No. 87906-1

**SUPREME COURT OF THE STATE OF WASHINGTON**

**CAROLA WASHBURN AND JANET LOH,
INDIVIDUALLY AND ON BEHALF OF
THE ESTATE OF BAERBEL K. ROZNOWSKI,
A DECEASED PERSON,**

**RESPONDENTS,**

**V.**

**CITY OF FEDERAL WAY,
A WASHINGTON MUNICIPAL CORPORATION,**

**PETITIONER.**

# BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON


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## INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a national, nonpartisan public interest organization of more than 500,000 members, dedicated to the principles of liberty and equality. Through its Women's Rights Project, founded in 1972 by Ruth Bader Ginsburg, the ACLU has taken a leading role in recent years advocating for the rights of survivors of gender-based violence. The ACLU's Human Rights Program, founded in 2004, works to bring a human rights analysis to its United States advocacy. Together, they have sought to strengthen governments' responses to domestic violence and the remedies available to victims.

The American Civil Liberties Union of Washington ("ACLU-WA") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties. ACLU-WA strongly supports police accountability and the availability of state tort remedies as a form of government accountability. It also has participated as *amicus* in cases involving this state's important public policy of protecting domestic violence victims. *See*, *e.g.*, *Indigo Real Estate Services v. Rousey*, 151 Wn.App. 941, 215 P.3d 977 (2009).

## ISSUE TO BE ADDRESSED BY *AMICI*

Whether state tort law, particularly as interpreted in light of international human rights law, supports a legally enforceable duty on the

part of local police agencies to take reasonable measures to separate the parties and ensure the safety of the victim when serving a protection order.

## STATEMENT OF THE CASE

The facts discussed in this brief are based on the parties' briefs filed below and in this Court.

## ARGUMENT

Ms. Roznowski obtained a protection order from the Superior Court. The anti-harassment order prohibited Mr. Kim from contacting Ms. Roznowski or being within 500 feet of her home. The City of Federal Way's police department agreed to serve that order on Mr. Kim. The court papers and the Law Enforcement Information Sheet given to the officer serving the order clearly stated that Mr. Kim would likely react violently to service of the order and would need interpreting services. The officer, however, chose to serve the order on Mr. Kim at Ms. Roznowski's home without explaining its terms to Mr. Kim or ensuring that the parties were safely separated. Later that day, Mr. Kim killed Ms. Roznowski.

*Amici* argue that the City owed a duty to Ms. Roznowski. That duty arises from state law, which imposes obligations on a city when its affirmative acts increase the risk faced by a domestic violence victim, such as in this case. The public duty doctrine does not shield the City from liability here. *Amici* devote much of this brief to explaining how a finding

that the City owed a duty under state law is consistent with the international human rights law governing governmental response to domestic violence.

### A. Well-Established State Law Shows the City had a Duty to Ms. Roznowski because of Its Affirmative Act in Serving the Protection Order. Additionally, if the Public Duty Doctrine Applies at All, the Legislative Intent Exception to that Doctrine Also Applies.

The following summary of state law demonstrates that the international law principles discussed below are consistent with state law. Under Washington state law, the City owed a legally enforceable duty to Ms. Roznowski. The City's affirmative acts in serving the order created a recognizable, high degree of risk of harm to Ms. Roznowski, thereby satisfying the legal threshold for finding police duty. Brief of Amici Curiae Legal Voice, et. al. at 11-14 (May 23, 2013), citing *Robb v. City of Seattle*, 176 Wn.2d 427, 430, 295 P.3d 212 (2013). The officer serving the order left it with the alleged abuser at the protected party's home, without separating the parties who were now legally ordered to cease contact. Worse, the officer left the protection order without explaining it to Kim, forcing Ms. Roznowski to explain it to him. It is well-documented that victims of domestic violence face high levels of danger when they try to

separate from their abusive partners.[1] Given how the City's actions elevated the risk faced by Ms. Roznowski, it cannot now claim that it owed no duty to her beyond what it owes to the general public.

