IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JAMES GUND, et al. Petitioners, vs. COUNTY OF TRINITY, et al, Respondents.	)	Case No. **S249792** Court of Appeal, Third District Case No. C076828 Trinity County Superior Court Case No. 11CV080

[PROPOSED] BRIEF OF AMICI CURIAE RURAL COUNTY REPRESENTATIVES OF CALIFORNIA AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENTS COUNTY OF TRINITY, et al.

(Cal. Rules of Court, rule 8.520(f))

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Amici curiae, to the best of their knowledge, are unaware of any entities or persons who have a financial or other interest in the outcome of this proceeding that would be relevant to the question of disqualification under Canon 3E of the Code of Judicial Ethics.

Dated: February 8, 2019

Respectfully submitted,

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/s/

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

It is impossible for anyone of good conscience not to feel compassion for James and Norma Gund. They did their civic duty without hesitation, and suffered horrific injuries. However, a ruling in their favor here would perversely weaken both the legal safety net for those who perform similar service in the future, and the underlying social safety net that Labor Code section 3366[1] was intended to recognize and promote.

Workers' compensation is a two-edged sword. At its heart lies a "presumed 'compensation bargain,' pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16.) As will appear, the Legislature consciously sharpened both edges when enacting Section 3366.

Plaintiffs have vacillated substantially regarding the *jurisprudential* outcome they seek. Their earlier briefing, both here and in the Court of Appeal, staked their case on the troubling proposition that whether an activity qualifies as "active law enforcement" depends upon the representations of the requesting officer. If accepted, this would indeed mean that one who is (allegedly) misled by an officer

[1] All further undesignated statutory references are to the Labor Code.

regarding the requested assistance might avoid the bar of exclusivity – but they would also be *ineligible for workers' compensation benefits*. By contrast, their Reply shifts to asking this court to recognize an extraordinary tort action that may be pursued based on the (alleged) misrepresentations, notwithstanding the general applicability of workers' compensation coverage. That's a very different jurisprudential proposition, with very different consequences not acknowledged or articulated by plaintiffs. The latter argument was belatedly raised, and is likely waived – but in any event, once untangled, it becomes quite clear that neither outcome is justifiable.

As discussed in greater detail below, the language, context, and history of Section 3366 necessitate a broad construction – and more specifically compel the conclusion that coverage depends upon the *actual functions performed and circumstances encountered by the civilian assistant*, not the representations made by the requesting officer. Moreover, even if "active law enforcement" coverage under Section 3366 was measured by the circumstances *as represented by the officer*, "check[ing] on a neighbor who made a 911 call" *is* a law enforcement function – both in common practice, in the attendant hazards, and in the dangerous reality that the responder simply *does not know* what they will encounter. Unexpected and violent surprise, as in this case, is undeniably tragic, but unfortunately not unusual. The possibility of confronting criminal activity requiring literal enforcement of the

law is an ever-present prospect inherent in any such call. That's why law enforcement agencies send sworn officers to respond, not clerks.

Further, the well-established standards for recognizing a tort action outside the bar of exclusivity are plainly not met here. While, as plaintiffs suggest, there may indeed be circumstances where an officer's misconduct rises to the level of violating the civil rights of the civilian, and thus the fundamental public policy of this state, this simply isn't that case. Plaintiffs' factual submissions might establish ordinary negligence at most – which is deeply regrettable, but nonetheless subject to workers' compensation.

For these reasons, the Gunds were engaged in "active law enforcement" when assisting Corporal Whitman in responding to "K's" 911 call. The Legislature intended that injuries incurred in such service be handled through the workers' compensation system, not tort litigation. The judgment of the Court of Appeal should be affirmed.

II. CONTEXT MATTERS: THE HISTORY, LAW, AND POLICY UNDERLYING THE ENACTMENT OF SECTION 3366

Like all questions of statutory interpretation, this case ultimately rises and falls with the text of Section 3366. However, that text was not enacted in a vacuum – and does not operate divorced from the either the policy concerns animating it, or the workers' compensation system into which it was engrafted. As will appear, these considerations point unmistakably toward a broad understanding of "active law enforcement."

Section 3366 recognizes what was, at one time, the prevailing mode of law enforcement throughout California. The roots of the Sheriff's power to request – and if necessary, demand – the assistance of civilians stretch back into the mists of the common law,[2] and since statehood our statutes have continuously authorized the Sheriff to "command the aid" of county residents in carrying out their duties. (Stats. 1851, ch. 23, § 4, now Gov. Code, § 26604. See also Pen. Code, § 150.) Notably, from these earliest enactments, this power has not been limited to seeking assistance in making arrests or suppressing breaches of the peace – but has included such essentially civil duties as service of process and keeping order in court. (*Ibid*.)

The necessity for civilian participation in the full spectrum of law enforcement activities – and its value in preserving public safety – were obvious in early California, where professional peace officers were few, and "preservation of the peace continued to be regarded as a duty of the public and not merely the special responsibility of particular government agencies." (Prassel, The Western Peace Officer (1972) pp. 30-31.)[3] These social assumptions are perhaps easier to overlook

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[2] See Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement* (2015) 104 J. Crim. L. & Criminology 761, 769-806.

[3] See also *id*. at pp. 126-127 (noting that "[t]he very movement westward contained strong elements of community policing" and describing the contemporary understanding that "every citizen is a policeman"). Mr. Prassel's work has been described as "the leading study of the office of sheriff in the western United States during the late nineteenth and early twentieth centuries." (Kopel, *supra*, 104 J. Crim. L. & Criminology at p. 802)

in modern urban society, with its expectations of large, organized, well-equipped, and well-trained police forces. They nonetheless remain very real – and very necessary – in those areas, like the remote regions of Trinity County, where government resources are thin and the social contract depends upon communal self-sufficiency.

Risk of injury to the civilian aiding law enforcement is an inherent feature of this enterprise, but has never been cause to discourage such assistance. Judge Cardozo once eloquently observed that "[s]till as in the days of Edward I, the citizenry may be called upon to enforce the justice of the State, not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand." (*Babington v. Yellow Taxi Corp.* (N.Y. 1928) 164 N.E. 726, 727.) As another high court aptly noted, "[t]he fact that there is danger involved is the very thing which calls for and makes obedience a duty." (*Dougherty v. State* (Ala. 1894) 17 So. 393, 394.)

It is consequently unsurprising that questions regarding the availability of workers' compensation for these civilian assistants arose near the dawn of the compensation system, prior to the Second World War. The early "current of authority" nationwide was to uphold awards of workers' compensation to civilians injured assisting law enforcement[4] – and California followed suit. In *County of*

[4] *Gulbrandson v. Midland* (S.D. 1949) 36 N.W.2d 655, 657-658. See, e.g., *West Salem v. Industrial Com. of Wisconsin* (Wi. 1916) 155 N.W. 929; *Tomlinson v.*

Monterey v. Industrial Acci. Com. (1926) 199 Cal. 221, a civilian "was commandeered by the sheriff of Monterey County" to assist in the arrest of some bootleggers, and was killed in the effort. The court upheld payment of workers' compensation to the decedent's children, "in view of the liberality of construction that must be indulged in favor of the award" – notwithstanding the absence of any statute expressly addressing such a circumstance, and regardless of whether the decedent was impressed as part of a formal *posse comitatus*. (*Id*. at pp. 224-230.)

Subsequent cases began to depart from this "liberality" and deny workers' compensation benefits to such civilian assistants, based upon "technical distinctions" that the California Law Revision Commission staff would later describe as "difficult to understand" (Cal. Law Revision Com., Second Supp. to Mem. 23 (May 18, 1962) study 52(L), at p. 2; Mot. For Jud. Not., exh. "A")[5] – such as whether the civilian was paid (*Department of Natural Resources v. Industrial Acci. Com.* (1929) 208 Cal. 14), and whether they were impressed into service. (*Long Beach v. Industrial Acci. Com.* (1935) 4 Cal.2d 624.) Importantly, the courts of that era had little occasion to consider the potential tort duties of the law enforcement agency requesting assistance – since at the time, sovereign immunity

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Norwood (N.C. 1935) 182 S.E. 659; *Mitchell v. Industrial Com. of Ohio* (Oh. 1936) 13 N.E.2d 736. See also *Babington v. Yellow Taxi Corp., supra,* 164 N.E. at p. 727.

