SUPREME COURT CASE NO. S269672

In the 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. E0737881

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT and BRIEF OF AMICI CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes	Page
Government Code section 815.2, subdivision (a)	7
Government Code section 815.2, subdivision (b)	10
Government Code section 820.4	27,28,30
Government Code section 821.6	*passim*
Vehicle Code section 17001	7, 9
Vehicle Code section 17004	9
Vehicle code section 21055, subdivisions (a) and (b)	8
Vehicle Code section 22350	7

Secondary Sources

Law Revision Commission Comments as to Government Code section 820.4 (4 Cal.L.Rev. Comm. Reports 801 (1963) as reported by Westlaw	27
Menetrez, Lawless Law Enforcement: The Judicial Invention of Absolute Immunity for Police and Prosecutors in California (2009) 49 Santa Clara L. Rev. 393	10,11, 14, 15,18,19, 22,30

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

The immunity from civil liability provided by Government Code section 821.6 immunizes public employees from civil liability only for claims related to their prosecution of judicial or administrative proceedings. Amici Curiae submit that inasmuch as *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710 (*Sullivan*), confined the "reach [of section 821.6] to malicious prosecution actions (*Sullivan,* 12 Cal.3d at 721), the many appellate court decisions that extended section 821.6 immunity beyond *Sullivan* were incorrectly decided.

Amici Curiae recently argued this point before Division 7 of the Court of Appeal for the Second District in the matter of *Silva v. Langford et. al.* (May 24, 2022, Court of Appeal Case No. 312660; certified for publication June 9, 2022) --Cal. App.5th-- 2022 WL 2072001 (*Silva*). In *Silva,* the plaintiffs were the parents of the decedent, Danuka Silva (Danuka), and had alleged several causes of action, including wrongful death, in their First Amended Complaint. They had also "asserted a cause of action against the CHP for public entity liability for the tort of a public employee (Gov. Code sect. 815.2, subd.(a)), in which they had alleged [that California Highway Patrol Officer Richard] Langford violated Vehicle Code section 22350 (basic speed law), for which CHP was liable under Vehicle Code section 17001 (public entity liability for negligent or wrongful operation of a motor vehicle by a public employee)." (*Silva, supra,* 2022 WL 2072001 at Page 1.)

As further alleged by the plaintiffs, the decedent had exited an Uber rideshare vehicle after the driver had abruptly stopped his car in the number one lane on U.S. Highway 101 near Encino. While the decedent "was attempting to cross the eastbound lanes of traffic on the freeway to get to safety, he was struck and killed by the CHP patrol vehicle driven by Langford in the scope of his employment. Langford was driving at an excessive speed without activating his patrol car's lights and sirens at the time he struck Danuka"[1] (*Silva, supra,* 2022 WL 2072001 at Page 2).

Both Officer Langford and CHP demurred, "arguing the complaint was barred by investigative immunity conferred under [Government Code] section 821.6" (*Silva, supra,* 2022 WL 2072001 at Page 2), a proposition with which the superior court agreed when it "sustained the [demurrers of Langford and CHP] without leave to amend." The court found the CHP defendants--Langford and the California Highway Patrol--were immune under section 821.6 because Langford ". . . was responding to a call" (*Silva, supra,* 2022 WL 2072001 at Page 3) and entered a judgment of dismissal in favor of the CHP defendants." (*Ibid.*)

On appeal, the plaintiffs contended that section 821.6 immunity does not extend to personal injury torts committed during the course of an

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[1]Officer Langford was in violation of Vehicle Code Section 21055, which exempts the driver of an emergency vehicle from the rules of the road when "responding to an emergency call" (Subdivision (a)) and if "the driver of the vehicle sounds a siren as may be reasonably necessary and the vehicle displays a lighted red lamp visible from the front as a warning to other drivers and pedestrians" (Subdivision (b)).

investigation; "and even if it did, the first amended complaint only alleged that Langford was on his way to investigate a call of a vehicle stopped on the freeway when he struck and killed Danuka, not that the investigation commenced." While the Court of Appeal agreed that the case raised "significant questions concerning both the scope and application of section 821.6 immunity," it explained that it "need not decide these issues because Langford is immune from suit under Vehicle Code section 17004 [immunizing a public employee from liability while driving an emergency vehicle in response to an emergency]; and as to CHP, it may be able under Vehicle Code section 17001." (*Silva, supra,* 2022 WL 2072001 at Page 6.)

