IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DETRICE GARMON, Plaintiff/Appellant, vs. COUNTY OF LOS ANGELES; STEVE COOLEY, individually and in his official capacity; DEPUTY DA MICHELLE HANISEE, individually and in her official capacity; KAISER PERMANENTE, Defendants/Appellees.	No. 12-55109 U.S. District Court No. 2:10-cv-06609-SJO-PJW Date of Panel Decision: July 5, 2016 Before: Hon. Milan D. Smith, Jr. and Jacqueline H. Nguyen, Circuit Judges, and Claudia Wilken, Senior District Judge

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

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Pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Rule 29-2, Proposed Amicus California State Association of Counties ("CSAC") respectfully moves this Court for leave to file the brief submitted herewith, as amicus curiae in support of Petitioners-Appellees County of Los Angeles, et al.'s Petition for Rehearing and for Rehearing En Banc.[1]

As explained more fully in the brief itself, the issue of California law addressed in this published opinion is of great importance to Amicus California State Association of Counties (CSAC). CSAC is a non-profit corporation whose membership consists of the 58 California counties. CSAC is concerned that this published opinion limits the scope of California Government Code section 821.6 immunity. That immunity provides protection to counties and their employees from claims for damages related to official investigations and official proceedings. Limiting this statutory immunity will increase the threat of litigation and liability for local officials who investigate and prosecute violations of California law, chilling enforcement efforts and increasing government's litigation costs and liability.

CSAC hopes to assist the Court with this amicus brief. CSAC's brief does not duplicate the parties' briefing. Rather, CSAC's brief focuses on two highly relevant California Supreme Court decisions that construed section 821.6: *Asgari v. City of Los Angeles*, 15 Cal. 4th 744 (1997) and *B.H. v. County of San Bernardino*, 62 Cal. 4th 168 (2015). The parties' briefing does not focus on these decisions. But CSAC's view is that, after full consideration of these California Supreme Court cases, the Court will reach a different conclusion on this important

[1] Petitioners-Appellees County of Los Angeles et al. and Respondent-Appellant Garmon have consented to leave to file this amicus curiae brief, though Respondent-Appellant Garmon reserves her right to respond on the merits should the Court so order.

question of California governmental immunity. CSAC and its constituent counties, through their counsel (including the author of the brief), routinely address questions regarding the scope of section 821.6 immuniy, and have litigated this question extensively in California and federal courts.

CSAC respectfully requests that this Court grant leave to file the attached amicus brief.

Dated: August 5, 2016

Respectfully submitted,

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By: */s/ Peter J. Keith*
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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

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CERTIFICATE OF SERVICE

I, SOPHIA GARCIA, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECFsystem on August 5, 2016.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed August 5, 2016, at San Francisco, California.

/s/ Sophia Garcia
SOPHIA GARCIA

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DETRICE GARMON, Plaintiff/Appellant, vs. COUNTY OF LOS ANGELES; STEVE COOLEY, individually and in his official capacity; DEPUTY DA MICHELLE HANISEE, individually and in her official capacity; KAISER PERMANENTE, Defendants/Appellees.	No. 12-55109 U.S. District Court No. 2:10-cv-06609-SJO-PJW Date of Panel Decision: July 5, 2016 Before: Hon. Milan D. Smith, Jr. and Jacqueline H. Nguyen, Circuit Judges, and Claudia Wilken, Senior District Judge

BRIEF OF AMICUS CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

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INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

The Court held that California Government Code section 821.6 immunity is limited to claims for malicious prosecution, and consequently denied immunity to an assistant district attorney who was alleged to have wrongfully invaded a witness' privacy during an investigation.

With regard to this question of California law, the Court disagreed with several California Court of Appeal decisions that broadly construed section 821.6 immunity to apply to more than just malicious prosecution claims. These California decisions held that section 821.6 bars any kind of claim for damages for an injury caused by conduct during an investigation or prosecution – even claims brought by individuals (like the plaintiff here) who are not the targets of the investigation or prosecution. Relying on a 1974 California Supreme Court decision, the Court concluded that the California Supreme Court would disagree with these intermediate California appellate decisions.