[5] This Court has previously indicated that Law Revision Commission records of this nature are both judicially noticeable and relevant when assessing the background and intent of legislation ultimately recommended by the Commission. (*Estate of Joseph* (1998) 17 Cal.4th 203, 210, fn. 1.)

largely shielded public agencies from tort liability for "governmental" functions such as law enforcement. (See A Study Relating to Sovereign Immunity (Jan. 1963) 5 Cal. Law Revision Com. Rep. (1963) pp. 404, 452-453 (1963 Van Alstyne Study); Mot. For Jud. Not., exh. "B".)[6] Thus, in most cases, a civilian injured assisting peace officers would either receive workers' compensation – or nothing at all.

This area of jurisprudence was radically upended by *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, which abolished the doctrine of sovereign immunity for California public entities. Faced with the prospect of immense liability exposure at the state and local level, the Legislature immediately suspended the effect of *Muskopf*, and the California Law Revision Commission undertook to comprehensively examine the subject of governmental tort liability and make recommendations for a new statutory scheme. (See Stats. 1961, ch. 1404.)

One such area examined concerned "injuries sustained by citizens aiding police in enforcing the law." The background study prepared by the Commission's research consultant, Professor Arlo Van Alstyne, noted that "the elimination of possible misgivings as to financial consequences in the event injury is sustained might conceivably tend to promote more willing and wholehearted cooperation by citizens when called upon to give aid in law enforcement." Professor Van Alstyne proceeded to suggest the alternative possibilities of either "absolute" (i.e., strict) tort

[6] Like their employing agency, the "policeman on the beat" themselves was largely shielded from personal tort liability by the common law "discretionary conduct" doctrine, which was broadly construed under the jurisprudence of the time. (1963 Van Alstyne Study, *supra*, at p. 249.)

liability for the requesting public agency or "legislation making workmen's compensation benefits available to citizens injured in the course of assisting in law enforcement." (1963 Van Alstyne Study, *supra,* at pp. 453-454.)

The Commission chose the latter approach. "In some states, local entities are civilly liable, without regard to negligence, for all damages resulting from the death or injury of a person impressed into law enforcement service. The Commission believes that it is better policy to extend to such persons the same benefits and protections that are provided to peace officers generally." (Recommendation relating to Sovereign Immunity, Number 6—Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers (Jan. 1963) 4 California Law Revision Commission Report (1963) p. 1505, fn. 6; Mot. For Jud. Not., exh. "C".) Notably, the Commission also rejected any suggestion that the injured civilian should obtain recovery through an ordinary tort action – as detrimental to *both* public agencies *and* civilians:

> "The Commission also considered whether the claimant should be entitled to workmen's compensation or should be given a right of action against the public entity for his injuries. Mr. Sifford recommended that the workmen's compensation solution to the problem be the one adopted by the Commission. He stated that this solution *permits the risk to be spread* so that a claim for which compensation is allowed would have only a relatively slight impact on any individual account. *In addition, it was noted that this solution guarantees that the claimant will receive compensation even though he assumed the risk or was contributorily negligent*."

(Cal. Law Revision Com. (May 24 and 25, 1962), Minutes, p. 10; Mot. For Jud. Not., exh. "D".)[7]

In light of these considerations, the legislation recommended by the Commission took a consciously broad approach to workers' compensation coverage. The Commission deliberately rejected the "technical distinctions" reflected in the line of cases narrowing *County of Monterey v. Industrial Acci. Com.,* and also went "a little further" than pre-existing law by extending workers' compensation coverage to persons who voluntarily assist in law enforcement upon request, not just those "impressed" into service. "Many people would assume that they are required to assist police officers whenever requested to do so, and others would feel it their civic duty whether required to by law or not. These people, it would seem, should also be covered by the Workmen's Compensation Act." (Second Supp. to Mem. 23, *supra,* at pp. 1-2.) "When a person not trained in law enforcement . . . is required by law to assume the risk of death or serious injury to provide such protection to the public, or when he undertakes to do so at the request of a peace officer . . . he and his dependents should be provided with protection against the financial

[7] Benton A. Sifford served as special research consultant to the Senate Fact Finding Committee on the Judiciary, and actively participated in numerous Commission meetings addressing governmental liability. (See Cal. Law Revision Com. (May 24 and 25, 1962), Minutes, *supra,* at p. 1.)

consequences of his death or injury." (Recommendation relating to Sovereign Immunity, *supra,* at p. 1505.)[8]

While the Commission often focused on ensuring benefits for the injured civilian, the ensuing legislative debates were dominated by concerns over the potential "increase in tort liability" if these provisions were not enacted. The Legislative Analyst noted that "apparently the area contains large potential liability," and the bill's author, Senator James Cobey,[9] emphasized in his letter to Governor Pat Brown that "the bill will make workmen's compensation benefits the *sole relief available to such persons*. Thus, it will *prevent such persons from bringing civil actions* for damages and will *eliminate the possibility of public entities having to pay catastrophic judgments*." (Legis. Analyst, analysis of Sen. Bill No. 47 (1963 Reg. Sess.) as amended May 3, 1963, p. 1; Mot. For Jud. Not., exh. "G"; Sen. Cobey, sponsor of Sen. Bill No. 47 (1963 Reg. Sess.), letter to Governor Brown, Jun. 21, 1963); Mot. For Jud. Not., exh. "H".)

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[8] The broad scope of "active law enforcement" conceived by the Commission is further evident in the Commission's deliberations in this proposal, which noted, with apparent approval, that "in one case the Industrial Accident Commission upheld the action of a referee in awarding workmen's compensation to a person who at the request of a deputy sheriff (who wanted to investigate an accident) flew the deputy in a private plane which crashed." (Cal. Law Revision Com. (Aug. 16, 17, and 18, 1962), Minutes, p. 27; Mot. For Jud. Not., exh. "E", as corrected by Cal. Law Revision Com. (Sep. 21 and 22, 1962), Minutes, p. 1; Mot. For Jud. Not., exh. "F".)

[9] Senator Cobey was also a member of the Law Revision Commission at the time. (See Recommendation relating to Sovereign Immunity, *supra,* at p. 1503.)

The Enrolled Bill Reports submitted to the Governor likewise urged that "[i]t is essential the tort liability bills (SB 42 through 47, inclusive) be signed to *avoid unlimited governmental vicarious tort liability* imposed by the Muskopf decision" and "that the Governor approve SB 47 as *part of the governmental immunity legislation*." (Dept. of Finance, Enrolled Bill Rep. on Sen. Bill No. 47 (1963 Reg. Sess.) Jun. 28, 1963, p. 1.); Mot. For Jud. Not., exh. "I"; Dept. of Industrial Relations, Enrolled Bill Rep. on Sen. Bill No. 47 (1963 Reg. Sess.) Jul. 11, 1963, p. 1; Mot. For Jud. Not., exh. "J".)[10] Governor Brown signed the bill into law on July 15, 1963, and it has remained unchanged in relevant part ever since.

III. "ACTIVE SERVICE IN THE FIELD": FROM CONTEXT TO CONCRETE APPLICATION OF STATUTORY LANGUAGE

As discussed in detail by the parties and Court of Appeal, the specific terminology used in Section 3366, "active law enforcement," has a long track-record in the workers' compensation arena. Textually, the term is defined primarily by those classes *excluded* from coverage – with a *categorical approach* taken toward identifying these classes (i.e., functions are either wholly included or excluded from coverage; coverage is not determined on a case-by-case basis). There is also a consistency to the types of activities excluded, i.e., "stenographers, telephone operators, and other officeworkers" (§ 3212.6) and "telephone operator,

[10] See also *Baines Pickwick v. City of Los Angeles* (1999) 72 Cal.App.4th 298, 302 (describing the 1963 legislative measure providing "[w]orkers' compensation benefits for persons assisting in law enforcement and fire suppression" as part of the Tort Claims Act).

clerk, stenographer, machinist, mechanic, or otherwise *clearly* not falling within the scope of active law enforcement service." (§§ 3212.9. See also §§ 4800, 4850.)