> CHP's immunity does not necessarily flow from any investigative immunity Langford may have under section 821.6 because the language in Government Code section 815.2, subdivision (b), limiting immunity where "otherwise provided by statute" applies here. Specifically, Vehicle Code Section 17001 provides a separate statutory basis for CHP liability: "A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an em- employee of the public entity acting within the scope of his employment."

(*Ibid.*)

In *Silva,* the Court of Appeal made clear that it would not be taking up the issues of whether the many appellate court cases upholding investigative immunity under Government Code section 821.6 were correctly decided and, if not, whether such investigative immunity applied in a situation where a public servant was en route to performing an investigation. *Silva,*

however, did note the case differed from the others "applying section 821.6 immunity to public entities in that [*Silva*] involves a vehicular injury." (*Ibid.*)

More than an injury, *Silva* is also distinguishable from the myriad of appellate court cases upholding investigative immunity in that it was the first time that the injury against which the defendants claimed investigative immunity arose from a fatality.[2] And by virtue of Vehicle Code section 17001 and Government Code Section 815.2, Subdivision (b), the lawsuit of Danuka's parents may go forward.

But what about the parents of a child killed by a law enforcement officer during the course of an investigation and where their child was in no respect culpable and no vehicle was involved? Does it make sense, either morally or legally, to allow wrongful death claimants redress where the decedent is killed by a bad driver but to deny them justice where their loss is the result of conduct just as or even more culpable but where no vehicle is involved? An analysis of the California Courts of Appeals' overreach with respect to their application of Government Code section 821.6 immunity by Frank J. Menetrez in *Lawless Law Enforcement: The Judicial Invention of Absolute Immunity for Police and Prosecutors in California*

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[2]The many appellate court cases upholding investigative immunity discussed by Appellant and Respondent in their respective briefs filed in the case now before this Court have to do with injuries that included loss of property, injury to reputation, and emotional distress. Nobody is killed.

(2009) 49 Santa Clara L.Rev. 393 (hereafter *Menetrez, Judicial Invention*),[3] includes the following warning:

> Under *Amylou R. [v. County of Riverside* (1994) 28 Cal.App. 4th 1205], police officers are immune to liability for any injuries caused by their conduct in the course of investigating crime, even if they act maliciously and without probable cause, and even if the injuries are suffered by innocent bystanders. Thus, for example, police searching the home of a criminal suspect would be immune to liability if they were to shoot an innocent witness who happened to be present in the home, even if the shooting were malicious and without probable cause.

(*Menetrez, Judicial Invention,* 49 Santa Clara L.Rev. at 412.)

Inasmuch as issues pertaining to the limits of Government Code section 821.6 immunity were at the forefront of their arguments to the Court of Appeal in *Silva*, Amici Curiae believe they can assist this Court in resolving the question of whether that immunity is, as Appellant contends, limited to claims against public employees for their prosecution of judicial or administrative proceedings; and this Court may, therefore, find their perspective useful.[4]

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[3]Frank J. Menetrez was appointed to the Court of Appeal for the Fourth District by Governor Jerry Brown in October of 2018. While Amici Curiae recognize that law review articles do not carry the authority of precedent, Justice Menetrez's analysis is thorough and on point.

[4]As discussed in the brief of Amici Curiae immediately following, there are some considerations in addition to those discussed by Appellants in their Opening and Reply Briefs why the arguments supporting Govt. Code section 821.6 investigagative immunity are meritless.

in part or made a monetary contribution intended to fund the preparation of the proposed brief.

No person or entity made a monetary contribution intended to fund the preparation or submission of the proposed brief.

Respectfully submitted,

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BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

I. THE IMMUNITY CONFERRED BY GOVERNMENT CODE SECTION 821.6 PROTECTS PUBLIC EMPLOYEES FROM CIVIL LIABILITY RELATED ONLY TO THEIR INSTITUTING OR PROSECUTING JUDICIAL OR ADMINISTRATIVE PROCEEDINGS.

A. ***Sullivan v. County of Los Angeles:*** In *Leon v. County of Riverside* (2021) 64 Cal.App.5th 837, 855 (*Leon*), the Court of Appeal noted that "the 'notion that the immunity provided by section 821.6 is limited to claims for malicious prosecution has been repeatedly rejected.'" Further, 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, supra,* 64 Cal.App.3d at 854.)

