NO. 1011199

SUPREME COURT OF THE STATE OF WASHINGTON

THE ESTATE OF DANIEL ALEXANDER MCCARTNEY, by and through Personal Representative CIERRA RENAE MCCARTNEY; CIERRA RENAE MCCARTNEY, individually and as the marital community of Cierra Renae and Daniel Alexander McCartney; TYTUS JOHN ALEXANDER MCCARTNEY, minor child of Daniel and Cierra McCartney; TATE DANIEL MCCARTNEY, minor child of Daniel and Cierra McCartney; and TRAXTON LANE MCCARTNEY, minor child of Daniel and Cierra McCartney , Appellants

v.

PIERCE COUNTY, a municipal corporation, located in Washington State, Respondent

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PIERCE COUNTY'S ANSWER TO MOTION FOR DISCRETIONARY REVIEW

Treated as an Answer to Petition for Review

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I. INTRODUCTION

Despite RAP 13.4(b)'s requirement that a "petition for discretionary review will be accepted by the Supreme Court *only*" upon a showing of one of the grounds listed in that rule, the Estate of Daniel McCartney, his spouse Cierra and sons Tytus, Tate and Traxton (hereinafter "Plaintiffs") fail to cite or even mention that rule or any other. Thus, they nowhere provide "the *reason why* review should be accepted under one or more of the tests established in section (b), with argument" as required by RAP 13.4(c)(7). Indeed, Plaintiffs do not demonstrate a basis even for finding "error" below -- much less any that "transcend[s] the particular application of the law in question" and shows a "compelling need to have the issue or issues decided generally" by this Court.

II. COUNTER-STATEMENT OF THE ISSUES

1. Should discretionary review be denied where Petitioners do not cite, mention or argue the requirements of RAP 13.4(b) and RAP 13.4(c)(7)?

2. Should discretionary review of a CR 12 dismissal based on Discretionary Immunity and the Professional Rescuer Doctrine be denied where Petitioners do not: a) cite, mention or argue the test under CR 12; b) show error in applying those defenses; or c) demonstrate an alleged error transcends the particular application and a compelling need this Court decide them generally?

3. Should discretionary review be denied where Petitioners show neither that ER 201 judicial notice of hyperlinks to public records was error, nor that the issue transcends the particular application of that rule and a compelling need it be decided by this Court generally?

III. COUNTER-STATEMENT OF THE CASE

Plaintiffs' conclusory and lightly cited "statement of the case" and subsequent argument contain more omissions and misstatements that can be identified and correct within the word limitations of RAP 18.17. Nevertheless, a counter-statement of the case provides the missing factual context and confirms

"plaintiff[s] … file[d] a long and detailed complaint" that "plead [themselves] out of court by including factual allegations which if true show that [their] legal rights were not invaded." *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 724 (7th Cir.1986).

A. Deputy McCartney Murdered by Escaping Suspects

Plaintiffs' 19 page Complaint alleges that after a Sheriff's Sergeant and "six Pierce County Sheriff's deputies" responded to a Tacoma request for "backup," CP 4, "other emergency calls" in unincorporated Pierce County were rapidly received – including a "*home intrusion in progress* from a home … located … within the Frederickson area of District 7" – *i.e.* a Sheriff's District adjacent to the more sparsely patrolled "District 10 where Deputy McCartney was on patrol." *Id.* (emphasis added). McCartney was a well-trained and experienced 8 year veteran patrolman who had graduated from the state Law Enforcement Academy, served with the Hoquiam Police Department starting in 2009, and in 2014 transferred for

the next four years to the Pierce County Sheriff's Department where he was "recognized not only for his strength, but his speed." CP 3. Thus "dispatch sent Deputy McCartney" and "various other deputies to respond" at 11:26:28 p.m. (*i.e.* within 2 minutes 38 seconds after the 911 call) to the intrusion. CP 6.[1]

