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SUPREME COURT
OF THE STATE OF WASHINGTON

CESAR BELTRAN-SERRANO, an incapacitated person, individually,
and BIANCA BELTRAN, as guardian *ad litem* of the person and estate of
CESAR BELTRAN-SERRANO,

Plaintiffs-Appellants,

v.

CITY OF TACOMA, a political subdivision of the State of Washington,

Defendant-Respondent.

**BRIEF OF *AMICUS CURIAE* OF AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON**

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I. INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 80,000 members and supporters, dedicated to the preservation of civil liberties, including those related to policing and excessive use of force by police. The ACLU strongly supports accountability for police use of excessive and unnecessary force, alternatives to arrest and incarceration, and de-escalation practices and training. It has participated in numerous police excessive use of force-related cases as *amicus curiae* or as counsel to parties, and has for decades advocated for policy change, including direct advocacy with the City of Tacoma on these issues, most recently in a March 2017 letter to the Tacoma Police Department.¹

II. INTRODUCTION

Pursuant to Washington Rule of Appellate Procedure 10.6(b), the ACLU submits this brief demonstrating that this Court should reverse the trial court’s summary judgment order dismissing Plaintiffs’ state common law negligence claim against the City of Tacoma. The trial court’s dismissal of Plaintiffs’ negligence claim will result in the unjust conclusion that it is acceptable for police to unreasonably and unnecessarily employ excessive, deadly force against vulnerable people who are mentally ill, non-English speaking, and homeless, where no probable cause for an arrest exists, there

¹ See “ACLU Letter to Tacoma Regarding Police Department Policies and Accountability,” Mar. 15, 2017, <https://www.aclu-wa.org/docs/aclu-letter-tacoma-regarding-police-department-policies-and-accountability>.

is no threat of imminent serious injury or death, and the underlying harm is the direct result of police conduct. The ACLU respectfully submits this brief to emphasize the harmful impact the trial court's error will have on a growing population of diverse, marginalized people.

III. STATEMENT OF THE CASE

The ACLU joins generally in Plaintiffs' Statement of Facts, summarized immediately below.

While on duty in a patrol car on June 29, 2013, Tacoma Police Officer Michel Volk noticed a Hispanic man near a known panhandling location on Portland Avenue in Tacoma. He appeared to be digging a hole for no reason. He appeared disheveled and homeless. Officer Volk witnessed him drink some orange liquid from a bottle he removed from the hole. Even though she did not witness the man, Carlos Beltran-Serrano, committing a crime, and without any reasonable suspicion he committed a crime or planned to commit a crime, she nevertheless parked her patrol vehicle, exited it, and contacted Mr. Beltran-Serrano. Officer Volk spoke at Mr. Beltran-Serrano who appeared confused, did not respond, and continued to dig the hole. She asked him if he spoke English, to which he shook his head no. She radioed for a Spanish-speaking officer, Jake Gutierrez, who was between one and a half and five minutes away.

Instead of waiting for Officer Gutierrez to arrive, Officer Volk continued to speak at and interrogate Mr. Beltran-Serrano in English, even though she was aware he did not speak or understand English. While

interrogating him in English, Officer Volk encroached on him, causing Mr. Beltran-Serrano to become fearful and move away from her. Without warning in a language understood by Mr. Beltran-Serrano, Officer Volk discharged a taser into his back while he was walking away. Mr. Beltran-Serrano was still able to move, so Officer Volk, again communicating in English, withdrew her Glock 45 and shot Mr. Beltran-Serrano four times. Mr. Beltran-Serrano survived but was severely and permanently injured.

IV. ISSUE

For the reasons stated in Plaintiffs' briefs and below, a negligence claim was validly presented and a trier of fact should be allowed to determine whether Officer Volk and the Tacoma Police Department breached their common law duty of care to Mr. Beltran-Serrano. The summary judgment should be reversed and Mr. Beltran-Serrano's negligence claim should be reinstated.

