SUPREME COURT CASE NO. S269672

SUPREME COURT OF

THE STATE OF CALIFORNIA

DORA LEON,

Plaintiff and Appellant,

v.

COUNTY OF RIVERSIDE,

Defendant and Respondent.

After a Published Decision by the Court of Appeal
Fourth Appellate District, Division Two
Case no. E073781

APPELLANT'S OPENING BRIEF ON THE MERTS

Richard L. Antognini
SBN 075711
LAW OFFICE OF
RICHARD L. ANTOGNINI
2036 Nevada City Highway,
Suite 636
Grass Valley, CA 95945
Telephone: (916) 295-4896
Email: rlalawyer@yahoo.com

Steven Zwick, SBN 063304
James Alquist, SBN 194995
LAW OFFICE OF
STEVEN ZWICK
25909 Pala, Suite 340
Mission Viejo, CA 92691
Telephone: (949) 699-4444
Email: steven.zwick@zwicklaw.com
james.alquis@zwicklaw.com

Attorneys for Plaintiff and Appellant
DORA LEON

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GLOSSARY

CT-Clerk's Transcript. Appellant will cite to it by page number, as there is only one volume. For example, the original complaint can be found at page 6 of the Clerk's Transcript. Appellant cites it as CT at 6.

County—the County of Riverside, the main defendant in the trial court.

Dora Leon or Dora—Plaintiff and Appellant Dora Leon.

José—José Leon, Dora Leon's murdered husband.

Lawless-- Frank J. Menentrez, *Lawless Law Enforcement: The Judicial Invention of Absolute Immunity for Police and Prosecutors in California* (2009), 49 Santa Clara L. Rev. 393.

Leon v. County of Riverside—the court of appeal opinion found at 64 Cal.App.5th 837 (2021).

ISSUE PRESENTED

Is immunity under Government Code section 821.6 limited to actions for malicious prosecution, as this Court correctly held in *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710?

THE GOVERNING STATUTES

Cal. Gov. Code § 815 provides:

> (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.
>
> (b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

Cal. Gov. Code § 815.2 states:

> (a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.
>
> (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

Cal. Gov. Code § 820.4 provides**:**

> A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

Cal. Gov. Code § 821.6 cautions:

> A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.

INTRODUCTION

This appeal involves an issue of vital social importance: the scope of governmental immunity for police misconduct committed during an investigation. The court of appeal's decision below, if affirmed, will give law enforcement officers *absolut*e immunity for *any* actions taken during a police investigation, including acts committed "maliciously and without probable cause." *Leon v. County of Riverside,* 64 Cal.App.5th 837, 945 (2021).

The implications of that ruling are disturbing. Under the lower court's interpretation of Section 821.6, even George-Floyd-style executions would trigger no liability under California law, either for the police officers involved or the public entities that

employ them. This result is unacceptable from a societal perspective. As one commentator put it, this interpretation of Section 821.6 "gives California's public employees a license to kill, destroy, and defame, maliciously and without probable cause, as long as their conduct relates to the investigation or prosecution of crime." Frank J. Menentrez, *Lawless Law Enforcement: The Judicial Invention of Absolute Immunity for Police and Prosecutors in California* (2009), 49 Santa Clara L. Rev. 393, 394 ["*Lawless*"].

The Court of Appeal's interpretation of Section 821.6 is contrary to the plain language of the statute, its legislative history, and the rulings of this Court. The Court should reject it.

STATEMENT OF FACTS

This case is a summary judgment appeal. This Court, like the court of appeal, construes all evidence and the facts against the moving party, the County of Riverside. *Aguilar v. Atlantic Richfield Co.,* 25 Cal.4th 826, 856-857 (2001). Dora Leon discusses the facts in that light.

I. The Murder of José Leon and the Treatment Of His Body.

José Leon, a Latino man, lived with his wife, Dora Leon, and their children at a mobile home park in Cherry Valley, California.

