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HAYLEY JONES

Gund v. County of Trinity

66 N.Y.L. SCH. L. REV. 75 (2021–2022)

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*“No good deed goes unpunished.”*¹

A familiar trope in American Westerns is the lone sheriff’s rounding up a group of able-bodied men, known as the posse, to help capture an outlaw.² Those oft-armed bystanders were, in fact, temporarily deputized as the “posse comitatus” under the “power of the country.”³ Posse comitatus power granted law enforcement officials the legal authority to conscript any adult for aid in keeping the peace.⁴ The Western storyline of deputizing ordinary citizens was rooted in an Anglo-Saxon tradition⁵ later embraced by the American legal system as a tool for local self governance.⁶ Throughout the early years of the republic, the posse comitatus power was used at the federal level to conscript state militias⁷ to join the federal militia⁸ in defense of the nation.⁹ At the state level, the posse comitatus power was used to conscript

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1. MARTIN H. MANSER, *THE FACTS ON FILE DICTIONARY OF PROVERBS* 203 (Rosalind Fergusson & David Pickering eds., 2d ed. 2007) (explaining the proverb which was first recorded in 1938 and is of unknown origin but has been attributed to several luminaries, including the writers Oscar Wilde and Clare Boothe Luce); see *In re S. Humboldt Cmty. Healthcare Dist.*, 254 B.R. 758, 761 (Bankr. N.D. Cal. 2000) (describing the quote as a “legal maxim”).
 2. Deborah McKeon, *Today’s Sheriff’s Posse Not like Those Seen in Western Movies*, *KILLEEN DAILY HERALD* (Aug. 25, 2014), https://kdhnews.com/news/today-s-sheriff-s-posse-not-like-those-seen-in-western-movies/article_68470a0c-2bba-11e4-a843-0017a43b2370.html.
 3. *Posse Comitatus*, *BLACK’S LAW DICTIONARY* (11th ed. 2019) (defining “posse comitatus” as a “group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations”).
 4. McKeon, *supra* note 2. This is not to be confused with the Posse Comitatus Act, enacted in 1878, which limits the federal government’s power to use military personnel as a posse comitatus or to execute domestic policies absent express authorization by the Constitution or an act of Congress. 18 U.S.C. § 1385; see also JENNIFER K. ELSEA, *CONG. RSCH. SERV.*, R42659, *THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW* 28–34 (2018).
 5. See David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 *J. CRIM. L. & CRIMINOLOGY* 761, 765–68 (2015) [hereinafter Kopel 2015].
 6. Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 *L. & HIST. REV.* 1, 10 (2008).
 7. A state militia was a military force composed of citizens, governed by the state, able to be federalized if necessary. Chuck Dougherty, *The Minutemen, the National Guard and the Private Militia Movement: Will the Real Militia Please Stand Up?*, 28 *J. MARSHALL L. REV.* 959, 963–68 (1995). Colonists who had arrived in America formed private militias to fight against the British army in the Revolutionary War. *Id.* at 962–63. Post-war, the United States’ standing army was reduced, and the state militias, composed of civilians and controlled locally, were trusted as the nation’s primary defense against foreign threats. *Id.* at 964–66. These militias were also used by states as their internal police force. *Id.* at 966–67.
 8. See Kopel 2015, *supra* note 5, at 763–64. “Federal militia” is generally understood as a well-armed body of the people ready to defend themselves and their local and national communities against threats to life and liberty. *Id.* at 828.
 9. *Id.* at 771 (noting that most of the men who fought in the Revolutionary War as the Continental Army were part of the militia and not full-time soldiers). The federal government’s posse comitatus power to create citizen military forces was derived from the U.S. Constitution’s Necessary and Proper Clause. U.S. CONST. art. I, § 8, cl. 18; *THE FEDERALIST* No. 29 (Alexander Hamilton).

private citizens to join the sheriff in defense of the locality.¹⁰ America's institution of the posse comitatus continues to thrive in today's twenty-first century.¹¹ However, civilians conscripted into a posse automatically forfeit their right to sue if they suffer harm during their service.¹²

In 2020, in *Gund v. County of Trinity*, a married couple unwittingly became California peace officers¹³ by answering a sheriff's call to their home phone and agreeing to check on a neighbor's well-being.¹⁴ The consequences were grave and left them quite literally scarred for life: James and Norma Gund were greeted by a knife-wielding assailant quick to slash their throats upon arrival.¹⁵ The couple therefore sought to recover against the county and its officials, including the sheriff, for negligently withholding critical information suggestive of ongoing criminal activity at the neighbor's home.¹⁶ But the California Supreme Court concluded that the Gunds had been injured during the course of "employment" with the sheriff's department and were therefore entitled solely to workers' compensation.¹⁷ In concrete terms, this meant that their recovery was limited to repayment of medical expenses for their slashed throats.¹⁸ This holding came after the Gunds' prior battles in