Contrary to plaintiffs' assertions, nothing in this language or its context supports a narrow interpretation of "active law enforcement." (cf. Open. Brief, p. 19.) Indeed, the statutory references to activities "*clearly* not falling within the scope of active law enforcement service" suggest a broad presumption of inclusion, rather than exclusion. Plaintiffs moreover invoke the wrong principle of statutory construction. Characterizing Section 3366 as an "exception" (supposedly to the general rule of excluding volunteers from coverage) is somewhat tortured in the first place – but is misguided regardless. The canon that statutory exceptions are to be construed narrowly has no application in this context, where other interpretive policies prevail – as explained in *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437:

> "[P]laintiff argues that because section 3363.6 is an exception to the general exclusion for volunteers in section 3352, subdivision (i), it must be narrowly construed . . . If section 3363.6 were an exception to the broad definition of "employee" in section 3351, that is, if it restricted the extension of workers' compensation, then we could disregard section 3202 and construe it narrowly because broadly construing the exception would restrict workers' compensation even more . . . In other words, the corollary to liberal construction for the purpose of extending workers' compensation coverage to injured persons is narrow construction of exceptions that restrict coverage. *Here, however, section 3363.6 is not an exception to the inclusive definition of "employee." It is an exception to an exclusion, and as such it expands the reach of workers' compensation. Accordingly, we consider it subject to liberal construction under section 3202.* (See, e.g., *Machado v. Hulsman* (1981) 119 Cal.App.3d 453, 455–456 [173 Cal. Rptr. 842] [liberally

> construing terms of § 3361, which creates exception to general exclusion for volunteers].)"

(*Minish, supra*, 214 Cal.App.4th at p. 466, fn. 16.)

The point to be drawn from the foregoing legislative history is that such liberality – and the categorical, class-based approach toward inclusion or exclusion of certain functions – are not merely consistent with the legislative intent behind Section 3366, but are affirmatively compelled by it. Excluding core functions commonly and predominantly undertaken by law enforcement officers in the field, rather than non-sworn public employees – such as performing welfare checks and responding to 911 calls – is clearly incompatible with the Legislature's intent to provide financial security and protection to *both* civilians *and* law enforcement agencies. Plaintiffs contrary suggestions are strongly reminiscent of the "technical distinctions" in determining coverage that the Law Revision Commission rejected.

Further, including or excluding civilian injuries from workers' compensation coverage based on a case-by-case assessment of either (1) the specific danger posed by the law enforcement officer's request in that particular case, or (2) the specific representations or disclosures made by the requesting officer, would be inconsistent with the categorical approach to coverage indicated by the Legislature's use of the term "active law enforcement."

Moreover, such an approach poses another conundrum the Commission specifically sought to avoid, i.e., the inability of a civilian to confidently determine their rights and duties, and whether their injuries will be covered. Perhaps most critically,

narrow construction of Section 3366 would fail to respect the historic, but still vital, reality of the broad range of law enforcement functions that residents may – and sometimes must – be called upon to perform for the benefit and protection of their community.

A good portion of plaintiffs' briefing is devoted to attacking a strawman – i.e., their argument that Section 3366 does not extend to "all activities peace officers perform." (Open Brief., at p. 19.) That misframes the issue before the court. Rather, the real question is whether a *particular subset of those activities* – i.e., those the Gunds knowingly undertook (responding to a 911 call for help) and/or those actually encountered (confronting a knife-wielding criminal) constitute "active law enforcement." Police officers also fill out reports, drive to the office, and engage in myriad other mundane activities shared in common with non-sworn public employees – none of which the Gunds were called upon to assist with, and none of which are at issue here.

Plaintiffs rely heavily on several cases interpreting the term "active law enforcement" in the pension context. To begin with, the relevance of pension cases to the interpretation of "active law enforcement" in the workers' compensation arena is questionable, at best, and has been rejected by several Courts of Appeal. (See, e.g., *Biggers v. Workers' Comp. Appeals Bd.* (1999) 69 Cal.App.4th 431, 437-440; *Riverside Sheriffs' Assn. v. Board of Administration* (2010) 184 Cal.App.4th 1,

12.)[11] Regardless, however, the pension cases and their progeny do not support plaintiffs' argument here. These cases draw the distinction between "active service in the field" and "less hazardous and more routine duties at a centralized location." (*United Public Employees v. City of Oakland* (1994) 26 Cal.App.4th 729, 732.) Classification of "active law enforcement" for pension purposes is thus "largely controlled by the extent to which the category exposes its holders to potentially hazardous activity." (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1333.)

Where these cases do mention "the active investigation and suppression of crime" and "the arrest and detention of criminals" – verbiage so oft quoted by plaintiffs – it is as *example* of the types of functions that qualify, *not an exclusive list*. (See, e.g., *Crumpler, supra,* 32 Cal.App.3d. at p. 577 quoting 22 Ops.Cal.Atty.Gen. 227, 229 ["active law enforcement work means 'physically active' work *such as* the arrest and detention of criminals"]; *Neeley, supra,* 36 Cal.App.3d at p. 822 ["their principal duties concern physically active work, *such as* the arrest and detention of criminals, which exposes such officers and employees to physical risk in the law enforcement field"].) Plaintiffs' effort to read those references into Section 3366 as the exclusive criteria for "active law enforcement"

[11] Moreover, many of the pension cases relied upon by plaintiffs involved deference to the applicable retirement board – a factor obviously not implicated here. (See, e.g., *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 578; *Neeley v. Board of Retirement* (1974) 36 Cal.App.3d 815, 820.) Plaintiffs' demand for "one uniform definition of active law enforcement applicable to all California statutes" (Open. Brief, at p. 20) consequently rings somewhat hollow.

finds no support in the holdings of these cases – let alone the actual language of the statute (or Law Revision Commission commentary). To the contrary, the pension cases never fail to return to the underlying principle that "the main reference is to *duties which expose officers and employees to physical risk in the law enforcement field* . . ." (*Crumpler, supra,* 32 Cal.App.3d. at p. 577.) Of course, perhaps most importantly, none of these cases actually involved functions remotely resembling those at issue here – providing first response, in person, to live 911 calls out in the field.

As the cases get closer to the core issues presented here, i.e., where workers' compensation benefits are at issue, the liberal trend becomes even stronger. *Biggers, supra,* examined whether courtroom bailiffs were engaged in "active law enforcement" for these purposes – and framed the issue as whether such function "is in the same *class* as support personnel of the sheriff's office performing more routine tasks, such as telephone operators, clerks, stenographers, machinists, and mechanics." The Court of Appeal found that it was not, specifically cautioning that "[l]ike police and firefighters, courtroom bailiffs also protect the public . . . While these hazards may not be as great as those faced by sheriff's deputies on patrol, they are of the *same kind* and they are *distinct from the job hazards faced by clerks, typists, and machinists*." (*Id.,* at pp. 440-441.)

The sparse authorities applying Section 3366 itself are perfectly consistent with this understanding. *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 263

concluded that a civilian who was injured while pointing out skidmarks to a peace officer at the scene of a car crash was not engaged in "active law enforcement," because "[t]he statute covers a person who assumes the functions and risks of a peace officer, and not one who merely informs a peace officer of facts *within his own knowledge*." (*Id.* at p. 263, fn. 11.) By contrast, in *Amend v. City of Long Beach* (1965) 30 Cal.Comp.Cases 29, the Industrial Accident Commission held that a civilian who assisted law enforcement by actively participating in the "sting" purchase of an illegal firearm *was* engaged in "active law enforcement." "The obvious purpose of the statute in issue is to afford protection to private individuals exposed to the hazards associated with police work . . . In assisting the police the applicant exposed himself to the *risk and peril which is concomitant with active law enforcement*." (*Id.* at pp. 30-31.)[12]

The former case involved a civilian who was fundamentally acting as a witness – a traditional civilian function – rather than a law enforcement officer; whereas the latter concerned an individual who undertook functions and risks "concomitant with active law enforcement." Extending the analogy here, had Corporal Whitman merely asked the Gunds for directions to K's house, this case would be very similar to *McCorkle*. However, the assistance he actually requested –

[12] The Workers' Compensation Appeals Board appears to have reached the same conclusion on similar facts in *Page v. City of Montebello* (1980) 45 Cal.Comp.Cases 373; however, the actual WCAB opinion was not re-printed in California Compensation Cases, and is referenced only in dictum by the Court of Appeal. (*Page v. City of Montebello* (1980) 112 Cal.App.3d 658, 662.)

going to K's house *themselves* in response to her 911 call for help – is plainly more akin to *Amend*. As will appear, this particular function too involves "risk and peril which is concomitant with active law enforcement" – and is thus categorically covered by workers' compensation.

