Supreme Court Number S269672

In the Supreme Court of the State of California

DORA LEON,

Plaintiff and Appellant,

v.

COUNTY OF RIVERSIDE,

Defendant and Respondent.

Fourth Appellate District, Division Two
Fourth Civil Number E073781
Riverside County Superior Court, Case No. RIC1722990
The Honorable Daniel Ottolia

ANSWERING BRIEF ON THE MERITS

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INTRODUCTION

Public entities and their employees are immunized from liability for injury caused by an employee's institution or prosecution of any judicial or administrative proceeding. (Gov. Code, §§ 815.2, subd. (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"], 821.6 ["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"].) Here, the trial court and the Court of Appeal properly held that the County of Riverside ("County") was immune from

liability to a murder victim's widow for alleged negligence in failing to promptly cover the murder victim's exposed body because the negligence, if any, occurred during the course of the official investigation of the murder.

In so ruling, the Court of Appeal correctly interpreted Government Code section 821.6 ("section 821.6") and applied it to conduct occurring during an official crime scene investigation because an investigation is an essential step toward the institution of formal proceedings. Scores of appellate court decisions have reached the same conclusion: immunity for malicious prosecution under section 821.6 extends to conduct during official investigations concerning a judicial or administrative proceeding. That immunity is necessary to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil lawsuits. Allowing law enforcement officers to perform their official duties free of "fear of consequences personal to themselves" is the same public policy behind the common law immunity that section 821.6 codified and that this court affirmed in *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710 (*Sullivan*). (*Leon v. County of Riverside* (2021) 64 Cal.App.5th 837, 847, 856 (*Leon*).)

Dora Leon ("Leon"), the wife of the victim, Jose Leon ("Jose"),[1] contends this court's decision in *Sullivan* limits the immunity in section 821.6 to *only* malicious prosecution claims.

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[1] Jose's first name is used for purposes of clarity. No disrespect is intended.

She argues countless Court of Appeal decisions issued over the course of the past several decades since *Sullivan* were wrongly decided by extending immunity to official investigations that precede the institution or prosecution of judicial or administrative proceedings. The County respectfully disagrees with the premise that *Sullivan* stands for the limited proposition Leon proposes.

Furthermore, extension of the immunity provided by section 821.6 to conduct occurring during a law enforcement investigation at the scene of a crime is consistent with the statutory text because an investigation is an essential precursor to the institution of formal proceedings. Providing immunity to law enforcement officials during an investigation also supports the important public policy codified in section 821.6 of "prevent[ing] interference with their discretionary and quasi-judicial responsibility for institution and prosecution of … proceedings." (*Sullivan, supra,* 12 Cal.3d at p. 722.) Affording immunity to conduct occurring during an official investigation of a crime allows for the exercise of discretion necessary for law enforcement personnel to perform their duties. The Court of Appeal decision should be affirmed.

STATEMENT OF FACTS

A. The Riverside County Sheriff's Department responds to a call about a shooting at a mobile home park.

Jose lived in space number 98 at a mobile home park located in the County of Riverside. [CT 146.][2] On the morning of March 25, 2017, Jose was shot near the driveway outside neighboring space number 96. [*Ibid.*] A deputy from the Riverside County Sheriff's Department responded to a 911 call about a shooting at the mobile home park and was the first law enforcement officer to arrive on the scene. [*Id.* at p. 167.] The deputy observed that a man (later determined to be Jose) was lying face down on the ground in a large pool of blood and did not appear to be breathing. [*Id.* at pp. 167–168.]

B. When shots ring out from a nearby mobile home, deputies move Jose Leon to a safe location behind a sheriff's SUV.

As the Riverside County Sheriff's Department deputy was squatting down to check on Jose, three shots rang out from a mobile home about 25 to 30 feet away. [CT 167, 169.] The deputy took cover and called for additional assistance. [*Ibid.*] His partner arrived in a Sheriff's SUV, which he moved in between where the shots were coming from and Jose. [*Id.* at p. 170.] The second deputy then turned Jose onto his back and pulled him about three feet until he was behind the SUV. [*Id.* at p. 171.] In the

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[2] All citations to the single-volume clerk's transcript are noted as "CT."

process, Jose's shorts were pulled down to his thighs, exposing his genitals. [*Ibid.*]

After unsuccessfully attempting chest compressions, the deputy called in Jose as deceased at 11:02 a.m. [CT 171, 184.]

C. Without disturbing Jose's body, the mobile home park is cleared, and a search ensues for the shooter, who is later found dead of self-inflicted gunshot wounds.

Leon and her family, along with other residents, were cleared from the scene and were not allowed to return until 11:00 p.m. that night. [CT 125–126, 132–133.] SWAT arrived on the scene at 11:41 a.m. and set up a perimeter and only law enforcement officers were allowed on the scene. [*Id.* at pp. 125–126, 132–133, 186.]

The deputy did not pull up Jose's shorts because there was an active shooter, and it was too dangerous. [CT 172.] He also did not want to contaminate the body. [*Id.* at p. 173.] The deputy acted in accordance with Government Code section 27491.2, subdivision (b), which prohibits disturbing or removing the body from the place of death without the coroner's permission. [*Id.* at pp. 128–130, 173.]