Although there is no shortage of cases from the California Courts of Appeal concurring with *Leon* on this point, those cases are inconsistent with the Supreme Court's decision in *Sullivan* and, therefore, wrongly decided.

> Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of [the California Supreme Court] are binding upon and must be followed by all of the state courts of California. . . . Courts exercising inferior jurisdiction must accept the law declared by courts of

> superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.

(Auto Equity Sales., Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.)

In *Sullivan*, the Supreme Court noted that "the history of section 821.6 demonstrates that the Legislature intended the section to protect public employees from liability only for *malicious prosecution"* (*Sullivan, supra,* 12 Cal.3d at 719) and, thus, characterized its interpretation of section 821.6's immunity "confining its reach to malicious prosecution actions" as a "narrow" one (*Sullivan v. County of Los Angeles, supra,* 12 Cal.3d at 721.) Notwithstanding the clear direction of *Sullivan,* however, *Leon,* among many other decisions of the Courts of Appeal, opines that section 821.6 civil immunity for law enforcement investigations is not inconsistent with *Sullivan* because *Sullivan* had nothing to say on the matter. (See *Leon, supra,* 64 Cal.App.5th at 854.)

> [T]he Court of Appeal's attempts to limit *Sullivan* are legally indefensible. *Sullivan* held that section 821.6 immunity does not apply to false imprisonment *because section 821.6 applies to malicious prosecution alone.* Thus, the limitation to malicious prosecution was part of the court's holding, so the Court of appeal was not at liberty to jettison it. Moreover, if the Court of Appeal were right that *Sullivan's* limitation of 821.6 to malicious prosecution was mere dictum, then it would be impossible for the Supreme Court *ever* to hold that the statute applies only to malicious prosecution. Rather, no matter how often the Supreme Court rejected the application of section 821.6 to particular causes of action on the ground that the immunity applies to malicious prosecution alone, the Court of Appeal would be remain free to discount the restriction to malicious prosecution as mere dictum and to

> limit the Supreme Court's decisions to the specific causes of action that the Supreme Court addresses. Such a result would be absurd. If the Supreme Court says that section 821.6 does not apply to false imprisonment *because* it applies to malicious prosecution alone, then the statute applies to malicious prosecution alone.

(*Menetrez, Judicial Invention*, *supra*, 49 Santa Clara L. Rev. at 418-419 [emphasis in original.)

> By reading *Sullivan* as holding only that the section 821.6 immunity does not apply to false imprisonment, the Court of Appeal freed itself to apply the immunity to every *other* claim a plaintiff might bring against a public official. Thus liberated, the court proceeded to apply the immunity well beyond the limits that *Sullivan*--and the text and history of section 821.6--had actually imposed.

(*Menetrez, Judicial Invention, supra,* 49 Santa Clara L.Rev. at 407.)

B. ***Asgari v. City of Los Angeles:*** Respondent contends that in *Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744 (*Asgari*), the Supreme Court had relied on several appellate court cases that had applied section 821.6 immunity to claims outside of the malicious prosecution context. (Respondent's Brief at Page 28.) While this is true, the cases Respondent identifies were cited in *Asgari* in support of only the single proposition that Govt. Code section 821.6 applies to all employees of a public entity, including police officers and not just to prosecuting attorneys.[5] Thus, "[u]nder California law, a police officer may be held liable for false arrest and false

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[5]Government Code Section 821.6 reads: "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."

imprisonment, but **not** for malicious prosecution" (*Asgari v. City of Los Angeles, supra,* 15 Cal.4th at 757, *emphasis added*); and without referencing any other causes of action or circumstances which section immunity 821.6 might embrace, *Asgari* states only that "California law grants immunity to any 'public employee' for damages arising from malicious prosecution. (Section 821.6.) 'Although Government Code section 821.6 has primarily been applied to immunize prosecuting attorneys and other similar individuals, this section is not restricted to legally trained personnel but applies to all employees of a public entity. [Citation.]'" (*Asgari, supra,* 15 Cal.4th at 756-757.)

