No. 24-5741

In The

SUPREME COURT OF THE UNITED STATES

WANDA NELSON
Petitioner

v.

SANTA BARBARA COUNTY SHERIFF'S OFFICE, et al.

Respondents

On Petition for Writ of Certiorari to California Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves the wrongful investigation, prosecution, arrest and conviction of Wanda Nelson ("Petitioner"), an African American woman aged 63 at the time of the incidents giving rise to this underlying action. Petitioner was a caregiver, with no criminal history who was aggressively prosecuted by the Santa Barbara County Sherriff's Office and the Santa Barbara County District attorney's office following the death of her client, Heidi Good.

Petitioner's first amended complaint was dismissed by demurrer because California Government Code § 821.6 affords absolute immunity to public employees for connected to their prosecution of crime. Pursuant to § 821.6, these employees enjoy immunity ***even when they act maliciously and without probable cause***. "For example, a public entity's liability for acts of its public employees in the course of their employment motivated by and resulting in racial discrimination is not barred by governmental immunity." *Watson v. Department of Rehabilitation*, 212 Cal.App.3d 1271, 1285, 261 Cal.Rptr. 204; *and see Ross v. San Francisco Bay Area Rapid Transit Dist.*, (2007) 146 Cal.App.4th 1507, 1516.

The overreach of California Government Code § 821.6 runs afoul of the protections afforded by the Fourteenth Amendment to the United States Constitution which affords equal protection of the law to all citizens. Specifically, because of the wording of §821.6, prosecutors and law enforcement

officers holding racial animus are free to weaponize their bias in their prosecution of crime under the shield of absolute immunity.

In addition to Cal. Govt. Code § 821.6 being unconstitutional on its face, Petitioner was deprived her due process rights by the California courts misinterpretation of case law and statutory authority that sought to limit the reach of Cal. Govt. Code § 821.6 to improve public confidence in law enforcement by enhancing accountability of law enforcement personnel who commit bad acts and address concerns of blanket immunity.

Petitioner respectfully requests that this Court review the unpublished decision of the Court of Appeal, Second Appellate District, Division Six, which re-affirmed the trial court's sustaining of Respondents' Demurrer without leave to amend following this Court's instruction to the Court of Appeal to vacate its December 14, 2021 decision and reconsider the cause in light of *Leon v. County of Riverside* (2023) 14 Cal.5th 910 ("*Leon*".) Petitioner's Petition for Review to the California Supreme Court was denied on April 10, 2024. (Pet.App.A)

The questions presented are:

1)Whether Government Code §821.6, as written, is a violation of Petitioner's right to Equal Protection under the United States Constitution, the California Constitution, and United States Supreme Court?

2) Whether the actions of the lower courts either singularly or combined violate the Due Process rights afforded under the U.S. Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner is Wanda Nelson.

Respondents are the Santa Barbara County Sheriff's Office, Santa Barbara County Sheriff's Deputy Charlie Bosma, Santa Barbara County Sheriff's Deputy Matthew Fenske, Santa Barbara County District Attorney's Office and Santa Barbara County Deputy District Attorney Cynthia Gresser .

RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the Central District of the United States District Court; the United States Court of Appeal, Ninth Circuit; the Superior Court of California, County of Santa Barbara; the California Court of Appeal, the California Supreme Court and this Court:

People v. Nelson, No. 1479637 (Cal. Super.Ct.) (conviction of Involuntary Manslaughter)

People v. Nelson, No. B271618 (Cal. Ct. App.) (overturned conviction of Involuntary Manslaughter)

People v. Nelson, No. 1479637 (Cal. Super.Ct.) (granting determination of factual innocence)

People v. Nelson, No. B290806 (Cal. Ct. App.) (overturned determination of factual innocence)

People v. Nelson, No. S256607 (Cal.), (petition for review denied September 11, 2019 declining to review November 6, 2017 appellate opinion)

Nelson v. Santa Barbara County Sheriff's Office, et al, No. 2:18-CV-JFW-PLA (U.S.D.C., Central District, CA) (granting motion for summary judgment and declining to exercise supplemental jurisdiction over state court causes of action)

Nelson v. Santa Barbara County Sheriff's Office, et al, No. 19CV06081)(Cal. Super. Ct.) (sustaining demurrer to Petitioner's First Amended Complaint)

Nelson v. Santa Barbara County Sheriff's Office, et al, No. B308778 (Cal. Ct. App.) (affirming order sustaining demurrer to first amended complaint)

Nelson v. Santa Barbara County Sheriff's Office, et al, No. S272870 (Cal.) (granting review of the December 14, 2021 appellate opinion)

Nelson v. Santa Barbara County Sheriff's Office, et al, No. S272870) (Cal.) (vacating the December 14, 2021 appellate opinion with directions to reconsider the cause in light of *Leon v. County of Riverside* (2023) 14 Cal.5th 910)

Nelson v. Santa Barbara County Sheriff's Office, et al, No. B308778 (Cal. Ct. App.) (affirming order sustaining demurrer to first amended complaint)

Nelson v. Santa Barbara County Sheriff's Office, et al, No. S283925) (Cal.) (declining to review January 16, 2024 opinion)

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of Supreme Court Rule 14.1(b)(iii)

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The California Court of Appeal opinion *Nelson v. Santa Barbara County Sheriff's Office* ("*Nelson II* ") (Pet. App. B.1 – B.21) is not reported but is available at 2024 WL 160960. The panel opinion *Nelson v. Santa Barbara County Sheriff's Office* ("*Nelson I*") (Pet. App. E.1-E.20) is not reported but is available at 2021 WL 5895933.

JURISDICTION

The California Court of appeal deemed the order sustaining the demurrer to Petitioner's First Amended Complaint to incorporate an order of dismissal pursuant to *Lucas v. Santa Maria Public Airport Dist.* (1995) 39 Cal.4th 1017, 1022 on January 16, 2024. (Pet.Appx.B.2-3, n.1) Petitioner's petition for review to the California Supreme Court was denied on April 10, 2024. (Pet.Appx.A) This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Section 1 of the Fourteenth Amendment to the Constitution for the United States provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 821.6 of the California Government Code 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 when he acts maliciously and without probable cause."