Within 3 minutes 12 seconds of the dispatch, McCartney arrived "in the area at 11:29:42 p.m." and "stopped near the neighbor's home" at "11:32:01 p.m. … requested a status update on back-up" since "deputies are asked to wait for back-up on dangerous calls," and at "11:32:29 p.m. … ran license plates for two vehicles." CP 6, 17, 26. Just 34 seconds later "at 11:33:03 p.m., Deputy McCartney notified dispatch that the home invasion suspects were on the run, headed west-bound" and he "gave chase on foot" rather than wait for his *en route*

[1] The Petition erroneously claims McCartney was "relatively new to the department." Pet. 4. As shown above from the face of the complaint – and as recognized by Division Two – the opposite is true. *See* Pet. App. 21 n. 9, 29.

backup as trained. CP 6.[2] "Less than one minute later, at 11:33:58 p.m., Deputy McCartney radioed 'shots fired', then went silent." *Id.*[3] Though 3 minutes 25 seconds later it was "*recorded* [a] deputy [had] arrive[d] at the scene," 2 minutes 11 seconds thereafter an earlier arriving deputy found McCartney and radioed he "was 'down.'" CP 7 (emphasis added). In short, the Complaint alleges within just "four minutes after he arrived on scene," Deputy McCartney had suffered "a fatal gunshot

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[2] Plaintiffs repeatedly argue McCartney "needed to be trained and directed to stand down and not engage in a solo foot pursuit against armed suspects." Pet. 15-16. But as Division Two noted and the face of the Complaint and Plaintiffs' appellate briefing admitted, it "was generally known to wait for backup" because "the department instructed deputies to wait for backup on dangerous calls," and here the Deputy was informed his backup was *en route*. *See* Pet. App. 3, 30; AB 39; CP 6.

[3] Plaintiffs' unprecedented proposal for an omnipotent, omniscient and omnipresent "real time remote" personal supervisor, Pet. 27, would have made no difference. Under *the Complaint's facts,* an all-knowing supervisor would have had only 55 *seconds* from the start of the deputy's foot pursuit until the shooting began to countermand by radio the deputy's announcement he was chasing the armed suspects and order him to follow County training and "stand down" until his backup arrived in less than 3.5 minutes.

wound when ambushed in the line of duty" by an intruder he was chasing in the dark and from whom he had come to rescue homeowners. CP 4, 6, 30-31; AB 1.

B. Plaintiffs Sue County for Deputy's Murder

On February 11, 2021, Plaintiff's Complaint for negligence was filed against the County[4] and sought to allege several different duties[5] -- *all of which* it claimed resulted from the

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[4] Plaintiffs' now abandoned "Second Cause of Action – Writ of Mandate" sought "injunctive relief." CP 18-19.

[5] The Complaint made *conclusory* statements that "Pierce County owed [McCartney] the duties of proper *supervision*," "of adequate *training*," and of "*hiring* sufficient deputies such that Deputy McCartney would not face unreasonably *unsafe working conditions*." CP 13, 18. However, neither it nor any brief asserted *facts* alleging McCartney or any deputy was not properly hired, supervised or adequately trained to *perform the duties at issue on the night in question,* and Plaintiffs identify no negligent act or omission of any other deputy that allegedly contributed to the shooting or created unsafe working conditions. Indeed, as noted above, the Complaint itself confirmed McCartney's own extensive law enforcement training and experience and his being instructed "to wait for back-up on dangerous calls." CP 3, 17. In any case, there is "no authority" a municipal employee "is permitted to bring a negligent supervision claim against her employer for her own personal injury." *McIver v. City of Spokane*, 182 Wn.App. 1034, *5 (2014)(emphasis added).

same supposed inadequate allocation of taxpayer resources by the County Council for Sheriff staffing[6] which the Department had to implement.[7] *See* CP 10, 14; RCW 36.16.070 (sheriff