Rehearing should be granted on this important question of California law, because the Court's opinion appears not to have considered two later California Supreme Court decisions that construed section 821.6 – *Asgari v. City of Los Angeles*, 15 Cal. 4th 744 (1997) and *B.H. v. County of San Bernardino*, 62 Cal. 4th 168 (2015). The absence of a discussion of these two decisions may have been the result of the parties' briefing of the case, which focused more on the federal immunity issues than the state law immunity issues. In any case, rehearing is appropriate so that the Court can fully consider this issue in light of these more recent California Supreme Court decisions. After all, before this Court can depart

[1] Counsel for amicus curiae authored the brief in whole. No person other than amicus curiae or its counsel contributed money to fund preparing or submitting the brief.

from a California Court of Appeal decision construing California law, there must be "convincing evidence" that the California Supreme Court would reject these intermediate appellate court decisions. *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1222 (9th Cir. 2015). And here, a fair reading of the California Supreme Court decisions in *Asgari* and *B.H.* is that the California Supreme Court has endorsed rather than rejected the California Court of Appeal decisions that this Court declined to follow. For example, this Court's opinion stated that the California Supreme Court would reject the construction of section 821.6 in *Amylou R. v. County of Riverside*, 28 Cal. App. 4th 1205 (1994), Slip Op. at 17 – but the California Supreme Court's decision in *Asgari* relied on *Amylou R.* to construe section 821.6. At the very least, *Asgari* and *B.H.* show there is not "convincing evidence" that the California Supreme Court would disagree with these California Court of Appeal decisions. On rehearing, the Court should instead follow these California Court of Appeal decisions and hold that the immunity under section 821.6 bars any kind of claim for damages for an injury caused by conduct during an investigation or prosecution – even claims brought by individuals (like the plaintiff here) who are not the targets of the investigation or prosecution.

In addition, the Court's decision here conflicts with past Ninth Circuit decisions construing section 821.6. Rehearing should be granted to maintain uniformity of this Court's decisions.

This issue of California law is of great importance to Amicus California State Association of Counties (CSAC). CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview

Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

CSAC is concerned about this published opinion, because limiting section 821.6 immunity will increase the threat of litigation and liability for local officials who investigate and prosecute violations of California law. Many laws and regulations are administered and enforced at the county level, not just in the criminal courts but also in the civil courts and before administrative tribunals. County employees perform vital duties like child welfare investigations and dependency proceedings. In these and other local proceedings, the stakes can be very high – and some individuals seek leverage by filing suits seeking money damages from involved local officials. Across all of these areas, the panel's ruling will increase the threat of litigation, chilling investigation and enforcement efforts by county employees. Public welfare and public safety will suffer. Not only that, counties will face increased monetary liability, because they are no longer protected by what, until now, has been an absolute immunity from California lawsuits for damages related to official investigations and official proceedings. Furthermore, the ruling will encourage forum-shopping, to the detriment of both the courts and the counties. Plaintiffs will now have a significant incentive to bring suit in federal court, and to create federal subject matter jurisdiction by asserting dubious federal law claims – burdening the federal district courts with more borderline suits, and increasing the counties' already high litigation costs.

CSAC and its constituent counties, through their counsel, routinely address questions regarding the scope of section 821.6 and have litigated this question extensively in California and federal courts. CSAC's briefing does not duplicate the parties' briefing. Rather, CSAC seeks to assist the Court by focusing on the

two above-mentioned California Supreme Court decisions that were not the focus of the parties' briefing – but are nevertheless highly relevant here.

For all of these reasons, CSAC respectfully requests that this Court grant rehearing or rehearing en banc.

ARGUMENT

I. The petition for rehearing presents a question of great importance, because California Government Code section 821.6 affects so many essential government functions in California.

The Court held that a criminal prosecutor was not entitled to immunity under California Government Code section 821.6, for allegedly using an improper subpoena in aid of a criminal investigation and thereby invading a witness' privacy.[2] But the impact of the Court's decision, if rehearing is not granted, will extend beyond criminal prosecutors and criminal proceedings. Indeed, the Court's ruling will greatly expand public liability in California at both the state and local level. California public officials engage in many different kinds of criminal, civil, and regulatory enforcement. To date, section 821.6 has protected public entities and public officials from suit for all of these activities – and any erosion of this protection will have far-reaching consequences.