C. The Pre-Sullivan Cases, including most especially *White v. Towers*:

Sullivan cited three Supreme Court cases and one appellate court case, all of which predated Government Code section 821.6, in support of its finding that the legislature had intended section 821.6 to immunize public employees from malicious prosecution claims only. The cases are:

1. *White v. Towers* (1951) 37 Cal.2d 727, 729, 734 *(White)*;
2. *Coverstone v. Davies* (1952) 38 Cal.2d 315, 322;
3. *Hardy v. Vial* (1957) 48 Cal.2d 577, 580, 583; and
4. *Dawson v. Martin* (1957) 150 Cal.App. 2d. 379, 382-384.

Respondent, however, asserts that section 821.6 should also immunize public employees while in the course of conducting investigations and cites language in *White*, which predates *Sullivan* by 13 years, in

support of the proposition that "the policy of promoting vigorous law enforcement without fear of harassment through civil suits took precedence over the potential hardship some individuals might suffer." (Respondent's Answering Brief on the Merits at Page 22.)

> As *White* observed: "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 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." (*White, supra,* 37 Cal.2d at pp. 729-730, 235 P.2d 209.)

(*Leon*, *supra,* 64 Cal.App.5th at 855.)

Not mentioned in *Leon* or by Respondent in its Answering Brief on the Merits is that "the main issue presented [in *White*] is whether defendant . . . , as an investigator for the State Fish and Game Commission, is immune from civil liability for the alleged malicious prosecution of . . . criminal proceedings." (*White*, *supra,* 37 Cal.2d at 729.) There is nothing in the case indicating that Mr. White was given, nor had he sought, immunity in connection with his investigations upon which the prosecutions were based.

The defendant had, "[a]ccording to the allegations of the complaint, . . . maliciously and without probable cause procured the institution of two criminal proceedings against plaintiff" (*White, supra,* 37 Cal. 2d at 728); and it was for those prosecutions and only for same that the Supreme Court afforded the defendant common law immunity. *White* mentions nothing

about any alleged culpability on the part of the defendant related to his two investigations that preceded the criminal proceedings. "Rather, it is the line of cases which directly concerns the application of the doctrine [of immunity] to those connected with the judicial processes which is determinative herein. Thus, it has been held almost universally that public prosecuttors are entitled to immunity." (*White, supra,* 37 Cal.2d at 731.)

> It is patent that defendant Towers is a law enforcement officer, charged with the duty of enforcing laws for the protection of fish and game. As such officer he is entitled to the immunity from civil liability with which the law surrounds officials directly connected with the judicial processes. To rule otherwise would place every honest law enforcement officer under an unbearable handicap and would redound to the detriment of the body politic. "The public welfare requires that this choice (*whether or not to institute proceedings*) shall be free of all fear of personal liability. To assure this freedom of action it is deemed best to make the assurance positive and definitive by securing him against even actions based upon a malicious abuse of his official power." (*Phelps v. Dawson,* 97 F.2d 339, 340 [116 A.L.R. 1343]; *emphasis added.*)

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

While an investigator is afforded immunity in *White*, such immunity obtains only with respect to a judicial proceeding resulting from that investigation. The immunity from civil liability described in *White* is, thus, prosecutorial immunity and that alone.[6] Notwithstanding that there is no

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[6]That immunity extends, moreover, to any government officials, "who, though not prosecutors themselves, provide information to prosecutors or otherwise instigate prosecutions." (*Menetrez, Judicial Invention, supra,* 49 Santa Clara L.Rev. at

language in *White* supporting the proposition that the immunity should extend to the tortious behavior of law enforcement perpetrated during the course of the investigation itself and unrelated to any subsequent prosecution or administrative proceeding, the Courts of Appeal continue to rely on *White* in support of that fiction.[7]

To pick just one of several examples, in *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205 (*Amylou*), a 15-year old rape victim had been subjected to inhumane treatment by the county's detectives. The evidence showed that one of the detectives had "told her that he 'knew' she was lying, that he wanted the truth, the whole story, and that if she refused, he would tell everyone she knew that she was lying, with the result that she would have no friends." (*Amylou, supra,* 28 Cal.App.4th at 1210.) In another conversation, that same detective "told the mother of another girl at Amylou's school that Amylou knew the man who committed the crimes,

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420.) See also *Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 901, holding that section 821.6 barred a malicious prosecution claim against two firefighters who instigated a meritless criminal prosecution of the plaintiff by providing misleading information to the city attorney.