INTRODUCTION

While substantial gains have been achieved in civil rights litigation and legislation to enhance protection against the harmful conduct of law enforcement officers and violations of constitutional and civil rights, the California Court of Appeal has chosen to ignore the law and uphold antiquated precedent affording prosecutors and law enforcement personnel absolute immunity for all of their investigatory and prosecutorial conduct, ***even if they act maliciously and without probable cause.***

On June 22, 2023, the California Supreme Court in *Leon v. County of Riverside, supra* 14 Cal.App.5th 920 reaffirmed the holding in *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 117 Cal.Rptr. 241 by confirming that Cal. Govt. Code § 821.6 "protects public employees from liability *only* for initiation or prosecution of an official proceeding." *Id.* at 930.

Pursuant to Government Code § 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.

To the extent that this code section allows blanket immunity to law enforcement personnel who intentionally deprive citizens of equal protection of the laws based upon racial animus and/or bias, this provision is unconstitutional. Review is necessary to uphold the fundamental protections afforded by the United States and California Constitutions.

The *Leon* decision and Bane Act amendments represent a shift in thinking on how racial bias in our justice system "undermines public confidence in the fairness of the state's system of justice and deprives Californians of equal justice under the law. *People v. Simmons* (2023) 96 Cal.App.5th 323, 332, 314 Cal.Rptr.3d 319, 326. Despite this Court's ruling in *Leon*, and its explicit admonition to the Court of Appeal to vacate is prior decision to affirm the trial court's sustaining of Demurrer to Petitioner's first amended complaint without leave to amend, the Court of Appeal wholly disregarded *Leon* and extended absolute immunity to the Respondents in this case.

"Justice must satisfy the appearance of justice." *Offutt v. U.S.,* (1954) 348 U.S. 11, 14. Here, the misapplication of *Leon* and the Bane Act by the California courts will have a chilling effect on litigants similarly situated to Plaintiff who are

deprived of justice based upon a continued overreaching application of §821.6 immunity.

This Court has exercised its discretion to review the decisions of state courts when this Court finds that the errors committed below "seriously affect the fairness, integrity, or public reputation of a judicial proceeding. *See Silber v. U.S.,* (1962) 82 S.Ct. 1287,1288. This is exactly the case at bar. The decisions of the California courts are devoid of fairness, logic, analysis, the application of the correct legal principles. Petitioner is entitled to Equal Protection and Due Process under the law.

It is inconceivable that a 60 plus year old woman with absolutely no criminal history should lose a year of her life in jail, stand trial for a murder she did not commit and have no recourse for the injuries and damages sustained by her at the hands of the Respondents' demonstrated bias against her. Review is necessary to provide uniformity of the law and to ensure protection to other similarly situated persons.

STATEMENT OF THE CASE

FACTUAL BACKGROUND

Petitioner, an African American Female, aged 60 years at the time of the incidents giving rise to this complaint, was a home health care provider for the decedent, Heidi Good. ("Heidi[1] ") Prior to the arrest and prosecution giving rise to this complaint,

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[1] The Decedent Heidi Good and her mother Marjorie Good will be referred to by their first names to avoid confusion; no disrespect is intended.

Petitioner did not have any criminal history, had never been arrested, and had never served any jail time. (Pet.Appx.I.4-I.5, ¶¶ 14-15)

Heidi was an Amyotrophic Lateral Sclerosis ("ALS") patient who was completely physically incapacitated by her illness and one hundred percent (100%) ventilator dependent. (Pet.Appx.H.2) Heidi remained cognitively sharp and communicated through "eye related interface computer assistance. (Pet.Appx.G.2-G.3)

Because Hedi lacked the muscle function to breath, she was placed on a ventilator that pumped oxygen into her lungs. (Pet.Appx.G.2) If the ventilator stopped working or was disconnected, an alarm would sound. (Pet.Appx.G.3-G.4)

In addition to her paid caregivers, Heidi's mother Marjorie Good ("Marjorie") also cared for her. (Pet.Appx.G3) Marjorie was usually left alone with Heidi every weekday morning from 8:00 a.m. to 10:00 a.m. when Petitioner arrived to work. (Pet.Appx.H.3)

On the afternoon of March 25, 2013, Heidi instructed Petitioner to go to Rite Aid to pick up a prescription. (Pet.Appx.H.5) Before leaving, Petitioner checked the ventilator and informed Marjorie and Heidi's son Christopher that she would be leaving the home because Heidi had asked her to run an errand. (Pet.Appx.G.3-G.5) The ventilator alarm was not signaling at the time that Petitioner left the Good home. (Pet.Apx.G.5)

When Petitioner returned from the pharmacy, she heard the alarm on Heidi's ventilator and immediately ran to Heidi's room. (Pet.appx.G.6) Petitioner noticed that one of the tubes on Heidi's ventilator was loose, and although it appeared as if Heidi was already deceased, Petitioner reconnected the tube and silenced the alarm. (Pet.Appx.I.6, ¶23) Petitioner checked Heidi's pulse, felt nothing, and ran outside to tell Marjorie that Heidi was dead. (Pet.Appx.G.6)

Heidi's body was initially examined by Dr. Robert Anthony of the Santa Barbara County Coroner's Office and detective coroner, Deputy Sheriff Jose Alvarez on March 27, 2013. (Pet.Appx.I.6, ¶26) Robert Anthony, the Santa Barbara County Coroner who performed the autopsy initially determined the cause of death for Heidi to be unknown. (Pet.Appx.I.6 FAC ¶ 28) Dr. Anthony examined Heidi's gastric contents and noted in his report that there was nothing of concern. (Pet.Appx.I.6, FAC ¶ 29)

Toxicologist, Dr. Barbieri also examined Heidi's remains, including her gastric contents and repeatedly told the Respondents that he could not come to any of the conclusions that the prosecutor wanted him to draw. (Pet.Appx.I.7, FAC ¶ 32)

Detectives Bosma and Fenske coerced Santa Barbara Sheriff's Office Deputy Alvarez to alter Heidi's death certificate to add that Heidi's ventilator was "tampered with." Detectives Bosma and Fenske caused Heidi's death certificate to be altered despite their knowledge that the ventilator hose would routinely pop off without intervention because their

expert pathologist, Dr. Hawley, determined opined that if the cause of death was the disconnection of the ventilator hose alone, there could be no homicide. (Pet.Appx.I.6-I.7, FAC ¶¶ 30, 31)

Once the Prosecutor and the Santa Barbara Sheriff's Office detectives determined that they desired to indict Petitioner in this case, the evidence had to be massaged and presented in a way to create probable cause in light of the fact that is undisputed that Petitioner was not present at the Good home at the time of Heidi's death.