V. ARGUMENT

Civil tort claims allow victims to be compensated for harm caused by governmental agencies or their employees and acts as a deterrent to future bad acts. An important aspect of civil tort liability is its deterrent effect.² "The deterrence of unreasonable behavior through tort liability

² See Sean Robinson, *Judge upholds \$15M verdict against Lakewood in fatal police shooting of unarmed black man*, The News Tribune (Jan. 12, 2018, 6:01 PM), <https://www.thenewstribune.com/news/local/crime/article194396599.html>; Alexis Krell, *Jacqueline Slayers' family sues city over fatal shooting by*

is . . . one of the guiding principles of the abolition of sovereign immunity.”³ “[C]ompensatory damages are intended to make the plaintiff whole, such damages also frequently include a deterrence component that should not be confused with a punitive award.”⁴

A. People Suffering from Mental Illness and non-English Speaking People Are Members of the Community Served by Law Enforcement, Who Have a Duty to Not Negligently Use Deadly Force.

Voluminous data demonstrates that Mr. Beltran-Serrano represents a growing number of people who, due to mental illness or the inability to speak English, are confronted with the unreasonable and unconscionable use of excessive and deadly force by police in Washington state. From 2010 to 2012, 6% of the region encompassing Tacoma (Pierce and parts of Kitsap Counties) experienced serious mental health issues. 21% reported mental illness and approximately 5% thought seriously about committing suicide. From 2006 through 2010, the region lost two inpatient facilities for mental health care.⁵ In 2014, the U.S. Department of Health and Human Services

Tacoma officer, THE NEWS TRIBUNE (May 3, 2017 9:50 PM), <https://www.thenewstribune.com/news/local/crime/article148186039.html>.

³ *Washburn v. City of Federal Way*, 178 Wn.2d 732, 761–62, 310 P.3d 1275 (2013) (citing *King v. City of Seattle*, 84 Wn.2d 239, 244, 525 P.2d 228 (1974), *overruled on other grounds by City of Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 223 (1997)).

⁴ *Shoemaker v. Ferrer*, 168 Wn.2d 193, 203, 225 P.3d 990 (2010) (legal malpractice plaintiff’s damages may include forfeiture of attorney’s contingency fee); *See also Savage v. State*, 127 Wn.2d 434, 446–47, 899 P.2d 1270 (1995) (recognizing tort law is concerned in part with deterring negligent acts).

⁵ Robert Wood Johnson Foundation, Culture of Health, Sentinel Community Snapshot, 2018 (SMSHA data).

considered Pierce County a “Health Professional Shortage Area” (HPSA) for community mental health care delivery, i.e., outpatient mental health services.⁶

The number of patients referred to criminal or forensic wards in Washington’s psychiatric hospitals increased exponentially from 2015 to 2016. The referrals increased by approximately 35% which substantially surpassed the previous four years of growth which ranged from 0.4% to 10.5%.⁷ The trend appears to be continuing based on preliminary forensic data. For example, in 2017, referrals to Western State Hospital during the first five months increased 36% from the same period in 2016.⁸

The 2010 Behavioral Risk Factor Surveillance System (BRFSS) survey of Tacoma residents reported 15 to 30 mentally unhealthy days in the past 30 days.⁹ Washington state averaged 9.7 mentally unhealthy days per resident.¹⁰ Serious Mental Illness (SMI) computed from scores averaged

⁶ U.S. DHHS, *HRSA Data Warehouse Designated Health Professional Shortage Areas Statistics, 2014*, statistics retrieved from <https://datawarehouse.hrsa.gov/data/datadownload.aspx>.

⁷ *Cassie Cordell Trueblood, et al. v. Washington State Dep’t of Soc. and Health Servs., et al.*, Monthly Report to Court Appointed Monitor, Behavioral Health Administration, Office of Forensic Mental Health Services, Washington State Department of Health Services, Aug. 15, 2017.