California case law illustrates the expansive scope of section 821.6 and its protection of all "public employee[s]" – and by extension, the broad impact of any ruling limiting the immunity. Many different categories of "public employee[s]" are protected by section 821.6 immunity:

> The immunity conferred by section 821.6 is not limited to peace officers and prosecutors but has been extended to public school officials (*Hardy v. Vial* (1957) 48 Cal. 2d 577, 583), heads of administrative departments (*White v. Towers* (1951) 37 Cal. 2d

[2] California Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

> 727, 731), social workers (*Gensburg v. Miller* (1994) 31 Cal. App. 4th 512, 518), county coroners (*Stearns v. County of Los Angeles* (1969) 275 Cal. App. 2d 134, 137, and members of county boards of supervisors (*Dawson v. Martin* (1957) 150 Cal. App. 2d 379, 382).

Tur v. City of Los Angeles, 51 Cal. App. 4th 897, 901 (1996). This list is hardly exhaustive – one could add county civil service commissioners (*Kemmerer v. County of Fresno*, 200 Cal. App. 3d 1426 (1988)), state professional licensing boards (*Kayfetz v. State of California*, 156 Cal. App. 3d 491 (1984)), county child protection workers (*All Angels Preschool/Daycare v. County of Merced*, 197 Cal. App. 4th 394, 408 (2011)), and many others who have been held protected under section 821.6.

Just as there are many different kinds of "public employee[s]" protected by section 821.6, there are many different kinds of "proceeding[s]" that trigger the immunity. The immunity applies not just to criminal proceedings, but also to any kind of civil or administrative proceeding – and the investigations that accompany potential or actual proceedings. *See, e.g.*, *Richardson-Tunnell v. Schools Ins. Program for Employees*, 157 Cal. App. 4th 1056, 1062 (2007) (administrative investigation of workers compensation claim); *Rosenthal v. Vogt*, 229 Cal. App. 3d 69, 74 (1991) (State Bar disciplinary proceedings); *Alicia T. v. County of Los Angeles*, 222 Cal. App. 3d 869, 883 (1990) (child dependency and removal proceedings); *Kemmerer*, 200 Cal. App. 3d at 1436-37 (employee discipline proceedings before county civil service commission); *Citizens Capital Corp. v. Spohn*, 133 Cal. App. 3d 887, 889 (1982) (state licensure proceedings for collections agency); *Fish v. Regents of the Univ. of California*, 246 Cal. App. 2d 327, 330 (1966) (mental illness commitment proceedings).

California courts have explained the important purpose of section 821.6 immunity: to ensure vigorous enforcement actions by state and local officials. The Legislature enacted section 821.6 in order to "free[] investigative officers from the fear of retaliation for errors they commit in the line of duty." *Baughman v. State of California*, 38 Cal. App. 4th 182, 193 (1995). In enacting such a broad immunity, the Legislature balanced the need for impartial and vigorous enforcement of the laws against the need for a civil damages remedy for misguided enforcement – and resolved that balance in favor of immunity. *Amylou R.*, 28 Cal. App. 4th at 1212-13. Thus, this immunity applies whether officials allegedly "acted negligently, maliciously or without probable cause in carrying out their duties." *Baughman*, 38 Cal. App. 4th at 192.

Given the scope and purpose of section 821.6 immunity, the Court's ruling limiting this statutory immunity will have a great impact on state and local governments in California. That makes this a "question of exceptional importance" under Federal Rules of Appellate Procedure Rule 35. Rehearing by the panel or en banc is warranted, to ensure that this Court has an opportunity to consider all relevant California Supreme Court decisions, as it decides this important question of California law.

II. Rehearing should be granted so that the Court can address additional relevant California Supreme Court decisions construing California Government Code section 821.6.

This Court expressly disagreed with California Court of Appeal decisions holding that section 821.6 grants absolute immunity from claims like Garmon's – and, departing from those California decisions, the Court denied immunity here.

Under Ninth Circuit law, a departure from intermediate California court decisions construing California law is permissible only upon a substantial showing:

"We must follow the decision of the intermediate appellate courts of the state unless there is *convincing evidence* that the highest court of the state would decide differently." *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1222 (9th Cir. 2015) (internal quotation marks omitted, emphasis added) (quoting *In re Schwarzkopf*, 626 F.3d 1032, 1038 (9th Cir. 2010), which in turn quotes *Owen ex. rel Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983)).

