IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

C.H. a minor by and through her guardian ad litem, DAVID J. HAYES, Plaintiff/Appellant, vs. COUNTY OF SAN DIEGO dba County Sheriff's Department, et al., Defendants/Appellees.	No. 09-55644 U.S. District Court No. CV-07-1738-DMS (JMA), Southern District of California

BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING *EN BANC* FILED BY DEFENDANTS-APPELLEES' COUNTY OF SAN DIEGO *ET AL.*

On Appeal from the United States District Court
for the Southern District of California

The Honorable Dana M. Sabraw, District Judge

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INTRODUCTION

The League of California Cities (League) and the California State Association of Counties (CSAC) (collectively, Amici) have a membership of 476 California cities and 58 counties in California. These member cities and counties are served by law enforcement officers who must respond when a citizen calls for help dealing with a dangerous person. Amici's interest in the case is based on the decision's expansion of California public entity and public employee liability.

The majority's decision in this case wrongly predicted that the California Supreme Court would impose a duty on law enforcement officers concerning officers' tactical decisions in dealing with dangerous persons. The men and women who serve as law enforcement officers in California are responsible to respond when a citizen calls for help dealing with a dangerous person. California courts do not lightly impose tort duties on these officers. And when California courts do decide questions of tort duty, they make express rulings after a thorough analysis of the relevant legal and policy issues.

The majority erred in concluding that in *Hernandez v. City of Pomona*, 46 Cal.4th 501 (2009), the California Supreme Court *implicitly* imposed a duty on police officers regarding their tactics in dealing with dangerous persons. In *Hernandez* (a case in which Amici participated), the California Supreme Court declined to address the question of duty, in favor of other legal and factual grounds for its decision. The Supreme Court expressly said it was not addressing the question of duty: "[W]e do not address defendants' claims that they owed no duty of care regarding their preshooting conduct." *Hernandez*, 46 Cal.4th at 521 n.18.

California courts often refrain from deciding difficult questions whether public entities or employees have a legal duty, where there are alternative factual or legal grounds for the decision. The majority was incorrect to interpret the

Supreme Court's judicial restraint as an implicit determination that the Supreme Court did, or would, create a new duty for law enforcement officers. Given that the California Supreme Court's *expressly* stated that it was declining to address the issue of duty – a statement by the California Supreme Court that the majority did not acknowledge or discuss – it was error for the majority to conclude that the Supreme Court *impliedly* ruled that a duty existed.

Rehearing should be granted, so that this Court can reconsider its conclusion regarding the probable views of the California Supreme Court, or alternatively, certify the issue to the California Supreme Court. Amici respectfully support the Appellees' petition for panel and *en banc* rehearing.

DISCUSSION

I. CALIFORNIA COURTS DO NOT LIGHTLY IMPOSE TORT DUTIES ON LAW ENFORCEMENT OFFICERS

In California, the scope of tort liability for public entities and public employees is determined by the California Tort Claims Act, California Government Code §§ 800, *et seq. See, e.g., Eastburn v. Regional Fire Protection Auth.*, 31 Cal.4th 1175, 1179 (2003). The intent of that Act is to limit public liability. "[T]he intent of the Tort Claims Act is not to expand the rights of plaintiffs in suits against governmental entities but to confine potential governmental liability to rigidly delineated circumstances: immunity is waived only if the various requirements of the act are satisfied." *Zelig v. County of Los Angeles*, 27 Cal.4th 1112, 1127-28 (2002) (quoting *Brown v. Poway Unified Sch. Dist.*, 4 Cal.4th 820, 829 (1993)). Under the Tort Claims Act, a public employee is liable for an act or omission to the same extent as a private person would be, and a public entity is vicariously liability for those acts or omissions. Cal. Gov. Code §§ 815.2(a), 820(a). However, the public employee is immune if some privilege,

immunity, or other defense to liability would apply, and her public entity employer also enjoys that immunity. *Id.* §§ 815.2, 820(b).

For a public employee to be liable for an allegedly negligent act or omission, there must be a determination whether a legal duty exists. *John B. v. Superior Court*, 38 Cal.4th 1177, 1189 (2006). "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 434 (1976). California courts recognize that a determination whether a public employee has a legal duty involves consideration of many factors, including factors unique to governmental functions like public safety. *Thompson v. County of Alameda*, 27 Cal.3d 741, 750 (1980).