To do this, the prosecutor had to create a factual scenario that Heidi was poisoned prior to the disconnection of the ventilator. The Respondents moved forward with this theory, despite the findings of the toxicologist Dr. Barbieri, that there was nothing of concern in Heidi's gastric contents. (Pet.Appx.I.7, FAC ¶ 32) Since neither the Santa Barbara County Coroner who performed the autopsy nor the toxicologist could find no evidence to substantiate foul play in the cause and manner of Heidi's death, D.D.A. Gresser retained the services of Dr. Dean Hawley.

Dr. Anthony, the coroner who performed Heidi's autopsy was intentionally excluded from testifying before the Grand Jury. (Pet.Appx.I.7, FAC ¶ 36)

The Respondents caused Dr. Hawley's testimony before the grand jury to be accurate subject to no contradiction of impeachment because they deliberately failed to investigate and present exculpatory evidence before the Grand Jury. For

instance, D.D.A. Gresser refused to allow witnesses to testify and present email to the Grand Jury that Heidi was terrified of her husband Steve Swiacki who expressed disdain towards Heidi for her attempts to prolong her life. (Pet.Appx.I.8, FAC ¶ 41) D.D.A. Gresser also failed to cross-examination Dr. Hawley regarding inconsistencies between his and toxicologist Dr. Barbieri's findings regarding Heidi's gastric contents. (Pet.Appx.I.8, FAC ¶ 41)

Respondents Detective Bosma, Detective Fenske and D.D.A. Gresser were also aware that the refrigeration unit that held Heidi's remains was not functioning at the time that Heidi's body was placed therein. (Pet.Appx.I.7, FAC ¶ 37) Detective Bosma, Detective Fenske and D.D.A. Gresser also knew that as a result, any presence of alcohol present in Heidi's toxicology was the result of the natural progression of decomposition that was exacerbated by the fact that her body was not held in a refrigerated unit, nevertheless Detective Bosma, Detective Fenske and D.D.A. Gresser intentionally caused Dr. Hawley to represent that Petitioner put alcohol in Heidi's feeding tube before leaving for the pharmacy. (Pet.Appx.I.7, FAC ¶ 37)

In collaboration with and at the direction of the Respondents and each of them, Dr Hawley constructed a timeline that purportedly established that Heidi was poisoned by a toxic level of medication or alcohol just moments before the ventilator was unhooked or stopped and that Heidi's death was therefore a homicide. (Pet.Appx.I.8, FAC ¶ 38)

Respondents Detective Bosma, Detective Fenske and D.D.A. Gresser were also aware that

Heidi's Pastor, Blain Gibbs, possessed a series of email communication between himself and Heid regarding Steve Swiacki expressed disdain for Heid taking antibiotics to prolong her life. (Pet.Appx.I.8, FAC ¶ 39)

Respondents Detective Bosma, Detective Fenske and D.D.A. Gresser, in collaboration with their star witness Dr. Hawley opined that Heidi's husband, Steve Swiacki, a Caucasian male, could not have been responsible for Heidi's death because he was at work and not at home at the time of Heidi's death. However, by creating this theory that Heidi was "poisoned" the Respondents were able to fabricate probable cause for Petitioner, who was also not at home at the time of Heidi's death. (Pet.Appx.I.8, FAC ¶ 40)

After a hearing before the grand jury, Petitioner and Marjorie were charged with First Degree Murder, Second Degree Murder and Involuntary Manslaughter. (Pet.Appx.I.8, FAC ¶ 42)

In support of their charge of murder, the Santa Barbara County District Attorney's Office ("the Prosecution") alleged that Petitioner and her co-defendant Marjorie conspired to kill Heidi. (Pet.Appx.I.9, FAC ¶ 43) The prosecution's theory of liability was that Marjorie and Petitioner had become very close friends over the years, they both hated Heidi's husband, Steve Swiacki, that Heidi had been poisoned, the ventilator machine rarely malfunctioned, and that Petitioner and Heidi were in a dispute over an unknown amount of taxes that Petitioner thought Heidi should cover. The prosecutor, D.D.A. Cynthia Gresser, claimed that

Petitioner and Marjorie poisoned Heidi, and after Petitioner left for the store, Marjorie disconnected Heidi's ventilator. (Pet.Appx.I.9, FAC ¶ 44)

Later, the prosecution's theory changed to say that Heidi was given additional drugs and alcohol to relax her prior to Heidi disconnecting the ventilator. (Pet.Appx.I.9, FAC ¶ 45) Finally, the prosecution's theory changed again and alleged that if Heidi was not poisoned or drugged, then Petitioner's trip to the store leaving Marjorie in charge of Heidi's care constituted gross criminal negligence and should lead to a conviction of Involuntary Manslaughter. (Pet.Appx.I.9, FAC ¶ 46)

At all times relevant hereto, the Respondents intentionally ignored evidence including but not limited to: Stephen Swiacki and Heidi had disagreements about whether Heidi should continue her medical treatment, or let "life take its course;" it was not uncommon for Heidi to be left at home alone with Marjorie to take care of her; it was not uncommon for the subject ventilator hose to "pop off" without tampering; the toxicology evidence relied upon by the Respondents was tainted and therefore unreliable. (Pet.Appx.I.9, FAC ¶ 47)

The deficient, malicious and/or reckless fabrication of evidence in the investigation and prosecution of Heidi's death by the Santa Barbara County Sheriff's Department and the Santa Barbara County District Attorneys' Office included but was not limited to the following:

- Detective Bosma, Detective Fenske and D.D.A. Gresser and each of them

knew that it was not uncommon for Petitioner to leave Heidi with Marjorie when Petitioner left to run errands. Yet, Detective Bosma, Detective Fenske and D.D.A. Gresser intentionally misrepresented to the jury that Petitioner was criminally negligent for leaving Heidi unattended. (Pet.Appx.I.10, FAC ¶ 49)

- Detective Bosma and Detective Fenske deliberately and intentionally misrepresented statements made by Petitioner to the Grand Jury and Jury. For instance, Petitioner at all times contended that when she returned, she noticed that the ventilator tube was loose, yet the detectives represented that Petitioner initially stated that "everything was attached" deliberately creating a scenario that would call Petitioner's credibility into question. (Pet.Appx.I.10, FAC ¶ 50)