[7]The holding in the subsequent California Supreme Court case of *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252 (*McCorkle*), further supports that it was never the Supreme Court's intention to immunize tortious conduct by law enforcement perpetrated during the course of an investigation. In *McCorkle,* a police officer arriving at the scene of an auto accident negligently placed the plaintiff in harm's way where he was struck by another automobile while the collision was being investigated. (*McCorkle, supra,* 70 cal.2d at 255 and 259-260.) Although the main issue in the case was whether the officer had discretionary immunity for the consequences of his negligence--he did not (*McCorkle, supra,* 70 Cal. 2d at 261-262)--investigative immunity is never mentioned, much less discussed.

that she was not the victim she presented herself to be, and that she was involved in the crimes." (*Amylou, supra,* 28 Cal.App.4th at 1210-1211.)

Amylou, who was never the target of any judicial or administrative proceeding, sued the County and, following a jury trial, was awarded $300,000 for the infliction of emotional distress (*Amylou, supra,* 28 Cal.App.4th at 1208 and 1211.) But citing *White* for the proposition that law enforcement officers must be " ' "free to act in the exercise of honest judgment uninfluenced by fear of consequences personal to themselves" ' " so they are not subjected " ' "to the constant dread of retaliation" ' " (*Amylou, supra,* 28 Cal.App.4th at 1213), the *Amylou* court took the award away from her. In so doing, the Court of Appeal misconstrued *White* in support of an unjust result.

D. Summary of the Evolution of Govt. Code Sect. 821.6:

1. In *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 719, 720 (*Sullivan*), the Supreme Court stated that the protection of Government Code Section 821.6 was narrow and confined to immunizing public employees for malicious prosecution only.

2. 23 years later, the Supreme Court confirmed Government Code Section 821.6's immunity for public employees against malicious prosecution actions in *Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 754, without extending such immunity to any other causes of action.

3. The Ninth Circuit has at least three times within the past five years followed *Sullivan's* "narrow view of Government Code Section

821.6. (*Garmon v. County of Los Angeles* (9th Cir. 2016) 828 F.3d 837, 847; *Mendez v. County of Los Angeles* (9th Cir. 2018) 908 F.3d 1067, 1071; and *Sharp v. County of Orange* (9th Cir. 2017) 871 F.3d 901, 920-921.)

4. The Court of Appeal's first deviation from *Sullivan's* interpretation of Government Code Section 821.6 was *Citizens Capital Corp. v. Spohn* (1982) 133 Cal.App.3d 887, 888 (*Spohn*), wherein the court stated that the contention that Section 821.6 immunized against malicious prosecution actions only was fallacious.

5. The ruling in *Spohn*, because it relied only on *Kilgore v. Younger* (1982) 30 Cal.3d 770, 797 (*Kilgore*), was without any real support inasmuch as *Kilgore* did not even mention Government Code section 821.6, but was rather predicated upon Civil Code Section 47, which has to do with privileged communications.

6. In *Kayfetz v. State* (1984) 156 Cal.App.3d 491, 497, the Court of Appeal stated incorrectly that *Spohn* demonstrates that section 821.6 is not limited to malicious prosecution, following which which *Sullivan's* central holding--that Govt. Code Sect. 821.6 protects only against actions for malicious prosecution--became "a dead letter" as to subsequent decisions of the Court of Appeal.

7. In *Randle v. City of San Francisco* (1986) 186 Cal.App.3d 449, 456, the Court of Appeal either ignored or misread *Sullivan's* holding that Government Code Section 821.6 immunized public employees only against malicious prosecution actions or else treated it as mere dicta.

8. *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426,

1436-1437 (*Kemmerer*), affirmed, *inter alia,* that investigation is a necessary part of the prosecution process and, therefore, covered by Section 821.6 immunity.

9. *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1211-1212, held, *inter alia,* that Government Code Section 821.6 also precludes liability on the part of public employees for injuries suffered not only by the target of an investigation but also by witnesses or victims.

10. *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1048, held, *inter alia,* that an investigation before the institution of a judicial proceeding is part of the prosecution of a judicial proceeding for purposes of the statute, even if the authorities later decide not to file charges.

11. *Strong v. State of California* (2010) 201 Cal.App.4th 1439, 1461, affirmed, *inter alia*, that the immunity of Government Code Section 821.6 is to be construed so broadly as to even shield a California Highway Patrol Officer from his/her otherwise actionable negligence while conducting a routine traffic accident investigation.