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10. Kopel 2015, *supra* note 5, at 784–87, 792. By 1788, sheriffs were recognized as leaders of the local armed forces and conservators of the peace. *Id.* In addition to their posse comitatus power, sheriffs had the exclusive power to administer "watch and ward" and to raise the "hue and cry." *Id.* at 788–89, 792. The watch and ward power meant that sheriffs could "arrange watches and patrols, and . . . require townsfolk to take turns on guard duty." *Id.* at 788. Sheriffs could raise the hue and cry, whereby all "able-bodied men were obliged to join" in the pursuit of fleeing criminals and to "use deadly force if necessary to prevent [their] escape." *Id.* at 788–89.
 11. David Kopel, *Sheriffs and the Posse Comitatus*, WASH. POST (May 15, 2014), <https://www.washingtonpost.com/news/voikh-conspiracy/wp/2014/05/15/sheriffs-and-the-posse-comitatus> (noting that posse service can range in form, from directing traffic at a parade to providing natural disaster emergency services). Sheriffs may also deputize posse members during urgent situations to prevent looting or destruction in municipal districts. *Id.* Large posses have been used effectively in exceptional circumstances. *See id.* For example, a posse helped to track down serial killer Ted Bundy after his escape from the Pitkin County Courthouse in 1977. *Id.*
 12. *See* CAL. LAB. CODE § 3366(a) (Deering, LEXIS through ch. 14 of 2022 Reg. Sess.) (analogizing that persons engaged in "active law enforcement service" to state employees entitled only to workers' compensation).
 13. The term "peace officer" is broadly defined and generally refers to government actors of varying enforcement power, and including police officers. *See* CAL. PENAL CODE §§ 830–831 (Deering, LEXIS through ch. 14 of 2022 Reg. Sess.). For purpose of this Case Comment, the terms "peace officer" and "police officer" are used interchangeably.
 14. 472 P.3d 435, 437–38 (Cal. 2020).
 15. *Id.* at 438–39; *see also* Ryan Sabalow, *This Couple Was Attacked by Knife-Wielding Killer. Did Their Sheriff Put Them in Harm's Way?*, SACRAMENTO BEE, <https://www.sacbee.com/latest-news/article216246885.html> (Mar. 28, 2019) (describing the permanent scars left on Mrs. Gund's body that continue to haunt her).
 16. *See Gund*, 472 P.3d at 448 (opining that, had the Gunds been told about the suspicious circumstances known to law enforcement surrounding their neighbor's initial 911 call, they may have been able to anticipate a dangerous situation).
 17. *Id.* at 437–38, 440–41, 452.
 18. *Id.* at 449, 451–52.

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federal¹⁹ and state²⁰ court, and was the first of its kind in California, where the state supreme court had to decide what constitutes “active law enforcement service.”²¹

This Case Comment contends that the California Supreme Court erred in *Gund* when it held that the Gunds were engaged in active law enforcement service by virtue of their responding to a sheriff’s call for unspecified help.²² First, *Gund* misapplied California’s posse comitatus statute by ignoring the limited nature of its availability to law enforcement: Civilian assistance may only be summoned in certain emergencies dealing with a criminal offense.²³ Second, *Gund* erred by ignoring state statutory law²⁴ and federal and state precedent, which hold that civilians are not state actors absent officer supervision or the requisite legal authority to act alone as public employees to perform peace officer functions.²⁵ Both errors confuse private with state action and deny the possibility of relief to future similarly situated plaintiffs.²⁶

The undisputed facts of the case are as follows. In the remote mountain community of Kettenpom, California, during the afternoon of March 13, 2011, one Kristine Constantino dialed 911 and whispered, “help me,” over and over until the line suddenly dropped.²⁷ The highway patrol dispatcher who answered Constantino’s call did not call back out of fear that her whispering was part of a larger effort not to