The Court here relied on *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710 (1974) to ascertain the California Supreme Court's construction of section 821.6. But the Court's analysis did not address two more recent California Supreme Court decisions construing section 821.6: *Asgari v. City of Los Angeles*, 15 Cal. 4th 744 (1997) and *B.H. v. County of San Bernardino*, 62 Cal. 4th 168 (2015). The absence of a discussion of these California Supreme Court decisions may have been a consequence of the parties' briefing, which focused more on the question of federal law immunity than the question of California law immunity. But regardless of how the parties to this case briefed this issue, the importance of this question of California law for parties not before the Court – like CSAC, its 58 constituent counties, and these counties' hundreds of thousands of public employees – supports granting the petition for rehearing. Granting the petition will ensure that this Court's decision is based on full consideration and analysis of the relevant California Supreme Court cases.

And on rehearing, CSAC respectfully urges this Court to conclude that, in light of these more recent California Supreme Court decisions, the burden required for this Court to diverge from the decisions of intermediate California courts – "convincing evidence" that the California Supreme Court would decide otherwise – is not met here.

A. In *Asgari v. City of Los Angeles*, the California Supreme Court construed section 821.6 broadly – and relied on California Court of Appeal case law that this Court rejected.

In its 1997 *Asgari* decision, the California Supreme Court revisited an issue regarding section 821.6 that it had not squarely addressed in *Sullivan* – the degree to which section 821.6 immunity *limited* the relief available to a person who was falsely imprisoned as a consequence of a wrongful arrest. Consistent with *Sullivan*, the Court held that section 821.6 did not preclude a wrongfully arrested person from maintaining an action for false imprisonment. However, unlike *Sullivan*, the *Asgari* decision construed section 821.6 as a *limitation* on false imprisonment claims. Specifically, section 821.6 precluded a wrongfully arrested person from claiming a false imprisonment once he was brought before a magistrate and the judicial process was commenced: "[L]iability for false arrest does not include damages caused by incarceration following the arrestee's arraignment on formal charges." *Asgari*, 15 Cal. 4th at 758.

Thus, *Asgari* signaled the California Supreme Court's enforcement of section 821.6 immunity, even at the expense of limiting a false imprisonment action. That was a notable inversion of *Sullivan* – which enforced the right to bring a false imprisonment action at the expense of section 821.6 immunity. Put differently, under *Asgari*, section 821.6 immunity is now the rule for plaintiffs suing for injuries caused by conduct related to official proceedings – and a false imprisonment claim, now limited to the brief period between arrest and a court appearance, is the narrow exception to that immunity.

Asgari is particularly helpful in assessing the views of the California Supreme Court regarding the intermediate California appellate decisions discussed in this Court's opinion – and *Asgari* strongly suggests that this Court should revise

its opinion. In *Asgari*, the Supreme Court broadly construed section 821.6 and favorably cited several Court of Appeal decisions that did the same:

> As noted above, California law grants immunity to any "public employee" for damages arising from malicious prosecution. (§ 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.]" (*Kemmerer v. County of Fresno* (1988) 200 Cal. App. 3d 1426, 1436.) Section 821.6 "applies to police officers as well as public prosecutors since both are public employees within the meaning of the Government Code." (*Randle v. City and County of San Francisco*, 186 Cal. App. 3d 449, 455 [1986].) "Immunity under Government Code section 821.6 is dependent on how the injury is caused...." (*Baughman v. State of California* (1995) 38 Cal. App. 4th 182, 192; *Amylou R. v. County of Riverside* (1994) 28 Cal. App. 4th 1205, 1211.)

Asgari, 15 Cal. 4th at 756-757. Each of the cited Court of Appeal decisions adopted an expansive interpretation of section 821.6 immunity.