> [The Courts of Appeal cases relating to the protection afforded public employees pursuant to Government Code Section 821.6 while conducting investigations] give [them] an immunity that is both sweeping and absolute. They can literally do whatever they want in the course of an investigation and never have to answer to their victims under state law.

(*Menetrez, Judicial Invention, supra,* 49 Santa Clara L.Rev. at 417.)

E. <u>Does the language of Government Code 821.6 affirm that the immunity provided thereunder extends to actions other than malicious prosecution?</u>

Respondent asserts:

> [*Amylou R.*] acknowledged *Sullivan* settled the issue once and for all that section 821.6 does not provide immunity for 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 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 is 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.)

(Respondent's Answering Brief on the Merits, at 26-27; see also *Leon,* 64 Cal.App.5th at 855.)

From the above Respondent derives that "even if he acts maliciously" means that actions undertaken by a public employee other than those initiated out of malicious intent are to be included within the protection of section 821.6. The analysis, however, ignores that the language of the statute mandates that "even if he acts maliciously" is to be tethered to a public's employee's "instituting or prosecuting any judicial or administrative proceeding within the scope of his employment." Nothing in "even if

he acts maliciously" can be reasonably construed as extending section 821.6's protection beyond a judicial or an administrative proceeding and to an investigation where, for example, County detectives maliciously defame a witness, cause her emotional distress, and/or otherwise act improperly.

In his concurring opinion in *Leon*, Justice Raphael observes:

> The argument is that the term "even if he acts maliciously" in section 821.6 indicates that some acts that are not "malicious," such as a negligence claim, must be covered. A relatively early case, however, explained that the wording was meant to cover those who act negligently as *part of the prosecution of an action*, and thus are even less culpable than those who act maliciously; still, the section is limited to covering a person who "institutes or takes part in criminal actions." (*Johnson v. City of Pacifica* (1970) 4 Cal.App.3d 82, 86-87, 84 Cal.Rptr. 246.)

(*Leon, supra,* 64 Cal.App.5th at 863.

F. Even if an investigation is an essential step toward the institution of formal proceedings, it does not follow that the preceding investigation should be similarly "cloaked" with section 821.6 immunity.

As asserted in *Leon:*

> Our state Court of Appeal has consistently construed section 821.6 as immunizing a public employee from liability for any injury-causing act or omission in the course of the institution and prosecution of any judicial or administrative proceeding, including an investigation that may precede the institution of any such proceeding. "Because investigation is 'an essential step' toward the institution of formal proceedings, it 'is also cloaked with immunity.'" (*Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1210 . . .; accord, *Baughman v. State of California* (1995) 348

Cal.App.4th 182, 191-193 . . . .
(*Leon,* 64 Cal.App.5th at 837.)

Even if an investigation is an essential step toward the institution of formal proceedings, it does not follow that the investigation should be similarly "cloaked" with Government Code section 821.6 immunity. *Leon's* conflating investigations with the institution of formal proceedings, moreover, fails the common sense test. By way of analogy, having an electronic device is likely an essential step towards exercising one's right under the First Amendment to communicate ideas to a large audience. The right to so communicate, however, does not confer the right to a cell phone, at least not without paying for it after finding a willing seller. Also, while driving to a pricey restaurant is an essential step towards sitting down and enjoying a five-course meal at such an establishment, the act of driving and the act of sitting down and eating are governed by different rules as they well should be.

But more to the immediate circumstance, a prosecutor filing charges against a criminal suspect is given civil immunity under section 821.6 even if he or she acts maliciously and without probable cause. But what about the hapless witness who may have identified the same or a different suspect but only after the police in the course of their investigation smacked him around so hard he had to undergo reconstructive jaw surgery? And if the officers who did the pummeling have immunity for their malicious conduct, then their victim would have no possibility of redress under the civil law. Thus, while investigations will in all or nearly all instances precede judicial

or administrative actions, there are compelling reasons why they should not be treated the same with respect to section 821.6 immunity. Doing otherwise easily leads to results that are unjust and/or absurd.

II. STATUTORY INTERPRETATION SHOULD BE REASONABLE:

A. General Principles: "Laws are made for the practical governance of men, and it is axiomatic that the construction of a statute which appears to be reasonable is to be preferred." (*Kashevaroff v. Webb* (1946) 73 Cal.App.2d 177, 183.)