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19. The Gunds filed a federal civil rights claim against the sheriff’s department under 42 U.S.C. § 1983 prior to filing a state claim. Complaint for Violation of Civil Rights (42 U.S.C. § 1983), *Gund v. County of Trinity*, No. 13-cv-0452, 2013 WL 3942030 (E.D. Cal. July 30, 2013), *aff’d*, 624 F. App’x 519 (9th Cir. 2015) [hereinafter Gunds’ Federal Complaint]. The § 1983 claim made its way to the Ninth Circuit Court of Appeals, which stripped the officer of qualified immunity because his actions were so egregious that they threatened the Gunds’ fundamental right to be free from bodily harm. *Gund*, 624 F. App’x at 520.
 20. See *Gund*, 472 P.3d at 439–40 (commencing in the Superior Court of Trinity County and then losing on appeal to the California Court of Appeal for the Third District).
 21. *Id.* at 437–38.
 22. *Id.* at 440–41, 447–48.
 23. *Id.* at 437, 442–43; see CAL. PENAL CODE § 150 (repealed 2020) (providing that a peace officer can only conscript a citizen for help with the process of an arrest, keeping the peace, or pursuing a criminal suspect); *City of Long Beach v. Indus. Accident Comm’n*, 51 P.2d 1089, 1091–92 (Cal. 1935) (finding that deputization must be for an “extraordinary request” related to criminal activity); *Monterey County v. Rader*, 248 P. 912, 914–15 (Cal. 1926) (stating that a sheriff may organize a posse comitatus for the purpose of enforcing criminal law).
 24. CAL. PENAL CODE § 832.6 (Deering, LEXIS through ch. 14 of 2022 Reg. Sess.) (requiring a person “deputized or appointed” as a reserve or auxiliary officer to have already satisfied the training requirements or be under the “immediate supervision” of an authorized officer).
 25. *Gund*, 472 P.3d at 447; see *Forro Precision, Inc. v. Int’l Bus. Machs. Corp.*, 673 F.2d 1045, 1053–54 (9th Cir. 1982) (holding that civilians had the same legal authority and protections as police because they were accompanied by and under the direct supervision of officers); *Stapleton v. Superior Court*, 447 P.2d 967, 968–69 (Cal. 1968) (holding that private citizens acted on behalf of the state because there was “official participation in the planning and implementation of the overall operation”).
 26. See *Gund*, 472 P.3d at 438 (barring the Gunds from pursuing civil action related to their engagement in “active law enforcement service”).
 27. *Id.*; Gunds’ Federal Complaint, *supra* note 19, at 1–2; see Sabalow, *supra* note 15 (naming the murder victim).

be overheard, so the dispatcher contacted Trinity County Sheriff's Department instead.²⁸ A Trinity County dispatcher tried phoning Constantino twice but both calls went straight to voicemail; the Trinity County dispatcher then relayed all of this information to a sheriff's deputy, Corporal Ronald Whitman ("Deputy Whitman" or "Whitman"), for follow-up.²⁹ Whitman was 100 miles outside of Constantino's residential area but knew that she lived just a quarter mile from the Gunds, so he called the couple to ask if they would check on her while he was on his way.³⁰ Neither of the Gunds had law enforcement experience or training.³¹ Whitman told them only that Constantino mentioned that she needed help, adding that it was "probably no big deal," that it "must be . . . all about" an approaching storm, and that Constantino's "911 call was likely a phone malfunction due to . . . inclement weather."³² He made no mention of Constantino's whispering, her repeated pleas for help, or the fact that the initial dispatcher believed the call was made in secret to avoid an uninvited ear.³³ He also never brought up the subsequent attempts to contact Constantino, all of which were unsuccessful.³⁴

The Gunds went to Constantino's home thinking they were simply being good neighbors but were greeted by something far different from a mundane, weather-related matter.³⁵ Norma Gund entered the house before her husband and was quickly grabbed by the assailant.³⁶ James Gund immediately ran inside, where he witnessed a motionless body lying on the floor with a bag over its head.³⁷ He then watched helplessly as the assailant held down his wife and carved into her throat, head, and face with a hunting knife.³⁸ James was next attacked.³⁹ He ultimately disarmed the assailant, but only after being tased, punched, and having his own throat slashed.⁴⁰

28. *Gund*, 472 P.3d at 438.

29. *Id.*

30. *Id.* at 438–39; Gunds' Federal Complaint, *supra* note 19, at 5–6. Norma Gund informed Whitman during the phone call that she and her husband were acquainted with Constantino. Petitioners' Opening Brief on the Merits at 9, *Gund*, 472 P.3d 435 (No. S249792) [hereinafter Gunds' Opening Brief].

31. Gunds' Federal Complaint, *supra* note 19, at 1–2; *see Gund*, 472 P.3d at 437–38.

32. *Gund*, 472 P.3d at 438–39; Gunds' Federal Complaint, *supra* note 19, at 2, 6.

33. 472 P.3d at 438–39 (adding that Whitman told Norma that Constantino "said two words [to the 911 dispatcher], 'Help me'").

34. *See id.* (noting that Deputy Whitman merely asked Norma whether Constantino's boyfriend ever seemed violent and she answered that she did not know but that "[h]e seemed real mellow").

35. The Gunds talked to each other on their drive to Constantino's house, hypothesizing which of several scenarios they might soon confront: a confused neighbor; trouble with a wood-burning stove; a fallen tree. *Id.* Mrs. Gund had been to the property before to help the previous owner with weather-related conditions like snow and fallen trees. *Id.* at 438.

36. *Id.* at 439; Gunds' Federal Complaint, *supra* note 19, at 6.

37. Gunds' Federal Complaint, *supra* note 19, at 7; *Gund*, 472 P.3d at 439.

38. Gunds' Federal Complaint, *supra* note 19, at 6; *Gund*, 472 P.3d at 439; Sabalow, *supra* note 15.

39. 472 P.3d at 439.