Even if the Court finds that the public duty doctrine is relevant to this case, at least one well-established exception to the doctrine applies here: legislative intent. As the briefs of the Respondents Washburn, et al., and *amici* Legal Voice, et. al., explain, with ample citation of statutes and other authority, Washington has a strong statutory policy promoting protection of domestic violence victims. *See, e.g.*, RCW 10.99.030, requiring law enforcement officers to be trained regarding domestic violence issues and ways to keep domestic violence victims safe. *See also Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 213, 193 P.2d 128 (2008), in which this Court recognized the numerous statutes demonstrating a policy of protecting domestic violence victims. The statutes evidence a clear intent to identify and protect a particular and circumscribed class of persons: domestic violence victims. And contrary to the City's arguments, the statutes demonstrate an intent to protect **all** domestic violence victims, including Ms. Roznowski, not just those with

[1] Leigh Goodmark, *Law is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 St. Louis U. Pub. L. Rev. 7, 24-25 (2004) ("The very act of seeking legal assistance in a restraining order or other type of case can endanger the battered woman... Battered women recognize… how dangerous seeking legal assistance is for them.").

the wherewithal to obtain a protection order specifically based on RCW 26.50 or those who find themselves in situations triggering mandatory arrest. Accepting the City's arguments would contradict the legislative intent of Washington's comprehensive domestic violence statutes. For this reason, the Court should affirm that the City owed a duty in this case.

### B. This Court Can and Should Look to International Law as Persuasive Authority in Considering the Existence of a Duty to Protect the Victim in this Case, and in Affirming the Need for an Effective Remedy when that Duty is Breached.

#### 1. The Role of International Law in this Case

International human rights law provides further support to the conclusion that the City owed a duty to Ms. Roznowski. International law recognizes that there is a fundamental human right to be protected from gender-based violence, including domestic violence, and to effective remedies when such protection fails. This norm as reflected in ratified treaties and other international instruments and the decisions of international human rights bodies can be referenced by this Court to guide its consideration of the duty and remedy issues in this case. *Amici* do not cite these authorities as binding precedent but rather because "the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own

heritage of freedom." *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005).

International human rights law relating to domestic violence can be considered by this Court because it forms part of the law of the United States. According to the United States Constitution, human rights treaties made under the authority of the United States are the supreme law of the land. U.S. Const. art. VI. Customary international law, also referred to as the law of nations, shares a similar status. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729, 124 S. Ct. 2739, 159 L.Ed.2d 718 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.").[2] The United States Supreme Court has also recognized that United States laws should be construed to be consistent with international law whenever possible. *See, e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118, 2 L. Ed. 208 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *Weinberger v. Rossi*, 456 U.S. 25, 102 S. Ct. 1510, 71 L.Ed.2d 715 (1982); *Trans World*

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[2] *See also*, *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L.Ed. 320 (1900) (declaring "international law is part of our law" and holding that "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations"); Restatement (Third) of Foreign Relations Law of the United States § 111 (1987) (defining international law and identifying and explaining its various sources).

*Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 104 S. Ct. 1776, 80 L.Ed.2d 273 (1984). Thus, this Court should consider international law relevant to this matter, particularly where it supports the domestic law principles set forth in Section A above.

Acknowledging the relevance of international law to domestic adjudication, the U.S. Supreme Court has frequently relied on this body of law in a variety of contexts. Most recently in *Graham v. Florida*, the Court reaffirmed its "longstanding practice" of "look[ing] beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual" for purposes of the Eighth Amendment. 130 S. Ct. 2011, 2033, 176 L.Ed.2d 825 (2010).[3]

Washington courts also have a history of referencing international as well as comparative legal sources as an aid to resolving issues arising