A search ensued for about four hours until the shooter's body was located in space number 97 at 2:52 p.m. [CT 125, 176.]

D. The coroner processes and releases Jose's body a few hours later.

The coroner arrived on the scene at 5:03 p.m. and processed Jose's and the shooter's bodies. [CT 185.] The bodies were released at 6:20 p.m. [*Id.* at p. 186.]

E. Leon sues the Sheriff's Department for negligence in leaving Jose's body uncovered during the hunt for the shooter and the crime scene investigation.

Leon filed a complaint against the County alleging a single cause of action for negligence. [CT 46–67.] She alleged the County negligently failed to cover Jose's body "for hours" while law enforcement officers were on the scene, causing her to suffer "insult, indignity and emotional injuries…." [*Id.* at p. 49.]

F. The trial court grants the County's summary judgment motion because section 821.6 immunizes the County from liability for its employees actions during the investigation.

After Leon filed her complaint, the County moved for summary judgment. The trial court determined the County was immune from liability under section 821.6 because the alleged failure to cover Jose's body occurred during an investigation and the immunity provided by section 821.6 applies to police investigations, which are considered an essential step in instituting formal proceedings. Thus, the trial court granted the County's motion for summary judgment. [CT 269–270; Reporter's Transcript, "RT" 4–5.]

G. The Court of Appeal affirms the grant of summary judgment.

On appeal, Leon argued the County was not immune from liability because leaving Jose's body exposed after the shooter was found dead was not in furtherance of the investigation. Therefore, immunity should not apply. [Appellant's Opening Brief, "AOB," p. 30.] Leon also argued for the first time that the *Sullivan* decision holds that section 821.6 immunity applies only to malicious prosecution claims and subsequent appellate court decisions have impermissibly broadened the scope of protection provided by section 821.6. [*Id.* at pp. 13, 36.]

The Court of Appeal rejected both of Leon's arguments. It held that the deputies' alleged negligence, if any, occurred during the performance of their official duties to secure the scene and investigate the shooting. (*Leon, supra,* 64 Cal.App.5th at p. 848.) Thus, the deputies and the County were immune from liability under section 821.6. (*Ibid.*)

In the court's view, *Sullivan* was not concerned with and did not preclude section 821.6's immunity from encompassing immunity for tortious injuries occurring during an official investigation because an investigation is an essential step toward the institution of formal proceedings. (*Leon, supra,* 64 Cal.App.5th at p. 856.) The court explained that the *Sullivan* court "specifically addressed whether section 821.6's immunity applied to claims for false imprisonment *in addition to* claims for malicious prosecution." (*Id.* at p. 854, original italics, citing

Sullivan, supra, 12 Cal.3d at pp. 713, 719–720.) "In holding that section 821.6 did not immunize public employees from claims for false imprisonment, the [*Sullivan*] court reasoned that section 821.6 could not be interpreted to defeat another common law rule, preserved in section 820.4, that public employees are *not immune* from liability for false arrest or false imprisonment." (*Leon*, at p. 854, original italics, citing *Sullivan*, at pp. 720–722.) The court explained that "*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*, at p. 854.)

Furthermore, the Supreme Court's indication in *White v. Towers* (1951) 37 Cal.2d 727, 731–732 (*White*), that the public policy of allowing law enforcement officers to perform their official duties free of "fear of consequences personal to themselves," which was inherent in the common law immunity rule regarding malicious prosecution, also supported construing section 821.6 as encompassing injuries caused during the course of an official investigation. (*Leon, supra,* 64 Cal.App.5th at p. 856.)

The Court of Appeal rejected the argument that conduct undertaken during the hours after the shooter was found did not constitute a part of the investigation. According to the court, undisputed evidence showed that the official investigation continued for several hours after the shooter was found dead.

(*Leon, supra,* 64 Cal.App.5th at p. 848.) Thus, the alleged negligence, if any, occurred during the course of the official investigation of the shooting. (*Ibid.*)

Justice Raphael wrote a concurring opinion to explain that he joined in the decision because the Court of Appeal's interpretation of section 821.6 to extend to acts during an investigation "correctly reads Court of Appeal case law," and "is currently state law." (*Leon*, *supra*, 64 Cal.App.5th at pp. 856, 859 (conc. opn. of Raphael, J.).) Justice Raphael noted that for decades, the Court of Appeal has limited the holding in *Sullivan* to false imprisonment claims and as not precluding application of section 821.6 immunity to other torts occurring during an official investigation, a view neither the Supreme Court nor the Legislature has repudiated. (*Id.* at p. 861.) Accordingly, the majority's opinion was consistent with 36 years of precedent, which is "current[] state law." (*Id.* at pp. 856, 859, 862–863.)

Justice Raphael also pointed out that California federal courts interpret *Sullivan* and section 821.6 differently, viewing it as providing immunity only against malicious prosecution claims, based on an interpretation of *Sullivan* as confining the reach of section 821.6 to malicious prosecution actions alone. (*Leon*, *supra*, 64 Cal.App.5th at pp. 859–860 (conc. opn. of Raphael, J.).)