40. *Id.*

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Norma managed to escape and frantically drove to the town's only store for help, scribbling on a notepad to communicate with the clerk while blood poured from her throat.⁴¹ James fled on foot back to their house to grab their other car and then rushed to meet his mutilated wife at the town store.⁴² The assailant was killed shortly thereafter in a high-speed chase, which ensued upon his refusal to comply with police orders to pull his vehicle over.⁴³ Norma had to be flown to U.C. Davis Medical Center, where she underwent multiple surgeries.⁴⁴ The attack left her permanently disfigured, even after reconstructive surgery.⁴⁵ Though they did not know it at the time, the Gunds were called to the scene of a double homicide: Constantino and her boyfriend, Christopher Richardson, had just been murdered by one Tomas Gouverneur.⁴⁶

The Gunds filed an action for intentional misrepresentation by a public employee in Trinity County Superior Court against Trinity County and Deputy Whitman.⁴⁷ Defendants moved for summary judgment, arguing that workers' compensation was the Gunds' exclusive remedy because their responding to a 911 call on the sheriff's behalf constituted "active law enforcement service" under section 3366 of the California Labor Code.⁴⁸ The Gunds opposed the motion, contending that no reasonable person would have understood Whitman's phone call as employing them to assist with law enforcement duties.⁴⁹ The trial court granted the defendants'

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41. *Gund v. County of Trinity*, 234 Cal. Rptr. 3d 187, 191 (Cal. Ct. App. 2018), *aff'd*, 472 P.3d 435 (2020); Sabalow, *supra* note 15. Trinity County notified the Northern California police that the assailant was armed and on the loose in a teal sedan with Oregon plates. Linda Williams, *Kettenpom Murders: New Details Emerge*, WILLITS NEWS, <https://www.willitsnews.com/2011/04/06/kettenpom-murders-new-details-emerge/> (Aug. 24, 2018).
 42. *Gund*, 234 Cal. Rptr. 3d at 192.
 43. *See* Sabalow, *supra* note 15 (detailing the forty-mile police chase that ended with the killer crashing into a tree and dying).
 44. *Id.*
 45. *See id.* (adding that Mrs. Gund still occasionally "requires surgery to burn away the scar tissue that forms inside her throat and chokes her windpipe"). Mr. Gund sustained "less serious" injuries. *Id.*
 46. *Id.* Gouverneur was allegedly at Constantino's home on the date of the attack for marijuana-related reasons. *Id.*
 47. *Gund v. County of Trinity*, 472 P.3d 435, 439 (Cal. 2020). The Gunds' first amended complaint included counts alleging misrepresentation by a public employee with actual malice and liability for the act or omission. *Id.*
 48. *Id.*; *see* CAL. LAB. CODE § 3366(a) (Deering, LEXIS through ch. 14 of 2022 Reg. Sess.) (providing that those engaged in "active law enforcement service," either as part of the posse comitatus or upon being asked by a peace officer, are deemed to be acting as employees of the relevant public entity and are therefore only entitled to workers' compensation).
 49. *Gund*, 472 P.3d at 439. Because Deputy Whitman misrepresented the situation as "probably weather[-] related and no big deal," the Gunds neither thought nor could even perceive that they were engaged in active law enforcement. *Gund v. County of Trinity*, 234 Cal. Rptr. 3d 187, 191–92 (Cal. Ct. App. 2018), *aff'd*, 472 P.3d 435 (Cal. 2020). Additionally, the Gunds argued that service under section 3366 applies "only when people are explicitly tasked to provide protection to members of the public in a manner that carries the risk of death or serious injury." Appellants' Reply Brief at 5–6, *Gund*, 234 Cal. Rptr. 3d 187 (No. C076828).

motion, holding that section 3366 barred the Gunds' civil suit.⁵⁰ The Gunds appealed, and the California Court of Appeal for the Third District affirmed but noted the misleading nature of Whitman's request.⁵¹

The power to summon civilian aid for law enforcement dates back to ninth-century England, where the Latin phrase "posse comitatus" originated.⁵² A millennium-plus later, nearly every state across 1950s America began codifying the common law rule in posse comitatus statutes; contemporary versions vary only in terms of the officials who carry the authority to mobilize the posse.⁵³ California's codification is found in Government Code section 26604, which provides that sheriffs shall command the aid of as many civilians within their jurisdiction as they feel necessary to execute the duties of their office.⁵⁴ California, like many other states,⁵⁵ also went so far as to criminalize a person's failure or refusal to join a posse comitatus when commanded to do so.⁵⁶ It was this criminal statute—Penal Code

The Gunds also cited a January 1963 report by the California Law Revision Commission, which drafted section 3366, recommending that compensation only be extended in one scenario: when civilians are requested or required "to assume the risk of death or serious injury while providing law enforcement protection to the public." *Id.* at 7–8 (citing 4 CAL. L. REVISION COMM'N, *Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers*, in RECOMMENDATION RELATING TO SOVEREIGN IMMUNITY 1503, 1505–07 (1963)). As such, the Gunds asserted that, because they were not asked to protect the public but merely to check on their neighbor—which, in Whitman's words, carried no inherent risk of death or injury—they were not engaged in "active law enforcement service." *Id.* at 6, 10.

