S249792

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JAMES GUND, et al,
Plaintiffs, Appellants & Petitioners,

v.

COUNTY OF TRINITY, et al.,
Defendants and Respondents.

After a Decision by the Court of Appeal,
Third Appellate District, Case No. C076828
(TCSC No. 11CV0080)

PETITIONERS' OPPOSITION TO AMICI CURIAE BRIEF

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I. INTRODUCTION

Amici curiae Rural County Representatives of California and League of California Cities (collectively, "RCRC") make the predictable plea to the Court to insulate public agencies from providing full redress to their citizens who suffer injury or death when they act in reliance on misrepresentations of law enforcement officers. Amici's arguments are readily answered.

II. RCRC MISSTATES THE WORK OF THE POSSE

RCRC contends that the scope of activities that section 3366 was intended to cover derives from "what was, at one time, the prevailing mode of law enforcement throughout California," the Sheriff's posse. (Amicus Curiae Brief ["ACB"] at pp. 11-12.) But, as the title of the authority RCRC relies on indicates, and the very first sentence expressly states, "Posse comitatus *is the legal power of sheriffs and other officials to summon armed citizens to aid in keeping the peace.*" (Kopel, *The* Posse Comitatus *and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement* (104 J. Crim. Law & Criminology (2015) 671 [italics in original].) RCRC follows its citation to Kopel with a quotation from a book repeating that posse comitatus is the power to engage the public in "preservation of the peace. . . ." (Prassel, The Western Peace Officer (1972) at pp. 30-31, quoted at ACB, p. 12.)

RCRC broadly states, without citation of authority, that the posse comitatus power "has included such essentially civil duties as service of process and keeping order in court." (ACB at p. 12.) RCRC stretches the facts. As Kopel explains, "The sheriff could use posse comitatus . . . to

enforce civil process—if and only if there was resistance to the civil process." (Kopel, *supra*, 104 J. Crim. Law & Criminology at p. 703).

Moreover, in modern California the work of the posse does not include the activity the Gunds were asked to undertake, i.e., simply to check in on their friend and neighbor, Kristine. The work of the posse "is confined generally to the making of arrests, or preventing a breach of the peace, or the commission of a criminal offense." (*County of Los Angeles v. Industrial Acc. Com.* (1935) 8 Cal.App.2d 580, 585, disapproved on another ground in *City of Los Angeles v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 403, fn. 9.) This Court has defined "breach of the peace" as "'disruption of public order by acts that are themselves violent or that tend to incite others to violence.'" *(Kaplan's Fruit & Produce Co. v. Superior Court* (*United Farm Workers of America, AFL-CIO*) (1979) 26 Cal. 3d 60, 77 fn. 13, quoting *In re Bushman* (1970) 1 Cal.3d 767, 773).)

Accordingly, even if the Legislature intended section 3366 to cover the activities traditionally undertaken by the posse—a claim for which RCRC offers no support—section 3366 would not apply to the Gunds. They were not asked to engage in activity for which the posse has traditionally been used: to preserve the peace. The sheriff's deputy, Corporal Whitman, did not summon them to quell a violent disruption of public order or acts tending to incite others to violence. He did not enlist them to serve process on a resisting subject. He certainly did not send for them to perform a task that would require being armed. He simply asked them to do him a favor, just check in on Kristine for what he represented to them was "no big deal," probably nothing more serious than a weather-related problem. (3 CT 675:4-16, 3 CT 680: 3-14.)

If the legislature did intend the scope of section 3366 to mirror the

traditional work of the posse, that would not further RCRC's argument that the section should apply to the Gunds. As shown in the Gunds' briefs on the merits, courts define "active law enforcement" as only "the active enforcement and suppression of crimes and the arrest and detention of criminals." (*Crumpler v. Board of Administration* (1973) 32 Cal. App. 3d 567, 578; see also *Boxx v. Board of Administration* (1980) 114 Cal. App. 3d 79, 87.) That definition of "active law enforcement" is consistent with the work of the posse, which is limited generally to acts aimed at preventing violent disruption of public order, not the performance of community caretaking tasks.