Leon v. County of Riverside, 64 Cal.App.5th at 843; CT 146. On March 25, 2017, a neighbor shot José in the chest, just outside his home. *Ibid.* He fell face down on the pavement. *Ibid.*

When police arrived on the scene, they believed he was dead because there was a large pool of blood around José's upper torso, and he was neither breathing nor actively bleeding. *Ibid.* One of the sheriff's deputies turned José onto his back and dragged him by the arms several feet, causing his pants to bunch down around his thighs, exposing his genitals. *Ibid.* They then left José in that position, with face and genitals exposed, for *seven hours*, despite his wife and neighbors' pleading that his body be covered out of respect. Their excuse was that they couldn't find a blanket or other covering and that protocol required that the body shouldn't be disturbed – even though "the body had already been turned over and dragged several feet." *Leon v. County of Riverside,* 64 Cal.App.5th at 843-844.

José's body remained uncovered, with his genitals exposed, until 6:30 p.m., when the coroner released the body. CT 147-148. No one tried to pull José's pants up or cover him. *Ibid.* Dora, her children, and her neighbors could see the body, with the genitals in plain view. *Ibid.* One of the involved officers later admitted

under oath that someone could have pulled José's pants back up once the SWAT team found the shooter dead. CT 150. But four more hours would pass until the body was removed. *Ibid.*

One neighbor, Sheri Sandstrom, testified in her declaration, "While he was being drug his pants fell off. I was sitting in my side room patio that was enclosed from which I could see everything…. His pants were down to his ankles, and he had no underwear on. His privates were exposed. I went outside and told the Sherriff to please cover him up. They got very upset with me and at that point he told everyone to get in the house and leave the trailer area. His body lay exposed for approximately 8-9 hours." CT 147: 25-28, CT 148: 1-5.

II. Dora Leon's Lawsuit Against the County of Riverside.

Dora Leon sued the County of Riverside (the "County") for negligent infliction of emotional distress. *Leon v. County of Riverside,* 64 Cal.App.5th at 845. She alleged: "Decedent's uncovered dead bloody body lay on the street, in public view, including the view of Decedent's spouse . . . for hours while all the while, law enforcement officers… were on the scene . . . and knew that the body remained uncovered and in view of the public,

including . . . the spouse of the Decedent, but negligently failed to cover the body." CT 9: 6-21.

During discovery, one deputy testified in deposition he did not know why José's pants were not or could not have been pulled back up once the shooter was determined to be dead, several hours before his body was removed from the scene. PE 13.

The County moved for summary judgment. It argued it owed Dora Leon no duty of care and was otherwise immune under Section 821.6. PE 3. *Leon v. County of Riverside,* 64 Cal.App.5th at 842. The trial court granted summary judgment, "reasoning that the county met its initial burden of showing that it was immune from any liability to Dora under sections 815.2, subdivision (b) and 821.6 . . .." *Ibid.*

III. The Decision Below.

The court of appeal affirmed, holding that the deputies were immune from liability under Section 821.6 and that the county "is immune from vicarious liability for the deputies' negligence, if any," under Gov. Code Sections 815.2(b) and 821.6. *Leon v. County of Riverside,* 64 Cal.App.5th at 842.

The court reasoned that even though Section 821.6, on its face, merely affords immunity for "injury caused by instituting or

prosecuting any judicial or administrative proceeding . . . ," the Legislature must have intended to fully immunize law enforcement officials for any misconduct committed during an investigation, "even if the employee acted maliciously and without probable cause," *Leon v. County of Riverside,* 64 Cal.App.5th at 854 "[b]ecause investigation is 'an essential step' toward the institution of formal proceedings . . ." *Id.,* at 846.

In so ruling, the court of appeals brushed aside this Court's ruling in *Sullivan v. County of Los Angeles*, 12 Cal.3d 710 (1974), which construed Section 821.6 as granting immunity only for malicious prosecution. In the lower court's view, "*Sullivan* was not concerned with, and did not address, whether section 821.6's immunity for malicious prosecution extended to torts committed by public employees during the course of official investigations related to judicial or administrative proceedings." *Leon v. County of Riverside,* 64 Cal.App.5th at 854. [citing Section 821.6].

The lower court found particularly persuasive the "public policy" concerns articulated in several decisions of this Court that predated *Sullivan*, including *White v. Towers,* 37 Cal.2d 727, 729-730, 732 (1951). *Leon v. County of Riverside,* 64 Cal.App.5th at 855. There, in discussing whether a public employee was immune from

civil liability for malicious prosecution of a criminal proceeding against the plaintiff, this Court stated that "[w]hen the duty to investigate crime and to institute criminal proceedings is lodged with any public officer, it is for the best interests of the community as a whole that he be protected from harassment in the performance of that duty." *Id.* at p. 729.