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[3] *See also Lawrence v. Texas*, 539 U.S. 558, 560, 123 S. Ct. 2472, 156 L.Ed.2d 508 (2003) (referencing a decision of the European Court of Human Rights to determine that a Texas sodomy law violated plaintiff's privacy rights under the due process clause of the 14th Amendment of the U.S. Constitution); *Roper v. Simmons*, *supra* p. 6, 576-78 (referencing the U.N. Convention on the Rights of the Child, other international treaties and instruments on children's rights, as well as foreign practice on the death penalty to determine that the application of the juvenile death penalty in the United States violated the Eighth amendment); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002) (examining the opinions of "the world community" to support its conclusion that execution of persons with mental retardation would offend the standards of decency required by the Eighth Amendment); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31, 108 S. Ct. 2687, 101 L.Ed.2d 702 (1988) (Stevens, J.) (looking to the opinions and practices of "other nations that share our Anglo-American heritage" and "leading members of the Western European community" as aids to the proper interpretation of the Eighth Amendment). *See generally*, Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1 (2006) (examining the U.S. Supreme Court's long history of using international law in constitutional interpretation).

under state law. In *Eggert v. Seattle*, 81 Wn.2d 840, 841, 505 P. 2d 801 (1973), the Washington Supreme Court cited to Article 13(1) of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) ["UDHR"], guaranteeing the right to freedom of movement, as well as English law in support of its conclusion that the Washington Constitution incorporates a right to travel. Having discerned this right, the Court struck down as unconstitutional a Seattle city ordinance that imposed a one year durational residency requirement upon applicants for civil service positions because it unduly impinged on the applicants' constitutionally protected right to travel. Significantly, the Court did not apply the UDHR and English laws as binding law, but rather considered it as persuasive authority to assist in the determination of a complicated issue of state law.

Other state court jurisdictions nationwide have adopted this same approach and looked to both international and comparative law to assist them in determining issues of domestic concern. As in *Eggert*, and the matter before this Court, state courts often resort to these sources where the issue is complex or of first impression but that the international community has previously grappled with and arrived at a reasoned

conclusion.[4] For example, in *Sterling v. Cupp*, 290 Or. 611, 617-25, 625 P.2d 123 (1981), the Oregon Supreme Court assessed whether Oregon's practice of allowing female guards to pat-down male prisoners violated specific provisions of the Oregon Constitution that guarantee prisoners the right not be treated with "unnecessary rigor. " In determining that the pat-down searches violated this guarantee, the Court cited relevant provisions of the UDHR, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights and the Standard Minimum Rules for the Treatment of Prisoners that prohibit torture and other forms of cruel, inhuman or degrading treatment or punishment. The Court also cited a decision of the European Court of Human Rights, *Ireland v. United Kingdom*, that defines these terms. *Id*. at 622, n.21. As the Oregon Supreme Court noted, it cited to these sources not as constitutional law but "as contemporary expressions of the

[4] *See, e.g.*, Hon. Margaret H. Marshall, *"Wise Parents Do Not Hesitate to Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. Rev. 1633 (2004) (describing why Massachusetts Supreme Court chose to look to comparative law sources to resolve complex and novel issues of domestic law). ).

[worldwide] concern with minimizing needlessly harsh, degrading, or dehumanizing treatment of prisoners." *Id*. at 622.[5]

Given the rich body of law and practice that has been developed at the international level specifically addressing state obligations to protect women from domestic violence and the right of victims of such violence to an effective remedy, this Court can and should look to this body of law as a guide to the proper resolution of the issues before this Court.

### 2. International Law Imposes a Duty on Governments to Protect Against Domestic Violence and to Provide Remedies to Victims.

The right to be protected from gender-based violence, including domestic violence, and to be afforded effective remedies when such

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[5] *See also Bott v. DeLand*, 922 P.2d 732, 740-41 (Utah 1996), *abrogated on other grounds by Spackman v. Bd. of Educ. of Box Elder County Sch. Dist*., 16 P.3d 533 (Utah 2000) (relying on *Sterling* and in particular its citation to international law to define legal standards for "unnecessary abuse" under the Utah Constitution in a case where prison officials had administered grossly negligent medical treatment to a prisoner).