- Detective Bosma, Detective Fenske and D.D.A. Gresser, and each of them caused reenactments to be made that were wholly inconsistent with the witness and party statements of events. For instance, even though Detective Bosma, Detective Fenske and D.D.A. Gresser and each of them knew that Marjorie

was outside using a hedge trimmer at the time of Marjorie's death, they created a scenario to determine Marjorie's reaction to the ventilator alarm that did not include the hedge trimmer. (Pet.Appx.I.10, FAC ¶ 51)

- Detective Bosma, Detective Fenske and D.D.A. Gresser also knew that when Petitioner went to the Pharmacy for Heidi on the day of the incident, she stopped at home, shopped for a birthday card for Heidi and caught up with the Pharmacist assistant before returning home, yet they intentionally presented a reenactment of the time it would have taken for Petitioner to go to and return to the pharmacy which involved the detective running red lights, running into the pharmacy and purchasing items with no lines in an attempt to deliberately misrepresent the timeline of events that occurred on the date of Heidi's death. (Pet.Appx.I.10, FAC ¶ 52)

- Non-party witnesses pleaded with Detective Bosma, Detective Fenske and D.D.A. Gresser to testify regarding their knowledge that Heidi was afraid of her husband, Steve Swiacki and that Swiacki wanted Heidi to die. However, Detective Bosma, Detective Fenske and D.D.A. Gresser deliberately

> withheld this testimony from the Grand Jury. (Pet.Appx.I.10, FAC ¶ 53)

There is a practice and custom between the Santa Barbara Sheriff's Office and the Santa Barbara District Attorney's office, whereby investigating detectives will consult with prosecutors to obtain false evidence. Following in this practice, Detectives Bosma and Fenske were coached by D.D.A. Gresser in planting a wire on Heidi's daughter Ashton Gomez (Formerly Ashton Swiacki) for the purpose of gathering evidence from Marjorie to create probable cause against Petitioner. (Pet.Appx.I.11, FAC ¶ 54)

Petitioner maintained her innocence throughout these proceedings and cooperated fully with law enforcement. Throughout the investigation, Detective Fenske and Detective Bosma repeatedly and intentionally misrepresented to Petitioner that she was not a "person of interest" in the investigation of Heidi's death. (Pet.Appx.I.11, FAC ¶ 58)

The Respondents, and each of them knew and or had reason to know that Petitioner was diagnosed with Breast Cancer after Heidi's death and that she was undergoing treatment in her hometown, the Bronx, New York. The Respondents and each of them knew and or had reason to know that Petitioner did not have a criminal history and that she had never been arrested. Notwithstanding, Petitioner was arrested in the Bronx, New York and placed into custody at Ryker's Island Prison, a maximum security facility, with violent offenders for three days. Petitioner was subsequently transferred

to the Santa Barbara County Jail where she remained for over eleven (11) months, until the conclusion of her trial. (Pet.Appx.I.11, FAC ¶ 59)

In or about February 2016, Petitioner was acquitted of First and Second-Degree Murder but charged on the lessor offense of Involuntary Manslaughter. (Pet.Appx.I.13, FAC ¶ 63)

A separate jury was impaneled for Petitioner's co-defendant, Marjorie, and a mistrial was declared. Petitioner's co-defendant, Marjorie was never retried. (Pet.Appx.I.13, FAC ¶ 64)

Petitioner's Involuntary Manslaughter conviction was overturned by the California Court of Appeal based upon insufficient evidence of criminal negligence on the part of Petitioner on or about November 6, 2017 and remitter was issued on or about January 23, 2018. (Pet.Appx.I.13, FAC ¶ 65)

The Superior Court of California accepted the decision of the Court of Appeal and dismissed the criminal action against Petitioner to the zealous objection of D.D.A. Cynthia Gresser and the Santa Barbara County District Attorney's Office. (Pet.Appx.I.13, FAC ¶ 66)

Petitioner was subjected to criminal charges based on false evidence. Respondents D.D.A. Gresser, Detective Bosma and Detective Fenske continued their investigation of Petitioner despite the fact that that Petitioner was innocent and used investigative techniques that were so coercive and abusive that they knew would yield false information. (Pet.Appx.I.13, FAC ¶ 67)

PROCEDURAL HISTORY

People v. Nelson[2]

On May 1, 2015, an indictment was filed, charging Petitioner and Marjorie good with one count each of willful, deliberate, pre-meditated murder. On February 18, 2016, after a three-month trial, Petitioner was convicted of the lesser offence of Involuntary Manslaughter.

Petitioner's conviction was subsequently overturned by the California Court of Appeal[3] on November 6, 2017 on the grounds that there was insufficient evidence to support her conviction of Involuntary Manslaughter because there was no evidence of criminal negligence on the part of Petitioner. Petitioner received a Determination of Factual Evidence from the Superior Court of California on or about May 10, 2018.

The Respondents appealed the Superior Court's Determination of Factual Evidence which was reversed by the California Court of Appeal on or about May 22, 2019.[4] Petitioner's petition to the California Supreme Court was denied on September

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[2] *People v Nelson, Santa Barbara Superior Court Case No. 1479637*

[3] *People v. Nelson, California Court of Appeal Case No. B271618*

[4] *People v. Nelson, California Court of Appeal Case No. B290806*

11, 2019.

Nelson v. Santa Barbara County Sheriff's Office – USDC Case No. 2:18-CV-10218-JFW (PLAx)

Petitioner filed her complaint in the United States District Court, Central District of California on December 7, 2018.

The Court granted Respondents' Motion for Summary Judgment on October 17, 2019. Petitioner filed a Notice of Appeal on November 14, 2019. The Ninth Circuit Court of Appeal affirmed the Order of the District Court on February 12, 2021. Petitioner will petition the United States Supreme Court for review.

Nelson v. Santa Barbara County Sheriff's Office – SBSC Case No. 19CV06081

The District Court declined to exercise supplemental jurisdiction over Ms. Nelson's state law causes of action and dismissed the same with prejudice to re-file in Superior Court. Ms. Nelson filed the above-referenced action on November 14, 2019.