IV. "RESPONDING TO A 911 CALL FOR HELP OF AN UNCERTAIN NATURE": AN INHERENTLY HAZARDOUS LAW ENFORCEMENT ACTIVITY

At the crux of the Court of Appeal's opinion is the simple proposition that responding to a 911 call – even one thought likely benign – is sufficiently hazardous to constitute "active law enforcement." On its face this appears clearly correct, both by reference to the functions included and excluded from "active law enforcement" under related statutes, and by reference to those activities for which law enforcement officers could and did traditionally request civilian aid for the benefit of the community. Responding to 911 calls, "weather related" or otherwise, is plainly the province of "sheriff's deputies on patrol," rather than "stenographers, telephone operators, and other officeworkers"[13] – and does not appear any less

[13] Plaintiffs' Reply asserts that "[f]irefighters and first-aid responders routinely check on people's welfare in response to 911 calls for help," and proceeds to suggest that such functions therefore cannot constitute "active law enforcement." (Reply at p. 8.) This is neither factually, logically, nor legally sustainable. To begin with, neither the record nor common knowledge supports the proposition that firefighters, etc. routinely respond to general 911 calls, perform welfare checks, or handle "weather-related emergencies." To the contrary, dispatchers commonly (as here) send law enforcement officers to such calls – and for good reason, as will appear. Second, plaintiffs cite no authority for the proposition that simply because some other public employees, sometimes, might undertake a function *predominantly* performed by law enforcement officers, that function must therefore be excluded

inherently hazardous than executing civil process (for which civilians were historically impressed into the Sheriff's posse[14]).

Moreover, this common-sense conclusion is empirically justified. Responding to 911 calls and performing welfare checks is *dangerous*, even when the caller does not report any particular criminal activity. Statistics compiled by the Federal Bureau of Investigation graphically detail the hazards of responding to "citizen complaint[s]" – a category encompassing such ostensibly mundane encounters as "[c]hecking on welfare of a citizen" and "[v]erbal complaint[s] of noncriminal violation," and *reported separately* from "[d]isorder/disturbance" calls and "[r]espond[ing] to crime in progress." (FBI, Uniform Crime Reports (2017) Law Enforcement Officers Killed and Assaulted, 2017, *LEOKA Definitions*, pp. 3-11; Mot. For Jud. Not., exh. "K".)[15]

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from "active law enforcement." Finally, it's worth remembering that a companion provision, Section 3365, similarly sweeps civilians assisting in firefighting activities within the scope workers' compensation. While no one would argue that the Gunds were "engaged in suppressing a fire," the suggestion that a class of activities that actually was shared between police and firefighters should be excluded from coverage is plainly at odds with the Legislature's intention.

[14] See, e.g., *Going v. Dinwiddie* (1890) 86 Cal. 633, 636; *Burnham v. Stone* (1894) 101 Cal. 164, 167-168.

[15] Available online, <https://ucr.fbi.gov/leoka/2017/resource-pages/leoka_definitions_2017.pdf> (as of Jan. 23, 2019).

The most recent (2017) edition of Law Enforcement Officers Killed and Assaulted ("LEOKA 2017")[16] indicates that between 2013 and 2017, officers responding[17] to "citizen complaint[s]" were "assaulted and injured with firearms, knives, or other cutting instruments" thirty-four times, and that six officers were "feloniously killed" responding to such calls within that timeframe.[18] (LEOKA

[16] LEOKA is an annual statistical report published by the FBI contained data compiled nationwide, and has been relied upon both by this court and the federal courts to demonstrate the dangers involved in particular law enforcement encounters. (See, e.g., *In re Arturo D.* (2002) 27 Cal.4th 60, 85, fn. 23; *Maryland v. Wilson* (1997) 519 U.S. 408, 413.)

[17] LEOKA subdivides each law enforcement encounter into a "Progression of Circumstances," beginning with the initial "Call for Service or Reason for Involvement," continuing through "Circumstance Encountered by Victim Officer Upon Arrival at Scene of Incident," and ending with "Specific Activity Being Performed by Victim Officer at Time of Attack." (See *LEOKA Definitions, supra,* p. 3, and LEOKA 2017, tbl. 118; Mot. For Jud. Not., exh. "L", available online <https://ucr.fbi.gov/leoka/2017/topic-pages/tables/table-118.xls > (as of Jan. 23, 2019). Thus, an incident that begins as "Citizen complaint/Check on welfare of citizen" may progress to "Encounter or assist an emotionally disturbed person" and then become "Arrest situation/Attempting to control/handcuff/restrain offender(s)". (*Ibid*.) For purposes of assessing the risks inherent in the activity *known to the Gunds based upon the statements allegedly made by Corporal Whitman*, the initial stage, "Call for Service or Reason for Involvement," plainly provides the appropriate set of statistics.

[18] The statistics for other assaults (i.e., those that are not armed, or do not result in injuries or death) are not reported with this degree of detail – i.e., only the "Circumstance at Scene of Incident" is reported (not the initial "Reason for Involvement"), and citizen complaints/welfare checks are apparently included in the catch-all category of "all other" (a category responsible for over 15% of officer assaults), rather than being separately reported. (See, e.g., LEOKA 2017, tbl. 84; Mot. For Jud. Not., exh. "M," available online <https://ucr.fbi.gov/leoka/2017/topic-pages/tables/table-84.xls> (as of Jan. 23, 2019).)

2017, tbls. 23 and 111; Mot. For Jud. Not., exhs. "N" and "O".)[19] This represents more than 6% of the *injury-producing armed assaults* reported, and over 2.5 percent of slain officers. (*Ibid*.)

A recent research study funded by the United States Department of Justice, Office of Community Oriented Policing (COPS)[20] reveals similar results. The study analyzes ninety-one law enforcement officer deaths resulting from dispatched calls between 2010 and 2014. Of these, 16 officer deaths (approx. 18%) resulted from "disturbance" calls – of which four (approx. 4.5%) involved call types such as "welfare check," "unconscious person," and "noise complaint," *which give no initial indication of criminal activity*. (Breul & Keith, Deadly Calls and Fatal Encounters: Analysis of U.S. Law Enforcement Line of Duty Deaths When Officers Responded to Dispatched Calls for Service and Conducted Enforcement, 2010-2014 (2016) p. 20; Mot. For Jud. Not., exh. "P".)[21] This data lead the researchers to emphasize that "a call for service is often not what it appears and that even minor infractions of the law or ordinances can involve armed criminals or persons with mental disorders"

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[19] Both available online, <https://ucr.fbi.gov/leoka/2017/topic-pages/tables/table-23.xls> and <https://ucr.fbi.gov/leoka/2017/topic-pages/tables/table-111.xls> (as of Jan. 23, 2019).

[20] This particular COPS study has likewise been relied upon by the federal courts when evaluating the dangers faced by law enforcement. (*Stimmel v. Sessions* (6th Cir. 2018) 879 F.3d 198, 210.)

[21] Available online, <https://web.archive.org/web/20180605182918/www.cops.usdoj.gov/Default.asp?Item=2881> (as of Jan. 23, 2019).

(*id.* at p. 25), and conclude that "[o]fficers must avoid being lulled into a false sense of security by a call classification." (*id.* at p. 26.)

The COPS data analysis also makes another valuable point, that "lack of clear and accurate information" is a common factor in "cases . . . in which tragedy erupted from what is normally a common call for service . . ." (Deadly Calls and Fatal Encounters, *supra*, at pp. 21, 24.) Failures in the chain of communication – from the initial caller to the dispatcher, from the dispatcher to the officer, and from one officer to another – are consequently *one of the inherent risks of responding to any 911 call*, no matter how seemingly minor – *not* a reason to conclude that such response is anything other than "active law enforcement."

Plaintiffs' broader assertion – that 911 calls involve a wide range of emergency assistance, not just those involving active criminal conduct – is generally accurate, but this premise does not support their conclusion. Responding to 911 calls, regardless of the nature of assistance requested, is inherently hazardous precisely *because* of the broad range of circumstances the first responder may encounter, and the unknowns involved. Not every 911 call actually involves the suppression of crime – but police departments still send law enforcement officers, not clerks, to respond.