"And it has been decided, not only that the language of a statute must be given a reasonable interpretation, but that every statute as a whole must be so construed, and thus, when opportunity arises, made compatible with common sense and the dictates of justice. In other words, it is the duty of courts . . . to interpret [statutes] in such a manner . . . which is consistent with sound sense and wise policy with a view to promoting justice." (*In re Todd's Estate* (1941) 17 Cal.2d 270, 274.)

"Where [a statute] is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense, and wise policy, the former should be rejected; and the latter, adopted." Under such circumstances, "'considerations of policy and wisdom, hardship and inconvenience, become . . . indispensable.'" (*In re Mitchell* (1898) 120 Cal. 384, 386.)

"[S]tatues must be given a reasonable interpretation, one which will carry out the intent of the legislators and render them valid and operative, rather than defeat them. In so doing, sections of the Constitution, as well as the codes, will be harmonized where reasonably possible, in order that all may stand." (*Rose v. State* (1942) 19 Cal.3d 713, 723.)

B. Harmonizing Government Code sections 820.4 and 821.6:

The application of section 821.6 immunity to official investigations compromises the harmony as between Government Code sections 820.4 and 821.6 to no good purpose, providing yet another reason why the construction of section 821.6 as described in *Sullivan* is to be preferred to the expansive and unwarranted reading of its text by the Courts of Appeal.

Section 820.4 provides in relevant part that "[a] public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law." The Law Revision Commission Comments as to Government Code section 820.4 indicate that it inures, by virtue of Government Code section 815.2, to the benefit of the public entity employing the particular public employee and that a similar immunity in almost identical language appears in the Federal Tort Claims Act. (4 Cal.L.Rev. Comm. Reports 801 (1963) as reported by Westlaw.)

On its face, section 820.4 immunizes public servants for their acts or omissions only insofar as they are undertaken while "exercising due care." Section 820.4, thus, provides **qualified** immunity for public servants while section 821.6 provides **absolute** immunity even for acts undertaken "mali-

ciously and without probable cause" as long as such acts relate to instituting or prosecuting either judicial or administrative proceedings. The immuization of malicious prosecution under the latter section is, thus, a recognized exception to the former and has been for approximately seven decades. But why extend the protection of section 821.6 to investigations when the balance of competing interests informing section 820.4 is clearly the more reasonable course? The clear intent behind section 820.4 is to immunize public employees from lawsuits even in the case of an act or omission yielding an unfortunate result as long as such public employee acted with due care, i.e. reasonably. That statute as written strikes an appropriate balance as a result of which the immunity afforded obtains as long as the act or omission was reasonable but fails when such act or omission is unreasonable. The chipping away as against such balance/the upsetting of the balance by the false doctrine of investigative immunity under section 821.6 is unnecessary and has led to any number of unfair results as recounted in the cases cited by Respondent in its Answer on the Merits.

Were it not for the absolute immunity that law enforcement enjoys while pursuing investigations, the victims in the cases described below would have either received reasonable compensation for their injuries at the hands of law enforcement, or else the police might have thought better of it and not acted as it did in the first instance. There are, of course, many more cases where the victims of overzealous law enforcement were dealt a second blow by the California Courts of Appeal, but the following will only identify three such cases.

Amylou R. supra, the facts with respect to which was discussed previously.

In *Baughman v. State of California* (1995) 38 Cal.App.4th 182 (*Baughman*), the plaintiff brought an action against the state for invasion of privacy, emotional distress, and conversion related to the destruction of computer floppy discs during a search by police pursuant to a warrant. During the course of this search, the police destroyed the discs containing the sole source of plaintiff's research over many years. The discs were not described in the search warrant. (*Baughman*, 38 Cal.App.4th at 186.) Held: the officers' actions during the investigation were cloaked with immunity, even if they had acted negligently, maliciously, or without probable cause in carrying out their duties. (*Baughman,* 38 Cal.App.4th at 192.)

In *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033 (*Gillan*), the plaintiff was a high school basketball coach who was accused of sexually molesting a student. The police arrested him without a warrant, booked, but then released him because they lacked sufficient grounds for filing a criminal complaint. They then issued a press release and held a press briefing at which time an officer identified the plaintiff by name, said it was alleged that he had "sexually molested a member of last year's girl's basketball team" who "was 17 years old at the time," claimed there was "supporting evidence" for that charge, and added that the authorities were trying to determine whether there were any additional victims. (*Gillan, supra,* 147 Cal.App.4th at 1038-1040.) The police lied. "Further investiga-gation revealed no additional accusers, witnesses, or significant corroborat-

ing evidence," and the District attorney declined to prosecute citing "lack of sufficient corroboration." (*Gillan, supra,* 147 Cal.App.4th at 1040.) The plaintiff sued for defamation and emotional distress, and the jury awarded him $4,453,000 for past and future losses. (*Gillan, supra,* 147 Cal.App.4th at 1040-1041.)