The court of appeal concluded that the public policy "inherent in the common law rule immunizing public employees from liability for malicious prosecution" supported its construction of Section 821.6 as affording absolute immunity for police misconduct: "To eliminate that fear of litigation and prevent the officers from being harassed in the performance of their duties, law enforcement officers are granted immunity from civil liability, even for the malicious abuse of their power." *quoting Amylou R. v. County of Riverside,* 28 Cal.App.4th at 1213.

In a lengthy concurrence, Judge Raphael expressed concern that the panel's decision was contrary to Section 821.6's plain language and this Court's decisions in *Sullivan*, *supra*, and *Asgari v. City of Los Angeles*, 15 Cal.4th 744, 752 (1997). *Leon v. County of Riverside,* 64 Cal.App.5th at 862-863. He further noted that the panel's expansive reading of Section 821.6. had been rejected in

three decisions of the U.S. Court of Appeals for the Ninth Circuit, which read *Sullivan* as controlling on this point. *Leon v. County of Riverside,* 64 Cal.App.5th at 862-863.

In Judge Raphael's view, were it not for the contrary precedent from California appellate courts, "a straightforward reading of [Gov. Code §§ 820.4 and 821.6] might apply Governmental Code section 820.4 qualified immunity to officers enforcing the law and section 821.6's absolute immunity once a legal proceeding is initiated." *Leon v. County of Riverside,* 64 Cal.App.5th at 863. "Working on a blank slate," wrote Judge Raphael, "I would follow the text of section 821.6." *Ibid.*

ARGUMENT

I. This Court has decisively held that Section 821.6 grants immunity against only malicious prosecution actions.

Section 821.6 is no stranger to this Court. It issued the definitive interpretation of the statute in *Sullivan v. County of Los Angeles,* 13 Cal.3d 710 (1974). There, Sullivan sued the County of Los Angeles for false imprisonment. He alleged the County had kept him in jail beyond his sentence. *Id.,* at 714. The County of Los Angeles contended it had immunity under section 821.6 because "the section's reference to 'instituting or prosecuting any

judicial…proceeding' is sufficiently broad to encompass retaining a person in jail although no criminal proceeding remains pending against him." *Id.* at 719.

This Court rejected the County's argument, finding that section 821.6's immunity extended only to claims for malicious prosecution. *Id.* at 720. The Court first noted, "the plain meaning of the language in section 821.6 demonstrates that the section does not encompass retaining a person beyond his term." *Ibid.* It stressed that the common understanding of "institute" means "to originate and get established…[to] initiate." *Ibid.* The common sense understanding of "prosecute" means to "institute legal proceedings against…." *Ibid.* Sullivan's claim for wrongful imprisonment did not originate or institute any proceeding. *Ibid.*

The Court held the legislative history of section 821.6 did not allow the statute to be extended beyond malicious prosecution. *Ibid.* "[T]he Legislature intended the section to protect public employees from liability only for *malicious prosecution* and not *false imprisonment*." *Ibid* (italics in original).

In 1997, the Court reaffirmed *Sullivan* and clarified the scope of the immunity that section 821.6 provides. See *Asgari v. City of Los Angeles,* 15 Cal.4th 744 (1999). There, the issue was

whether a police officer's liability for false imprisonment "may include damages sustained by the arrestee after the filing of formal charges where, for example, the officer knowingly presented false evidence to the prosecutor." *Id.* at 748. The court concluded that damages for false imprisonment end with the filing of formal charges. However, it wrote that because of section 821.6, a contrary conclusion "would produce absurd results:

> If a police officer falsely arrested a suspect and then knowingly provided false information to the prosecutor, the officer could be found liable for damages arising from the entire period of the suspect's incarceration. But the officer would enjoy absolute immunity if, instead of arresting the suspect, the officer proceeded directly to the prosecutor and maliciously and knowingly provided false information that led to the filing of criminal charges. Such conduct would constitute malicious prosecution, and the officer would enjoy absolute immunity from liability under section 821.6. . . . A police officer's liability for damages arising from the filing of criminal charges, in conjunction with his or her malicious provision of false information to the prosecutor, should not depend upon whether the filing of criminal charges was preceded by an unlawful arrest. *Id.* at 759.