⁸ *Id.*

⁹ *A Community Mental Health and Chemical Dependency Assessment City of Tacoma December 2012* 8, Tacoma-Pierce County Health Department, Office of Assessment, Planning, and Improvement, <http://www.cms.cityoftacoma.org/ncs/mhcd/CityofTacomaMHCDAssessmentfinal>.

¹⁰ *Id.*

on six questions on mental illness (2009 to 2010 average) showed a score of 3.3% for Tacoma residents compared to 2.9% for Washington overall.¹¹ From 2006 to 2011, data from the Washington State Comprehensive Hospitalization Abstract Reporting System (CHARS) indicate markedly higher mental illness (by about 25%) among Tacoma residents compared to the rest of Pierce County.¹² One Tacoma hospital system reported the percentage of emergency department (ED) visits and hospitalizations of people presenting with severe mental health problems for the period of August 2011 to July 2012 as follows:

Sixteen percent of hospitalized patients were diagnosed with psychosis not otherwise specified. Seven percent of ED visits had a diagnosis of schizophrenia. Sixty-one percent of patients presenting at the ED with a mental health diagnosis also had chemical dependency issues (co-occurring).¹³

The 2012 City of Tacoma environmental scan of 27 MHCD direct service agencies found the following:

Eighty-two percent of those agencies that provide services to adults reported that they currently have adult clients with mental health issues. Forty-four percent of those agencies that provide services to youth currently had youth clients with mental health issues.¹⁴

Mental health is also a prevalent issue in the homeless community. The U.S. Department of Housing and Urban Development's 2015 Annual Homeless Assessment Report to Congress concluded the number of

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

homeless in Washington state increased by approximately 10.0% from 2014 to 2015.¹⁵ Specifically, in Pierce County, the number of homeless between 2014 and 2018 increased from 1464 to 1628.¹⁶ The January 26, 2018 PIT count of 1628 homeless individuals included 50% with mental health disabilities and 152 people with developmental disabilities.¹⁷ On January 26, 2018, over 40% of homeless in Pierce County were either mentally or developmentally disabled.¹⁸

Thus, inevitably, law enforcement in Tacoma will continue to encounter with increasing frequency persons with mental illness. The incarceration data for Tacoma and Pierce County bears this out. In its February 2016 Study of Mental Health in Pierce County, the League of Women Voters of Tacoma determined:

The Pierce County Jail can hold up to 1,100 prisoners in different stages of the arrest and sentencing process. In 2015, 26% of those were on psychiatric medications and 50 or 60 individuals were considered “high intensity.”¹⁹

Approximately a quarter of the people at the Pierce County Jail are on psychiatric medications, which corresponds to roughly 266 people at any

¹⁵ Annual Homeless Assessment Report to Congress, Part 1, Ex. 2.8, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Office of Community Planning and Development.

¹⁶ Pierce County 2018 Point-In-Time Count Results, Jan. 26, 2018.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ League of Women Voters of Tacoma-Pierce County, Study of Mental Health in Pierce County 35 (Feb. 2016), <http://www.piercecountywa.org/DocumentCenter/View/42628>.

given time.²⁰ Considering the number of people with mental illness in the Pierce County Jail, in Tacoma generally, and in Tacoma's homeless population, the logical inference is that law enforcement encounters people with mental illness frequently and that will not change soon.

In addition to mental illness, police interaction with non-English speaking people has proven to be an issue. Between 1990 and 2000, U.S. residents from other countries increased by 57%.²¹ In 2000, over 31 million U.S. residents were born in countries other than the U.S.²² Unlike previous immigration patterns, many of the new immigrants arrived from Latin America.²³ Also defying previous immigration patterns, many of the new immigrants settled beyond the gateway cities of New York and Los Angeles into suburbs, small towns, and rural areas, attracted by the lower cost of living and economic opportunity, especially in agriculture. More than one-third of the U.S.'s foreign-born population live in the West and most are Hispanic or Asian.²⁴

²⁰ *Id.* This estimate is based on the average daily population of the Jail in July 2018. See Legal Information Network Exchange, "Jail Population," https://linxonline.co.pierce.wa.us/linxweb/Reports/ReportsList.cfm?report_type=jail_pop (last accessed Aug. 17, 2018).