Most relevant here, the California Supreme Court cited *Amylou R.* when it endorsed the principle that "[i]mmunity under Government Code section 821.6 is dependent on how the injury is caused." *Amylou R.*, of course, is a Court of Appeal decision that this Court concluded the California Supreme Court would have disagreed with. Slip Op. at 17. But the California Supreme Court's favorable citation of *Amylou R.* shows that it does not disagree with *Amylou R.*

Not only that, *Amylou R.* – and *Baughman*, the other California Court of Appeal decision the Supreme Court cited for the principle that immunity is "dependent on how the injury was caused" – involved claims similar to those made by appellant Garmon here. In each case, a plaintiff who was not the intended target of an investigation claimed an injury caused by conduct during the investigation, and asserted claims other than the formal tort of malicious prosecution. But section 821.6 immunity nevertheless applied. "Officers are also immune from claims made by those who are not the actual targets of the

investigation of the prosecution, but who happen to be injured by decisions an officer makes during the course of such investigation." *Baughman*, 38 Cal. App. 4th at 192 (immunity from claims for conversion and intentional and negligent infliction of emotional distress, arising from officers' alleged destruction of computer equipment during search for evidence of someone else's crime). "[T]he language of section 821.6 does not limit its application solely to the tort of malicious prosecution. To the contrary, by specifying that the employee is immune 'even if he acts maliciously,' the section clearly extends to proceedings which were not initiated out of a malicious intent, and thus would not constitute malicious prosecution. … Accordingly, the notion that the immunity provided by section 821.6 is limited to claims for malicious prosecution has been repeatedly rejected." *Amylou R.*, 28 Cal. App. 4th at 1211 (barring claims for intentional and negligent infliction of emotional distress arising from officers' allegedly callous treatment of crime victim). In each case, what mattered was that the injury was caused by the investigation, and that "[i]mmunity under Government Code section 821.6 is dependent on how the injury is caused," *Asgari*, 15 Cal. 4th at 757.

The California Supreme Court's broad construction of section 821.6 is also evident from how *Asgari* applied the principle that "[i]mmunity under Government Code section 821.6 is dependent on how the injury is caused." *Asgari*, 15 Cal. 4th at 757. There, the Supreme Court held that section 821.6 barred any legal claim by the plaintiff for an injury caused by the official proceedings against him. Thus, the plaintiff could not maintain an action to recover for the injury of imprisonment after court proceedings commenced – either on a false imprisonment theory or on an intentional infliction of emotional distress theory. *Asgari*, 15 Cal. 4th at 760. Thus, *Asgari* shows that this Court's decision on this California law issue was contrary to what the California Supreme Court would decide, insofar as this Court

stated that the immunity could apply only to malicious prosecution claims. Slip Op. at 18.

A counter-argument might be made, that Garmon's claims are distinguishable from the claims made the plaintiff in *Asgari*: the *Asgari* plaintiff was the target of a prosecution, while Garmon was not. But the relevant question here is not whether Garmon's claims can be distinguished from the *Asgari* plaintiff's claims. Rather, on this issue of California law, the relevant question is whether California Court of Appeal decisions like *Amylou R.* are binding constructions of California law. And, as noted above, this Court must follow those intermediate California decisions unless there is "convincing evidence" that the California Supreme Court would reject them. The relevance of the *Asgari* decision is that the California Supreme Court endorsed *Amylou R.* and similar decisions broadly construing section 821.6 immunity. That is far from the "convincing evidence" required for this Court to depart from *Amylou R.*

B. In *B.H. v. County of San Bernardino*, the California Supreme Court indicated that section 821.6 immunity would apply to injuries to individuals who are not being prosecuted – like Garmon – so long as the injury was caused by allegedly wrongful conduct during an investigation.

Even if *Asgari* did not expressly address whether section 821.6 would protect against claims by individuals other than targets of a prosecution, another California Supreme Court decision did address that issue, in 2015: *B.H. v. County of San Bernardino*, *supra*.

The *B.H.* decision addressed the liability principles that apply to public employees who are charged with investigating child abuse. The case involved claims on behalf of a victim of child abuse, where the child's injuries were allegedly caused by negligent failures to investigate child abuse.

The Supreme Court discussed the statutory duties and statutory immunities that applied to investigators of child abuse. In its discussion, the Supreme Court noted that one such applicable statutory immunity is section 821.6. *B.H.*, 62 Cal. 4th at 180. Not only that, the Supreme Court's discussion of immunity favorably cited *Alicia T.*, 222 Cal. App. 3d at 883, a Court of Appeal decision that held section 821.6 protected investigators of child abuse from claims of intentional or negligent misconduct during their investigations. *B.H.*, 62 Cal. 4th at 195. Ultimately, *B.H.* relied on the various statutory duties and immunities to hold that the investigating deputy could not be liable. Thus, *B.H.* supports the view that the California Supreme Court would not reject the California Court of Appeal decisions construing section 821.6 to immunize officials against claims of collateral injuries caused by misconduct during an investigation.