III. RECOGNIZING THAT THE GUNDS WERE NOT ASSISTING IN ACTIVE LAW ENFORCEMENT SERVICE FURTHERS THE POLICIES RCRC PROMOTES

RCRC argues that the legislative history of section 3366 indicates that the section serves three major policy goals: promoting more willing and wholehearted cooperation by civilians when called upon to give aid in law enforcement; providing civilians with protection against the financial consequences of death or injury; and, eliminating the possibility of public entities having to pay catastrophic judgments. Providing full redress outside the workers' compensation system to citizens who, relying on information from a law enforcement officer, agree to perform services like those of the Gunds would strongly promote the first two policies.

As to the goal of reducing public entities' risk of "catastrophic" judgments, RCRC identifies nothing in properly considered legislative history documents showing that this was a factor motivating the passage of section 3366. RCRC offers only a single letter by the author of the enacting bill, Senator James Cobey. (ACB at p. 18; RCRC Motion for

Judicial Notice at pp. 109-110.) As more fully shown in the Gunds' opposition to the motion for judicial notice, that letter is not a proper source of legislative history from which to determine the intent of the entire Legislature. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699-701; *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589-590; *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 120, fn. 13 [letter from bill's principal author].)

RCRC argues that section 3366 was intended to encourage civilians to assist authorities, which, RCRC maintains, is especially important in rural areas like Trinity County where emergency services may be distant. But the willingness of citizens to assist authorities is significantly lessened if civilians are barred from obtaining full compensation for injury or death while assisting a police officer in performing services that do not involve detection or suppression of crime or the detention and arrest of criminals. This is particularly true when the requesting authority induced a citizen to assist though misrepresentation. The lack of meaningful redress dampens the willingness to of citizens to assist.

In fact, the disastrous consequences of misrepresentation are exactly what happened to the Gunds. If denied full compensation for the injuries they suffered after relying on the deputy's false assurances that Kristine's 911 call was probably nothing more than something to do with the weather, their fate would serve as a cautionary tale strongly *discouraging* others from agreeing to assist law enforcement authorities.

Furthermore, civilians like the Gunds are untrained and inexperienced. They lack equipment including, but not limited to, firearms for self-protection. If Law Revision Commission's goal in proposing section 3366 was truly to encourage meaningful civilian assistance in

remote areas like Trinity County, a rule that *encourages* law enforcement to provide civilian aides with as much true and accurate information as is possible would not only make such civilians more likely to act, but more effective when they do. As RCRC admits, even officers can be lulled into a false sense of security when provided with inaccurate information. (ACB at p. 29.) The consequences of such misrepresentation may be dire for trained officers, but are assuredly even more severe for those persons like the Gunds that lack law enforcement training.

RCRC argues that section 3366 serves the purpose of providing civilians protection against the financial consequences of death or injury while assisting law enforcement personnel. But that goal is frustrated if a citizen is unable to obtain full compensation for injury or death he or she may suffer while assisting a law enforcement officer in performing a chore that does not involve the active enforcement of law. Again, this is particularly true when the citizen has been induced by the requesting officer's misrepresentation to unknowingly place himself or herself in danger.

IV. "ACTIVE LAW ENFORCEMENT SERVICE" DOES NOT MEAN ALL ACTIVE SERVICE IN THE FIELD

RCRC contends that the crux of the Court of Appeal's opinion is the simple proposition that responding to a 911 call—even one represented as likely benign—is sufficiently hazardous to qualify as active law enforcement service. RCRC ignores the obvious: had the Legislature meant section 3366 cover all potentially hazardous activities, the Legislature could have easily done so by simply providing that a person is entitled to workers' compensation for injury or death "while engaged in

assisting any peace officer" without any qualifying or limiting words. Instead, the Legislature, in adopting the Law Revision Commission's recommended statute, chose to limit the scope of workers' compensation coverage to tasks it characterized as "active law enforcement service."

RCRC's contention that "active law enforcement service" describes all "active service in the field" is inconsistent with this Court's holding in *McCorkle v. City of Los Angeles*, (1969) 70 Cal.2d 252. There, plaintiff was injured "in the field" while assisting a police officer in performing the officer's duties to investigate an automobile accident. Plaintiff was injured when he walked with the officer onto an active roadway to help the officer determine where the accident occurred. This Court held, however, that when plaintiff was injured by a passing automobile, he not was engaged in "active law enforcement service" as that term is used in section 3366. (*McCorkle, supra*, 70 Cal.2d at p. 264, fn. 11.)