If given a clean slate, Justice Raphael stated he would not constrict the *Sullivan* opinion "to its barest holding," but found "36 years of precedent" persuasive. (*Leon*, *supra*, 64 Cal.App.5th at p. 863 (conc. opn. of Raphael, J.).) Therefore, Justice Raphael,

with some reluctance, joined the Court of Appeal's opinion, which interprets *Sullivan* as deciding "only that section 821.6 malicious prosecution immunity did not extend to the tort claim at issue there, false imprisonment, and was 'not concerned' with whether it extended to any other tort claim." (*Id.* at p. 860.) According to Justice Raphael, this reading of *Sullivan* was consistent with the current state of the law as set forth in numerous Court of Appeal decisions. (*Id.* at p. 862.)

Leon then petitioned this court for review. This court granted review of Leon's petition, which raised a single issue: "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*, 12 Cal.3d 710, 721 (1974)?" As explained below, the answer is irrefutably "no."

ARGUMENT

I. This Court's Interpretation of Government Code Section 821.6 Immunity in *Sullivan* Does Not Preclude Immunity from Liability for Conduct During a Crime Scene Investigation.

A. The *Sullivan* decision.

Section 821.6 was enacted in 1963 as part of the California Tort Claims Act. (*Sullivan, supra,* 12 Cal.3d at p. 720; *Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 764 (*Asgari*).)
It codified the common law rule immunizing public entities and public employees from liability for malicious prosecution claims. (*Ibid.*) Section 821.6 provides:

> 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.

In 1974, this court in *Sullivan* addressed the issue of whether section 821.6 immunity applied to false imprisonment claims as well as malicious prosecution claims. (*Sullivan, supra,* 12 Cal.3d at pp. 713, 719–720.) The defendant in *Sullivan*, the County of Los Angeles, contended it had immunity under section 821.6 for allegedly keeping a prisoner in jail after his sentence expired because the words "instituting or prosecuting any judicial. . .proceeding" were sufficiently broad to encompass claims of false imprisonment. (*Id.* at pp. 714, 719.) In *Sullivan,* this court decided the narrow issue before it—"whether an individual who is confined in a county jail beyond his proper jail term may maintain an action for false imprisonment against the county or whether such a suit is barred by the governmental immunity provisions of the California Tort Claims Act." (*Id.* at p. 713.)

This court gave three reasons for deciding the statutory language "instituting or prosecuting any judicial . . . proceeding" was not broad enough to encompass retaining a person in jail when no criminal proceedings remain pending against him. (*Sullivan, supra,* 12 Cal.3d at pp. 719–720.)

First, the plain meaning of "institute" and "prosecute" did not, taken literally, "reach the act of holding a person in jail beyond his term." (*Sullivan, supra,* 12 Cal.3d at p. 719.)

Second, "the history of section 821.6 demonstrates that the Legislature intended the section to protect public employees from liability only for *malicious prosecution* and not for *false imprisonment*." (*Sullivan, supra,* 12 Cal.3d at p. 719, original italics.)

Finally, this court concluded section 821.6 continues existing immunity for malicious prosecution, whereas there was no immunity for false imprisonment that could be continued. (*Sullivan, supra,* 12 Cal.3d at pp. 720–721.) Indeed, Government Code section 820.4 specifically provided that public employees were *not* immune from liability for false imprisonment. The fact the California Tort Claims Act distinguished malicious prosecution and false imprisonment—providing immunity for the former, but none for the latter—confirmed this court's interpretation of section 821.6 as applying only to malicious prosecution and not to false imprisonment. (*Id.* at p. 721.)

The *Sullivan* decision did not, however, address whether injury-causing conduct occurring during a criminal investigation preceding the institution or prosecution of a judicial proceeding would be subject to immunity under section 821.6. Nor did *Sullivan* examine the purpose or effect of the statutory phrase "instituting or prosecuting" in section 821.6 as applied to investigatory conduct preceding institution of formal proceedings.

The analysis in *Sullivan* was limited to the comparison of malicious prosecution to false imprisonment claims. (*Sullivan, supra*, 12 Cal.3d at pp. 713, 719–720.)

As this court has repeatedly observed, "'cases are not authority for propositions not considered.'" (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 11.) The Court of Appeal here correctly observed that "*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,* 64 Cal.App.5th at p. 854.) Consequently, the Court of Appeal opinion is not in conflict with *Sullivan*. Furthermore, the opinion presents a correct interpretation of section 821.6 and promotes the important public policies that undergird that immunity provision.

B. The Court of Appeal correctly applied section 821.6 immunity to official investigations.

As Justice Raphael pointed out in his concurring opinion in this case, the Court of Appeal has for decades interpreted section 821.6 immunity as extending beyond malicious prosecution. (*Leon*, *supra*, 64 Cal.App.5th at p. 860 (conc. opn. of Raphael, J.).) In a long line of cases since *Sullivan* was decided, courts have firmly established that section 821.6's immunity provision is not limited to malicious prosecution. (Cf. *Randle v. City & County of San Francisco* (1986) 186 Cal.App.3d 449, 452, 456 (*Randle*) [district attorney and police inspector's suppression of

exculpatory evidence during rape prosecution]; *Kayfetz v. State of California* (1984) 156 Cal.App.3d 491, 497–498 [publication of "Action Report" regarding physician discipline]; *Citizens Capital Corp. v. Spohn* (1982) 133 Cal.App.3d 887, 889 [immunity applied to statements the state prosecutor and regulatory agency officials made in press releases regarding their investigation of the plaintiff]; *Engel v. McCloskey* (1979) 92 Cal.App.3d 870, 881–883 [investigation of attorney's moral character by California State Bar]; *Johnson v. City of Pacifica* (1970) 4 Cal.App.3d 82, 85 [police officers' negligent investigation of citizens' complaints leading to criminal prosecution]; *Stearns v. County of Los Angeles* (1969) 275 Cal.App.2d 134, 137 [coroner's negligence leading to criminal prosecution].)[3]