After the Santa Barbara Superior Court sustained a Demurrer to Petitioner's complaint, Petitioner filed her First Amended Complaint on August 3, 2020. (Pet.Appx.I.1-I.28) Respondents' Demurrer to Appellant's First Amended Complaint was sustained without leave to amend October 19, 2020. (Pet.Appx.F.1-F.17)

Petitioner appealed the order sustaining Demurrer without leave to amend.[5] The California Appellate court affirmed the decision of the California Superior Court. (Pet.Appx.E.1-E.20) Petitioner appealed to the California Supreme Court and review was granted and deferred pending the consideration and disposition of *Leon v. County of Riverside*, S269672 ("*Leon I*"). (Pet.Appx.D.1)

On August 23, 2023, the California Supreme Court transferred the matter to the Court of Appeal, Second Appellate District with directions to vacate its decision and reconsider the action in light of *Leon v. County of Riverside* (2023) 14 Cal.5th 910. (Pet.Appx.C.1)

The California Court of Appeal re-affirmed the decision of the California Superior Court to sustain demurrer to Petitioner's First Amended Complaint without leave to amend. (Pet.Appx.B1-B.21)

SUMMARY OF ARGUMENT

Government Code § 821.6, as written, provides absolute immunity to public employees from claims based upon injuries inflected in the course of law enforcement investigations. The language, ***even if he acts maliciously and without probable cause*** opens the door for constitutional rights violations because prosecutors and law enforcement personnel have free reign to discriminate against disenfranchised persons such as Petitioner.

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[5] *Nelson v. Santa Barbara County Sherrif's Office,* Case No. B308778.

The lower courts misapplication of *Leon* and California Civil Code § 52.1 deprived Petitioner of her due process rights because Petitioner's action was dismissed at the demurrer stage depriving her of the opportunity to argue before a trier of fact, the jury, that her constitutional rights had been violated because of her race.

The holding of the California courts in this action is inconsistent with the mandate of the United States Constitution that all persons are allowed equal protection of the laws and due process to redress their wrongs. Review is necessary to protect our constitution and to assure uniformity of the laws.

REASONS FOR GRANTING THE WRIT

A. CALIFORNIA GOVERNMENT CODE § 821.6 IS UNCONSTITUTIONAL.

> The Constitution of the United States is the supreme law of the land and binds every forum, whether it derives its authority from a state or from the United States. When the United States Supreme Court declares state legislation to be in conflict with the Constitution of the United States and therefore void, the state tribunals are bound to conform to such decision. A bankrupt law that comes within this category cannot be pleaded as a discharge, even in the forums of the state that enacts it.

Cook v. Moffat & Curtis, (1847) 46 U.S. 295, 308.

The Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In line with this court, the California Supreme Court has declared "[t]he Legislature may not enact a statute that amends the California Constitution." *People v. Simmons, supra*, 96 Cal.App.5th at 332 (Yegan, J. dissenting) "Wherever statutes conflict with constitutional provisions, the later must prevail." *Id.* (*citing People v. Navaro* (1972) 7 Cal.3d 248, 260, 102 Cal.Rptr. 137, 497 P.2d 481.) The California Constitution, states "[a]person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws ...." California Constitution, Article I, § 7(a).

Therefore, to allow absolute immunity to a public employee "even if he acts ***maliciously and without probable cause***; and even "when the officials act out of a discriminatory motive " is unconstitutional on its face because it grants

prosecutors and law enforcement free will to enforce their intentional and unintentional bias against disenfranchised persons without absolutely no accountability. Cal. Govt. Code §821.6 ("§821.6"), as written, is in direct contravention to the California and United States Constitution guarantee to all persons, equal protection of the laws.

Everyone accepts that a detention based on race, even one otherwise authorized by law, violates the Fourteenth Amendment's Equal Protection Clause. In *Yick Wo v. Hopkins* (1886) 18 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, for example, San Francisco jailed many Chinese immigrants for operating laundries without permits but took no action against white persons guilty of the same infraction. Even if probable cause existed to believe the Chinese immigrants had broken a valid law—even if they had in fact violated the law—this Court held that the city's discriminatory enforcement violated the Fourteenth Amendment. *Id.*, at 373–374, 6 S.Ct. 1064; *see also Whren v. United States* (1996) 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89.

Following the lead of the United States Supreme Court, the courts of appeal have recognized that § 1983 plaintiffs alleging racially selective arrests in violation of the Fourteenth Amendment don't have to show a lack of probable cause, even though they might have to show a lack of probable cause to establish a violation of the Fourth Amendment: "[S]imply because a practice passes muster under the Fourth Amendment (arrest based on probable cause) does not mean that unequal treatment with respect to that practice is consistent with equal protection." *Hedgepeth v. Washington*

Metropolitan Area Transit Auth. (C.A.D.C. 2004) 386 F. 3d 1148, 1156 see also *Gibson v. Superintendent of N. J. Dept. of Law and Public Safety–Div. of State Police* (3rd Cir. 2005) 411 F. 3d 427, 440; *Marshall v. Columbia Lea Regional Hospital* (10th Cir. 2003) 345 F. 3d 1157, 1166; *Vakilian v. Shaw* (6th Cir. 2003) 335 F. 3d 509, 521; *Johnson v. Crooks* (8th Cir. 2003) 326 F. 3d 995, 999–1000; *Holland v. Portland* (1st Cir. 1996) 102 F. 3d 6, 11.

Government Code § 821.6 is "neutral in its wording but 'grossly discriminatory in its operation' which [should] give rise to a heightened equal protection analysis. *Gates v. Superior Court* (1995) 32 Cal.App.4th 481, 509 (*citing American Motorist Ins. Co. v. Starnes* (1976) 425 U.S. 637, 645, 96 S.Ct. 1800, 1804, 48 L.Ed.2d 263; *Williams v. Illinois* (1970) 399 U.S. 235, 242, 90 S.Ct. 2018, 2022-2023, 26 L.Ed.2d 586. The phrase "***even if he acts maliciously and without probable cause***" embedded in §821.6 provides the context to support a heightened equal protection analysis in malicious prosecution cases alleged to be motivated by race.

> Therefore, we must apply the rational basis equal protection test articulated by the United States Supreme Court in *G.D. Searle & Co. v. Chon* (1982) 455 U.S. 404, 408, 102 S.Ct. 1137, 1141-11142, 71 L.Ed.2d 250 which states: 'In the absence of a classification that is inherently invidious or that impinges upon fundamental rights, a state statute is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate

> government ends.' (*Accord, Whitfield v. Roth* (1974) 10 Cal.3d 874, 889-890, fn20, 112 Cal.Rptr. 540, 519 P.2d 588; *Bonds v. State of California ex rel Cal. Highway Patrol* (1982) 138 Cal.App.3d 314, 322, 187 Cal.Rptr. 792; *Stanley v. City and County of San Francisco* (1975) 48 Cal.App.3d 575, 580-582, 121 Cal.Rptr.842.)

Gates v. Superior Court, supra 32 Cal.App.4th at 509.