Accordingly, California courts have carefully limited the scope of law enforcement officers' tort duty. That is not surprising, given that three of the factors identified by *Thompson* include: the consequences to the community of imposing liability for a breach of duty, the potential scope of liability, and for public agencies, their budget. *Id.* The duty of law enforcement personnel "to protect the citizenry is a general duty owed to the public as a whole." *Von Batsch v. American District Telegraph Co.*, 175 Cal.App.3d 1111, 1121 (1985). Therefore, California courts have limited the scope of liability for law enforcement activities by ruling that this generalized duty does *not* translate into a tort duty to protect any particular person. *Williams v. State of California*, 34 Cal.3d 18, 23 (1983). Thus, the Supreme Court has found no duty of care or liability arising from officers' failure to protect particular persons, absent a showing of some special relationship. *Id.* at 25; *see also Eastburn*, 31 Cal.4th at 1185; *Zelig*, 27 Cal.4th at 1129; *Camp v. State of California*, 184 Cal.App.4th 967, 975-79 (2010)

(discussing cases involving duties imposed on law enforcement officers and other first responders).

Law enforcement duty questions become even more difficult, when it comes to officers' tort duty toward dangerous persons whom they encounter. That is because it is the duty of law enforcement officers to affirmately act to neutralize danger. California courts recognize the unique position of law enforcement officers. "Unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties." *Edson v. City of Anaheim*, 63 Cal.App.4th 1269, 1273 (1998). A "police officer has a duty to the community to carry out his or her obligation to promote law-abiding, orderly conduct, including, where necessary, to detain and arrest suspected perpetrators of offenses." *Hooper v. City of Chula Vista*, 212 Cal.App.3d 442, 453 (1989). This duty to act *against* dangerous persons is, to state it mildly, in tension with any duty *not to harm* those same persons. Intermediate California courts have weighed these considerations, along with the other *Thompson* factors, and held that the duty of law enforcement officers toward dangerous persons is limited to the duty not to use unreasonable force against them, and that officers have no duty toward dangerous persons with regard to their pre-force tactical decisions. *Munoz v. City of Union City*, 120 Cal.App.4th 1077, 1093-99 (2004); *Adams v. City of Fremont*, 68 Cal.App.4th 243, 271-76 (1999).

Before *Hernandez v. City of Pomona* was decided, another intermediate California court identified the same question whether officers have a duty with regard to their tactics against dangerous persons, and expressly declined to decide it. Instead of determining the duty question, the court rejected the plaintiff's claim on alternative grounds: that if law enforcement officers had any duty with regard

to their tactical decisions, the facts of the case would show no breach. *Brown v. Ransweiler*, 171 Cal.App.4th 516, 536 (2009).

In short, California courts recognize the unique position of law enforcement officers with regard to these duty issues. California courts do not decide questions of law enforcement officers' duty without careful and complete consideration of the relevant policy issues – and may opt not to decide the duty question at all.

II. CALIFORNIA COURTS WEIGHING PUBLIC LIABILITY QUESTIONS CAN AND DO EXPRESSLY DECLINE TO DECIDE DUTY ISSUES, WHERE THERE IS AN ALTERNATIVE BASIS FOR FINDING NO PUBLIC LIABILITY

In deciding legal questions surrounding public liability, California courts must address more than the question whether a duty exists. Even if a duty exists, there may be governmental immunity or a statutory privilege that bars liability. And in every case, there is a potential that the facts would not give rise to liability, even if the court were to decide the duty and immunity questions in favor of a plaintiff. California courts are not required to follow a rigid "order of battle" in addressing these questions. They can be flexible.

The normal rule is to decide duty questions before immunity questions. "Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity." *Davidson v. City of Westminster*, 32 Cal.3d 197, 201-02 (1980); *see, e.g., Macdonald v. State of California*, 230 Cal.App.3d 319, 333 (1991) ("Only if a duty exists may we reach the issue of whether any statutory immunities ... apply to the challenged conduct."). However, the rule of deciding duty before immunity is not absolute. The California Supreme Court has stated that "for purposes of judicial economy," a court may "elect to proceed directly to the immunity issue." *Cruz v. Briseno*, 22

Cal.4th 568, 572 (2000) (citing cases in which the Supreme Court decided an immunity issue without deciding a duty issue). Likewise, a California court is permitted to avoid the duty question by simply deciding that on the facts as pled (or proven), there would not be a breach of any hypothetical duty. *See, e.g.*, *Brown*, 171 Cal.App.4th at 536.