For these reasons, even taken entirely on its own terms, the Court of Appeal's decision was plainly correct. Even if – as plaintiffs argue – workers' compensation coverage is measured by "what the Gunds reasonably believed to be

true about their neighbors 911 call" (Open. Brief, p. 23), those facts alone present precisely "the risk of death or serious injury to provide such protection to the public" that Section 3366 is intended to encompass. Plaintiff's suggestion that "[t]hey were not asked to engage, and did not engage, in an activity that inherently carries a risk of death or injury" (Open. Brief, at p. 15, 22) – and the characterization of responding to ordinary 911 calls as "non-hazardous" (*id.* at p. 20) – are simply mistaken.[22]

Based *solely* on the information (allegedly) supplied by Corporal Whitman, the Gunds would have known that they were walking into a situation that results in over 6% of injury-producing armed assaults on peace officers, and at least 2.5% of officer homicides. (Phrased differently, even accepting plaintiffs' allegations in full, Corporal Whitman did not – as plaintiffs' counsel argues – misrepresent a dangerous situation as *safe*; rather, the alleged representations go only to the *degree of danger* involved – something clearly within the exclusivity bar of workers' compensation.)

[22] To carry the point further, even discounting the potential for human-caused hazards, plaintiffs have provided no factual or logical support for their belief that what they themselves describe as a "weather-related emergency" presented no inherent "risk of death or injury" to responders. (Open. Brief, at pp. 15-16, 21, 26.) The suggestion that extreme weather events pose no meaningful dangers is plainly untenable in today's California. Law enforcement officers or civilians responding to calls for help under such circumstances face obvious hazards – even if "a big storm" really is all they encounter.

Against this backdrop, it cannot be realistically argued that the Legislature intended to *exclude* an activity that actually *is* so inherently hazardous, and is so much a part of the core functions of a "deputy sheriff on patrol," from the scope of "active law enforcement." Clearly a civilian undertaking such risks was meant to be covered by workers' compensation – with all of its benefits and tradeoffs.

V. "SUCH A RESULT WOULD UNDERMINE THE UNDERLYING PREMISE UPON WHICH THE WORKERS' COMPENSATION SYSTEM IS BASED": THE ROLE OF *KNOWLEDGE* IN DETERMINING APPLICABILITY OF WORKERS' COMPENSATION COVERAGE

All of that said, the Court of Appeal may have reached the right result for a more fundamental reason. Central to plaintiffs' argument is the assumption that the applicability of Section 3366 turns upon the civilian assistant's *knowledge* of the nature of service they are called to perform, rather than the *objective nature* of the activity. The situation that the Gunds actually encountered upon responding to Corporal Whitman's request – confronting an armed criminal – plainly constitutes "active law enforcement" under any definition, with all of the attendant risks. The matter becomes murky only if workers' compensation coverage is measured not by the actual dangers encountered, but by those dangers that are known to the civilian assistant at the time they are enlisted. (Phrased differently, whether "the officer allegedly misrepresented the potential danger of the situation" is relevant only if coverage depends upon the facts known to the injured party.)

Plaintiffs' argument on this point is vanishingly thin – drawn entirely from a smattering of Fourth Amendment caselaw of no apparent relevance to California's statutory workers compensation system. (Open. Brief, at pp. 24-25, 28.) The "community caretaking" exception to the Fourth Amendment warrant requirement arises from different sources, has different history, and serves different purposes than the legislative policy choices regarding what types of law enforcement activity get which forms of compensation. The knowledge and intentions of the officer are highly relevant to the former – where condoning mixed or false motives would threaten civil liberties – but have no apparent relevance to the latter, which is concerned with reducing uncertainties and risks for both civilians and law enforcement agencies, not ferreting out unreasonable searches.

There is nothing at all anomalous in the Legislature's choice to extend workers' compensation coverage to certain activities that would not require a warrant under the Fourth Amendment. Indeed, it would have been rather surprising for the Legislature to select those particular limits for coverage, as they bear little connection to the rationale behind extending workers' compensation benefits to civilian assistants in the first place. Simply put, plaintiffs' premise that the scope of "active law enforcement" under Section 3366 has any bearing on search and seizure doctrine – or vice versa – is flatly mistaken. They may both use the term "law enforcement," but that's about all they share in common.

While research has uncovered no authorities specifically addressing plaintiffs' novel attempt to import Fourth Amendment concepts into workers' compensation jurisprudence, the caselaw is replete with authorities rejecting analogies between workers' compensation principles and various other areas of law, precisely because of the different purposes served by each scheme. (See, e.g., *Pulaski v. Occupational Safety & Health Stds. Bd.* (1999) 75 Cal.App.4th 1315, 1336 [workplace safety rules]; *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 25-26 ["common law of contracts"]; *Munyon v. Ole's, Inc.* (1982) 136 Cal.App.3d 697, 702 [vicarious tort liability]; *Biggers, supra,* 69 Cal.App.4th at pp. 437-440 [pension statutes].) Therefore, plaintiffs' arguments premised upon the scope of the "community caretaking" exception may be safely disregarded – along with the parade of horribles they envision if responding to generic 911 calls and performing welfare checks are determined to constitute "active law enforcement" under Section 3366.

Section 3366 does not exist in a void, but rather is part of the larger system of workers' compensation. The precise argument advanced by plaintiffs here – i.e., that misrepresentations regarding "the potential danger of the situation" should avoid the bar of exclusivity – has been raised and rejected numerous times in workers' compensation jurisprudence. (See, e.g., *Johns-Manville Prods. Corp. v. Superior Court* (1980) 27 Cal.3d 465; *Spratley v. Winchell Donut House* (1987) 188 Cal.App.3d 1408; *Wright v. FMC Corp.* (1978) 81 Cal.App.3d 777.) Indeed, the law

on this subject was already well-established at the time Section 3366 was enacted. (*Buttner v. American Bell Tel. Co.* (1940) 41 Cal.App.2d 581.)

These arguments have been strongly rebuffed based not merely on a technical reading of the Labor Code, but because such a result is *fundamentally inconsistent with the premise upon which workers' compensation is based*:

> "The reason for the foregoing rule seems obvious. It is not uncommon for an employer to 'put his mind' to the existence of a danger to an employee and nevertheless fail to take corrective action. In many of these cases, the employer does not warn the employee of the risk. Such conduct may be characterized as intentional or even deceitful. Yet if an action at law were allowed as a remedy, many cases cognizable under workers' compensation would also be prosecuted outside that system. *The focus of the inquiry in a case involving work-related injury would often be not whether the injury arose out of and in the course of employment, but the state of knowledge of the employer and the employee regarding the dangerous condition which caused the injury. Such a result would undermine the underlying premise upon which the workers' compensation system is based*." (*Johns-Manville, supra,* 27 Cal.3d at p. 474.)[23]

Other courts have echoed this reasoning and result. In *Spratley*, the plaintiff alleged she did not wish to accept employment at the donut shop because she feared working alone at night where a burglary had recently occurred. To induce her to accept employment, the defendant falsely and fraudulently told plaintiff it had changed the locks and would arrange for continuous security. A month later,

[23] *Johns-Manville* did recognize "a trend toward allowing an action at law for injuries suffered in the employment if the employer acts *deliberately for the purpose of injuring the employee* or if the harm resulting from the *intentional misconduct* consists of *aggravation of an initial work-related injury . . .*" (*Id.* at p. 476.) This implications of this exclusivity exception for this case - or lack thereof - is discussed in greater detail in Part VII, *infra*.

plaintiff was assaulted while working alone at night. The court rejected the suggestion that the alleged misrepresentations regarding the potential hazards took the case outside of workers' compensation exclusivity:

> "Were we to hold this complaint states a claim in tort, an employee who is injured and suffers emotional distress due to an unknown or concealed hazard in the workplace could avoid the workers' compensation bar simply by alleging the employer misrepresented or fraudulently concealed the hazard during the hiring process. Such a result, as well, would invite a multiplicity of claims, focus attention on the knowledge of employer and employee and undermine the underlying premise on which the workers' compensation system is based."
> (*Spratley, supra,* 188 Cal.App.3d at p. 1416.)

As the court in *Buttner, supra,* 41 Cal.App.2d at p. 584 stated bluntly, rejecting a tort claim arising from alleged misrepresentation regarding the nature of the substances an employees was assigned to handle, "[t]he fact that appellant founds his cause of action upon the deceit allegedly practiced by respondents is immaterial." In modern workers' compensation parlance, misstatements regarding the nature and degree of risk associated with an activity – whether innocent, negligent, or intentional – are firmly within the scope of the workers' compensation "bargain" and therefore subject to the exclusive remedy.