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[6] Plaintiffs baselessly assert the "case does not exclusively involve elected officials." Pet. 17. However, the allegations of "hiring," "supervision," "training" and "unsafe working conditions" were all stated *by the Complaint* to have resulted from the *County Council's funding* decisions for Sheriff staffing. *See* CP 14 ("*Pierce County Council's* organization and voting structure allowed *for micro-managing the Sheriff's Department* in a manner that *resulted in too few positions and too few dollars being appropriated to staffing districts*" and it "should have left *staffing priorities to the elected Sheriff* and … *appropriated monies to bring staffing to sufficiently safe levels*," or alternatively it "should have reconstructed its law enforcement obligations so that staffing was sufficiently safe" -- but the "*Council* failed to take timely and corrective action to fix the Sheriff's Department's staffing issues when consultants it retained informed it that as a *direct result of understaffing*, deputies, like Deputy McCartney, were at risk"), 15 (it *"*was not reasonable for *Pierce County Council,* to believe *one part-time staff person* could sufficiently, or adequately, and *timely process Sheriff's Department applications to maintain staffing levels at the appropriate level*")(emphasis added).

[7] The allegations *against the Sheriff's Department,* all concerned the *"elected* Sheriff*"* and his command staff's decisions *implementing* the Council's staffing budget. *See* CP 3 ("County *set minimum staffing levels* approximately 16 or more years ago without increasing staffing minimums to correspond or keep pace with population growth"), 12 ("department did not have a *training plan* to ameliorate *the danger of short*

empowered to employ deputies and other necessary employees "with the consent*"* of commissioners who "shall fix their compensation").

The County's Answer denied these allegations and claims, as well as asserted affirmative defenses such as "failure to state a claim," "discretionary immunity" and "assumption of risk/professional rescuer's doctrine." CP 28. The County then moved for judgment on the pleadings under CR 12(c). CP 35. Plaintiffs opposed dismissal but initially neither objected to the County's ER 201(f) request for judicial notice of the Council's

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staffing"), 13 (negligent for not "*hiring sufficient deputies* such that Deputy McCartney would not face unreasonably *unsafe working conditions,"* as well as "negligent when *hiring* Deputy McCartney laterally without simultaneously *hiring sufficient deputies*"), 14 ("*department or county* was negligent when it created unsafe working conditions *through understaffing*"), 15 ("Department failed to adequately *train, supervise, and appoint deputies to the hiring process* so that Pierce County *hired sufficient deputies*"; it "*did not allocate sufficient resources to the background unit* to timely *process applicants,"* and "failed to provide adequate *training, supervision, and allocation of resources* to *process background checks* in a timely manner.*"*)(*emphasis added*).

public records published on its official website nor questioned their accuracy, while their own briefs' footnotes cited similar hyperlinks to such records – as did their later appellate brief. *See* CP 137 n. 26, 139 n. 36, 140 n. 46; AB 15 n. 72. When Plaintiffs at oral argument unexpectedly objected to judicial notice, the parties were directed to brief the ER 201(f) issue. VRP 23-24, 56-59; CP 190-95.

On April 12, 2021, the Superior Court dismissed the Complaint, CP 205, and on June 28, 2022, the Court of Appeals affirmed. Pet. App. Abandoning their writ of mandamus action, Plaintiffs now seek discretionary review only of their negligence claim's dismissal. Pet. 2-3; RAP 13.4(c)(5); RAP 13.7(b).

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. RAP 13.4(b)(4) and RAP 13.4(c)(7) BAR REVIEW

Plaintiffs' assignments of error allege discretionary review should be granted to consider whether the Court of Appeals

"erroneously" affirmed dismissal under the defenses of Discretionary Immunity and the Professional Rescuer Doctrine, as well as somehow "err[ed]" by taking judicial notice of hyperlinks to public records. Pet. 2-3. However:

> [T]he Supreme Court, in passing upon petitions for review, is not operating as a court of error. Rather, it is functioning as the highest policy-making judicial body of the state. . . . . Consequently, the primary focus of a petition for review should be on why there is a compelling need to have the issue or issues presented decided generally. *The significance of the issues must be shown to transcend the particular application of the law in question*. Each of the four alternative criteria of RAP 13.4(b) support this view.