This Court has repeatedly applied the rational basis test to statutes affecting the right to participate in civil litigation. *Id.*

Instead of focusing on the impact of *Gates* as protecting citizens from statutory violations of constitutional rights, the California Court of Appeal limited the import on its holding to Cal. Govt Code § 845. As Justice Armstrong points out in his concurring opinion, "a public entity's liability for acts of its public employees in the course of their employment motivated by and resulting in racial discrimination is not barred by governmental immunity." *Gates v. Superior Court, supra* 32 Cal.App.4th at 520 (*citing Watson v. Departmental Rehabilitation* (1989) 212 Cal.App.3d 1271, 1285, 261 Cal.Rptr. 204; *Stone v. State of California* (1980) 106 Cal.App.3d 924, 930, fn.8, 165 Cal.Rptr. 339) "Nor can a public entity be immune from suit if it intentionally deploys a police personnel in a manner motivated by and resulting in racial or ethnic discrimination. No legitimate governmental interest is served by application of the police protection

immunity under these circumstances." *Id.* at 521.

The significance of *Leon* is that "law enforcement no longer has absolute immunity against being sued for maliciously or even negligently causing harm to anyone in the course of carrying out its investigations." *See* Zador, Leslie. The Significance of the Leon Case is Law Enforcement no Longer has Absolute Immunity. Daily Journal, June 29, 2023. The California Supreme Court was tasked to reconsider Petitioner's appeal in light of the *Leon* holding. In doing so, the court was remiss in failing to consider the constitutionality of § 821.6.

Review should be granted to make a conclusive judicial determination that §821.6 as written to provide absolute immunity to prosecutors and law enforcement personnel is unconstitutional to the extent that it embodies these individuals to create an assumption of guilt based upon their preconceived biases as opposed to seeking to find the truth as their oaths require.

§821.6 was enacted in 1963 as part of the government claims statutes formerly known collectively as the Tort Claims Act. *Leon v. County of Riverside, supra* 14 Cal.App.5th at 917. 1963 was also the year of the historic March on Washington where Dr. Martin Luther King, Jr. led 2000 demonstrators to the nation's capital to pressure the administration of John F. Kennedy to *initiate* a strong federal civil rights bill in Congress. The Civil Rights Act, which ended segregation in public places and banned employment discrimination on the basis of race, color, religion, sex or national origin was

enacted a year later in 1964. This history is important to this petition because in 1963, when §821.6 was enacted, advocacy for persons of color, and in particular, persons of color investigated for crime was not a part of the narrative or intentions in getting this legislation passed.

Fast forward to May 25, 2020, our nation watched in horror as Derrick Chauvin slowly killed George Floyd in front of our eyes. In response our nation not only demanded justice for George Floyd but a much needed dialogue of the impacts of implicit bias and institutionalized racism ensued. The majority was introduced to the "Central Park Five," a group of 5 young African American males wrongly accused for the murder of Trisha Meili, on the basis of their race, and exonerated in 2002 with a jailhouse confession. The nation was outraged by these and other tales that became known in this time of heightened sensitivity to systemic injustices disproportionately projected at African Americans.

Following this outcry, the Racial Justice Act was enacted with the "intent 'to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under article VI of the California Constitution, and violates the laws and Constitution of the State of California." *People v. Simmons, supra,* 96 Cal.App.5th at 333.

In this climate, it is not only practical but necessary for our country's highest court to evaluate the constitutionality of §821.6, a statute that

provides **absolute** immunity to prosecutors and law enforcement personnel even if their bad acts are motivated by racial discrimination; without being called to stand before a trier of fact to justify their acts.

§821.6 as written is unconscionable. It undermines the communities trust in our judicial system to know that prosecutors and law enforcement personnel can commit bad acts against our citizens with malice regardless of their intent. There is no legitimate purpose for this statute as written and it is imperative that the statute be interpreted in line with the protections afforded by the Equal Protection Clause of the United States Constitution.

B. PETITIONER HAS BEEN DEPRIVED OF DUE PROCESS UNDER THE LAW

It has been said that Due Process can be summed up in one word: "Fairness." Petitioner is entitled to Due Process under the law, yet at no point in this litigation has Petitioner been afforded fairness by the California Courts. According to the Justice Yegan, Petitioner received a "significant victory" when she was arrested for murder but convicted of the lessor offense of involuntary manslaughter which was ultimately reversed. (Pet.Appx.B.20) This statement ignores the fact that Petitioner was not only prosecuted for a murder that she did not commit ... a murder of her friend nonetheless ..., but she sustained devastation that she suffers to this day, on a prosecution of facts that the court determined could not even survive criminal negligence. Moreover, because Petitioner's action

was dismissed at demurrer, she was not afforded the opportunity to argue her case before the trier of fact. Where was the fairness in Petitioner's process?

The California courts, at the pleadings stage, made an evidentiary determination that Petitioner was not singled out in this case because of her race, based on pleadings, not evidence. Plaintiff was deprived her constitutional due process right to a fair hearing on this issue.

1. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL'S OPINION CRITICALLY MISINTERPRETS THIS COURT'S HOLDING IN *LEON*

The California Court of Appeal was instructed to vacate its opinion affirming the Santa Barbara Superior Court's sustaining of Demurrer to Petitioner's First Amended Complaint in light of the *Leon* decision. Based upon an extremely limited reading of *Leon*, the court re-affirmed the trial court's decision in error.

Leon v. County of Riverside

The California Supreme Court reversed a judgment of the California Court of Appeal affirming a trial court's judgment in favor of the County of Riverside in an action asserting negligent infliction of emotional distress, holding that § 821.6, does not immunize public employees from claims based on certain injuries inflicted in the course of law enforcement investigations. *Leon v. County of Riverside, supra,* 14 Cal.5th at 910.

In *Leon*, the plaintiff's husband was shot and killed. *Id.* at 916. When deputies with the Riverside County Sheriff office dragged the decedent's body in an attempt to revive him, the movement exposed his naked body. *Id.* The plaintiff in *Leon* alleged that the officers and County failed to exercise reasonable care when they left her husband's body exposed for several hours in view of both the plaintiff and the general public. *Id.* The trial court granted judgment for the County, concluding that the *Leon* defendants were immune under § 821.6 for "all conduct related to the investigation and filing of charges." *Id.* The court of appeal affirmed. The California Supreme Court reversed, holding that the California Court of Appeal erred in upholding the application of § 821.6 to confer absolute immunity on the County for negligent infliction of emotional distress arising out of the alleged mishandling of Plaintiff's husband's body because the claims did not concern alleged harms from the institution or prosecution of judicial or administrative proceedings. *Id.* at 910.