²¹ Susan Shah, Insha Rahman, and Anita Khashu, *Overcoming Language Barriers: Solutions for Law Enforcement* 3, New York, VERA INSTITUTE OF JUSTICE & U.S. DEPT. OF JUSTICE, 2007, https://www.lep.gov/resources/vera_translating_justice_final.pdf.

²² Migration Information Source, "Immigration in the United States by Decade; Fiscal Years 1821 to 2000," <http://www.migrationinformation.org/GlobalData/charts/final.immig.shtml>

²³ *Id.*

²⁴ *Id.*

The 2000 census determined 20% of U.S. residents speak a language other than English at home and 8% have limited English proficiency.²⁵ Between 2012 and 2016, 19.2% of Tacoma's population spoke a language other than English in their homes.²⁶ Public service providers cannot adequately serve these communities if they are unable to effectively communicate with them.

Recent use of excessive and deadly force against vulnerable people by police in Washington state is well-documented. On December 16, 2011, the Department of Justice issued a report finding, in relevant part, the Seattle Police Department engaged in a pattern or practice of using unnecessary or excessive force.²⁷ The investigation was conducted, in part, following the unprovoked shooting death of John T. Williams, who was hearing impaired, by a Seattle Police Department officer. Mr. Williams, like Mr. Beltran-Serrano, did not pose an imminent threat and the shooting was deemed unjustifiable.²⁸

²⁵ Elizabeth Greico, *English Abilities of the U.S. Foreign-Born Population*, (Washington, D.C.: Migration Policy Institute, Jan. 2003), <http://www.migrationinformation.org?USFocus/display.cfm?ID=84>.

²⁶ *Id.*

²⁷ See U.S. Department of Justice, Civil Rights Division, *Investigation of the Seattle Police Department* (Dec. 16, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf.

²⁸ William Yardley, *Justice Department to Review Seattle Police's Use of Force*, Mar. 31, 2011, <https://www.nytimes.com/2011/04/01/us/01seattle.html>; ACLU Washington, *Officer Birk and the SPD's Bigger Problem*, Feb. 16, 2011, <https://www.aclu-wa.org/blog/officer-birk-and-spds-bigger-problem>.

On February 10, 2015, Antonio Zambrano-Montes, who had been struggling for weeks with an emotional crisis, was shot and killed by Pasco Police, who were familiar with and aware of Mr. Zambrano-Montes's mental health history. Police were called to the scene because Mr. Zambrano-Montes was throwing rocks. The police spoke to him in English though they knew that he was not English-language proficient and appeared to be suffering from an emotional crisis. Ultimately, when Mr. Zambrano-Montes did not obey commands in English to drop the rocks that he was holding, several officers who were only a few yards away, shot 17 rounds at Mr. Zambrano-Montes, five to seven of which struck him. Many other instances of excessive and deadly force by police against people with disabilities and non-English speaking people exist.²⁹

B. The Reasonableness of Using Deadly Force in a Negligence Case Should Be Assessed Under the Totality of the Circumstances.