From the foregoing, it would appear anomalous to suggest that alleged misrepresentations regarding the potential danger of the situation should play any role in determining the trigger for workers' compensation under Section 3366. Such a result "would invite a multiplicity of claims, focus attention on the knowledge of employer and employee and undermine the underlying premise on which the

workers' compensation system is based" just as much here as in the traditional employment context. The Legislature surely did not intend for a consideration that is not merely irrelevant, but anathema to the determination of workers' compensation coverage to govern the applicability of such coverage under Section 3366. To the contrary, the correct answer is that the Legislature intended a consistent set of principles and results, under which workers' compensation coverage is determined by the actual nature of the activities performed, *not* the parties' representations or state of knowledge.

Therefore, whether or not Corporal Whitman accurately represented the dangers involved in providing these assistance he requested, or whether the Gunds did or did not knowingly and intelligently assume these risks, *the objective nature of the assistance they provided* plainly constitutes "active law enforcement," and workers' compensation coverage is consequently triggered.

Plaintiffs' arguments that application of Section 3366 depends upon whether their performance of qualifying "active law enforcement" services was "knowing," "intelligent," and "voluntary" (Open. Brief, at p. 30-32) are doubly misguided. From the workers' compensation perspective, it is well-established that the individual applicant's personal knowledge that workers' compensation coverage applies to their activities, and/or agreement to accept that coverage in lieu of civil remedies, is wholly irrelevant – and *this principle has been specifically applied to volunteers ostensibly unaware that their service was covered*. (*Minish, supra,* 214 Cal.App.4th

at pp. 467-471 [“the Act applies regardless of whether the injured person knows that he or she is a covered employee or wants to be covered under the Act"].)[24]

The particular history and intent of Section 3366 leads to the same conclusion. That statute reaches not merely those who voluntarily assist with law enforcement, but also those compelled to do so – and *was specifically intended to eliminate the distinction between those groups*. (See Second Supp. to Mem. 23, *supra*, at p. 1.) It appears curious to suggest that those whose choice to serve was not fully informed may avail themselves of civil remedies – but those who had no choice at all may not. The correct answer is otherwise. Here, as in the rest of workers’ compensation jurisprudence, coverage is determined by the objective nature of the functions and circumstances encountered, not the knowledge, intention, state of mind, or representations of the parties.

VI. "THE CONSEQUENCES OF A PARTICULAR INTERPRETATION, INCLUDING ITS IMPACT ON PUBLIC POLICY": NOT A CLOSE CALL IN THIS CASE

"In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy.” (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses* LLC (2015) 61 Cal.4th 830, 838.) To that end, the admonition of this court in *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055 bears repeating in full:

[24] The *Minish* court specifically distinguished *Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal.3d 222, relied upon by plaintiffs here. (*Minish, supra,* 214 Cal.App.4th at p. 470.)

> "Our conclusion comports with the Legislature's command in section 3202 that the Act 'be liberally construed by the courts with the purpose of extending [its] benefits for the protection of persons injured in the course of their employment.' This command governs all aspects of workers' compensation; it applies to factual as well as statutory construction. Thus, '[i]f a provision in [the Act] may be reasonably construed to provide coverage or payments, that construction should usually be adopted even if another reasonable construction is possible.' The rule of liberal construction 'is not altered because a plaintiff believes that [she] can establish negligence on the part of [her] employer and brings a civil suit for damages.' It requires that we liberally construe the Act 'in favor of awarding work[ers'] compensation, not in permitting civil litigation.'"

(*Id.* at p. 1065. See also *Machado v. Hulsman, supra,* 119 Cal.App.3d at pp. 455-456 [Workers' Compensation Act must "be liberally construed in favor of the application of … benefits *even where it might be to the advantage of a particular plaintiff to avoid them and seek a remedy at law*"].)

Three major policy goals may be divined from the legislative history of Section 3366: "[P]romot[ing] more willing and wholehearted cooperation by citizens when called upon to give aid in law enforcement" (1963 Van Alstyne Study, *supra,* at p. 453); providing civilian assistants with "protection against the financial consequences of his death or injury" (Recommendation relating to Sovereign Immunity, *supra,* at p. 1505); and, "eliminat[ing] the possibility of public entities having to pay catastrophic judgments." (Letter to Governor Brown, *supra,* at p. 1.) Making workers' compensation coverage – or exclusivity – depend upon a case-by case determination of whether "the officer allegedly misrepresented the potential danger of the situation" would frustrate each of these purposes, and also threaten real danger to public safety.

From a policy perspective, encouraging civilians to assist the authorities with responding to *any* call for help – regardless of its nature – is obviously desirable. The most basic function of any community is mutual aid in times of danger, and neither history nor logic limits this principle to dangers of an overtly criminal nature. This is especially true in remote communities – where civilian assistance may be the only help available – but may arise in any community when emergency strikes. It bears remembering that although the Gunds' efforts tragically could not save "K" in this case, it could easily have been otherwise – and civilian neighbors responding to such a call could be the difference between life and death. Encouraging the assistance of civilians under the broadest range of circumstances clearly serves public policy.

As discussed at several points in the legislative history, civilian assistance is encouraged by the *certainty* of being compensated in the event of injury. That's why workers' compensation coverage was extended regardless of whether the civilian's assistance is legally compelled, and also why the Law Revision Commission disdained tort remedies. As noted during the Commission proceedings, consigning recovery to the tort system raises the specter that the injured civilian will receive something less than full compensation – or none at all – if he or she "assumed the risk or was contributorily negligent." (May 24 and 25, 1962 Minutes, *supra,* at p. 10.)

Should the Gunds be denied full compensation for their medical bills and lost wages because they could have been more careful when responding to "K's" 911 call? Indeed, should their recovery depend upon proof that they would have assisted only "faintly and with lagging steps" – or not at all – had they been fully informed of "the potential danger of the situation"?[25] While in this case, plaintiffs may believe that they can overcome these obstacles and achieve substantial recovery, from the larger policy perspective such uncertainties are plainly detrimental. This detriment is obviously compounded if the civilian's compensation, or the mechanism therefor, depends upon the representations made by the requesting officer, rather than the actual circumstances encountered.

Moreover, civilians would not be the only ones discouraged by such a result. Contrary to plaintiffs' suggestions, imposing civil liability for failure to make full disclosure of all potentially relevant facts will not simply make law enforcement officers more careful. In fast-paced emergent circumstances, the prospect of having a jury second-guess their actions won't induce officers to have longer, more thorough discussions with prospective civilian assistants. Rather, it will discourage them from calling upon civilians at all.

Indeed, few law enforcement agencies are likely to allow or encourage such requests for assistance, if this exposes the agency to the "large," "catastrophic,"

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[25] Actual reliance upon the alleged misrepresentation is, of course, a *prima facie* element of both intentional and negligent misrepresentation. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166.)

"unlimited" liability against which the drafters of Section 3366 warned. The mere threat of having to litigate such fact-intensive allegations, and attendant defense costs, creates an obvious deterrent for public agencies from sanctioning such requests – even if they have full faith in the accuracy and veracity of their officers. This will predictably result in fewer civilians aiding law enforcement, more calls for help that cannot be timely heeded, and ultimately real, substantial harms to the public safety and to actual people that could have been avoided.

Taking a narrow view of "active law enforcement" as suggested by plaintiffs – or having applicability of the workers' compensation "bargain" depend upon the statements of the requesting officer – ultimately harms all parties involved. As a matter of public policy, this case is not a close call.

VII. PUBLIC POLICY, CIVIL RIGHTS, AND THE "COMPENSATION BARGAIN"

Conventional workers' compensation exclusivity analysis proceeds in two steps. "[T]he first step normally entails simply determining whether the plaintiff is seeking to recover for industrial personal injury or death, i.e., for personal injury or death sustained in and arising out of the course and scope of employment. If the plaintiff's claim comes within the conditions of compensation . . . one reaches the second step in the exclusivity analysis, which is to determine whether the acts or motives giving rise to the injury constitute a risk reasonably encompassed within the compensation bargain." (*Operating Engineers Local 3 v. Johnson* (2003) 110

Cal.App.4th 180, 185. See also *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 811-812.)