Washington Appellate Practice Deskbook, 27-8 to 27-9 (Wash. State Bar Assoc. 1993 & Supp. 1998)(emphasis added).

Thus, under RAP 13.4 a "petition for discretionary review will be accepted by the Supreme Court *only*" upon satisfying that rules' requirements. Plaintiffs, however, fail even to mention RAP 13.4(b), its requirements, or "the reason why review should be accepted *under one or more of the tests established* in section (b), *with argument*" as separately dictated by RAP

13.4(c)(7)(emphasis added). Pet. iii-iv. Their failure to satisfy these rules alone necessitate denial. *See Puget Sound Water Quality Def. Fund v. Municipality of Metro. Seattle (Metro),* 59 Wn.App. 613, 618, 800 P.2d 387 (1990)(*citing* RAP 10.3; RAP 13.4(c)(7); *Kagele v. Aetna Life and Cas. Co.*, 40 Wn.App. 194, 698 P.2d 90 (1985)(Plaintiffs "neither cite authority nor present argument in support of the claimed error" so "this assigned error will not be considered.")).

B. CR 12(c) Dismissal Under Discretionary Immunity and Professional Rescuer Doctrine Shown to be Neither Erroneous nor to Transcend the Particular Application

Though Plaintiffs seek discretionary review solely on their claim the Court of Appeals erroneously affirmed dismissal, they again neither cite nor mention – much less discuss and apply – CR 12 governing that dismissal and its affirmance. *See* CP 35, 205; Pet. App. 9. Their failure to acknowledge that rule and its principles confirms there is no dispute it was properly followed. Indeed, it is both undisputed and well settled that dismissal is

properly affirmed under CR 12 where the complaint shows an action is barred by Discretionary Immunity, *Loger v. Washington Timber Products, Inc.*, 8 Wn.App. 921, 929–30, 509 P.2d 1009 (1973) (affirming discretionary immunity required 12(c) dismissal of claim of "faulty performance or non-performance of the activity" relating to safe workplaces), or the Professional Rescuer Doctrine. *See Markoff v. Puget Sound Energy, Inc*., 9 Wn.App.2d 833, 835, 447 P.3d 577 (2019), *rev. denied*, 195 Wn.2d 1013 (2020)(affirming grant of CR 12 (b)(6) "motion to dismiss on the basis that the professional rescuer doctrine barred all of the firefighters' claims.")

1. Ruling on Discretionary Immunity was Not Error

This Court has established:

> [W]aiver of sovereign immunity "does not render the state liable for every harm that may flow from governmental action" because "the official conduct giving rise to liability must be tortious" and "the legislative, judicial, and purely executive processes of government" "cannot and should not, from the standpoint of public policy and the

> maintenance of the integrity of our system of government, be characterized as tortious."

Ehrhart v. King County, 195 Wn.2d 388, 401, 460 P.3d 612 (2020) (*quoting Evangelical United Brethren Church of Adna v. State,* 67 Wn.2d 246, 253, 407 P.2d 440 (1965)). Discretionary immunity prevents "courts from passing judgment on basic policy decisions that have been committed to coordinate branches of government." *Mancini v. City of Tacoma,* 196 Wn.2d 864, 884, 479 P.3d 656 (2021) (*quoting Bender v. City of Seattle,* 99 Wn.2d 582, 587-88, 664 P.2d 492 (1983) (citing *Evangelical*, *supra.*)). Thus "discretionary immunity is rooted in the separation of powers principles inherent in our constitutional system of government." *Ehrhart*, *supra.* at 401 (*citing King v. Cty of Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974)).