The above data is relevant in this negligence action. In determining

²⁹ See ACLU Washington, *Keeping Everyone Safe: Changes Needed to Pasco Police Practices*, Jan. 1, 2016, <https://aclu-wa.org/docs/keeping-everyone-safe-changes-needed-pasco-police-practices>; ACLU Washington, *ACLU Urges Overhaul of Pasco Police Policies*, Feb. 10, 2016, <https://aclu-wa.org/blog/aclu-urges-overhaul-pasco-police-policies>; Lynn Thompson, *Seattle police fatally shoot black Seattle mother; family demands answers*, THE SEATTLE TIMES (June 18, 2017, 11:03 AM), <https://www.seattletimes.com/seattle-news/crime/officer-involved-shooting-in-magnuson-park-leaves-3-children-in-protective-custody/>; Lewis Kamb, *Family of man killed by King County deputy files lawsuit, claims race was a factor*, THE SEATTLE TIMES (Jan. 16, 2018, 11:28 AM), <https://www.seattletimes.com/seattle-news/family-of-man-killed-by-king-county-deputy-files-lawsuit-claims-race-was-a-factor/>.

whether a duty is owed to the plaintiff, the court considers “logic, common sense, justice, policy, and precedent, as applied to the facts of the case.”³⁰

Furthermore:

[a] person acts negligently if the person does not exercise reasonable care under all [of] the circumstances. Primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.³¹

Contrary to the trial court’s ruling here, law enforcement has a duty to “eliminate or reduce the risk of harm.” Whether the Tacoma Police Department’s actions or inactions created the risk of harm suffered by Mr. Beltran-Serrano is a question of fact to be determined by a fact-finder. The same inquiry is true for Officer Volk’s actions. These inquiries should be conducted based on the “totality of circumstances” which includes a lack of evidence that Mr. Beltran-Serrano committed a crime or was under reasonable suspicion for a crime, as well as his mental health and his inability to speak English.³² This is especially critical because the Tacoma Police Department had policies and procedures in place to deal with these issues and had trained its officers to comply with these policies and

³⁰ *Centurion Props. III, LLC v. Chi. Title Ins. Co.*, 186 Wn.2d 58, 65, 375 P.3d 651 (2016).

³¹ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3.

³² *See, e.g., Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 901, 223 P.3d 1230 (2009) (“a trier of fact may infer that the city breached the duty of care it owed to [plaintiff] based on the totality of the surrounding circumstances”).

procedures. When the employer does not disclaim liability for the employee, claims of negligent hiring, training, and supervising collapse into a direct tort claim against the employer.³³

In this instance, logic and common sense dictate that the court consider the circumstances of Mr. Beltran-Serrano, specifically his mental illness and his inability to understand English, as well as the Tacoma Police Department's policies and procedures to deal with these issues and whether Officer Volk failed to follow them. The Tacoma Police Department's own Ethical Standards supports the conclusion. The Tacoma Municipal Code, § 1.06.470, states, in relevant part: "[t]he Police Department, under the supervision of the Chief of Police, shall [. . .] (4) detect and apprehend offenders and suspected persons; (5) preserve peace and order in the City; (6) protect persons and property; [. . .] (10) maintain an adequate service training program." The Tacoma Police Department's Professional Standards further set out core values:

Respect for Our Employees and Citizens – We are guided by the principle that every individual has dignity and worth. We are committed to show respect and compassion for the citizens we serve as well as for the men and women of our Department. We show consideration for all individuals by treating everyone fairly, listening and seeking to understand all viewpoints, and appreciating diversity.³⁴

These core values are a part of the Tacoma Police Department's

³³ *Brownfield v. City of Yakima*, 178 Wn. App. 850, 878, 316 P.3d 520 (2013).

³⁴ Tacoma Police Department, Professional Standards, Sub Section 1.1, P1.1.3 VALUES.

Professional Standards whose purpose is “to ensure that agency members are aware of the actions and attitudes expected of them and **to provide the public with a general standard by which agency and individual performance can be measured.**”³⁵

The Department’s own ethical and professional standards, the burgeoning incidence of mental illness, the rise in the limited English-language proficient population, the high likelihood a police officer will encounter these individuals, and the prohibition against the unnecessary use of excessive and deadly force, support that victims of alleged police misconduct should be allowed to pursue state common law negligence claims against law enforcement.