50. *Gund*, 234 Cal. Rptr. 3d at 189.

51. *Gund*, 472 P.3d at 439.

52. Kopel 2015, *supra* note 5, at 764. Alfred the Great, King of England from 871 to 899 CE, required active involvement by the armed people to keep "the King's peace" and defend the government's authority. *Id.*

53. *Id.* app. at 830–50 (compiling posse comitatus statutes in all fifty states). Relatedly, since the nineteenth-century rise of centralized bureaucratic police organizations across the United States, law enforcement officers have operated as state officials. Specifically, in the 1830s, as American cities faced new challenges due to industrialization, particularly among urban populations, local municipal police organizations emerged as a means of social control. See Kristian Williams, *The Demand for Order and the Birth of Modern Policing*, MONTHLY REV., Dec. 2003, at 16, 16, 20. Modern policing expanded on this concept, taking responsibility for the public welfare from untrained citizens and transferring it to a body of full-time professionals directed by and accountable to government authorities. *Id.* at 22.

54. CAL. GOV'T CODE § 26604 (Deering, LEXIS through ch. 14 of 2022 Reg. Sess.).

55. See, e.g., Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 39 n.179 (1993) (listing state criminal statutes that make it an indictable offense to refuse law enforcement's call for aid); Jon C. Blue, *High Noon Revisited: Commands of Assistance by Peace Officers in the Age of the Fourth Amendment*, 101 YALE L.J. 1475, 1476 n.3 (1992) (listing state statutes that historically criminalized one's refusal to aid a police officer).

56. Up until 2020, failing to comply with a deputy's request for assistance in making an arrest or preventing crime or breaches of the peace was criminalized as a misdemeanor and violators were subject to a fine. CAL. PENAL CODE § 150 (repealed 2020); § 1550 (repealed 2020).

section 150—that courts read as setting forth the grounds upon which sheriffs may exercise the authority granted them under section 26604.⁵⁷

In the eyes of the common law, a private individual serving as a member of the posse comitatus is deemed to have the same authority and legal protections as the sheriff.⁵⁸ Otherwise, in California, a statute must vest a civilian with peace officer powers for them to execute police duties.⁵⁹ This is consistent with what other jurisdictions have traditionally required: An actor must be “endowed with law enforcement powers beyond those enjoyed by private citizens” to be recognized as an employee performing a “uniquely public function.”⁶⁰

In California, a private individual serves “as an arm of the police” when working alongside law enforcement.⁶¹ However, the state’s supreme court in the 1968 case of

57. PENAL § 150; GOV’T § 26604. While the text of section 150 did not explicitly restrict the grounds for which sheriffs are authorized to summon the posse, the California Supreme Court has adopted such an interpretation. *E.g.*, *City of Long Beach v. Indus. Accident Comm’n*, 51 P.2d 1089, 1091–92 (Cal. 1935); *Monterey County v. Rader*, 248 P. 912, 914 (Cal. 1926). And even though section 150 was repealed before *Gund* was decided, the *Gund* court nevertheless recognized section 150’s significance. *Gund*, 472 P.3d at 442–43.

58. *Filarsky v. Delia*, 566 U.S. 377, 388–89 (2012).

59. Provisions dealing with peace officer authority in California’s Penal Code outline the various means by which unauthorized persons can be empowered to enforce the law. *E.g.*, CAL. PENAL CODE §§ 830, 830.6, 832.6 (Deering, LEXIS through ch. 14 of 2022 Reg. Sess.). The California legislature’s overall intent was to “designate the public employees who are peace officers and to limit that status to the persons designated.” *Serv. Emps. Int’l Union v. City of Redwood City*, 38 Cal. Rptr. 2d 86, 92 (Cal. Ct. App. 1995); *see also, e.g.*, PENAL § 830.6 (providing means by which someone is appointed or deputized for law enforcement participation); PENAL § 832.6 (stating training and supervision requirements for persons to exercise peace officer functions).

60. *United States v. Ackerman*, 831 F.3d 1292, 1295–96 (10th Cir. 2016) (first citing *Filarsky*, 566 U.S. at 388; then citing *Gallagher v. “Neil Young Freedom Concert,”* 49 F.3d 1442, 1457 (10th Cir. 1995); then citing *Wade v. Byles*, 83 F.3d 902, 905–06 (7th Cir. 1996); then citing *United States v. Garlock*, 19 F.3d 441, 443–44 (8th Cir. 1994); and then citing *Romanski v. Detroit Ent., L.L.C.*, 428 F.3d 629, 637–38 (6th Cir. 2005)).

A private party necessarily becomes a state actor only if the state delegates to him or her a function “traditionally exclusively reserved to the State.” *Gallagher*, 49 F.3d at 1456 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974)). For instance, a private security guard merely investigating crime is not a state actor when his authority to act is “no broader than that enjoyed by any private citizen,” like the right to carry a weapon, use deadly force in self-defense, and effect a citizen’s arrest, because the act does not require performing a “uniquely public function.” *Ackerman*, 831 F.3d at 1295–96 (citing *Romanski*, 428 F.3d at 637–38).