The cases cited are but a handful of the many from around the country in which judges have looked to international and comparative law to assist them in addressing issues of state law. For additional case-law and analysis, *see, e.g.*, Hon. Shirley S. Abrahamson & Michael J. Fisher, *All the World's a Courtroom: Judging in the New Millennium*, 26 Hofstra L. Rev. 273, 288-89 (1997) (citing cases and discussing experience of using international law in authoring legal opinions and observing that "American courts … can surely strengthen and better convey their message if they are willing to broaden their vision … [w]e should be citing … law from the rest of the world."); Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism after Medellin*, 115 Penn St. L. Rev. 1051 (2011) (citing state law cases that have referenced international and comparative sources). *See also* Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. Rev. L. & Soc. Change 359 (2006) (citing cases and explaining the rationale behind state courts' use of international and comparative law in the adjudication of domestic issues).

protection fails is recognized in widely-ratified human rights treaties,[6] including those ratified by the United States, numerous U.N. resolutions and other inter-governmental organizations,[7] decisions of international courts and tribunals,[8] and the laws and practices of other nations.[9] Inherent in this right is the obligation on governmental entities to

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[6] *See, e.g.*, International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, S. Treaty Doc. No. 95-20 (signed by the United States Oct. 5, 1977, entered into force Mar. 23, 1976) ["ICCPR"]; Human Rights Comm., 68th Sess., Gen. Comment No. 28: Equality of Rights Between Men and Women (art. 3), ¶¶ 10, 11, 14, 16, 21, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) (identifying protection from various forms of violence and subordination in the family as implicit under articles 6,7,12,18 and 24 of the ICCPR); Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) ["CEDAW"]; Comm. on the Elimination of Discrimination against Women, 11th Sess., Gen. Recommendation No.19: Violence Against Women, ¶¶ 1, 24(b) (1992) ["CEDAW Gen. Rec. 19"], http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19 (recognizing "gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms" and recommending that States Parties "ensure that laws against family violence and abuse . . . give adequate protection to all women"); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *opened for signature* June 9, 1994, 33 I.L.M. 1534 (entered into force Mar. 5, 1995).

[7] *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (Dec. 12, 1948); World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Programme of Action, ¶ 18, U.N. Doc. A/CONF.157/24 (Part I) (Oct. 13, 1993) ["Vienna Declaration"]; Declaration on the Elimination of Violence Against Women, arts. 1, 2, G.A. Res 48/104, U.N. GAOR, 48th Sess. Supp. No. 49, U.N. Doc. A/48/49, at 217 (Dec. 20, 1993); Council of Europe, Comm. of Ministers, 794th mtg. of the Ministers' Deputies, Recommendation Rec(2002)5 to Member States on the Protection of Women Against Violence (Apr. 30, 2002).

[8] *See, e.g., Opuz v. Turkey*, Eur. Ct. H.R., App. No. 33401/02 (June 9, 2009) (holding that states have an obligation to protect women, in particular, from domestic violence and that domestic violence is a form of gender discrimination that states are required to eliminate and remedy); *M.C. v. Bulgaria*, Eur. Ct. H.R., App. No. 39272/98 ¶¶ 185-87 (Mar. 4, 2004); *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 704 (2001).

[9] *See generally* U.N. Secretary-General, *Violence Against Women: Rep. of the Secretary-General*, U.N. Doc. A/59/281 (Aug. 20, 2004).

undertake reasonable measures to protect women from acts of violence where there is a real and immediate risk of harm to a particular individual or family. This "due diligence" obligation requires that governments adopt measures aimed at preventing such violence from occurring in the first place, investigating it when it does, and punishing perpetrators – an obligation that applies equally whether the perpetrator is a state or private actor.[10] The due diligence obligation requires, at a minimum, that "the organization of the entire state structure—including the state's legislative framework, public policies, law enforcement machinery, and judicial system—[]adequately and effectively prevent and respond to violence against women."[11]