Despite the explicit ruling in *Leon*, the California Court of appeal conferred absolute immunity to the Respondents in this case, for all of the harm caused to Petitioner, in direct contravention of *Leon*.

a. FALSE IMPRISONMENT/FALSE ARREST

The elements of a claim for false imprisonment are: "(1) the nonconsensual, intentional confinement of a person, (2) without lawful privilege, and (3) for an appreciable period of time, however brief ".

False imprisonment involves coercion, by force, threat, or otherwise." *Jon Davler, Inc. v. Arch Ins. Co.* (2014) 229 Cal. App. 4th 1025, 1034. "False arrest and false imprisonment are the same tort. False arrest is a way of committing false imprisonment." *Cox v. Griffin* (2019) 34 Cal.App.5th 440, 446 n. 6. *Leon* rejected the argument that § 821.6 covers "claims of injury caused by acts that are merely investigatory and unconnected to the prosecution of any official proceeding." *Leon v. County of Riverside, supra,* 14 Cal.5th 910 at 926. However, *Leon* leaves open the extension of immunity to acts connected to or causally related to the eventual initiation and prosecution of an official proceeding. *Id.* at 918.

In *McKay v. County of San Diego* (1980) 111 Cal. App.3d 251, the court determined that false imprisonment could exist on the same facts which support malicious prosecution. *Id.* at 256. *McKay* involved a law enforcement officer who was an investigator for the District Attorney's office. In *McKay*, the complaint alleged that a law enforcement officer conspired with others to fabricate evidence for the sole purpose to permit the arrest of the plaintiff on false charges. *Id.* at 251. The trial court based its ruling on the fact that the individual respondents did not personally appear in New York to effectuate the arrest. (Pet.Appx.F8-F.9)) Relying on § 821.6, the trial court determined that the individual respondents would be immune from suit. (Pet.Appx.F.9) This notwithstanding the fact that Petitioner's counsel argued how an amendment could conform Petitioner's complaint to the facts underlying the *McKay* action. (Pet.Appx.F.6)

In the interest of justice given *Leon*'s clarification of § 821.6's scope, Petitioner should have been afforded an opportunity to amend her complaint to attempt to allege a claim for False Imprisonment/False Arrest separate from her claim of malicious prosecution. In light of the holding in *Leon*, it was a grave miscarriage of justice to deny Petitioner the opportunity to amend her complaint. The Court's interpretation of the facts of Petitioner's complaint deprives the trier of fact the opportunity to make a ruling on this issue. This matter must be remanded to the trial court to allow Petitioner the opportunity to cure any purported defects to her complaint.

b. NEGLIGENCE

The California Court of Appeal completely ignores the mandate in *Leon* in finding that the Respondents were afforded absolute immunity for their negligence under § 821.6. In *Leon*, the court concluded "the Court of Appeal erred in finding Gov. Code § 821.6, conferred absolute immunity on the county for negligent infliction of emotional distress arising out of the alleged mishandling of plaintiff's husband's body. Because plaintiff's claim did not concern alleged harms from the institution or prosecution of judicial proceedings, § 821.6 did not apply." *Leon v. County of Riverside, supra,* 14 Cal.5th 910 at 910.

> [T]he facts surrounding conduct of an investigation and the initiation or conduct of prosecution may sometimes overlap. But the potential for factual overlap between investigations and

> prosecutions does not justify treating them as one and the same ... Where ... the plaintiff's claim of injury does not stem from the initiation or prosecution of proceedings, section 821.6 does not apply.

Id. at 924.

"In enacting section 821.6, the Legislature conferred absolute immunity against claims based on injuries caused by wrongful prosecutions, ***but not*** other types of injuries inflicted in the course of law enforcement investigations." *Id.* at 1104 (*emphasis added*).

To the extent that Petitioner has alleged negligence outside of the scope of the institution of legal proceedings, Respondents do not enjoy § 821.6 immunity.

i. Petitioner Sufficiently Alleged Mandatory Duties on the Part of Respondents

"[Cal. Govt. Code §] 815.6 has three elements that must be satisfied to impose public entity liability: (1) a mandatory duty was imposed on the public entity by an enactment; (2) the enactment was designed to protect against the particular kind of injury suffered; and (3) the breach of the mandatory statutory duty proximately caused the injury." *B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 179. The Court of Appeal erroneously concluded that Petitioner failed to allege a mandatory duty entitling

her to relief.

In her First Amended Complaint, Petitioner alleged the following mandatory duties:

a. the failure to property and adequately screen hire and train employees, including CYNTHIA GRESSOR, MATTHEW FENSKE and CHARLIE BOSMA as mandated by Government Code § 815.6;

b. negligent retention of said deputies and deputy district attorney's maintenance of a "code of silence," whereby no other deputies, investigators and/or deputy district attorneys' supervisor or policy maker would disclose or intervene to prevent and/or would actively cover up the aforementioned misconduct in violation of Government Code § 815.6;

c. by filing false and/or misleading reports in violation of Penal Code § 118;

d. the failure to abide by the mandatory duty to inform the Grand Jury of Exculpatory Evidence as mandated by Penal Code § 939.7; and

e. Failure to ensure Plaintiff's Fourth and Fourteenth Amendment rights in violation of Civil Code § 52.1

(Pet.Appx.I20-I.21, ¶112)

In addition to the forgoing, Petitioner's complaint contains allegations to support Respondents' violation of the mandatory duty enacted in Penal Code § 13519.4.

> Racial profiling, which has been defined as the practice of detaining a suspect based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped (Pen. Code, § 13519.4, subd. (e)), is expressly prohibited by statute (§ 13519.4, subd. (f)). The practice of racial profiling presents a great danger to the fundamental principles of a democratic society. It is abhorrent and cannot be tolerated (§ 13519.4, subd. (d)(1)).

Claremont Police Officers Assn. v City of Claremont (2006) 39 Cal.4th 623, 632.

The California Courts erred by not remanding this matter to the district court to afford Petitioner leave to amend her complaint to cure any purported defects.

c. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The California courts also ignored the holding in *Leon* which specifically states that Respondents do not enjoy immunity for any and all harmful actions they took in the course of investigating the death of Heidi. *Leon v. County of Riverside, supra,* 14 Cal.5th 910.