Thus, because the malicious provision of false information to prosecutors constitutes malicious prosecution, and because public employees are absolutely immune to suits for malicious prosecution under section 821.6, public employees cannot be liable for damages resulting from the malicious provision of false

information to prosecutors. And, once formal charges are filed against a criminal defendant, the defendant's subsequent incarceration is attributable to the filing of the charges, not to any unlawful arrest that may have preceded that filing. Recoverable damages for false arrest therefore must end once formal charges are filed:

> As one commentator has noted, "*Asgari* is significant not only because it shows the continuing validity of *Sullivan*'s holding—that the section 821.6 immunity applies only to malicious prosecution—but also because it clarifies the scope of that immunity. As *Asgari* explains, prosecutors are not the only potential defendants in malicious prosecution actions. See *Asgari*, 937 P.2d at 282 (stating that if a police officer maliciously and knowingly provides a prosecutor with false information that leads to the filing of criminal charges, the officer's conduct "would constitute malicious prosecution"). Rather, anyone who furnishes false information to a prosecutor and thereby instigates a baseless prosecution can, as a general matter, be sued for malicious prosecution. Public employees such as police officers, however, are immune to such suits because of section 821.6, even when they act maliciously and without probable cause." *Lawless*, 49 Santa Clara L. Rev. at pp. 398-399.

II. The plain language of section 821.6 limits it to malicious prosecution.

The plain language of section 821.6 confirms that the Court's narrow interpretation of the statute was correct. As in any statutory construction case, the Court begins with the language of the statute and the cardinal rule of statutory interpretation—if the language of the statute is clear, it must be followed. The Court has reaffirmed this rule often, most recently in *Meza v. Portfolio Recovery Associates, LLC*, 6 Cal.5th 844, 856–857 (2019): "We first examine the statutory language, giving it a plain and commonsense meaning…. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend."

The plain language of section 821.6 limits immunity for "injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment…." Section 821.6 nowhere uses the term investigation or any word that may describe an investigation. It contains no language suggesting it applies to police arriving on a crime scene, finding a victim, and then failing to cover the victim's body.

Reading the word "investigation" into section 821.6 inserts language that just is not there. No court may escape the plain terms of a statute by importing words the Legislature chose not to use. *Smith v. LoanMe, Inc.,* 11 Cal.5th 183, 190 (2021). To paraphrase Donald Rumsfeld, courts construe the language of statutes the Legislature passed, not the statutes they wish the Legislature had passed. *NLRB v. S.W. Gen., Inc.,* 137 S.Ct. 929, 939 (2017). Because section 821.6 does not use the word "investigate," no court should insert that word into the statute.

Because section 821.6 is unambiguous, legislative history is irrelevant. *Meza v. Portfolio Recovery Associates, LLC*, 6 Cal.5th at 857. Regardless, the statute's history confirms that the Legislature intended to confine section 821.6 immunity to malicious prosecution. *Sullivan,* 13 Cal.3d at 719. The Legislature made this intent clear in the Senate Committee Report on the statute:

> The California courts have repeatedly held . . . public employees immune from liability for this sort of conduct.… This section continues the existing immunity of public employees; and, because no statute imposes liability on public entities for malicious prosecution, public entities likewise are immune from liability." *Sullivan,* 13 Cal.3d at 720 (citations omitted).

The Senate Committee Report shows that, in passing section 821.6, the Legislature merely intended to codify public employees' "existing immunity" from malicious prosecution. The cases the Legislature cited all concerned malicious prosecution claims. They confirm that section 821.6's immunity was limited to that context.

III. The courts of appeal have stretched section 821.6 beyond its clear language.

Sullivan and the rules of statutory construction should end the discussion. The Legislature and this Court have spoken. "The decisions of this court are binding upon and must be followed by all the state courts of California." *Auto Equity Sales, Inc. v. Superior Court,* 57 Cal.2d 450, 455 (1962).

Despite *Sullivan,* various California courts of appeal, including the lower court, have construed section 821.6 as conferring absolute immunity on any form of a police investigation. *Amylou R. v. County of Riverside,* 28 Cal.App.4th 1205, 1210 (1994) (*Amylou R.*); *Baughman v. State of California,* 38 Cal.App.4th 182, 191-193 (1995) (*Baughman*); *Leon v. County of Riverside,* 64 Cal.App.5th at 846.