Due diligence also requires that governments provide victims with "access to just and effective remedies, including compensation and

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[10] *See, e.g.*, Human Rights Council Res. 14/12, Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention, 14th Sess., May 31-June 18, 2010, U.N. Doc. A/HRC/RES/14/12 (June 30, 2010) (the failure of states to exercise due diligence in policing gender-based violence "violates and impairs or nullifies the enjoyment of [the] human rights and fundamental freedoms [of victims of domestic violence and sexual assault]"); Elimination of Domestic Violence Against Women, G.A. Res 58/147, ¶ 5, U.N. GAOR, 58th Sess., U.N. Doc. A/Res/58/147 (Feb. 19, 2004) ("States have an obligation to exercise due diligence to prevent, investigate and punish the perpetrators of domestic violence against women and to provide protection to the victims."); Vienna Declaration, *supra* note 7, ¶ 18(recognizing gender violence as a human rights violation requiring system-wide as well as national reforms designed to eliminate such violence); CEDAW Gen. Rec. 19, *supra* note 9, ¶. 9; *see also Opuz v. Turkey*, Eur. Ct. H.R., App No. 33401/02 (June 9, 2009).

[11] *Jessica Lenahan (Gonzales) and Others v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 125 (2011).

indemnification." Inter-American Comm'n on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, ¶ 48, OEA/Ser.L/V/II., Doc. 68 (2007).[12] International courts and human rights bodies have recognized that victims of gender-based violence should be afforded remedies against governments that fail to protect them. For example, the European Court of Human Rights issued a judgment against the government of Turkey and awarded damages to Nahide Opuz, a domestic violence survivor, because the government had failed to take adequate steps to protect her and her family from repeated violence. *Opuz v. Turkey*, Eur. Ct. H.R., App No. 33401/02 (June 9, 2009). Likewise, in *Maria da Penha Maia Fernandes v. Brazil*, the Inter-American Commission on Human Rights concluded that Brazil had violated Ms. Fernandes's rights by delaying the prosecution of her abusive husband for attempted murder for 15 years. The Commission found that Ms. Fernandes was entitled to prompt and effective compensation from the

[12] *See also*, Fourth World Conference on Women, Sept. 4-15, 1995, Beijing Declaration and Platform for Action, Annex I, Ch. IV, ¶¶ 125-30, U.N. Docs. A/CONF.177/20, A/CONF.177/20/Add.1 (Sept. 15, 1995) (recognizing the right of women to be free from violence by affording "women who are subjected to violence with access to the mechanisms of justice and . . . to just and effective remedies for the harm they have suffered.") ["Beijing Declaration"]; *Opuz v. Turkey*, Eur. Ct. H.R., App No. 33401/02 (June 9, 2009).

government. Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, ¶¶ 3, 61, OEA/Ser.L/V/II.111, Doc. 20 rev. at 704 (2001).[13]

In 2011, the Inter-American Commission on Human Rights (IACHR) found serious violations of these rights by the United States in its responses to domestic violence. *Jessica Lenahan (Gonzales) and Others v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, (2011), *available at* http://www.oas.org/en/iachr/decisions/merits.asp. The *Lenahan* case arose out of police failure to enforce a protective order, with similarly tragic consequences as those presented here. In June 1999, Ms. Lenahan's abusive ex-husband abducted their three daughters in violation of a protective order. *Lenahan*, at ¶ 24. Although Ms. Lenahan pleaded with the Castle Rock, Colorado police to intervene to enforce the order and track down her children, they repeatedly refused to do so. The dead bodies of the three girls were later discovered. After the U.S. Supreme Court denied her relief based on a federal