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[3] While not a comprehensive list, additional cases applying section 821.6 immunity to actions other than malicious prosecution, and particularly to investigatory conduct include: *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1037 [defamation and intentional infliction of emotional distress]; *Javor v. Taggart* (2002) 98 Cal.App.4th 795, 807–808 [slander and clouding of title, intentional infliction of emotional distress, and negligence]; *Gensburg v. Miller* (1994) 31 Cal.App.4th 512, 518 [civil rights violations in the context of suspending a foster home license]; *Ronald S. v. County of San Diego* (1993) 16 Cal.App.4th 887, 899 [negligence in the process of administering an adoption]; *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 882–883 [claims of negligent and intentional conduct alleged in connection with a child abuse investigation]; and *Jenkins v. County of Orange* (1989) 212 Cal.App.3d 278, 283 (*Jenkins*) [social worker immune for liability for negligent investigation of reports of child abuse].

In *Randle,* the court directly addressed and rejected the plaintiff's contention that section 821.6 immunity applied only to conduct analogous to the tort of malicious prosecution based on *Sullivan*. The court limited the *Sullivan* decision to "the specific context of distinguishing actions for malicious prosecution from ones for false arrest or false imprisonment." (*Randle, supra,* 186 Cal.App.3d at p. 456.) The court concluded, "[w]hile appellant's cases [including *Sullivan*], therefore, preclude application of section 821.6 to suits for false arrest or imprisonment, they do not preclude its application to suits alleging conduct other than malicious prosecution which comes within the terms of the immunity provision." (*Ibid.*)

The court reasoned that *Sullivan* established that false arrest or imprisonment and malicious prosecution are mutually inconsistent concepts and that liability for false arrest and imprisonment is specifically retained in the Government Tort Claims Act. However, *Sullivan* did not preclude application of section 821.6 to conduct during an ongoing prosecution. (*Randle, supra,* 186 Cal.App.3d at p. 456.) Accordingly, the court upheld application of section 821.6 immunity to suits alleging conduct other than malicious prosecution, including in that case to claims against the City and County of San Francisco, an assistant district attorney and a police inspector that they allegedly suppressed exculpatory evidence during a rape prosecution. (*Id.* at pp. 451–452.)

The *Randle* court observed that the policy advanced by the immunity for malicious prosecution suits as articulated in *White, supra,* 37 Cal.2d 727, 729–730, a pre-*Sullivan* case, applied equally to law enforcement officers concerning their handling of prosecutions. (*Randle, supra,* 186 Cal.App.3d at p. 457.) In *White,* the policy of promoting vigorous law enforcement without fear of harassment through civil suits took precedence over the potential hardship some individuals might suffer:

> We are aware of the fact that in thus surrounding peace officers with immunity in cases of this sort, hardship may result to some individuals. However, experience has shown that the common good is best served by permitting law enforcement officers to perform their assigned tasks without fear of being called to account in a civil action for alleged malicious prosecution.

(*White, supra,* 37 Cal.2d at p. 730.)

The court in *Jenkins, supra,* 212 Cal.App.3d 278, similarly agreed that *Sullivan* "limited its holding and discussion to the lack of immunity for false imprisonment." (*Id.* at p. 283.) In concluding that a social worker has immunity for allegedly failing to consider all of the evidence and misrepresenting the evidence to the court, *Jenkins* found such conduct to fall within the ambit of section 821.6's language regarding "instituting or prosecuting any judicial or administrative proceeding. . . ." (*Id.* at p. 284.)

Likewise, in *Cappuccio, Inc. v. Harmon* (1989) 208 Cal.App.3d 1496, 1500–1501 (*Cappuccio*), the court found extending section 821.6 immunity to statements made by an

investigating officer and published by the Department of Fish and Game after the judicial proceedings ended was consistent with the policy behind section 821.6 immunity as articulated by the Supreme Court in *White*:

> When 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. 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.

(*Cappuccio, supra,* 208 Cal.App.3d at p. 1501, quoting *White, supra,* 37 Cal.2d at pp. 729–730.)

The *Cappuccio* court distinguished *Sullivan* as holding that section 821.6 does not apply to false imprisonment. Moreover, *Sullivan* did not address whether the false imprisonment was committed during or after the judicial proceeding. (*Cappuccio, supra,* 208 Cal.App.3d at pp. 1501–1502 ["What the court there held was that Government Code section 821.6 does not apply to a prosecution for false imprisonment. Whether the false imprisonment was committed during the judicial proceeding or after the termination thereof was not an issue in that case, and the court did not address the issue"].)