As noted above, plaintiffs' initial argument appears to have been directed entirely toward the first step in this analysis, essentially asserting that responding to generic "welfare check" 911 calls is categorically outside the special "scope of employment" established by Section 3366 (i.e., "active law enforcement"). They only belatedly acknowledge the latter step in their Reply brief, advancing the somewhat cursory argument that Corporal Whitman's alleged misrepresentations were not "a risk reasonably encompassed within the compensation bargain" that the Legislature has generally decreed for "active law enforcement."

Even if this latter issue has been preserved for review, plaintiffs miss the mark widely. It is well-established that even intentional misrepresentations regarding the risks and dangers of an activity are generally part-and-parcel of the compensation bargain. (That's the point of *Buttner*, *Johns-Manville*, *Spratley*, and *Wright*.) Plaintiffs argue, in essence, that *government* misrepresentations are different – because (1) misrepresentations by state actors may violate an individual's constitutional rights, and (2) violation of constitutional rights is "contrary to fundamental public policy," which is a recognized exception to workers' compensation exclusivity.

As will appear, plaintiffs have identified some of the correct principles – but they misstate the caselaw and neglect the details. Thorough examination of the

decisions applying the "public policy" exception to exclusivity – and the interaction between this exemption and civil rights jurisprudence – provides a roadmap for ascertaining when alleged officer misconduct truly does fall outside the exclusive remedy, and demonstrates why none of these circumstances is present in this case.

"In the first place, the proposition that intentional or egregious employer conduct is necessarily outside the scope of the workers' compensation scheme is erroneous . . . Even intentional 'misconduct' may constitute a normal part of the employment relationship . . . Even if such conduct may be characterized as intentional, unfair or outrageous, it is nevertheless covered by the workers' compensation exclusivity provisions." (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 752.) "[I]f the injuries did arise out of and in the course of the employment, the exclusive remedy provisions apply notwithstanding that the injury resulted from the intentional conduct of the employer, and even though the employer's conduct might be characterized as egregious." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 15.)

Nonetheless, "in some exceptional circumstances the employer is not free from liability at law for his intentional acts even if the resulting injuries to his employees are compensable under workers' compensation. Where the acts are a 'normal' part of the employment relationship . . . or where the motive behind these acts does not violate a fundamental policy of this state, then the cause of action is

barred. If not, then it may go forward." (*Charles J. Vacanti, M.D., Inc., supra,* 24 Cal.4th at p. 812.)

"Thus, courts have permitted fraud claims against an employer when the employer conceals the existence of an employee's workplace injury because such concealments cannot be linked to a normal employer action . . . In addition to the acts themselves, the motive element of a cause of action may insulate that cause of action from the purview of the exclusive remedy provisions. This exception to exclusivity, however, is quite limited. Any inquiry into an employer's motivation is undertaken not to determine whether the employer intentionally or knowingly injured the employee, but rather to ascertain whether the employer's conduct violated public policy and therefore fell outside the compensation bargain. In other words, the motive element of a cause of action excepts that cause of action from exclusivity only if it violates a fundamental public policy of this state." (*Id.* at pp. 822-823.)

These are formidably high barriers, which must inform the inquiry even in this context. As noted, the alleged misconduct here – i.e., safety-related misrepresentations made by one statutory "co-worker" to another – have been repeatedly adjudged to be a "normal" part of the employment relationship. Further, though such occurrences are obviously lamentable, they have not been found to violate fundamental public policy (notwithstanding plaintiffs' paean to the policies

"favoring the effective protection of the lives and property of citizens"[26]). While public officials are indeed subject to restrictions inapplicable to private businesses, the fact that a particular type of conduct *is* within the compensation bargain for employers in general suggests that courts should tread cautiously when considering whether special rules, if any, apply to government entities.

Law enforcement officers are state actors, and must consequently respect the civil rights of all those with whom they interact. A colorable argument could be made that willful civil rights violations would constitute the sort of public policy infringement sufficient to support an action under state law outside the exclusive remedy of workers' compensation (aside from whatever federal liability might attach). While none of the cases cited by plaintiffs actually stands for this proposition, [27] it is unobjectionable in the abstract, and may be accepted for purposes of analysis.

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[26] Reply at p. 15.

[27] See Reply, at pp. 13-14. In particular, none of the cases cited by plaintiffs stands for the proposition that *any* constitutional violation necessarily "contravenes fundamental public policy" within the meaning of the workers' compensation caselaw, such that resulting physical injuries are categorically outside the exclusivity bar. Suffice it to say that not all constitutional violations are equivalent, and the underlying rationale for the "public policy" exception to exclusivity does not mandate that they all be treated identically *for these purposes*, regardless of the nature of the violation, its circumstances, or context. There is more than adequate room in California's expansive exclusivity jurisprudence to encompass even constitutional violations that are not willful, do not shock the conscience, or are otherwise not outside a reasonable understanding of the compensation bargain for a particular employment. That said, it is unnecessary to explore this point in detail, as

Plaintiffs' application of this premise degrades rapidly, however. Their asserted constitutional violation arises from the "state created danger" theory, under which the Fourteenth Amendment may be violated "when the state affirmatively places the plaintiff in danger by acting *with deliberate indifference* to a known or obvious danger." (*Patel v. Kent Sch. Dist.* (9th Cir. 2011) 648 F.3d 965, 971-972.) However, their argument on this point conflates – or simply ignores – critical elements of the law on this subject, namely the "proper standard of culpability" expressly and repeatedly emphasized in both California and Ninth Circuit jurisprudence.

To begin with, California courts have not looked kindly on the "state created danger" theory. This theory was acknowledged (but not applied) in *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112. The *Zelig* court noted several times that the asserted "deliberate indifference" of the governmental defendant was an integral component of that plaintiff's allegations, but had no occasion to further articulate this criterion. (*Id.* at pp. 1121, 1123, 1147.) The Court of Appeal took the next step in *O'Dea v. Bunnell* (2007) 151 Cal.App.4th 214, addressing the requisite culpability necessary to establish a constitutional violation under this theory:

> "We cannot agree with a narrow reading of these cases that imposes liability under the due process clause for a state-created danger *simply because* the state actor affirmatively placed the plaintiff in danger with deliberate indifference to a known or obvious danger. In our view, such a reading overlooks the gravamen of a substantive due process claim based

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the evidence submitted by plaintiff on summary judgment fails to establish any actual violation here.

> on the deprivation of a plaintiff's liberty interests . . . Therefore, regardless of whether a case can be said to fall under the special relationship exception or the danger-creation exception, *if the state has not deprived the plaintiff of liberty by restraining his individual freedom to act on his own behalf*, the plaintiff simply does not have a cause of action under section 1983 under either exception."

(*O'Dea, supra,* 151 Cal.App. 4th at pp. 224-225.)

Research has not disclosed any conflict amongst the Courts of Appeal on this point, nor any California authority applying the "state created danger" theory more broadly. Under these standards, plaintiffs' argument clearly does not measure. There is no allegation (much less evidence) that Corporal Whitman restrained the Gunds' freedom to act in any manner. Their argument for a constitutional violation, and thus exemption from workers' compensation exclusivity, could simply end there.[28]

Moreover, plaintiffs' Fourteenth Amendment claim – and thus their public policy argument – would also fail under the (arguably more relaxed) standards applied by the Ninth Circuit. *L. W. v. Grubbs* (9th Cir. 1992) 974 F.2d 119 ("*Grubbs I*"), relied upon by plaintiffs and cited in *Zelig*, expressly held that "mere negligence" is insufficient to establish a constitutional violation. "Something more than an ordinary tort is required." (*Id.* at p. 122-123.)[29] Plaintiffs' extended

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[28] Phrased differently, if O'Dea's allegation that his employer actually "orchestrated the fight" in which he was injured were insufficient to establish a constitutional violation (*O'Dea, supra,* 151 Cal.App.4th at p. 217), the allegations of much less culpable conduct in this case surely must fail the test.

[29] See also *Deshaney v. Winnebago County Dep't of Social Services* (1989) 489 U.S. 189, 202 ["the Due Process Clause of the Fourteenth Amendment, . . . as we have

discussion of *Grubbs I* fails to note this caveat – or that *Grubbs I* was followed by *L.W. v. Grubbs* (9th Cir. 1996) 92 F.3d 894, 896 ("*Grubbs II*").