[13] *See also A.T. v. Hungary*, Comm. on the Elimination of Discrimination Against Women, Communication No. 2/2003, ¶¶ 9.3, 9.5, 9.6 (Jan. 26, 2005) (recommending that Hungary provide reparations to a domestic violence survivor whom it failed to protect); *Bevacqua & S. v. Bulgaria*, Eur. Ct. H.R., App. No. 71127/01 (June 12, 2008) (awarding damages to domestic violence survivor where government had failed to protect); *Kontrova v. Slovakia*, Eur. Ct. H.R., App No. 7510/04 (May 31, 2007) (same); *Branko Tomasic & Others v. Croatia*, Eur. Ct. H.R., App. No. 46598/06 (Jan. 15, 2009) (same).

constitutional claim, Ms. Lenahan filed a petition with the IACHR, alleging violations of international human rights laws.[14] *Lenahan*, at ¶ 39.

The IACHR, in August 2011, found that the United States government's failure to exercise due diligence to protect Ms. Lenahan and her children violated their fundamental rights to non-discrimination, life, and judicial protection under the American Declaration on the Rights and Duties of Man.[15] The IACHR concluded that, "a State's failure to act with due diligence to protect women from violence constitutes a form of discrimination, and denies women their right to equality before the law." In addition, the IACHR found that the State's lack of due diligence in enforcing a protection order also violates the right to life, *Lenahan*, at ¶¶ 111-112, and the right to effective judicial remedies when the government fails to carry out its due diligence obligation. *Lenahan*, at ¶ 173.

### 3. State Law as Interpreted in Light of International Law Imposes a Duty on the Part of the City in this Case.

International law as reflected in the IACHR's findings in *Lenahan* is highly relevant to this case. In *Lenahan*, the IACHR emphasized that

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[14] See, *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 768, 125 S. Ct. 2796, 162L.Ed.2d 658 (2005) (holding that there is no right under the U.S. Constitution to police enforcement of a protection order). Despite this holding, Justice Scalia noted that the decision "does not mean States are powerless to provide victims with personally enforceable remedies." *Id*. Here, the survivors of Ms. Roznowski sought such a remedy through Washington state courts and law.

[15] *Jessica Lenahan (Gonzales) and Others v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 199 (2011).

through issuance of protective orders, governments recognize the risk faced by domestic violence victims, particularly where, as here, the order is based on a determination from a judicial authority that the beneficiary was in need of protection. *Lenahan*, at ¶ 143. At that point, the due diligence obligation requires the government to take certain measures to ensure the victim's protection:

> In light of this judicial recognition of risk, and the corresponding need for protection, the State was obligated to ensure that its apparatus responded effectively and in a coordinated fashion to enforce the terms of this order to protect the victims from harm. This required that the authorities entrusted with the enforcement of the restraining order were aware of its existence and its terms; that they understood that a protection order represents a judicial determination of risk and what their responsibilities were in light of this determination; that they understood the characteristics of the problem of domestic violence; and were trained to respond to reports of potential violations.

¶ 145. Moreover, the IACHR in *Lenahan* noted that issuance of a protective order may result in increased danger for domestic violence victims:

> [W]hen a State issues a protection order, this has safety implications for the women who requested the protection order, her children and her family members. Restraining orders may aggravate the problem of separation violence, resulting in reprisals from the aggressor directed towards the woman and her children, a problem which increases the need of victims to receive legal protection from the State after an order of this kind has been issued.

*Lenahan*, at ¶ 166. As in *Lenahan*, and for the reasons described in Respondent Washburn's briefs and amicus briefs of Legal Voice, et. al., the government here failed to carry out several of its obligations that were triggered upon issuance of the protection order in this case.[16] Instead of acting with due diligence, the City police increased the risk of harm to Ms. Roznowski by serving the anti-harassment order on Mr. Kim at her home, failing to explain the meaning and consequences of the order to him, and leaving without ensuring the safety of Ms. Roznowski or taking measures to safely remove Mr. Kim from the home, as required by the order.