In *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1436 (*Kemmerer*), disapproved on other grounds in *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 815,

fn. 8, the court acknowledged that although the "principal use" of section 821.6 was for suits for damages for malicious prosecution, the section is not limited to such suits. (*Kemmerer*, at p. 1436.) The court held that section 821.6 immunity applied to claims arising out of formal disciplinary proceedings against a civil service employee in the County of Fresno's Social Services Department. (*Id.* at p. 1435.) The investigation, preliminary notice and proceedings before the civil service commission were subject to section 821.6 immunity because they fell within the scope of an "administrative proceeding." (*Id.* at p. 1437.)

Leon contends *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205 (*Amylou R.*), was the first case in which, despite *Sullivan,* the Court of Appeal construed section 821.6 "far beyond its plan [*sic*] language," and read *Sullivan* "too narrowly." (Opening Brief on the Merits, "OBOM," pp. 21, 23.) In *Amylou R.,* the plaintiff sued the County of Riverside for false imprisonment and intentional and negligent infliction of emotional distress based on conduct by the County's police employees who investigated a crime in which the plaintiff was a victim. The plaintiff alleged the county officers, during the course of their investigation, became antagonistic to her and claimed she knew more than she was telling. (*Amylou R.,* at pp. 1207–1208, 1210–1211.) The court reversed the jury's award of emotional distress damages because section 821.6 immunity applied. (*Id.* at p. 1211.) The court reasoned that the acts the plaintiff complained about were incidental to the investigation of the crimes and investigation is part of the prosecution of a judicial proceeding.

(*Id.* at p. 1210 ["Because investigation is 'an essential step' toward the institution of formal proceedings, it 'is also cloaked with immunity'"].) Therefore, section 821.6 applied. (*Id.* at p. 1211.)

The *Amylou R.* court further addressed whether the immunity is "limited to claims for injuries suffered by the target of the judicial or administrative proceeding, or whether it also shields the officers from liability for injuries suffered by others, such as witnesses or victims." (*Amylou R., supra,* 28 Cal.App.4th at p. 1211.) The court concluded immunity applies even if the person suffering the injury is not the target of the prosecution. (*Ibid.*)

The *Amylou R.* decision acknowledges that *Sullivan* established that section 821.6 does not provide immunity for false imprisonment claims. (*Amylou R., supra,* 28 Cal.App.4th at p. 1211, fn. 2.) In discussing whether immunity is limited to claims made by a target of the former proceeding, the court noted nothing in the language of section 821.6 suggests such a limitation. (*Id.* at p. 1211.) While a person pursuing a malicious prosecution action must have been a target, "the language of section 821.6 does not limit its application solely to the tort of malicious prosecution." (*Ibid.*) As the court reasoned:

> To the contrary, by specifying that the employee is immune 'even if he acts maliciously,' the section clearly extends to proceedings which were not initiated out of a malicious intent, and thus would not constitute malicious prosecution. [Citation.] Accordingly, the notion that the immunity

> provided by section 821.6 is limited to claims for malicious prosecution has been repeatedly rejected.

(*Amylou R., supra,* 28 Cal.App.4th at p. 1211, citing *Johnson v. City of Pacifica, supra*, 4 Cal.App.3d at pp. 86–87; *Jenkins, supra*, 212 Cal.App.3d at p. 283.)

Finally, the *Amylou R.* decision addressed the public policy behind section 821.6 of protecting police officer's discretionary decisions from the fear of subsequent litigation: "The impartiality of that system requires that, when exercising that responsibility, the officers are "free to act in the exercise of honest judgment uninfluenced by fear of consequences personal to themselves."" (*Amylou R., supra,* 28 Cal.App.4th at p. 1213, quoting *White, supra,* 37 Cal.2d at p. 732, quoting *Pearson v. Reed* (1935) 6 Cal.App.2d 277, 288.) That public policy reflects the salutary view that, "'[i]n the end [it is] better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'" (*Amylou R.,* at p. 1213, quoting *Hardy v. Vial* (1957) 48 Cal.2d 577, 583, quoting *Gregoire v. Biddle* (2d Cir. 1949) 177 F.2d 579, 581; accord, *Imbler v. Pachtman* (1976) 424 U.S. 409, 428.)[4]

Contrary to Leon's contention, *Amylou R.* did not read *Sullivan* too narrowly. It acknowledged *Sullivan* settled the issue once and for all that section 821.6 does not provide immunity for

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[4] This court declined to review *Amylou R.* (*Amylou R. v. County of Riverside* (1994) 1994 Cal. Lexis 6860, review den. Dec. 22, 1994, S043324.)

false imprisonment claims. (*Amylou R., supra,* 28 Cal.App.4th at p. 1211, fn. 2.) However, *Amylou R.* went on to address the statutory language in section 821.6, which states that "even if" an employee acts maliciously, he is immune, as meaning the section extends to proceedings that were *not* initiated out of a malicious intent. Therefore, if non-malicious acts are covered by section 821.6, that section necessarily applies to acts that do not constitute malicious prosecution. (*Id.* at p. 1211 ["However, the language of section 821.6 does not limit its application solely to the tort of malicious prosecution. To the contrary, by specifying that the employee is immune 'even if he acts maliciously,' the section clearly extends to proceedings which were not initiated out of a malicious intent, and thus would not constitute malicious prosecution"].) Consequently, the court in *Amylou R.* correctly extended section 821.6 immunity to claims against the county officers who were interviewing the plaintiff in the course of investigating the crime that had occurred. (*Id.* at p. 1214.)