61. *Stapleton v. Superior Court*, 447 P.2d 967, 970 (Cal. 1968); *see also Dyas v. Superior Court*, 522 P.2d 674, 677–80 (Cal. 1974) (“[Public actors perform] duties as officers and as employees and agents of the state.” (quoting *People v. Martin*, 36 Cal. Rptr. 924, 927 (Cal. Ct. App. 1964))).

The California legislature has provided that a civilian assisting law enforcement has such police powers as the supervising officer delegates to him or her, and thus the statute also affords the citizen with that officer’s same legal protections. *Forro Precision, Inc. v. Int’l Bus. Machs. Corp.*, 673 F.2d 1045, 1054 (9th Cir. 1982) (first citing *Vallindras v. Mass. Bonding & Ins. Co.*, 265 P.2d 907, 910–11 (Cal. 1954); then citing *Peterson v. Robison*, 277 P.2d 19, 24 (Cal. 1954); and then citing *Sokol v. Pub. Utils. Comm’n*, 418 P.2d 265, 272 (Cal. 1966)). Private individuals aiding law enforcement receive the same common law immunity because civil liability would deter citizens from promptly rendering aid, thereby hindering police work. *Developments in the Law: State Action and the Public/Private Distinction*,

Stapleton v. Superior Court of Los Angeles County limited that holding to situations involving a “joint operation” coordinated by government officials.⁶² Federal precedent on this issue has also held that an officer’s supervision over a civilian is necessary for such legal authority, or agency, to attach.⁶³

As case law developed to conclude that localities lacked sovereign immunity and thus could be sued for tort liability in California,⁶⁴ the state legislature responded by creating a loophole in workers’ compensation law for suits brought by ordinary citizens who sustained injuries after being compelled to serve as law enforcement.⁶⁵ This restored law enforcement’s immunity from suit⁶⁶ while allowing those injured to recover only up to their out-of-pocket medical expenses.⁶⁷ Specifically, the state enacted section 3366 of the California Labor Code out of concern that injured individuals who render aid—or their families if killed—would litigate for remuneration relentlessly if offered no other option.⁶⁸

Section 3366 provides that members of the public who are engaged in “active law enforcement service” at the behest of a peace officer are entitled to compensation from

123 HARV. L. REV. 1248, 1276 (2010) (discussing *Mejia v. City of New York*, 119 F. Supp. 2d 232 (E.D.N.Y. 2000)).

62. *Stapleton*, 447 P.2d at 970 (deeming the private citizen a public actor when he assisted police officers who were on the scene in conducting searches of suspect’s home and vehicle); *see also* *People v. Payne*, 81 Cal. Rptr. 635, 638 (Cal. Ct. App. 1969) (stating that private persons must be “participating in a joint activity or in cooperation with law enforcement officers”).
63. *See Forro*, 673 F.2d at 1053–54 (holding that police presence and supervision over citizens aiding in search of business premises effectively transformed them into government officials for purposes of having the same legal immunity from civil suits).
64. *See generally* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 & nn.54–55 (1978) (announcing that the Eleventh Amendment does not immunize municipalities from suit in actions under 42 U.S.C. § 1983 if the alleged violation resulted from official policy); *see also* *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 461–62 (Cal. 1961) (abrogating governmental immunity for tortious harms caused by official activities).
65. 4 CAL. L. REVISION COMM’N, *supra* note 49, at 1505.

[A] person not trained in law enforcement . . . [and] required by law to assume the risk of death or serious injury” or who “undertakes to do so at the request of a peace officer” to protect the public should, along with their dependents, “be provided with protection against the financial consequences of his death or injury.

Id.
66. *See* ALAN ESKENAZI, CALIFORNIA CIVIL PRACTICE WORKERS’ COMPENSATION § 1:1, Westlaw (database updated Mar. 2022) (listing workers’ compensation statutes that exempt employers from civil actions for damages).
67. *See* CAL. DEP’T OF INDUS. RELS., WORKERS’ COMPENSATION IN CALIFORNIA: A GUIDEBOOK FOR INJURED WORKERS 10 (6th ed. 2016) (commenting that the California workers’ compensation system requires payment for “medical care that is ‘reasonably required to cure or relieve’ the effects of the injury”).
68. CAL. LAB. CODE § 3366 (Deering, LEXIS through ch. 14 of 2022 Reg. Sess.); *see* *Gund v. County of Trinity*, 472 P.3d 435, 451 (Cal. 2020) (stating that receiving workers’ compensation is “a simpler path to compensation” than a plaintiff “having to fight over what an officer communicated or whether it amounted to negligence”).

the state if injured while rendering such service.⁶⁹ Although this workers' compensation statute allows recovery for injuries irrespective of fault,⁷⁰ it is a posse member's exclusive remedy and much narrower in scope than the menu of remedies otherwise available in a tort suit.⁷¹ Conversely, civic-minded individuals or bystanders who voluntarily aid the police, while typically not eligible for employment benefits, may challenge police misconduct for money damages.⁷² "Active law enforcement service," however, was not defined by section 3366's language and had yet to be interpreted by any California court, let alone the state's highest court, until this case.⁷³