The City's arguments contradict both this state's legislative intent protecting domestic violence victims like Ms. Roznowski, and the due diligence obligation imposed on governments under international law. The City argues that all the police could have done after serving the order was

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[16] *See also* Special Rapporteur on Violence Against Women, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Mission to the United States of America*, ¶¶ 13, 15, 115.A(d), U.N. Doc. A/HRC/17/26/Add. 5 (June 1, 2011) (by Rashida Manjoo) (calling on U.S. institutions to establish meaningful standards for enforcement of protection orders and to impose consequences for a failure to enforce); Special Rapporteur on Violence Against Women, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, The Due Diligence* Standard *as a Tool for the Elimination of Violence Against Women*, ¶ 49, U.N. Doc. E/CN. 4/2006/61 (Jan. 20, 2006) (by Yakin Erturk) (expressing serious concern about major gaps in the enforcement of protective obligations by police and the judiciary); Inter-American Comm'n on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, ¶¶ 166-68, OEA/Ser.L/V/II., doc. 68 (2007) (stressing that failure to prevent violence and implement protective orders ranks among the chief obstacles to the practice of due diligence); *Opuz v. Turkey*, Eur. Ct. H.R., App. No. 33401/02, ¶¶ 128-30 (June 9, 2009).

make Kim leave the house, and Kim did leave the house after the officer left. Petition for Review at 20. However, this argument completely ignores the effect of the officer serving the order, as contemplated by statute, and leaving Kim at the house in violation of its terms. By failing to ensure that Kim and Roznowski were safely separated as required by the order, the officer sent a message: the order is a piece of paper, and not a judicial decree that extends police protection to Ms. Roznowski. The City further suggests that Ms. Roznowski should have called 911 upon Kim's return. Petition for Review at 20. Setting aside whether Ms. Roznowski could have called 911 given the circumstances, this argument further illustrates the City's lack of understanding of how its actions exacerbated an already dangerous situation. As the IACHR has noted, "State inaction towards cases of violence against women fosters an environment of impunity and promotes the repetition of violence since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts." *Lenahan*, ¶ 168 (internal quotation marks omitted).

International law may also be referenced to guide this Court's consideration of whether, under state law, the burden of monitoring how the government carried out the protective measures rests on the government, or on the victim. The City argues that it had no duty to Ms.

Roznowski distinguishable from any other member of the public, and thus it had no obligation to properly enforce the order. The City therefore places the burden on Ms. Roznowski, a victim recognized by the Superior Court, to determine how or whether the government undertakes any protective measures such as enforcement of court orders. International law rejects this view. As the IACHR noted in *Lenahan*:

> The Commission has manifested its concern on how States mistakenly take the position that victims are themselves responsible for monitoring the preventive measures, which leaves them defenseless and in danger of becoming the victims of the assailant's reprisals.

*Lenahan*, at ¶ 158. *See also* Inter-American Comm'n on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, ¶ 170 OEA/Ser.L/V/II. Doc. 68 (2007). Tragically, what the IACHR described is precisely what happened in Ms. Roznowski's case. She filed for a protection order and indicated that the respondent would need interpreting services to understand the terms of the order and that he would react violently once served. The officer acted without regard to these serious risk factors, and his conduct increased her vulnerability to Kim's ultimately homicidal reprisal. It is appropriate that the Court place the burden on the City, not the victim, to ensure that the officer serving the order take reasonable measures to separate Ms. Roznowski from her abuser to advance her safety.

Lastly, it is critical that this Court preserve the ability of domestic violence victims to hold police accountable in cases such as this one. Concluding that police owe no duty based on the public duty doctrine would create a generally insurmountable bar for victims seeking judicial remedies for police misconduct relating to domestic violence. Such a decision would be in conflict with international human rights law, which guarantees remedies for violations of domestic violence victims' rights, and state law, which has created an exception to the public duty doctrine based on the legislative intent to protect domestic violence victims.

## CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court uphold the trial court's verdict and the Court of Appeals' ruling recognizing that the City owed a duty in this case.

Respectfully submitted this 24th day of May 2013.


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