It might be argued that because *B.H.* did not expressly turn on section 821.6 immunity, the Supreme Court's statements regarding section 821.6 were dicta. But federal courts must follow the reasoned dicta of the California Supreme Court when applying California law. See *Homedics, Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135, 1141 (9th Cir. 2003); *Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 1164 (9th Cir. 1995). And regardless, the crucial question here is not whether these statements were dicta – it is whether there is "convincing evidence" that the California Supreme Court would reject California Court of Appeal decisions like *Amylou R.* and *Alicia T.* And on that crucial question, *B.H.* shows that this heavy burden is not met here.

C. On rehearing and after full consideration of these additional California Supreme Court decisions that were not discussed in the opinion, the Court should hold that California law immunity applies here.

Rehearing should be granted so that this Court's decision on this California law issue is based on full consideration of California law. And on rehearing and consideration of these California Supreme Court decisions, the Court should conclude that there is not "convincing evidence" that the California Supreme Court would deny immunity. This is an important legal issue, with consequences that will reach beyond the parties currently before the Court.

Appellees have suggested that certification of this question to the California Supreme Court is a proper alternative. CSAC believes that after full consideration of the additional relevant California Supreme Court decisions in *Asgari* and *B.H.*, this Court will conclude that there is not "convincing evidence" that the California Supreme Court would disagree with the California Court of Appeal decisions relied on by the appellees. However, to the extent that uncertainty remains, certification would be an appropriate alternative given the importance of this question.

III. Rehearing should be granted because the decision conflicts with several prior Ninth Circuit decisions concerning section 821.6.

Appellees' petition for rehearing correctly observes that the Court's opinion conflicts with the Ninth Circuit's past decision regarding section 821.6 in *Blankenhorn v. City of Orange*, 485 F.3d 463, 487-88 (9th Cir. 2007). But *Blankenhorn* is not the only past decision by this Court to have construed section 821.6 differently.

In other decisions, the Ninth Circuit has construed section 821.6 to apply not just to the formal tort of malicious prosecution, but to any legal theory used to seek damages for an injury caused by an official proceeding or investigation. In *Poppell v. City of San Diego*, 149 F.3d 951 (9th Cir. 1998), the Ninth Circuit expressly held that section 821.6 immunity barred state law damages claims for negligent infliction of emotional distress, violation of the California Constitution, and violation of California Civil Code section 52.1. *Id.* at 961, 970 ("Carr enjoys immunity under state law for any action which presumably caused Poppell to suffer damages . . . ."). Similarly, in *Cousins v. Lockyer*, 568 F.3d 1063 (9th Cir. 2009), the Ninth Circuit noted that the exact legal theory does not matter for section 821.6 immunity – the immunity applies to claims that are "akin to malicious prosecution," not just the express tort of malicious prosecution. *Id.* at 1071; *accord Martinez v. City of Los Angeles*, 141 F.3d 1373, 1379 (9th Cir. 1998).

Rehearing should be granted to achieve uniformity with these decisions. The Court should clarify that section 821.6 immunity applies not just to malicious prosecution claims, but to any legal theory that seeks to impose liability for an injury caused by an investigation or proceeding (other than the brief period between a wrongful arrest and being brought before a magistrate, which can give rise to a claim for false imprisonment).

CONCLUSION

For the above reasons, Amicus California State Association of Counties respectfully asks this Court to grant the petition for rehearing and accept the suggestion for rehearing en banc, to ensure proper consideration of all of the legal authorities relevant to determining this important question of California law.

Dated: August 5, 2016

Respectfully submitted,

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CALIFORNIA STATE ASSOCIATION OF COUNTIES

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 4,156 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on August 5, 2016.

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CERTIFICATE OF SERVICE

I, SOPHIA GARCIA, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECFsystem on August 5, 2016.

BRIEF OF AMICUS CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed August 5, 2016, at San Francisco, California.

/s/ Sophia Garcia
SOPHIA GARCIA