In the operative complaint, Petitioner alleged, among other allegations, that she was suffered harm when she was intentionally and willfully targeted because of her race; that she received disparate treatment as compared to other potential suspects and her co-defendant who were not African American; that the Respondents recklessly created a false narrative against Petitioner that Petitioner was a murderer; and that the Respondents knowingly arrested Petitioner, without probable cause and placed her in a maximum security prison while Petitioner was recovering from Breast Cancer. (Pet.Appx.1.19-I.20)

Pursuant to the holding in *Leon*, these acts that fall outside of the institution and prosecution of the case against Petitioner and therefore § 821.6 immunity does not apply. This is especially true of Petitioner's claim of intentional and reckless treatment she was subjected to because of her race.

2. THE BANE ACT

Cal. Civ. Code § 52.1 in its form at the time of the actions giving rise to this action made it unlawful for a person whether or not acting under color of law to interfere with an individual's constitutional rights. *Leon* clarifies that none of the Respondents, including the Santa Barbara County District Attorney's Office and Deputy District Attorney Gresser can enjoy immunity for their conduct that caused Petitioner's harm, specifically, the reckless disregard in the violation of Plaintiff's Fourteenth Amendment Rights.

In analyzing the cases that seek to interpret the Bane Act, the legislators commented that "case law has created a high bar for plaintiffs and confusion for all parties and the courts." Senate Judiciary Committee Analysis, Senator Thomas Umberg Chair, SB 2 (Bradford), Version: March 11, 2021 at page 12. Nothing in the text of the Bane Act requires that the offending "threat intimidation or coercion" be independent from the constitutional violation alleged. "Indeed, if the words of the statute are given their plain meaning, the required 'threat, intimidation or coercion' can never be 'independent' from the underlying violation of attempted violation of rights, because the element of fear-inducing conduct is simply the means of accomplishing the offending deed (the interference or 'attempted ... interference" Senate Judiciary Committee Analysis, Senator Thomas Umberg Chair, SB 2 (Bradford), Version: March 11, 2021 at page 10.

The proposed amendment to the Bane Act with regards to allegations of threat and intimidation and mens rea only clarify its original intent making it a more effective and powerful tool to combat civil rights violations and make accountability a more pressing priority." Senate Judiciary Committee Analysis, Senator Thomas Umberg Chair, SB 2 (Bradford), Version: March 11, 2021 at page 12. In doing so, the proposed bill directly addressed the additional requirement imposed by the court in *Shoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947 by adding the provision "The threat, intimidation, or coercion required under this section need not be separate or independent from, and may be inherent in, any interference or attempted

interference with a right." *Id.*

Second, the bill sought to abrogate the holdings in *Cornell v. City and County of San Francisco* (2017) 17 Cal.App.5th 766 and *Reese v. County of Sacramento* (9th Cir. 2018) 888 F.3d 1030 by inserting "A person bringing suit under this section need not prove that a person being sued under this section had specific intent to interfere or attempt to interfere with a right secured by the Constitution or law." *Id.* Making clear that it was always the intent of the legislature that specific intent is not required to establish a violation of the Bane Act.

Following the intent of the drafters of the Act, once Petitioner alleged a violation of her Fourteenth Amendment rights by racial profiling and/or bias, which is threatening, intimidation and coercive conduct in and of itself, the next step was for a jury to decide if the violation was intentional, reckless or malicious. *See Cornell v. City and County of San Francisco, supra* 17 Cal.App.5th at 799, 803.

The California Court of Appeal contends that pursuant to *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780 (*"Lopez"*), Appellant's Bane Act cause of action is improperly plead. In reaching this conclusion, the California Court of Appeal chose to ignore the facts set forth in Petitioner's complaint that justify Petitioner's Bane Act claim for racial profiling. The California Court of Appeal also misapplies the law by stating that Petitioner's Bane Act cause of action is based on the sole allegation that Petitioner was "the only African American in the scenario." This contention runs afoul

of the numerous allegations to support Petitioner's theory that she was targeted because of her race. Moreover, the plaintiff in *Lopez* was afforded leave to amend. *Id.* at 796.

Petitioner's complaint has not omitted allegations of a forcible and coercive interference with her constitutional rights. The allegation that the Respondents intentionally or with reckless disregard violated her Fourteenth Amendment rights through racial profiling is the perfect example of the cruel and unjust treatment that people in protected classes are subjected to by law enforcement and are sufficient for this cause of action to survive demurrer. Of course, Petitioner would still have to prove to a jury that her Constitutional rights were violated by the Respondents but the allegations in the operative complaint sufficiently survive demurrer.

The California Court of Appeal's decision to reaffirm the sustaining of Respondents' Demurrer without leave to amend should be reversed in its entirety. The purpose of the amendments to the Bane Act was to reconcile the California cases that have applied different standards of culpability to Bane Act defendants and more important, to ensure that citizens Constitutional Rights are protected; and that bad actors who act either intentionally or with reckless disregard are held accountable for their actions. The California courts missed the mark in this regard.

CONCLUSION

Reflecting on the wrongful death of Darren Burley, Justice Goodwin Liu highlighted the "failure of our civil rights laws to adequately address the civil rights violations that we continue to see all too regularly." *See* Senate Judiciary Committee Analysis, Senator Thomas Umberg Chair, SB 2 (Bradford), Version: March 11, 2021 at page 5. In affirming the wrongful death judgment, Justice Liu asked

> How are we to ensure that 'the promise of equal justice under law is, for all our people, a living truth'? ... Whatever the answer, it must involve acknowledging that Darren Burley's death at the hands of law enforcement is not a singular incident unmoored from our racial history. With that acknowledgment must come a serious effort to rethink what racial discrimination is, how it manifests in law enforcement and the redress for our neighbors, friends, and citizens who continue to bear the cruel weight of racism's stubborn legacy.

B.B. v. County of Los Angeles (2020) 10 Cal.5th 1, 35.

The California Court of Appeal's attempted departure from the monumental strides that our courts and the legislature have made to even the playing field for disenfranchised persons cannot be overlooked.

Petitioner did not commit a crime. The Respondents reckless and relentless persecution of

Petitioner for a crime that she did not commit causes her harm to this date. Petitioner deserves the opportunity to have her case decided by the appropriate trier of fact, the jury. For these reasons, Petitioner respectfully requests that this Court grant writ of certiorari.

By: */s/ Nichelle D. Jordan*

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APPENDIX