As this Court also recognizes, this protection is necessary because "in any organized society there must be room for basic governmental policy decision and the implementation thereof,

unhampered by the threat or fear of sovereign tort liability ….” *Evangelical, supra.* at 254. Otherwise, as Plaintiffs seek here, courts “would be placing ourselves in a position of having to determine how limited police resources are to be allocated,” which “is neither a traditional nor appropriate role for the courts to assume.” *See Walters v. Hampton*, 14 Wn.App. 548, 553, 543 P.2d 648 (1975). In short: “Discretionary acts are immune from suit, … because … ‘it is not a tort for government to govern.’” *Cummins v. Lewis Cty*., 156 Wn.2d 844, 863, 133 P.3d 458 (2006)(Chambers, J. concurring) (quoting *Dalehite v. United States*, 346 U.S. 15, 57 (1953)); *see also Evangelical, supra.* at 253 (quoting *Dalehite, supra.)*.

This “provide[s] sufficient breathing space for making discretionary decisions, by preventing judicial second-guessing of such decisions through the medium of a tort action.” *Zellmer v. Zellmer*, 164 Wn.2d 147, 160, 188 P.3d 497 (2008) (*citing Petersen v. State*, 100 Wn.2d 421, 433–34, 671 P.2d 230 (1983) (same)); *United States v. Gaubert*, 499 U.S. 315, 322–23

(1991)). Therefore "discretionary acts or activities … can be omitted at the discretion of the state" and "their omission, *no matter how negligent*, does not subject the state to tort liability." *Loger supra.* at 929 (emphasis added).

Neither acknowledging these holdings nor citing any authority rejecting them, Plaintiffs simply assert *ipse dixit* that Discretionary Immunity is inapplicable to negligent police staffing claims and that a deputy's nighttime foot chase of armed suspects without waiting for backup as required by his training somehow states a statutory workplace safety claim. Pet. 6-19. However, as the Court of Appeals observed: 1) "this is just a disguised argument that the [Council's] decision was a poor one;" 2) "no statute remove[s] the County's discretion to allocate funding resources and to staff employees of the Sheriff's Department," and 3) Plaintiffs cite "no workplace safety law that changes the discretionary nature of these decisions, nor" "that compels counties to ensure a certain number of sheriff deputies are assigned to certain patrols in

certain areas." Pet. App. 17, 19-20.[8] Indeed, RCW 41.26.281 allows LEOFF plaintiffs, like those here, to bring tort claims

[8] *See* Pet. App. 13 (Const. art. II, § 35 "is a mandate on the legislature, not local governments" and Plaintiffs "cite to no source where it applies in the law enforcement context"), 21 n. 9 (workplace safety statutes protect employees "from conditions of labor which have a pernicious effect on their health" and address where "inadequate wages and unsanitary conditions of labor exert such pernicious effect," but Plaintiffs cite no "nondiscretionary standard that could alleviate such a pernicious effect" of chasing armed suspects without waiting for backup that is known to be *en route*)(quoting RCW 49.12.010). Plaintiffs also cite PCC 3.15 *et seq*., but ignore its language. *Compare* Pet. 9-10 *with* PCC 3.15.010 (limited to "premises *owned or leased or work sites otherwise occupied by Pierce County*")(emphasis added); PCC 3.15.020E (defining 'workplace" by listing specific places -- *including* a "field location"—so "workplace" cannot mean anywhere a policeman works because then: 1) the list of other specific places would be superfluous; and 2) it would violate the rules that specific terms restrict the application of general terms where both are used in sequence and that a "word's meaning is determined by its relationship to other words in the statute." *See Green v. Pierce Cnty*., 197 Wn.2d 841, 853, 487 P.3d 499, 505 (2021), *cert. denied*, 142 S. Ct. 1399, 212 L. Ed. 2d 343 (2022)("doctrine of *noscitur a sociis* directs that a word is not read in isolation"); *see also Carlson v. Tactical Energetic Entry Sys., LLC*, 2015 WL 3935805, at *8 (W.D. Wis. 2015)(officer's unsafe workplace claim dismissed where – like here - "plaintiff offers no legal authority for the proposition that [an employer's] one time use of Volk Field for a training exercise by one of its agents somehow renders it [a] place of employment.")

against their employers only "as otherwise provided by law," and Discretionary Immunity is a defense “otherwise provided by law.” *See Hansen v. City of Everett*, 93 Wn.App. 921, 924-25, 971 P.2d 111 (1999)(because LEOFF member’s suit is "as otherwise provided by law," the "comparative fault statute applies to [his] lawsuit based on fault under LEOFF's 'excess damages' provision.")

