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 REPLY BRIEF ON THE MERTS

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GLOSSARY

CT-Clerk's Transcript. Appellant will cite 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.

County brief-the County's answering brief on the merits.

Dora Leon or Dora—Plaintiff and Appellant Dora Leon.

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

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

Sullivan—Sullivan v. County of Los Angeles, 12 Cal.3d 710 (1974).

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,* 12 Cal.3d 710 (1974)?

INTRODUCTION

To the County of Riverside (County), this appeal is a public policy case, not a statutory construction case. Or the Court should apply stare decisis by affirming affirm a long line of appellate court cases broadly construing Government Code section 821.6.

This appeal is both a statutory construction and public policy case. The rules of statutory construction, which this Court applied faithfully in *Sullivan v. County of Los Angeles,* 12 Cal.3d 710 (1974), do not permit the County's broad interpretation of section 821.6. Public policy also cuts against the County's construction, as even the County admits.

Finally, stare decisis does not favor the County. This Court got it right in *Sullivan.* The County offers no good reason to overrule that case. Because public policy and statutory construction support *Sullivan,* the Court should reaffirm it.

ARGUMENT

I. The rules of statutory construction require a narrow interpretation of section 821.6.

All statutory construction begins with the statute. Section 821.6 states:

> 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.

The County argues this statute gives it complete immunity for any mistakes or intentional wrongdoing a County employee may make in investigating a crime. County brief, at pages 31-33. In response to Leon's position that the statute does not use "investigate," the County insists: "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." County brief, at page 32.

The County reads "investigation" into "instituting or prosecuting any judicial proceeding…." Common sense, which controls statutory construction, *Meza v. Portfolio Recovery Associates, LLC,* 6 Cal.5th 844, 856-857 (2019), tells us that a public

employee firsts investigates a crime and then initiates a prosecution or proceeding. They are distinct steps. The rules of statutory construction do not allow the County to combine the functions.

The County never explains in its brief why its Sheriff's deputies were only investigating a crime, as opposed to securing a crime scene. This case turns on whether the deputies should have quickly covered Jose Leon's genitals rather than wait hours before the coroner released the bodies. The County cannot argue that it has complete immunity when its deputies perform multiple tasks.

Other than including investigations as part of initiating a prosecution, the County makes no other serious statutory construction argument.

II. Public policy does not favor complete immunity.

Rather than rest on statutory construction, the County urges public policy. It contends that, unless this Court construes section 821.6 broadly to immunize investigations, threats of litigation will interfere with law enforcement. County brief, at pages 25-27. The County asserts this "public policy reflects the salutary view that, '[i] 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." County brief, at page 26, *quoting Amylou R. v. County of Riverside,* 28 Cal.App.4th 1205, 1213 (1994).

All parties support effective and honest law enforcement. But the County's reliance on public policy has numerous problems. Courts cannot use public policy to rewrite the plain language of a statute. *Skidgel v. California Unemployment Ins. Appeals Board,* 12 Cal.5th 1, 10 (2021). As Dora Leon explained in her opening brief, at pages 18-20, the clear language of section 821.6 does not extend to investigations, as the County believes. No public policy can change that interpretation.

As the County points out, County brief at page 36, "the Legislature is the appropriate body to address the balance of immunity and liability for law enforcement officers…." But the Legislature already made that choice—it wrote section 821.6 narrowly to grant immunity only from malicious prosecution. *Sullivan,* 13 Cal.3d at 719-720. If the County wants to change that statute, it should look to the Legislature, not this Court.

Law enforcement officers also do not have unlimited discretion in performing their duties. If they act wrongfully, they can be sued in federal court under 42 U.S.C. § 1983. *Garmon v. County of Los Angeles,* 828 F.3d 837, 841-842 (9th Cir. 2016). They

also can be sued under the Tom Baines Civil Rights Act, Civil Code section 52.1, as the County admits. County brief, at page 36. Or they face liability under Civil Code section 52.3 (a), another civil rights statute. If the public policy favored by the County is giving law enforcement unfettered discretion, that policy cannot be achieved no matter how this Court rules. Absolute discretion is long gone. Because it no longer exists, if it ever did, it cannot justify a broad reading of section 821.6.

Unlimited discretion for law enforcement cannot be the public policy of this state. As one appellate justice warned, the County's 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, *Law Enforcement: The Judicial Invention of Absolute Immunity for Police and Prosecutors in California* (2009), 49 Santa Clara L. Rev. 393, 394. This cannot be California's public policy after the deaths of George Floyd and so many others. And it need not be.