Held: The defendants were immune from liability for defamation and infliction of emotional distress because the evidence showed "that the press releases and the other public statements were made by the individual defendants in the course of their investigation of a purported crime and in furtherance of the investigation." (*Gillan, supra,* 147 Cal.App.4th at 1050.)

Amici Curiae would have Justice Menetrez offer the last word on this subject:

> Given the existence of section 820.4, it cannot plausibly be argued that the absolute immunity codified in section 821.6 applies to law enforcement in general. If it did, then section 820.4's qualified immunity for that same conduct would be superfluous. Consequently, the only reasonable interpretation that harmonizes the two statutes is the interpretation adopted in *Sullivan* and affirmed in *Asgari:* while section 820.4 provides a broad but qualified immunity for law enforcement conduct in general (except for acts constituting false imprisonment), section 821.6 provides an absolute immunity for a specific type of that conduct, namely, conduct of the sort that can give rise to a malicious prosecution action.

(Menetrez, *Judicial Invention, supra*, Santa Clara L. Rev. at 399-400.)

III. CONCLUSION

For the reasons set forth above and for those set forth in Appellant's Briefs on the Merits, statutory language and public policy do not justify construing Government Code section 821.6 to grant absolute immunity for an investigation undertaken by law enforcement. Unjust results will continue to follow if that broad interpretation is allowed to stand.

This Court should agree it correctly decided *Sullivan v. County of Los Angeles* and that the immunity of public employees from civil claims pursuant to section 821.6 is limited to those arising from their initiation or prosecution of judicial or administrative proceedings.

Dated: June 20, 2022

LAW OFFICES OF LES T. ZADOR

By: _____
Leslie T. Zador, Amicus Curae

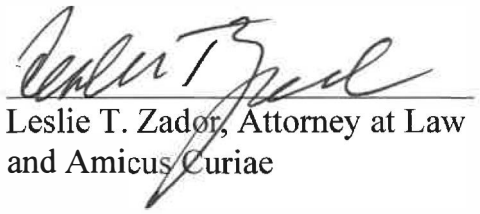
(amicusbrief)

CERTIFICATE OF COMPLIANCE

This brief was prepared using 13-pt. Times New Roman. According to Word Perfect, the word processing program I used to prepare this brief, the word count is 4,935, excluding the Cover, Table of Contents, Table of Authorities, and Application for Leave to File Amicus Curiae Brief in Support of Appellant.

The undersigned certifies that this brief complies with the form requirements as set forth in California Rules of Court, Rule 8.530 and contains fewer words than permitted by Rule 8.530(c)(1).

Dated: June 20, 2022



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(amicusbrief)

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

PROOF OF SERVICE BY TRUE FILING SYSTEM, BY E-MAIL, AND BY FIRST CLASS MAIL

I, LESLIE T. ZADOR, declare:

On June 21,2022, I served the following document on the parties identified below: APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT and BRIEF OF AMICI CURIAE. I did this service using the Court's TrueFiling system, which e-mailed to counsel for the parties. By accessing that e-mail, counsel for the parties could then download the document. All counsel are subscribers to the TrueFiling system. The names, street addresses, and e-mail addresses (the latter to the extent known) of counsel are:

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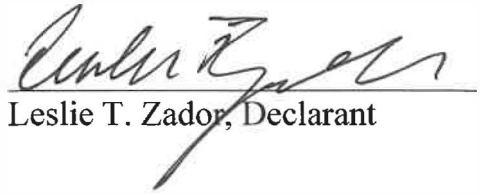
On June 21, 2022, I served the document using TrueFiling as described above on the parties identified on the previous page. As to the Riverside Superior Court and the Court of Appeal, I placed a true copy of the document in a Fed-Ex Envelope addressed as described above and caused the document to be deposited with the overnight mail provider on this date with postage paid as per my agreement with the provider.

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

Executed on June 21, 2022, in Northridge (City of Los Angeles), California.



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