Leon contends the next "erroneous" decision is *Baughman v. State of California* (1995) 38 Cal.App.4th 182 (*Baughman*), which she criticizes for not discussing *Sullivan*. (OBOM, p. 23.) In *Baughman,* the plaintiff alleged police officers destroyed floppy computer disks in the course of their search executed pursuant to a search warrant. (*Baughman,* at p. 186.) In addressing the plaintiff's conversion claim, the Court of Appeal concluded the officer's actions during the investigation were immunized under section 821.6. (*Id.* at p. 191–192.) The court emphasized the same policy reasons for extending immunity

expressed in other cases beyond only malicious prosecution actions: "Government Code section 821.6 frees investigative officers from the fear of retaliation for errors they commit in the line of duty." (*Id.* at p. 193.)

Although Leon argues these cases were erroneously decided, this court did not disapprove of them when it addressed the limitations on false imprisonment damages when it considered in *Asgari, supra,* 15 Cal.4th 744, whether "a police officer's liability for false arrest may include damages sustained by the arrestee *after* the filing of formal charges…." (*Id.* at p. 748, original italics.) In *Asgari,* this court started its analysis by citing *Sullivan* for the premise that "[u]nder California law, a police officer is granted statutory immunity from liability for malicious prosecution, but not for false arrest and imprisonment." (*Id.* at p. 752.) In affirming the grant of immunity for damages arising from malicious prosecution, the court relied on *Kemmerer, supra,* 200 Cal.App.3d 1426, *Randle, supra,* 186 Cal.App.3d 449, *Baughman, supra,* 38 Cal.App.4th 182, and *Amylou R, supra,* 28 Cal.App.4th 1205. (*Asgari,* at p. 757.) Each of these Court of Appeal decisions, cited without criticism, involved interpretations of section 821.6 immunity as applying to actions beyond those involving malicious prosecution. Although the court in *Asgari* had the opportunity to address the scope of the immunity applied in *Kemmerer, Randle, Baughman* and *Amylou R.*, it remained silent.

More recently, appellate courts have continued to affirm the application of section 821.6 immunity beyond actions for malicious prosecution. For instance, in *Strong v. State of California* (2011) 201 Cal.App.4th 1439, 1461, the court applied section 821.6 immunity to a claim for spoliation of evidence during the course of a California Highway Patrol investigation. In construing the immunity broadly, the court noted the broad application given the immunity in *Asgari, supra,* 15 Cal.4th 744, 756–757 to all employees of a public entity, including police officers as well as public prosecutors. (*Strong,* at p. 1461.)

In *Doe v. State of California* (2017) 8 Cal.App.5th 832, the court addressed allegations that State agents negligently maintained the sex offender registration system and improperly included the plaintiff's information in the system. (*Id.* at p. 843.) The court affirmed that California courts construe section 821.6 broadly "in furtherance of its purpose to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits." (*Id.* at p. 844.) As the court stated, "[c]ourts have long held that acts undertaken in the course of an investigation or in preparation for instituting a judicial proceeding cannot give rise to liability, even if no proceeding is ultimately instituted." (*Ibid.*, citing *Gillan v. City of San Marino, supra,* 147 Cal.App.4th at p. 1048; *Richardson-Tunnell v. School Ins. Program for Employees (SIPE)* (2007) 157 Cal.App.4th 1056, 1062, disapproved on other grounds in *Quigley v. Garden Valley Fire Protection Dist., supra,* 7 Cal.5th at p. 815, fn. 8; *White, supra,* 37 Cal.3d at pp. 729–730.) Therefore, the

court concluded section 821.6 immunized the State agents' conduct. (*Doe,* at pp. 844–845.)

As this large body of law demonstrates, application of section 821.6 immunity beyond just malicious prosecution actions is well-entrenched in California law. In extending immunity to investigatory conduct, the decisions apply, directly or indirectly, the same test applied in *Sullivan* with regard to malicious prosecution—"whether the defendant was actively instrumental in causing the prosecution." (*Sullivan, supra,* 12 Cal.3d at p. 720.)

Further, the decisions are soundly fashioned based upon the same policy that this court in *White* found most persuasive in its analysis; the need to protect public employees in the performance of their duties and to remain "free to act in the exercise of honest judgment uninfluenced by fear of consequences personal to themselves." (*White, supra*, 37 Cal.2d at p. 732; see also *Sullivan, supra,* 12 Cal.3d at pp. 718–720.) As *Sullivan* explained when it disapproved *Watson v. County of Los Angeles* (1967) 254 Cal.App.2d 361, the rationale for section 821.6 immunity is "'to prevent interference with [prosecutors' and other law enforcement officers'] discretionary and quasi-judicial responsibility for institution and prosecution of enforcement proceedings.'" (*Sullivan,* at p. 722.) The Court of Appeal's decision here supports the same public policy this court has indicated is paramount in determining whether section 821.6 immunity applies: that it is in the best interests of the community as a

whole and the system of law enforcement at the investigatory level that law enforcement officers be immunized from liability for their discretionary conduct during the performance of their duty. (*Leon, supra,* 64 Cal.App.5th at p. 856.)