V. *O'DEA* DOES NOT APPLY

RCRC relies on *O'Dea v. Bunnell* (2007) 151 Cal. App. 4th 214 ("*O'Dea*"), to argue that a government entity cannot be liable for injuries to a plaintiff on the ground that a public employee placed the plaintiff in danger with indifference to the danger unless the entity in some manner restrained the plaintiff from acting in his own behalf. In *O'Dea*, the plaintiff correctional officer was injured when a fight broke out between rival prison gangs. In an action under the Federal Civil Rights Act, 42 U.S.C. section 1983, he sued other correctional officers and an assistant warden for violation of his due process right to liberty, alleging that they recklessly failed to act to prevent the fight and did not take proper, timely action to quell the riot. But during the riot he had pepper spray and a

baton, which he used to subdue prisoners. Defendants themselves did not injure him and there was no evidence that they restrained him from acting in his own behalf. (*Id.*, 151 Cal.App.4th at p. 221.)

In contrast, the Gunds were restrained in their ability to act on their own behalves. Whitman's misrepresentations about the harmless reason for their neighbor's 911 call impaired their ability to take action to defend themselves and they arrived at Kristine's home unconcerned that criminal activity might be afoot. Whitman's misrepresentations made the Gunds, as the *O'Dea* court put it, "'more vulnerable'" to the dangers of doing a seemingly harmless favor for the deputy. (*Id.*, 151 Cal.App.4th at p. 223, quoting *DeShaney v. Winnebago Soc. Serv.* (1989) 489 U.S. 189, 201, 109 S.Ct. 998, 1006, 103 L.Ed.2d 249, 262.)

Such state-induced vulnerability is precisely the type of conduct that other courts have held actionable under the danger-creation line of cases. For example, in *Wood v. Ostrander* (9th Cir. 1989) 879 F.2d 583, a state trooper, after arresting a driver for intoxication, left the driver's female passenger stranded alone at night in a high crime area and she was raped. She sued the officer in a section 1983 action. The Ninth Circuit held that she stated a claim for violation of her constitutional right to personal security, a liberty interest protected under the Due Process clause of the Fourteenth Amendment. (See also, *L. W. v. Grubbs* (9th Cir. 1992) 974 F.2d 119, 121 [state employees liable under section 1983 for their acts which created opportunity for and facilitated rape of nurse assigned to work alone in prison with known violent sex-offender]; *Munger v. City of Glasgow* (9th Cir. 2000) 227 F.3d 1082 [police officers liable for hypothermia death of visibly drunk bar patron after ejecting him from bar on cold night]; *Kennedy v. Ridgefield City* (9th Cir. 2006) 439 F.3d 1055

[plaintiff reported to police officer that neighbor with violent propensities molested plaintiff's daughter and feared violent reaction from neighbor if he was informed of the allegations; officer promised to warn her before informing neighbor, but informed neighbor without giving plaintiff prior warning].)

Furthermore, in *O'Dea*, the court drew a significant distinction between a person like O'Dea, a correctional injured while engaged in a task the dangers of which he knowingly accepted, and a person unknowingly exposed to danger by state action. "The state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten. It may not throw Daniel into the lions' den, but if Daniel chooses to be a lion tamer in the state's circus, the state need not separate Daniel from his charges with an impenetrable shield." (*O'Dea v. Bunnell* (2007) 151 Cal.App.4th 214, 221, *quoting Walker v. Rowe* (7th Cir. 1986) 791 F.2d 507, 511.)

Here, to use the court's metaphor in *O'Dea*, the Gunds never volunteered to be snake charmers or lion tamers. They agreed at Whitman's request to perform what he described as, and they reasonably believeD to be, an innocuous task of merely helping their neighbor with a weather-related problem. Through his misrepresentations, he threw them unexpectedly and unpreparedly the lions' den.

RCRC argues that a cognizable claim under the danger creation line of cases requires deliberate indifference. Whether Whitman acted with deliberate inference is a question of fact a jury could answer affirmatively. Moreover, regardless of whether he spoke with the Gunds' neighbor directly or had information about the call relayed to him, it is not disputed that Whitman knew the Gund's neighbor had been whispering for help. (3

CT 656:17-19; 3 CT 657:13-18; 3 CT 658:6-11; 3 CT 613-6.) Nor is it disputed that Whitman knew that the CHP dispatcher who had spoken with their neighbor was afraid to call her back in case she had been trying to secretly call for help. (*Id.*) Nor is it disputed that Whitman also knew that the 911 caller could no longer be reached despite efforts having been made to do so. (*Id.*) Despite knowledge of these facts and their clear implications, not only did Whitman fail to tell the Gunds what he knew, he advised the Gunds that their neighbor's call was "likely weather related" and "probably no big deal." (*Id.*)

Whitman's conduct is akin to the conduct of the officer in *Wood* who abandoned a female passenger in a high-crime area and the officer in *Munger* who ejected an intoxicated bar patron out into the cold night. In all of these cases, law enforcement officers caused civilians to alight from places of safety to places of generalized danger.