III. IN HERNANDEZ V. CITY OF POMONA, THE SUPREME COURT DID NOT DECIDE THE DUTY QUESTION, AND RELIED INSTEAD ON GROUNDS OF LEGAL PRIVILEGE AND THE ABSENCE OF ANY POTENTIAL FACTUAL BASIS FOR THE PLAINTIFF'S "NEGLIGENT TACTICS" CLAIM

In *Hernandez v. City of Pomona, supra*, the Supreme Court declined to address the question whether law enforcement officers owe any duty to dangerous persons with regard to their pre-shooting tactics: "[W]e do not address defendants' claims that they owed no duty of care regarding their preshooting conduct." *Hernandez*, 46 Cal.4th at 521 n.18. This *express* statement by the California Supreme Court, that it did not decide any duty question, precludes the majority's conclusion that the Supreme Court *implicitly* decided a duty question.

Moreover, even if the *Hernandez* court had not *expressly* stated that it was not deciding the duty question, it would not be correct to conclude that the *Hernandez* court necessarily had to decide the duty question, in order to discuss the other factual and legal issues in the case. Rather, as already discussed above (Part II), courts confronted with difficult legal questions regarding the imposition of new duties on law enforcement officers can and do decide cases on alternative grounds.

That is exactly what occurred in *Hernandez*. The Supreme Court had alternative factual and legal grounds to find that the plaintiff could not state a negligence claim against law enforcement officers. The *Hernandez* court stated "on the conceded facts here, we find no basis for a preshooting negligence claim."

Hernandez, 46 Cal.4th at 521. The *Hernandez* court also held that the plaintiff's negligence claim would be barred on legal grounds – namely, privilege:

> Penal Code section 835a provides that a peace officer with reasonable cause to make an arrest "may use reasonable force to effect the arrest" and "need not retreat or desist from his efforts [to make an arrest] by reason of the resistance or threatened resistance of the person being arrested." Thus, California law expressly authorized Cooper to pursue Hernandez and to use reasonable force to make an arrest.

Hernandez, 46 Cal.4th at 519 (alterations in *Hernandez*). Thus, the Supreme Court found, this privilege barred the plaintiff's "pre-shooting negligence" claim. "As we have already explained, the officers were not obliged simply to let Hernandez go; they were authorized to press forward in an attempt to make an arrest, using reasonably necessary force." *Id.* at 521 (citing Penal Code § 835a).

Thus, the majority erred in concluding that the California Supreme Court implicitly ruled that officers have a duty toward dangerous persons with regard to officer tactics leading up to a use of force.

IV. THIS ISSUE IS OF EXCEPTIONAL PUBLIC IMPORTANCE, AND OF GREAT INTEREST TO AMICI

Each year, the men and women who serve as sworn law enforcement officers in California must respond to literally thousands of calls from the public for help with potentially dangerous persons. When one of these encounters turns deadly, officers' decisions leading up to the use of force can always be second-guessed in 20/20 hindsight. The majority's decision is an unwarranted expansion of the scope of public liability arising from law enforcement activities.

There are two consequences of the majority's decision that are of direct interest to California residents and the local governments that serve them – and thus, Amici. First, this decision will have negative consequences for public safety. Where before law enforcement officers could be held liable only for unreasonable

force, now officers can be held liable simply for making the decision to engage a dangerous person – that is, doing their job. The majority's decision creates a substantial and unfortunate incentive for officers simply not to act. Second, as a practical matter, the budgets of local governments throughout California are already strained by the increasing costs of providing essential public services, and a decreasing revenue base. The majority's dramatic expansion of the scope of public liability under California law will only further strain local government budgets.

CONCLUSION

Amici respectfully request that the Court grant the Appellees' petition for rehearing and rehearing *en banc*.

Dated: April 29, 2011

Respectfully submitted,

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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 2,304 words up to and including the signature lines that follow the brief's conclusion.

No counsel for a party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than the amicus curiae, its members, or counsel contributed money that was intended to fund preparing or submitting the brief.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 29, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the following document(s):

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

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