As the United States Supreme Court has said, "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision. . . ." (*Helvering v. Hallock* (1940) 309 U.S. 106, 119, original italics.) Even if *Sullivan* were viewed as holding that *only* malicious prosecution claims were subject to section 821.6 immunity, the doctrine embraced in the many published decisions of the Courts of Appeal promoting a different view of the scope of that immunity are intrinsically sound. The doctrine of stare decisis should not be mechanically applied to preclude application of section 821.6 immunity to the investigatory conduct at issue in this case.

II. Statutory Interpretation Favors Application of Section 821.6 Immunity to Investigatory Conduct.

Section 821.6, by its terms, applies to the "instituting or prosecuting" of a "judicial or administrative proceeding." Leon's resort to basic statutory interpretation rules requiring an examination of the language of the statute offers no support for her position. Leon correctly states that construction of a statute begins with the language of the statute. (OBOM, p. 18.) However, Leon misses the mark in arguing the plain language of section 821.6 does not include the word "investigation" or any word that might describe an investigation and therefore "no court

should insert that word into the statute." (*Id.* at p. 19.) Inclusion of the word "investigate" is not necessary to reach the conclusion that investigations are precursors to the institution of a judicial or administrative proceeding, and thus fall within the scope of section 821.6.

The language of section 821.6 provides immunity to a public employee "for injury caused by his instituting or prosecuting any judicial or administrative proceeding. . . ." This court in *Sullivan* interpreted the "plain meaning" of the language in section 821.6. (*Sullivan, supra*, 12 Cal.3d at p. 719.) The court looked at the dictionary definition of "institute" as meaning "to originate and get established. . . ." (*Ibid.*) The court also considered the dictionary definition of "prosecute" as meaning "to institute legal proceedings against; . . . ." (*Ibid.*) The court concluded in light of those definitions, the language of the statute "does not reach the act of holding a person in jail beyond his term." (*Ibid.*)

Here, the act of investigating a crime as a precursor to "instituting or prosecuting" a criminal proceeding falls within the terms used in section 821.6. In *Amylou R., supra,* 28 Cal.App.4th 1205, where the complained-of conduct by the law enforcement officers occurred during the course of their investigation of the crime, the court expressly tied its analysis to the words of the statute and considered there to be "little doubt that the actions complained of were committed in the course of the institution and prosecution of a judicial proceeding." (*Id.* at p. 1209.) In contrast,

false imprisonment, which is defined as holding a person in jail beyond his term, involves neither the instituting nor prosecution of a judicial proceeding. (See *Sullivan, supra,* 12 Cal.3d at p. 719.) Thus, *Sullivan's* exclusion of false imprisonment from the ambit of section 821.6 immunity based on the statute's language does not provide a basis for excluding investigatory conduct that is a precursor to a judicial proceeding.

In addition to the statutory text, *Sullivan* examined the legislative history behind the statute. Leon's contention that "legislative history is irrelevant" because the statute is unambiguous is belied by *Sullivan's* reliance on legislative history as informing its decision. (OBOM, p. 19; *Sullivan, supra,* 12 Cal.3d at p. 719, 721–722.) Nonetheless, Leon contends the legislative history shows the Legislature, in enacting section 821.6, intended to codify only "existing immunity" from malicious prosecution. (OBOM, p. 20.) Not so.

While certainly the legislative history indicates section 821.6 codifies existing immunities provided to public employees for malicious prosecution, that history does not preclude the application of immunity to investigations that precede a judicial prosecution. The driving policy behind immunity for malicious prosecution—protection of public employee discretion in performing their duties—applies equally to investigatory conduct, the protection of which is equally warranted. (See *Sullivan, supra*, 12 Cal.3d at p. 722; *Amylou R., supra*, 28 Cal.App.4th at p. 1213, quoting *White, supra*, 37 Cal.2d at p. 732.)

As the court stated in *Amylou R.*, nothing in the legislative history of section 821.6 suggests its immunity did not extend to claims made by nontargets of official investigations. (*Amylou R., supra*, 64 Cal.App.5th at pp. 1211–1214 & fn. 3; see also *Leon, supra*, 64 Cal.App.5th at p. 855 ["In reaching that conclusion, *Amylou R.* relied on the absence of legislative history limiting the scope of section 821.6, and on the public policy supporting construing the statute's immunity as applying to torts committed by law enforcement officers in the course of their official investigations"].) So, too, nothing in the legislative history suggests that extension of immunity to the investigating officers and the County here is precluded.

III. Extending Immunity to Investigatory Conduct Is Consistent with Public Policy.

Since at least 1937, this court has upheld immunity from liability for conduct occurring in the institution or prosecution of judicial or administrative proceedings as consistent with public policy. In *White,* this court warned of the "untold harm" a breakdown of our system of law enforcement would cause if law enforcement officers could not perform their tasks without fear of being sued. (*White, supra,* 37 Cal.2d at pp. 729–730.) This court in *White* acknowledged some individuals might not be able to pursue legal remedies against wrongful, even malicious conduct in some instances. "However, experience has shown that the common good is best served by permitting law enforcement officers to perform their assigned tasks without fear of being

called to account in a civil action for alleged malicious prosecution." (*Id.* at p. 730.)