C. Officer Volk’s Unreasonable Acts Arose from Discretion Exercised at An Operational Level, Therefore She Is Not Immune from Liability.

A police officer’s discretion exercised at an operational level is not immune from state tort claims of negligence.³⁶ This Court held so in *Mason*, a case involving Washington State Patrol officers and Seattle Police Department officers who engaged in a high-speed pursuit on I-5 through the City of Seattle.³⁷ An accident occurred involving the driver of the speeding car and occupants of another car, killing the occupants of both vehicles, including the plaintiff.³⁸ The plaintiff brought an action against the State

³⁵ *Id.* (emphasis added).

³⁶ *Mason v. Bitton*, 85 Wn.2d 321, 327–29, 534 P.2d 1360 (1975).

³⁷ *Id.* at 322.

³⁸ *Id.* at 323.

and the City of Seattle alleging their agents were negligent in the way the pursuit was carried out and the negligence caused the plaintiff's death.³⁹ The State and the City of Seattle moved for summary judgment based on governmental immunity.⁴⁰ On appeal, this Court rejected governmental immunity, explaining there was no immunity when the decision to engage and continue in a high-speed chase was an "operational" activity.⁴¹ The court reasoned "[t]o now hold that this type of discretion, exercised by police officers in the field, cannot result in liability under RCW 46.61.035 due to an exception provided for basic policy discretion, would require this court to close its eyes to the clear intent and purpose of the legislature when is abolished sovereign immunity under RCW 4.96.010. **If this type of conduct were immune from liability, the exception would surely engulf the rule, if not totally destroy it.**"⁴²

Officer Volk's actions fit squarely within the "operational discretion" exception to governmental immunity. Officer Volk exercised her discretion to stop and engage Mr. Beltran-Serrano. She continued to exercise that discretion when failing to recognize his potential mental illness as the Department trained her to do and failing to allow Mr. Beltran-Serrano reasonable language access as required. Moreover, it was her operational discretion to use a taser while Mr. Beltran-Serrano walked away from her,

³⁹ *Id.* at 323.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 328–29 (emphasis added).

then deadly force when he continued to walk away. Mr. Beltran-Serrano committed no crimes. A jury or finder of fact should decide the credibility of material facts and determine whether Mr. Beltran-Serrano suffered harm because of her and the City's actions.

An officer's failure to deescalate an encounter with a person with mental illness also factors into whether the officer provided reasonable accommodation under Title II of the Americans with Disabilities Act.⁴³ One example with facts similar to this case is *Sheehan v. City of San Francisco*, wherein police officers forced their way into a woman's room without taking her mental illness into account, despite knowing she had a mental illness.⁴⁴ The Ninth Circuit Court of Appeals held that the city was not entitled to summary judgment because a reasonable jury could find that "the officers [had] an opportunity to wait for backup and to employ less confrontational tactics," including accommodations based on the woman's disability.⁴⁵

Failing to allow civil tort claims, especially by those impaired by mental illness, those with difficulty communicating, and those who were blameless for the circumstances leading to a police officer's use of deadly

⁴³ *Sheehan v. City & Cnty. of San Francisco*, 743 F.3d 1211, 1231–33 (9th Cir. 2014), *rev'd in part, cert. dismissed in part sub nom. City & Cnty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015) (citing 42 U.S.C. § 12132) (holding that Title II ADA claims apply to arrests).

⁴⁴ *Id.*

⁴⁵ *Id.* at 1233.

force, encourages law enforcement to ignore the realities of a changing community and places no deterrence against continued practices which damage the growing numbers of disenfranchised and marginalized members of our communities. People with serious mental health disabilities, whose primary language is not English, or experiencing unsheltered homelessness, are members of our most marginalized groups and, as demonstrated, are not uncommon in today's population. Mr. Beltran-Serrano was all three. And immunity does not apply.

D. The Public Duty Doctrine Should Not Shield the Tacoma Police Department and Officer Volk Because They Owed a Common Law Duty and Needlessly Created the Underlying Situation.