Further, the Court of Appeals here noted “our courts have long held that they will not interfere in such decisions” allocating scarce police resources. Pet. App. 19. It cited as one example this Court’s precedent of *State ex rel. Farmer v. Austin*, 186 Wash. 577, 583-84, 59 P.2d 379 (1936), holding that even when a County legislature’s reduction of sheriff’s staff “was improvident and ill considered” and “the sheriff's office will be hampered by the reduction in force,” the “remedy lies with the electors rather than in the courts” because “the harm will not be nearly as great as would be the consequences of the interference by the courts with the executive duties of the

board of county commissioners, in whom is reposed the financial management of the county's affairs." *See also Walters*, 14 Wn.App. at 553 (holding it inappropriate for courts to allow tort action over city's alleged negligence in "allocation of limited police resources"); *Loger*, 8 Wn.App. at 930 (discretionary immunity required dismissal of claim over state's "faulty performance or non-performance of" its duty to ensure safe workplaces).[9]

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[9] Ignoring both *Austin* and *Loger*, Plaintiffs acknowledge only *Walters* – but do not contest its discretionary immunity analysis regarding allocation of police resources but only attempt to distinguish it on the ground workplace liability was not involved. Pet. 7-8. However, *Plaintiffs' citations* to authority involve *neither governmental workplace tort liability* nor high-level *discretionary administrative decisions*. Pet. 9 n. 16 (citing *Bayley Const. v. Washington State Department of Labor and Industries*, 10 Wn.App.2d 768, 458 P.3d 788 (2019)(affirming Board of Industrial Insurance Appeals concerning WISHA citation); *Martinez-Cuevas v. DeRuyter Brothers Dairy, Inc.*, 196 Wn.2d 506, 475 P.3d 164 (2020)(exemption for private dairy farmers from paying otherwise mandatory overtime pay violated "privileges and immunity clause"); *Stevens v. Brink's Home Security, Inc*., 162 Wn.2d 42, 169 P.3d 473 (2007)(concerning wage compensation statute not workplace safety)); Pet. 16 n. 21 (citing *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975)(holding decisions made during active law

Plaintiffs lastly dispute whether *Evangelical*'s four discretionary immunity considerations are met – including the obviously present factor that the Council and Sheriff possess "the requisite constitutional, statutory, or lawful authority and duty" to decide whether and how to hire deputies and operate a law enforcement agency.[10] *Compare* Pet. 18-19 *with* RCW 36.28.010 (6)(Sheriffs "may call to their aid such persons, or power of their county as they may deem necessary"); RCW 36.16.070 (County "may employ deputies" and county board "shall fix their compensation"). Still, they cite no decision ever holding high-level discretionary policy decisions for the maintenance of law enforcement – such as the recruiting,

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enforcement vehicle pursuit are operational and not protected "administrative" decisions); *Estate of Jones v. State*, 107 Wn.App. 510, 15 P.3d 180 (2000)(ruling supervision of parolee was low-level, operational matter, not high-level discretionary policy decision)).

[10] Plaintiffs do not argue under *King,* 84 Wn.2d at 246, that the Council and Sheriff failed to make a "considered decision" from "ample information" and consciously balanced risks and advantages. *Compare* Pet. 11-19 *with* Pet. App. 3, 15, 17-18.

hiring, and deploying of deputies at issue here – fail to meet those considerations. Pet. 11-19. Indeed, Plaintiffs *ignore* cited precedent affirmatively holding such high-level administrative policy decisions allocating police resources *satisfy* those factors and are protected by Discretionary Immunity. *Compare id. with* Pet. App. 14-15 (citing *Walters*, 14 Wn.App. at 551-53).