These courts have reasoned that immunity begins from the moment law enforcement arrives at the scene of a crime to the trial

of the criminal suspect. *Ibid.* "' Because investigation is an 'essential step' toward the institution of formal proceedings, it 'is also cloaked with immunity.'" *Leon v. County of Riverside,* 64 Cal.App.5th at 846, *quoting Amylou R.,* 28 Cal.App.4th at 1210.

Despite *Sullivan,* the courts of appeal construed section 821.6 far beyond its plan language. The first such case was *Amylou R.* There, police investigating a rape and murder believed the rape victim did not tell all she knew. *Amylou R.,* 28 Cal.App.4th at 1207. According to the plaintiff, the officers badgered her and threatened her with arrest. *Ibid.* She refused to speak with them any further. *Ibid.* She then sued the County of Riverside for false imprisonment and intentional infliction of emotional distress, among other torts. *Ibid.* A jury ruled in her favor. *Ibid.*

The court of appeal affirmed the verdict, except where it awarded the plaintiff damages for the county's investigation. In the court's view, section 821.6 gave the county absolute immunity for any liability arising from the investigation. *Amylou R.,* 28 Cal.4th at 1209-1210. The court found that "the actions complained of were committed in the institution and prosecution of a judicial proceeding," as required by section 821.6. *Amylou R.,* 28 Cal.App.4th at 1209. "Because investigation is an 'essential step'

toward the institution of formal proceedings, it 'also is cloaked with immunity.'" *Amylou R.,* 28 Cal.App.4th at 1210.

The *Amylou R.* opinion noted *Sullivan* but said that the case only held section 821.6 did not apply to actions for false imprisonment. *Amylou R.,* 28 Cal.App.4th at 1211, fn. 2. *Sullivan* did not prevent a court from construing the section 821.5 immunity to extend to any aspect of a police investigation. *Ibid.*

Next came *Baughman v. State of California,* 38 Cal.App.4th 182 (1995). Baugham sued the State of California when state police seized and then destroyed computer disks containing his research. *Baughman,* 38 Cal.App.4th at 186. The police were investigating a theft of computer data from California Polytechnic State University at San Luis Obispo. *Ibid.*

The State argued at trial that section 821.6 gave it absolute immunity because its officers were investigating a crime. *Ibid.* The jury returned a defense verdict. Baughman appealed. *Ibid.*

The court of appeal upheld the defense verdict. It ruled it was bound by *Amylou R. Baughman*, 38 Cal.App.4th at 191. The state police had seized Baughman's computer drives as part of an investigation into a crime. *Ibid.* Because section 821.6 immunized

any police investigation, it barred Baughman's suit as a matter of law. *Ibid.* The court did not discuss *Sullivan.*

Finally, we come to the court of appeal opinion in this case. Unlike *Amylou R.* and *Baughman,* the court here rested its ruling on public policy. It believed that any liability for a botched investigation would invite interference with police functions and hamper law enforcement. *Leon v. County of Riverside,* 64 Cal.App.5th at854-855. "The efficient functioning of our system of law enforcement is dependent largely upon the investigation of crime and the accusation of offenders by properly trained officers. A breakdown of this system at the investigative or accusatory level would wreak untold harm." *Leon v. County of Riverside,* 64 Cal.App.5th at 855, *quoting White v. Towers,* 37 Cal.2d 727, 729-730 (1951).

These cases erred in several ways. First, they ignored or misconstrued *Sullivan.* One did not discuss *Sullivan* in any detail. *Baughman,* 38 Cal.App.4th at 190-192. A second case read *Sullivan* too narrowly, holding *Sullivan* did not prevent a court from construing the section 821.6 immunity to include all aspects of a police investigation. *Amylou R.,* 28 Cal.App.4th at 1211, fn. 2.

In this case, the court of appeal opinion dismissed *Sullivan,* noting *Sullivan* "was not concerned with, and did not address, whether section 821.6's immunity for malicious prosecution extended to torts committed by public employees during the course of official investigations…." *Leon v. County of Riverside,* 64 Cal.App.5th at 854. The court read *Sullivan* too narrowly. *Sullivan* was categorical-because section 821.6 was clear, as was the legislative history, the statute could go no farther than immunize employees from malicious prosecution claims. The limited reach of the statute was vital, not whether it applied to investigations.