Law enforcement officers and police departments do not enjoy unfettered immunity from state law tort claims.⁴⁶ The public duty doctrine is not a judicial grant of immunity and should not apply here. “[T]he public duty doctrine has never been applied by the Supreme Court to bar a claim alleging the breach of a common law duty by a governmental actor.”⁴⁷ Rather, “the public duty doctrine only applies to tort claims premised upon a violation of a statute, ordinance, or regulation when the duty imposed by the statute, ordinance, or regulation was owed to the public in general, as

⁴⁶ See RCW 4.96.010; *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013); *Staats v. Brown*, 139 Wn.2d 757, 991 P.2d 615 (2000).

⁴⁷ *Mancini v. City of Tacoma*, No. 71044-3-I, 2015 Wash. App. LEXIS 1196, at *26 (Ct. App. June 8, 2015); *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 886-87, 288 P.3d 328 (2012) (Chambers, J., concurring).

opposed to the claimant in particular.”⁴⁸ The doctrine “is simply a tool” used “to ensure that governments are not saddled with *greater liability* than private actors as they conduct the people’s business” in carrying out duties imposed or mandated by statute, ordinance, or regulation.⁴⁹ However, “if a private person would be liable in tort to the particular claimant, so too would be a governmental actor.”⁵⁰ The governmental actor’s liability, like private individuals, extends “to all those foreseeably harmed by a breach of the same common law duties.”⁵¹

Officer Volk owed Mr. Beltran-Serrano a common law duty of ordinary care to avoid the foreseeable dangers of her conduct, to not violate the safety and security of Mr. Beltran-Serrano’s person through either unreasonable excessive or deadly force, or creating a situation where there was an unreasonable risk of harm to Mr. Beltran-Serrano.⁵² Mr. Beltran-Serrano’s neighbors would be liable for negligently (or intentionally) employing excessive or deadly force against him under the circumstances at issue here. The same should be true for Officer Volk. The public duty

⁴⁸ *Mancini*, 2015 Wash. App. LEXIS 1196, at *26.

⁴⁹ *Munich*, 175 Wn.2d at 886-87 (Chambers, J., concurring) (emphasis added) (“This court has never held that a government did not have a common law duty solely because of the public duty doctrine.”).

⁵⁰ *Mancini*, 2015 Wash. App. LEXIS 1196, at *26.

⁵¹ *Munich*, 175 Wn.2d at 892 (Chambers, J., concurring).

⁵² *Nguyen v. City of Seattle*, 179 Wn. App. 155, 164, 317 P.3d 518 (2014) (citing *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005)) (“Government entities are held to the same negligence standards as private individuals.”); *Wells v. Vancouver*, 77 Wn.2d 800, 803, 467 P.2d 292 (1970) (“Generally, the duty to use ordinary care is bounded by the foreseeable range of danger.”).

doctrine should not immunize the Tacoma Police Department from being held liable for the negligence of Officer Volk, and further should not be considered a proper basis for barring Mr. Beltran-Serrano's negligence claim from proceeding to trial.

Moreover, Mr. Beltran-Serrano's claim is unique since the harm he suffered arose because Officer Volk created a situation that did not previously exist which necessitated first, the use of force, and then, because of her continued actions, the use of deadly force. The facts and circumstances leading to the use of deadly force were non-existent until Officer Volk needlessly created them. Under these facts and circumstances, the Court should reject any attempt to bar Mr. Beltran-Serrano's negligence claim by way of any immunity purportedly offered by the public duty doctrine and should allow his negligence claim to proceed.

VI. CONCLUSION

The ACLU respectfully requests that this Court reverse the Superior Court's grant of summary judgment and allow the case to proceed to trial.

DATED this 1st day of October, 2018.

KARR TUTTLE CAMPBELL

By: /s/ J. Dino Vasquez

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