In Citizens Capital Corporation v. Spohn, *supra,* 133 Cal.App.3d 887, the court noted that public policy favored immunity because, "immunity, even from wrongfully motivated action, is granted, as a matter of public policy, to avoid the risk of public officers avoiding their public duty for fear of the burden of trial and risk of its outcome." (*Id.* at p. 889.) As the court in *Amylou R., supra,* 28 Cal.App.4th 1205 observed,

> [O]ur system of law enforcement depends upon 'the investigation of crime and the accusation of offenders by properly trained officers.' [Citations.] The impartiality of that system requires that, when exercising that responsibility, the officers are "'free to act in the exercise of honest judgment uninfluenced by fear of consequences personal to themselves.'" [Citations.] To eliminate that fear of litigation and to prevent the officers from being harassed in the performance of their duties, law enforcement officers are granted immunity from civil liability, ...

(*Amylou R., supra,* 28 Cal.App.4th at p. 1213.)

The imagined "shield [against] outrageous and illegal conduct" Leon evokes as a reason not to extend section 821.6 immunity to the officer's conduct in leaving Jose's body undisturbed during the official crime scene investigation is both over-stated and inaccurate. (OBOM, p. 27.) Police officers do not have absolute immunity in all circumstances from all conduct during the course of a criminal investigation. There are many ways in which police officers may be held accountable under

appropriate circumstances and with appropriate safeguards balancing the rights of the officers and the individuals asserting they have been harmed.

Police officers can be held criminally liable for their conduct. They are also subject to civil rights violation claims.[5] As Leon states, the Tom Bane Civil Rights Act, for example, protects against law enforcement misconduct. (Civ. Code, § 52.1, subd. (c).) This statute was recently amended to eliminate certain immunity provisions for peace officers and custodial officers and public entities employing them, including that provided in section 821.6. (The Kenneth Ross Jr. Police Decertification Act of 2021, Sen. Bill No. 2, Stats. 2021, ch. 409, § 3.) Civil Code section 52.1, subdivision (n), now provides: "The state immunity provisions provided in Sections 821.6, 844.6, and 845.6 of the Government Code shall not apply to any cause of action brought against any peace officer or custodial officer, . . . or directly against a public entity that employs a peace officer or custodial officer, under this section."

Although civil rights claims are not at issue in this case, this recent enactment suggests the Legislature is the appropriate body to address the balance between immunity and liability for law enforcement officers, and define the limits of each. Public entity immunity and the strict limitations on public entity

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[5] Leon did not allege a violation of her civil rights; her discussion of the interplay between section 821.6 immunity and a civil rights statute is, therefore, purely hypothetical.

liability found in the Government Tort Claims Act are well-entrenched and founded on important concerns that public entities and their employees be able to perform functions that benefit the public as a whole without hesitating before they do what they need to do to protect the public. The need for this type of immunity is especially acute with respect to law enforcement officers, whose jobs are inherently dangerous and whose hesitation to act can literally have life or death consequences. Without protections from liability for police officers' conduct in investigating a crime, frequently undertaken under extraordinary circumstances requiring quick action, there is a real risk of losing law enforcement officers to the detriment of public safety in the communities they serve.[6] The Court of

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[6] The exodus from policing is significant and causing a staffing crisis across the country. A recent Special Report by the Police Executive Research Forum ("PERF") on a national survey on police workforce trends found an overall 18 percent increase in the resignation rate among police officers in 2020-2021 compared to 2019-2020, and a 45 percent increase in the retirement rate. (Police Executive Research Forum, PERF Special Report, *Survey on Police Workforce Trends* (June 11, 2021) <https://www.policeforum.org/workforcesurveyjune2021> [as of Mar. 16, 2022].) The exodus could ultimately have a negative impact on public safety, according to the Colorado Association of Chiefs of Police (CACP) President and Steamboat Springs Police Chief. In June 2020, the Colorado state senate passed legislation (Senate Bill 20-217) that eliminates qualified immunity as a defense in civil actions. In a CACP survey, 65 percent of survey respondents cited concerns about the bill as a top reason for officer departures. (Public Safety Colorado, *Survey Outlines Challenges, Opportunities for Colorado Law Enforcement* (Mar. 8, (footnote continued)

Appeal's application of section 821.6 immunity to the investigating officer's conduct in this case strikes the appropriate balance and supports the policy of protecting law enforcement conduct from liability for the manner in which an investigation is conducted for the many reasons this court and others have consistently affirmed for the last many decades.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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2022) <https://www.publicsafetycolorado.com/pressreleases/blog-post-title-one-aykzb-gdpp4-h9xyx> [as of Mar. 16, 2022].)

CERTIFICATE OF COMPLIANCE WITH RULE 8.520

I, the undersigned, Jeffry A. Miller, declare that:

1. I am an attorney and partner in the firm of Lewis, Brisbois Bisgaard & Smith LLP, counsel of record for defendant and respondent County of Riverside.

2. This certificate of compliance is submitted in accordance with rule 8.520 of the California Rules of Court.

3. This Answering Brief on the Merits was produced with a computer. It is proportionately spaced in 13-point Century Schoolbook typeface. The answering brief contains 7,383 words, including footnotes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Diego, California, on March 16, 2022.

/s/ Jeffry A. Miller
Jeffry A. Miller

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Fourth Civil No. E073781
Supreme Court No. S269672

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/s/ *Lynn Sylvestre*
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Supreme Court of California

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