VI. RCRC'S RELIANCE ON *ASELTON* IS SIMILARLY MISPLACED

In *Aselton v. Town of East Hartford,* (2006) 277 Conn. 120, 890 A.2d 1250, the Connecticut Supreme Court considered whether the family of a police officer who was murdered while responding to a 911 call had a cognizable section 1983 claim for violation of the officer's substantive due process rights. The officer was dispatched to respond to a 911 caller and informed that the caller said that he heard a loud noise outside but didn't know what it was, perhaps someone groaning and yelling, the caller was unwilling to go look. A dispatcher also informed the officer that the caller was willing to be seen—but that was only the dispatcher's assumption. As the officer approached the caller's apartment, he encountered four

individuals committing robbery and assault and one of them fatally shot him.

The Connecticut Supreme Court held that the dispatcher's conduct in incorrectly informing the officer that the caller was willing to be seen did not violate due process under the state-created danger theory. The Court held the dispatcher's conduct was not so reckless as to shock the conscience.

There is however a significant difference between failing to provide an armed, trained and experienced police officer with proper information about a 911 call and deliberately providing incomplete and misleading information to untrained, unarmed, inexperienced civilians to induce them to respond to a 911 call.

VII. WHITMAN'S CONDUCT VIOLATED FUNDAMENTAL PUBLIC POLICY

RCRC concedes that violations of fundamental public policy exempt a cause of action from workers compensation exclusivity. (ACB at p. 45.) RCRC also concedes "there may indeed be circumstances where an officer's misconduct rises to the level of violating the civil rights of the citizen, and thus the fundamental public policy of this state..." (*id.* at p. 11.) However, RCRC argues that not all constitutional violations necessarily contravene fundamental public policy. (*Id.* at 46, fn 27.) The Gunds' Fourteenth Amendment right to substantive due process, including the citizen's right not to be unknowingly put in danger by a government employee while the government does nothing to protect the endangered citizen, is not a minor or trivial right. Due process is a "fundamental libert[y]" protected by the Constitution. (*Obergefell v. Hodges* (2015)

___U.S.___, 135 S.Ct. 2584, 2597, 192 L.Ed.2d 609, 623.) As our Supreme Court has said, "There is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens." (*General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1184; *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 82-83 [quoting *General Dynamics*].)

VIII. CONCLUSION

RCRC's arguments rest on inapposite authority and contravene the public policies they are offered to promote, and the most important policy at issue, the fundamental constitutional right of citizens not to be put into danger by the state and left unprotected.

RCRC's arguments should be rejected.

Dated: March 21, 2019

Respectfully submitted,

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By: /s/
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CERTIFICATE OF WORD COUNT

I certify that the text of this document uses a 13-point Times New Roman font and consists of 3,008 words as counted by the Microsoft Word Processing Program used to generate this document.

Dated: March 21, 2019

Respectfully submitted,

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CERTIFICATE OF CONFORMITY WITH ELECTRONIC BRIEF

I hereby certify that Petitioners' Answer to Amicus Curiae Brief to which this Certificate of Conformity is attached is, aside from the attachment of this Certificate, identical in all respects to the electronically filed Opening Brief submitted using the Court's electronic upload website.

The paper copies of the Brief were printed from the PDF file generated by Word, the program in which the original Opening Brief was created.

Dated: March 21, 2019 BRAGG, MAINZER & FIRPO, LLP

By: /s/
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PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Humboldt. My business address is 804 Third Street, Eureka, California 95501. At the time of service, I was over 18 years of age and not a party to this action.

On March 21, 2019, I served true copies of the following document on the interested parties in this action as follows:

PETITIONERS' OPPOSITION TO AMICUS CURIAE BRIEF OF RURAL COUNTY REPRSENTATIVES OF CALIFORNIA AND LEAGUE OF CALIFORNIA CITIES

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Supreme Court of California
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, Executed on March 21, 2019 at Eureka, California.

_____
Joni Aitken