are often prevented from being "made whole," due to civil damages calculations that explicitly rely on race to undervalue the lives and injuries of people of color.[23]

These problems underscore the need for stronger mechanisms of police accountability and structures that enhance the ability of victims to seek and obtain fair remedies. Expanding the special duty rule here would do precisely the opposite: it would add yet another barrier in the way of justice for victims of police

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[22] *See generally* Jeh Johnson, *Report from the Special Advisor on Equal Justice in the New York State Courts*, (October 1, 2020) http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf (review of racial bias in the New York State Court system finding language barriers, discrimination, juror bias, and institutional and financial barriers faced by people of color navigating the court system).

[23] *See, e.g.,* Lawyers Committee for Civil Rights, *How Race, Ethnicity, and Gender Impact Your Life's Worth: Discrimination in Civil Damage Awards* (documenting how historically, race was explicitly referenced by judges in order to reduce damages and how today, race and gender is explicitly used in expert damages calculations to justify lower award amounts, based on lower wages and valuations of future income lost).

misconduct, who are disproportionately people of color, and further deny compensation to groups that already face enormous challenges to accessing meaningful legal remedies.

C. Impunity for Police Violence Undermines Trust in the Rule of Law.

The harm that results when police violence occurs with impunity extends beyond the individuals directly impacted: it causes insidious mistrust between civilians and police. This is particularly true for Black and brown New Yorkers. Justice Sotomayor evocatively described the impact on the lived realities for people of color: "For generations, black and brown parents have given their children 'the talk' — instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger — all out of fear of how an officer with a gun will react to them." *Utah v. Strieff,* 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).

Research corroborates the fears and mistrust endemic in the relationship between communities of color and police. Nationally, Black people are five times more likely and Latinos are four times more likely to fear police brutality compared with whites.[24] There are also substantial racial gaps in perceptions of local police. Studies indicate that Black Americans are significantly less likely than whites to

[24] *See* Amanda Graham, et al., *Race and Worrying about Police Brutality: The Hidden Injuries of Minority Status in America*, Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice (Volume 15, 2020 - Issue 5).

believe that police officers in their community are held accountable for misconduct and significantly more likely to see fatal encounters with police as part of a broader problem rather than isolated incidents.[25]

These perceptions of biased and unaccountable police departments are corrosive to community trust in the police, legal systems, and government more broadly.[26] It undermines the effectiveness of policing and erodes public faith in the rule of law.[27] Further shielding careless police violence from liability and depriving its victims from legal recourse would exacerbate these deleterious effects on public safety.

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.

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[25] *See, e.g.,* Rich Morin & Renee Stepler, Pew Research Center, *The Racial Confidence Gap in Police Performance*, 5 (Sept. 29, 2016) (finding that only 1/3 of Black survey participants believe local police do an "excellent or good job" when it comes to deploying the appropriate level of force in a given situation; 31% of Blacks, compared with 70% of whites, believe that the police in their community are held accountable for misconduct).

[26] U.S. Dep't of Justice, Ferguson Police Department Investigation, (Mar. 4, 2015) ("loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime."); Inst. on Race and Justice, Northeastern Univ., Promoting Cooperative Strategies to Reduce Racial Profiling ("When the police are perceived as unfair in their enforcement, it will undermine their effectiveness.").

[27] *Id.*

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I hereby certify pursuant to 22 NYCRR § 500.13 that the foregoing *amicus* brief was prepared on a computer using Microsoft Word.

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