Other California statutes give law enforcement officers broad immunity from frivolous claims. Government Code section 820.4 grants them immunity if they use due care. In addition, they

have qualified immunity from section 1983 claims. *Garmon v. County of Los Angeles,* 828 F.3d at 842. These statutes allow law enforcement wide discretion. They are broad enough to prevent interference in criminal investigations. The County's worries are unfounded.

Finally, California public policy is moving away from absolute law enforcement discretion to accountability. The Banes Civil Rights Act is one example of this trend. Another is the Legislature's recent action (pointed out by the County at page 36 of its brief) to eliminate section 821.6 as a defense against civil rights claims. See Civil Code section 52.1 (n): "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…." The trend in public policy does not favor a broad interpretation of section 821.6. Instead, it supports this Court's narrow construction of the statute in *Sullivan.*

III. The courts of appeal misconstrued the statute and public policy.

The County uses much of its brief to describe the court of appeal decisions that support its interpretation of section 821.6. County brief, at pages 19-30. The County notes, "As

this large body of law demonstrates, application of section 821.6 immunity beyond just malicious prosecution actions is well-entrenched in California law." County brief, at page 30.

And, as the County stresses, the court of appeal opinions rely on the same public policy:

> 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 is, 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. County brief, at pages 30-31.

This line of court of appeal decisions does not bind this Court. First, most of them misconstrued or ignored the plain language of section 821.6, which does not go beyond malicious prosecution actions. Opening brief, at pages 24-26; *Sullivan,* 13 Cal.3d at 719-720.

Second, as the County exclaims, the court of appeals decisions relied on a single public policy—unlimited discretion for law enforcement. County brief, at pages 30-31. As explained above, this is not the only relevant public policy. Protecting civil rights is an equally strong public policy. But the Court need not choose between the two, as the courts of appeal did. It can say the conflict

is false-no California public policy now or has ever favored absolute law enforcement discretion. Limits have always been imposed, either by courts or the Legislature. The court of appeal decisions the County cited relied on a public policy that never existed.

Third, on rare occasions, the courts of appeal err. The remedy for this Court is to disapprove those decisions, no matter how numerous. This Court has not hesitated to do so. *See, e.g., Sheen v. Wells Fargo Bank, N.A.,* 12 Cal.5th 905, 928, fn. 12 (2022), disapproving four cases. It should follow that practice here because the court of appeal opinions did not apply the correct rules of statutory interpretation or relied on a single public policy.

IV. *Sullivan* cannot be dismissed as applying only to malicious prosecution claims.

The County sees *Sullivan* as an embarrassing relative to hide in the attic before guests arrive. It dismisses the case as having a narrow scope. *Sullivan* only held that section 821.6 did not apply to false imprisonment claims. It said nothing about other torts or liabilities. County brief, at page 18: "The *Sullivan* decision did not, however, address whether the injury-causing conduct occurring during a criminal investigation preceding the institution of prosecution of a judicial proceeding would be subject to

immunity under section 821.6." The County emphasizes that several courts of appeal decisions came to the same conclusion. County brief, at pages 19-26.

The County does not have the temerity to ask this Court to overrule *Sullivan*. No grounds exist for discarding the case, as it applied the proper rules of statutory construction. But the County's weak attempts to get around *Sullivan* must fail. As Dora Leon argued in her opening brief, at page 24, *Sullivan* was categorical—because section 821.6 was clear, as was the legislative history, the statute only immunized public employees from malicious prosecution claims. *Sullivan*, 13 Cal.3d at 719-720. It had no other purpose or intent. It is a narrow statute, not the broad grant of immunity the County desires.

CONCLUSION

The County offers no compelling reason this Court should ignore or distinguish *Sullivan*. Its public policy arguments fail, and it presents no argument on statutory construction.

For these additional reasons, appellant Dora Leon asks that the court of appeal's judgment be reversed.

Dated: May 26, 2022

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CERTIFICATE OF WORD COUNT
Calif. Rules of Court, Rule 8.204 (c) (1).

The text in this Reply Brief on the Merits consists of 2,456 words, as counted by the Microsoft Word program used to generate the petition.

Dated: May 26, 2022

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SUPREME COURT CASE NO.: S269272
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I also served the reply 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:

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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 May 26, 2022, at Grass Valley, California.

/s/ Richard L. Antognini
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STATE OF CALIFORNIA
Supreme Court of California

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