Second, the three courts of appeal opinions forgot controlling rules of statutory construction. They did not focus on the actual language of section 821.6. They did not realize the statute never used the word "investigation." They did not recognize that the statute's use of "initiate" and "prosecute" signaled an intent to limit the immunity to malicious prosecution.

Third, they relied on their own ideas of good public policy rather than the statute's plain language. Public policy is important, but it cannot override clear statutory language. *Skidgel v. California Unemployment Ins. Appeals Board,* 12 Cal.5th 1, 10 (2021).

Fourth, the courts of appeal did not look to another rule of statutory construction--statutes must be construed in context. *Meza v. Portfolio Recovery Associates, LLC*, 6 Cal.5th at 856-857. This rule means a court must look at surrounding statutes to interpret a particular statute. *Ibid.*

For example, the Government Claims Act provides that public employees are liable for their negligence. However, they do not enjoy absolute immunity for every action they may take. Government Code section 815.2 (a) states, "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."

If a public employee had absolute immunity for any act she might commit in an investigation, it would make section 815.2 (a) meaningless. Section 815.2 (a) would create liability only to have section 821.6 take away that liability in any situation. Section 821.6 cannot be broadly construed to destroy section 815.2 (a) because that interpretation would be absurd. "If the language is clear, courts must generally follow its plain meaning unless a

literal interpretation would result in absurd consequences the Legislature did not intend." *Meza v. Portfolio Recovery Associates, LLC*, 6 Cal.5th at 856.

Government Code section 820.4, like section 821.6, a part of the Government Claims Act, provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law."

This statute provides a police officer with broad immunity unless he or she does not use due care. It cannot be reconciled with an interpretation of section 821.6 that grants absolute immunity. If a law enforcement officer is absolutely immune for a negligent investigation, section 820.4 is unnecessary and redundant. That interpretation goes against a vital rule of statutory construction-a court cannot interpret a statute to make another statute redundant or irrelevant. *Meza v. Portfolio Recovery Associates, LLC*, 6 Cal.5th at 856–857.

This Court should not follow *Amylou R., Baughman*, or the court of appeal opinion below because those opinions disregard crucial rules of statutory construction.

IV. Public policy favors an interpretation of section 821.6 that limits it to malicious prosecution.

Even if relevant in the face of clear statutory language, public policy concerns do not salvage the lower's court's mistaken interpretation of section 821.6.

The greatest danger is that absolute immunity under section 821.6 will shield outrageous and illegal conduct. Examples stand out in today's news. As one example, consider George Floyd. A police officer arrested him and kneeled on his neck for nine minutes, suffocating him. A jury found that behavior rose to homicide. Yet, under the court of appeal's interpretation of section 821.6, both the officer and the city that employed him would be immune from any civil liability. Although Floyd was being arrested, both can claim that the responding officers were also investigating shoplifting. Even if the officer committed homicide, he would enjoy absolute immunity, as would his employer.

Or take the case of Breonna Taylor. Police officers stormed her apartment and shot her, then realized they had attacked the wrong unit. She was the victim of incompetence and excessive force. Under the court of appeal's ruling, her family would have no recourse. Instead, the officers and their employer could claim

absolute immunity under section 821.6 because they were investigating drug crimes.

Justice Menetrez best described the danger of absolute immunity under section 821.6: "The Court of Appeal's interpretation of the statute gives California's public employees a license to kill, destroy and defame, maliciously and without probable cause, as long as their conduct relates to the investigation or prosecution of crime. However absurd that may sound, it presently is the law of the land in California." *Lawless,* 49 Santa Clara L. Rev. at 394.

Absolute immunity does not fit the times. Citizens, legislatures, and courts now insist on accountability from all public employees, including law enforcement.

For example, the Tom Bane Civil Rights Act, Civil Code section 52.1 (c), protects citizens from law enforcement misconduct, whether in investigations or otherwise: "Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or

her own behalf a civil action for damages…." Allowing absolute immunity for police actions will erase this statute.

As another example, Civil Code section 52.3 (a), a related statute, provides: "No governmental authority, or agent of a governmental authority, or person acting on behalf of a governmental authority, shall engage in a pattern or practice of conduct by law enforcement officers that deprives any person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States or by the Constitution or laws of California." As expanded by the court of appeal in Dora Leon's case, absolute immunity will hollow out this statute.

Law enforcement officials still will retain strong defenses against frivolous lawsuits. Under section 820.4, they will be immune if they use due care. They will stand on the same footing as the citizens they protect, who also must exercise due care. See Civil Code section 1714 (a): "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person…."