In *Walters*, the Court of Appeals upheld dismissal of a tort suit over a police chief's allocation of resources. Those allocations were protected by discretionary immunity because: 1) the police chief had statutory authority and duty to make the challenged omission or decision; 2) local government's basic function includes providing for and furthering "the general health, order, peace, and morality, and . . . provid[ing] justice for those governed," 3) "maintenance of police departments is basic to the accomplishment of that basic government function;" and 4) "the amount of protection afforded by any individual police department is necessarily determined by the resources available to it" and "determination of how these

resources can most effectively be used is a legislative-executive decision." *See* 14 Wn.App. at 551-53. Plaintiffs' refusal to confront *Walter's* cited analysis confirms their inability to overcome it.

Plaintiffs disregard the consequences of imposing some vague duty requiring law enforcement employers to somehow maintain the safety of all *locations* to which police are called to respond and which they *do not control* – much less entire patrol districts where police must be dispatched on high-risk calls. They admit this means deputies could only be dispatched to high-risk calls if those locations somehow have already been made safe without them. Pet. 15. Its application here also would have the absurd result of making it an allegedly unsafe workplace whenever police in rapidly changing and tense situations decide to bypass County policy requiring waiting for backup. Additionally, as the Court of Appeals noted: "Beyond having the result of holding County taxpayers liable for individual criminal acts against police officers, allowing such

negligence claims to proceed would dissuade local governments, ex ante, from sending law enforcement professionals into dangerous situations." Pet. App. 22 n. 10.

2. Ruling on Professional Rescuer Doctrine Was Not Error

Plaintiffs seek discretionary review by improperly arguing for the first time that the Professional Rescuer doctrine is "in contravention to state statute, RCW 41.26.281," and should be relegated to "a comparative fault doctrine if applicable at all and not an absolute bar to suit." Pet. 20-23. This argument not only was waived, *see* RAP 2.5(a); *Karlberg v. Otten*, 167 Wn.App. 522, 531, 280 P.3d 1123 (2012)("A failure to preserve a claim of error by presenting it first to the trial court generally means the issue is waived"), but Plaintiffs fail to explain how it can succeed when: 1) RCW 41.26.281 expressly states suits under it may be brought only "as otherwise provided by law," *see also Hansen*, 93 Wn.App. at 924-25, and; 2) this Court's precedent confirms the Professional Rescuer Doctrine *bars*

suits. *See Maltman v. Sauer*, 84 Wn.2d 975, 983, 530 P.2d 254 (1975)("plaintiff should be denied recovery in this case" because decedents were "professional rescuers"). This Court has explained the "doctrine is a type of implied primary assumption of the risk defense" that can bar a deputy's RCW 41.26.281 suit against his employer if met. *See Beaupre v. Pierce County*, 161 Wn.2d 568, 572, 166 P.3d 712 (2007)(in LEOFF suit against deputy's employer, doctrine only did not apply because injury resulted from fellow deputies' actions after arrival at rescue scene since "the professional rescue doctrine does not apply when an independent or intervening act causes the professional rescuer's injury"). Plaintiffs' new argument thus also fails because "under *stare decisis*, we will not overturn prior precedent unless there has been 'a *clear showing* that an established rule is incorrect and harmful.'" *W.G. Clark Const. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014)(quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508

(1970))(emphasis added).

Plaintiffs next argue "McCartney died when ambushed in a foot pursuit chasing the fleeing suspects far away from any victims inside the home," so somehow "there was no rescue." Pet. 22-23. However, in *Loiland v. State*, 1 Wn.App.2d 861, 868, 407 P.3d 377 (2017), *rev. denied*, 190 Wn.2d 1013 (2018), a professional rescuer was barred from suing both a law enforcement agency and the driver of a truck abandoned on a roadway because – though neither were being rescued (indeed both already had left the scene) – their alleged "negligence" had not "created a new or unknown risk" but only "placed the … police officer in harm's way" and Plaintiff then "assumed the risk of hazards that are inherently within the ambit of [the] rescue." *See also* Pet. App. 25.