The California Supreme Court in *Gund v. County of Trinity* analyzed sua sponte whether heeding an officer's request to "check on" a neighbor constitutes "active law enforcement service," and thus transforms the Gunds into "employees" of the state under section 3366.⁷⁴ The Gunds argued that California courts construe "active law enforcement service" narrowly to exclude "community caretaking" functions like performing welfare checks by peace officers.⁷⁵ The Gunds further argued that the

69. LAB. § 3366.

70. *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund*, 14 P.3d 234, 243 (Cal. 2001). Underlying the exclusivity concept in the workers' compensation context is protection of the worker himself: "[T]he employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability . . . [so that t]he employee is afforded relatively swift and certain payment of benefits . . . without having to prove fault . . ." *Id.* (quoting *Shoemaker v. Myers*, 801 P.2d 1054, 1062 (Cal. 1990)).

71. LAB. § 3602(a); *see also Shoemaker*, 801 P.2d at 1062 (noting that workers give up a "wide[] range of damages potentially available in tort").

72. *See* LAB. § 3352(a)(9) (excluding volunteers "who do[] not receive remuneration for the[ir] services" from the definition of "employee"). Civilians who volunteer to help law enforcement only become "employees" if they come to fall within the scope of section 3366's coverage. *See* LAB. § 3366(a); *see also Gund v. County of Trinity*, 234 Cal. Rptr. 3d 187, 188 (Cal. Ct. App. 2018) (suing for negligence and misrepresentation in requesting plaintiffs' assistance), *aff'd*, 472 P.3d 435 (Cal. 2020).

73. *Gund*, 472 P.3d at 440–42.

74. *Id.* at 438–40. State employee status limits a plaintiff's award to workers' compensation and constrains their ability to seek additional redress. *See id.* at 440.

75. Gunds' Opening Brief, *supra* note 30, at 8–9. The Gunds also argued that if the court were to find they had engaged in "active law enforcement service," its holding would stand to dismantle the community caretaking doctrine and contradict long-standing U.S. Supreme Court precedent, which permits warrantless entries by peace officers onto a civilian's property when a "reasonably prudent officer" has reason to believe that there is a public safety interest in doing so. *Id.* at 28–29 (first citing *People v. Ray*, 981 P.2d 928, 931 (Cal. 1999); and then citing *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). The rationale for this argument was that those entries are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 28 (quoting *Ray*, 981 P.2d at 931). Thus, as the Gunds argued, if the *Gund* court found that wellness checks alone and without connection to any criminal activity suffice to constitute "active law enforcement service," then even peace officers acting pursuant to the community caretaking doctrine would be engaged in "active law enforcement service." *Id.*

For an understanding of the "community caretaking" doctrine, see David L. Hudson, *Courts in a Muddle over 4th Amendment's Community Caretaking Exception*, A.B.A. J. (Aug. 1, 2013), https://www.abajournal.com/magazine/article/courts_in_a_muddle_over_4th_amendments_community_caretaking_exception ("[P]olice do not always function as law enforcement officials investigating and ferreting out

legislature intended for section 3366 to apply only to “the physically active and life-threatening function of police work related to suppressing crime and arresting criminals,” which was not the case here because neither the Gunds nor the sheriff’s department knew⁷⁶ that the neighborly check-in would call for crime suppression and an arrest.⁷⁷

In opposition, the defendants claimed that, even if responding to a 911 call could be characterized as a “community caretaking” or “routine” function, it would be antithetical to section 3366 to exclude those functions from the meaning of “active law enforcement service,” particularly in light of other California statutes with the same language.⁷⁸ They contended that courts have broadly interpreted “active law enforcement service” as referring to the nature of the peace officer position and the “principal duties” involved, as distinct from other public roles more administrative in nature.⁷⁹

The California Supreme Court agreed with the defendants and used a canon of statutory construction for its literal reading⁸⁰ of “active law enforcement service,” which it defined as encompassing peace officer responsibilities loosely concerned with enforcing the law, protecting the public, and investigating or preventing crime.⁸¹ It looked to both judicial opinions and public discourse, which the court understood as treating officers who primarily conduct welfare checks no differently than officers

wrongdoing, but sometimes may act as community caretakers designed to prevent harm in emergency situations.”).

76. This Case Comment contends that an officer cannot use the posse comitatus power to conscript civilian aid absent some knowledge that criminal activity is indeed afoot. This argument was not explicitly made by the Gunds.