And law enforcement officers will enjoy qualified immunity under the federal civil rights statute, 42 U.S.C. § 1983. *Garmon v.*

County of Los Angeles, 828 F.3d 837, 842 (9th Cir. 2016). But they will not have absolute immunity because that immunity "is an extreme remedy, and it justified only where 'any lesser degree of immunity would impair the judicial process itself.'" *Id., quoting Lacey v. Maricopa County,* 693 F.3d 896, 912 (9th Cir. 2012).

Construing section 821.6 as conferring absolute immunity as to all "investigations" would also create complicated line-drawing problems. The County and the court below believed law enforcement should have unrestricted discretion in conducting investigations to find criminal perpetrators and deter crime. *Leon v. County of Riverside,* 64 Cal.App.5th at 856, *citing White v. Towers,* 37 Cal.2d 729-730.

But when does an investigation begin? In Dora Leon's case, that question has no clear answer. Did the investigation begin when the sheriff's deputies arrived on the scene? Did it start when the deputies dragged Jose's body, causing his pants to fall? Did it begin when the shooter killed himself, or only when the SWAT team found his body? Did it begin when the coroner arrived?

How a court answers this question may decide liability. If the investigation began when SWAT found the shooter, the County faces exposure because Jose's body had been out in the open for

several hours. If the investigation started when the coroner arrived, more hours had passed with Jose's body in plain view. A court will not find it easy to distinguish between an investigation and officers responding to a crime. Making "investigation" the line of demarcation will not end factual disputes or ease the job of trial and appellate courts deciding those disputes.

Courts also will face mixed motives. When a police officer takes action, is she trying to stop a crime or investigating one? When the deputies arrived at the mobile home park, was their motive to stop a shooting and assist the victim? Or were they investigating a crime? The honest answer is they were doing both-they had dual motives. Do the dual motives mean they are not immune under 821.6 because their purpose went beyond investigation? Again, courts will be asked to decide complicated and unclear issues of fact. That, too, is reason enough to reject the Court of Appeal's policy-based rationale for its overbroad reading of Section 821.6.

CONCLUSION

Statutory language and public policy do not justify construing Government Code section 821.6 to grant absolute immunity for all aspects of a police investigation. Disastrous results will follow if that broad interpretation continues.

This Court should agree it correctly decided *Sullivan v. County of Los Angeles* and rule section 821.6 is limited to malicious prosecution. Because the court of appeal construed section 821.6 far too broadly, its judgment should be reversed.

Dated: December 1, 2021

LAW OFFICE OF
RICHARD L. ANTOGNINI

Richard L. Antognini
Attorneys for Plaintiff and
Appellant Dora Leon

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Dated: December 1, 2021

LAW OFFICE OF
RICHARD L. ANTOGNINI

Richard L. Antognini
Attorneys for Plaintiff and
Appellant Dora Leon

SUPREME COURT CASE NO.: S269272
LEON v. COUNTY OF RIVERSIDE

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Steven Zwick, Esq.
James Alquist, Esq.
Law Office of Steven Zwick
25909 Pala, Suite 340
Mission Viejo, CA 92691
Co-counsel for appellant

Lann G. McIntyre, Esq.
Jeffrey A. Miller, Esq.
Lewis Brisbois Bisgaard & Smith LLP
701 B Street, Suite 1900
San Diego, CA 92101
Counsel for respondent County of Riverside

I also served the opening brief on the trial court by mail and the Court of Appeal by efiling the brief with the Supreme Court. The addresses of the trial court and the Court of Appeal are:

Clerk
Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501
(efiled copy of brief only)

Hon. Daniel A. Ottolia
Judge of the Superior Court
County of Riverside
4050 Main Street
Riverside, CA 92501

I declare under penalty of perjury of the laws of the State of California and the United States that the preceding is true and correct. Executed on December 1, 2021, at Grass Valley, California.

/s/ Richard L. Antognini
Richard L. Antognini

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Jeffry Miller Lewis Brisbois Bisgaard & Smith, LLP 126074	jeff.miller@lewisbrisbois.com	e-Serve	12/1/2021 8:01:53 PM

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Antognini, Richard (075711)

Last Name, First Name (PNum)

Law Office of Richard L. Antognini

Law Firm