Plaintiffs finally argue, again without cited support, that "negligence of an employer that reduces the safety preparedness of its deputies should be deemed intervening and an exception to the absolute bar whether the omissions occurred on the day

of rescue or prior." Pet. 26. As the Court of Appeals held, however, this exception "applies only where the employer is 'guilty of some negligence toward the rescuer *after he*, the rescuer, has begun to attempt the rescue.'" Pet. App. 25 (*quoting Maltman*, 84 Wn.2d at 982)(emphasis added). Alleged negligent funding, hiring, recruiting, deployment or other policy decisions *made years earlier* cannot be *intervening* since such "alleged negligence occurred *before* [the rescuer] responded" and had not "created a new or unknown risk" as the exception requires. *See Loiland,* 1 Wn.App.2d at 869; *see also Markoff*, 9 Wn.App.2d at 845 (intervenor exception did not apply so suit barred because "[t]here was no new negligent act or omission *after the firefighters' arrival*")(emphasis added).

C. Upholding ER 201 Judicial Notice of Public Documents Available by Hyperlink Neither is Shown Erroneous nor to Transcend the Particular Application

Again citing neither caselaw nor the record, Plaintiffs finally mischaracterize the relevance of the records judicially noticed,

claim their "content was not discrete or ascertainable with a reasonable degree of certainty," and allege it "is highly prejudicial for a court to consider hyperlinked content that is not in the record …." Pet. 27-30.

However, as the Court of Appeals noted, Plaintiffs "make no showing of this claim" of the records' alleged irrelevance or being unascertainable. Pet. App. 33. Indeed, the record confirms both the easily ascertainable nature of the cited public records as well as their relevance to showing the Council and Sheriff's high-level decisions were based on "budget considerations and … knowledge of hiring trends, criminal statistics, population densities, and other factors." *See id.* at 6, 10, 15, 17-18; Cy Corr. Resp. Br. 41-44; CP 137 n. 26, 139 n. 36, 140 n. 46.

Likewise, Plaintiffs have not contested that the requirements of judicial notice under ER 201 were met. *Compare* Pet. 27-30 *with* Pet. App. 10 (noting "authenticity of the records cannot be reasonably disputed, and the McCartneys do not raise such a

dispute.") *See also Jackson v. Quality Loan Serv. Corp.*, 186 Wn.App. 838, 844-45, 347 P.3d 487 (2015)(because plaintiff "cannot challenge the authenticity of these readily available public documents, the trial court did not err in taking judicial notice of these documents.") By definition, those public records properly could be judicially noticed without also being admitted into evidence. *See e.g*. *In re Marriage of Davis*, 180 Wn.App. 1015 at *1 (2014) (unpublished)(when court used "Internet to verify state licensing requirements for public accountants" and "parties had an opportunity to be heard, the court properly took judicial notice"). Indeed, Plaintiffs – like this Court -- repeatedly cited hyperlinks as sources for judicial notice. CP 137 n. 26, 139 n. 36, 140 n. 46; AB 15 n. 72; *Matter of Simmons,* 190 Wn.2d 374, 397, 414 P.3d 1111 (2018) ("judicial notice of the fact that Hopwood's story is well known within the legal community)(citing hyperlink); *State v. Gregory,* 192 Wn.2d 1, 22, 427 P.3d 621 (2018) (considering "the evidence before this court and our judicial notice of implicit and overt

racial bias")(citing hyperlink).

V. CONCLUSION

Because Plaintiffs demonstrate neither error nor ground for discretionary review under RAP 13.4, Pierce County respectfully requests denial of discretionary review.

I certify that this brief contains 4,989 words and is in compliance with the length limitations of RAP 18.17(c).

DATED this 25th day of August 2022.

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CERTIFICATE OF SERVICE

On August 25, 2022, I hereby certify that I electronically filed the foregoing PIERCE COUNTY'S ANSWER TO MOTION FOR DISCRETIONARY REVIEW with the Clerk of the Court which will send notification of such filing to the following:

- **Joan Mell:** joan@3brancheslaw.com

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