Whereas *Grubbs I* was a pleading case, *Grubbs II* was decided after jury trial. Reversing a jury verdict in favor of the plaintiff, the Ninth Circuit surveyed the "The Proper Standard of Culpability" at length, and held that liability under the "state created danger" theory requires *deliberate indifference* – a stringent standard of fault that entails a culpable mental state *more than gross negligence*. (*Id.* at pp. 896-900.) This is plainly a tough standard, and "[s]ince *Grubbs* established this demanding deliberate indifference standard, the Ninth Circuit has permitted 'few' Section 1983 cases based on deliberate indifference theories to proceed to trial." (*R. H. v. Los Gatos Union Sch. Dist.* (N.D.Cal. 2014) 33 F. Supp. 3d 1138, 1155 citing *Patel, supra,* 648 F.3d, at 974-75.)

Plaintiffs' efforts to transform Corporal Whitman's alleged misrepresentations into a constitutional violation – and from thence into an exemption from workers' compensation exclusivity – disregard the foregoing entirely. Their briefing thoroughly conflates the concept of tortious misrepresentation with "state created danger" under the Fourteenth Amendment, and elides the deliberate indifference element. They argue that "a public entity violates fundamental constitutional rights and fundamental public policy when, through misrepresentation *or* acting with deliberate indifference, the entity

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said many times, does not transform every tort committed by a state actor into a constitutional violation"].)

affirmatively exposes persons to dangers that they would not otherwise have faced." (Reply at p. 15.) However, that "or" is not the law. The stringent culpability requirement is *mandatory*, and plaintiffs' failure to address it is telling.

Further, while plaintiffs did actually allege deliberate indifference in related litigation (*Gund v. County of Trinity* (E.D.Cal. 2013) 2013 U.S. Dist. LEXIS 106823), their factual submissions on summary judgment have fallen far short.[30] The facts provided by "K" to law enforcement, and known to Corporal Whitman, were sparse and fragmentary. None of them are actually inconsistent with a weather-related emergency. Corporal Whitman never spoke with "K" himself; rather, he was told *third*-hand that she had been whispering. Similarly, the fear of calling her back represented the judgment of someone else (the CHP dispatcher), not himself – and the fact that subsequent attempts to call "K" back were unsuccessful would have many possible explanations, most of them mundane. A reasonable officer might have suspected (or feared) more – but brushing such suspicion aside is careless at worst, not deliberately indifferent.

Likewise, in hindsight, Corporal Whitman's communications with the Gunds were incautious – perhaps overconfident of his guesses regarding the nature of K's complaint – but not overtly false (and there is patently no evidence in the record supporting any suggestion of intentional lies or malice). The proposition that K's 911 call related to "a big storm coming in" was stated as opinion ("probably" and

[30] These facts are taken from the Court of Appeal opinion (Slip. Op., at pp. 6-8), and the parties briefs. (Open. Brief, at pp. 9-10; Resp. Brief, at p. 10.)

"likely") – and the conversation also included elements that might reasonably have lead the Gunds to realize that there were more dangerous possibilities – such asking Ms. Gund "if K.'s boyfriend ever seemed violent," and the admonition that she take her husband. It could be argued that a reasonable officer should have done more – but that is ordinary negligence at most, not recklessness, and certainly not evidence from which a jury could find deliberate indifference.

In the end, viewed in the light most favorable to plaintiffs, the facts presented upon summary judgment would establish, at worst, garden variety negligence – and do not seriously approach deliberate indifference, or otherwise suggest a violation of fundamental public policy. There is no constitutional infringement here, much less one serious enough to fall outside the compensation bargain – and thus plaintiffs' argument for exemption from the exclusivity bar must fail.

The importance of strictly policing the interaction between the "state created danger" theory and the public policy exception to workers' compensation exclusivity cannot be overstated, because its ramifications extend well beyond civilians covered under Section 3366. Regular public employees may also claim Fourteenth Amendment violations under the "state created danger" theory – *Grubbs* and *O'Dea* were both such cases. Without consistent application of the stringent culpability standards articulated by the California and federal courts, the potential for such claims to multiply in the public employment context and "undermine the

underlying premise on which the workers' compensation system is based" is readily apparent.

For this reason, courts of other jurisdictions addressing such claims by public employees unfailingly emphasize the stringent culpability requirement necessary to assert civil rights claims outside the bar of exclusivity. The specific culpability standard varies by jurisdiction, with some imposing burdens much heavier than deliberate indifference. This leads to varying outcomes for these cases – although the great majority are resolved in favor the public employer. The centrality, importance, and mandatory nature of the culpability criterion are nonetheless consistent throughout. (See, e.g., *Aselton v. Town of East Hartford* (Conn. 2006) 890 A.2d 1250, 1267[31]; *Gormley v. Wood-El* (N.J. 2014) 93 A.3d 344, 365; *Estate*

[31] *Aselton* had some striking similarities to this case, involving an action by the estate of a deceased law enforcement officer against "employees of the East Hartford police department who allegedly were responsible for dispatching the decedent to the scene with inadequate and misleading information." The Connecticut Supreme Court rejected the plaintiffs' claims, for reasons that resonate strongly here: "We are mindful that the defendants' failure to provide the decedent with complete and accurate information impeded his ability to assess the incident effectively and to avoid the ambush awaiting him. The defendants' acts and omissions, however, do not meet the stringent standard set forth by the United States Supreme Court. Indeed, the nature of 911 dispatch work strongly counsels against imposing liability except where the conduct is extraordinarily egregious because the job routinely requires dispatching officers into dangerous and even potentially deadly situations. We do not intend to suggest that negligence, whether gross or minimal, should be tolerated when life and limb are at risk. Our law enforcement officials face great enough potential for harm at the hands of violent criminals without saddling them with the additional risk that their coworkers' actions may impair the officers' ability to protect themselves from harm. Nonetheless, we must be mindful of [the Supreme Court's] admonition that 'only the most egregious official conduct can be said to be arbitrary in the constitutional sense

of Johnson v. Weber (8th Cir. 2015) 785 F.3d 267, 272; *Slaughter v. Mayor of Baltimore* (D.Md. 2010) 757 F.Supp.2d 548, 551.)

In sum, excluding cases like this one from the ambit of workers' compensation exclusivity would both contravene the legislative intent behind Section 3366, and threaten significant hindrance to the public protection functions of law enforcement agencies statewide. The court is strongly urged to decline that invitation.

VIII. CONCLUSION

Imagine, for a moment, that the shoe was on the other foot – and that the Gunds sought workers' compensation, only for their claim to be denied because *they did not know* they were assisting with active law enforcement. "The less we tell you, the less coverage you get." Such an outcome would be absurd (not to mention cruel), and would never reach this court. Although the procedural posture here is different, the answer is the same. The Gunds are entitled to workers' compensation, and it provides their full and complete remedy. The judgment of the Court of Appeal should be AFFIRMED.

Dated: February 8, 2019

Respectfully submitted,

ARTHUR J. WYLENE
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/s/
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. . . .' The defendants' conduct cannot be deemed sufficient." (*Aselton*, *supra*, 890 A.2d at p. 1267.)

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to California Rule of Court 8.204(c)(1), I certify that this Brief of Amicus Curiae contains 11,698 words, not counting the tables, and this attachment, as determined by the word count function of Microsoft Office Professional Plus 2010.

Dated: February 8, 2019

Respectfully submitted,

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Gund, et at. v. County of Trinity, et al.
Supreme Court Case No. S249792
Court Of Appeal, Third District, Case No. C076828
Trinity County Superior Court Case No. 11CV0080

DECLARATION OF SERVICE

I am a citizen of the United States and a resident of Sacramento County, California. I am over the age of eighteen years and not a party to the within above-entitled action. My business address is 1215 K St., Suite 1650, Sacramento, California.

On the date indicated below, I served the following:

[PROPOSED] BRIEF OF AMICI CURIAE RURAL COUNTY REPRESENTATIVES OF CALIFORNIA AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF RESPONDENTS COUNTY OF TRINITY, et al.

__X_ BY MAIL. I am familiar with this company's practice whereby the mail, after being placed in a designated area, is given the appropriate postage and is deposited in a U.S. mailbox in the City of Sacramento, California, after the close of the day's business.

__X_ BY ELECTRONIC SERVICE. Submitted via e-submission through the court's electronic filing system.

__X_ BY OVERNIGHT DELIVERY. I caused such document to be delivered overnight to the office of the person(s).

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed at Sacramento, California on February 12, 2019.

_____/S/_____
Signature

_____Julie Lunn_____
Printed Name

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