77. Gunds’ Opening Brief, *supra* note 30, at 9, 12–16.

78. Respondents’ Brief at 9, *Gund*, 472 P.3d 435 (No. S249792).

79. *Id.* at 16–19 (first citing *Crumpler v. Bd. of Admin.*, 108 Cal. Rptr. 293, 300–02 (Cal. Ct. App. 1973); and then citing *Boxx v. Bd. of Admin.*, 170 Cal. Rptr. 538, 543–44 (Cal. Ct. App. 1980)); *see also id.* at 20 (noting that the California Supreme Court has “implicitly recognized” that a response to a “vague 911” call is within police officer duties (citing *People v. Dolly*, 150 P.3d 693, 701 (Cal. 2007))).

The county asserted that the phrase “active law enforcement service” is used as a means to distinguish police officer functions from secretarial or administrative roles, such as “telephone operator[s], clerk[s], stenographer[s], machinist[s], mechanic[s], firefighters or first-aid responders.” *Id.* at 14. *But see* Gunds’ Opening Brief, *supra* note 30, at 13–14 (noting that courts have held that “active law enforcement service” references hazardous tasks which deal with criminal activity (first citing *Crumpler*, 108 Cal. Rptr. at 300–02; and then citing *Boxx*, 170 Cal. Rptr. at 544)).

Local advocates argued as amici curiae in support of the same broad interpretation advocated for by the defendants. *See* (Proposed) Brief of Amici Curiae Rural County Representatives of California and League of California Cities in Support of Respondents County of Trinity et al. at 19–21, *Gund*, 472 P.3d 435 (No. S249792). Amici even asserted that responding to a 911 call and performing welfare checks are inherently dangerous. *Id.* at 26–30 (providing statistics of police encounters that have resulted in injury or death when they initially lacked any indication of criminal activity).

80. The “literal reading” canon, or the “plain-meaning rule,” posits that unambiguous legal text should be applied by its literal terms without concern for public policy, legislative history, or other extraneous matter unless doing so would produce an absurd result. *Plain-Meaning Rule*, BLACK’S LAW DICTIONARY (11th ed. 2019).

81. *Gund*, 472 P.3d at 441–42.

who primarily enforce the law.⁸² In other words, the court understood “police officers” to be virtually synonymous with “law enforcement officers.”⁸³ This understanding supported the court’s conclusion that “active law enforcement service” refers to the range of work police officers do in addition to crime investigation and suppression and the handling of criminals.⁸⁴ The court also reasoned that the California legislature intended for “active law enforcement service” to be interpreted broadly to include police work beyond crime investigation and suppression, which entail risk of serious injury, considering police often double as first responders.⁸⁵ Therefore, the court held that responding to a 911 call for unspecified help, which may only theoretically involve dangerous criminal activity, is a common police duty and thus constitutes “active law enforcement service.”⁸⁶

The court then assessed the means by which a civilian can engage in such assistance, focusing on section 3366’s applicability to services rendered involuntarily by conscription or voluntarily by request.⁸⁷ In discussing the posse comitatus authority sheriffs are vested with, the court looked to the inherently risky circumstances delineated in California Penal Code former section 150, for which civilian assistance could be conscripted and criminally sanctioned if ignored.⁸⁸ Still, despite finding former section 150 implicit in the labor code’s section 3366, the Gund court rested its holding on the more attenuated California Government Code section 26604, which permits sheriffs to command civilian assistance as they see necessary to execute less risky police duties.⁸⁹ The court interpreted the statutes in light of each other to mean that officers were allowed to deputize individuals in instances other than those involving criminal law enforcement.⁹⁰

Rather than analyzing the penal code to determine when people who are not part of a traditional crime-fighting posse may temporarily become law enforcement

82. *Id.* (first citing *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1348–49 (Cal. 1991); and then citing Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 559, 567 (1997)).

83. *Id.*

84. *Id.* at 441–43.

85. *See id.* at 440–45 (stating that the legislature meant for workers’ compensation to provide wide coverage for injured civilians); *id.* at 441 (“Police officers in our society function as both first responders and criminal investigators.” (quoting *Michigan v. Bryant*, 562 U.S. 344, 368 (2011))). The court rejected the Gunds’ argument that law enforcement service was limited to hazardous investigation, evidence gathering, and criminal detention. *Id.*; Petitioners’ Reply Brief on the Merits at 7–9, *Gund*, 472 P.3d 435 (No. S249792).

86. *Gund*, 472 P.3d at 441–42.

87. *Id.* at 442–43.

88. *Id.* (including assistance with making an arrest, recapturing an escapee, preventing a breach of the peace or the commission of criminal offense).

89. *Gund*, 472 P.3d at 442.

90. *Id.*; *see* CAL. PENAL CODE § 150 (repealed 2020) (obligating citizens to aid law enforcement upon request).

officers,⁹¹ the court declared that it was sufficient to merely be engaged in an activity within the general job description of a police officer, even if not in the presence of police.⁹² Without definitively classifying the Gunds as either volunteers or members of the posse comitatus for purposes of assessing workers' compensation under section 3366, the court deemed them public employees by virtue of their performing a task associated with employment as a peace officer—checking on an individual who called 911 for unspecified help.⁹³ In doing so, the court conflated the two categories, referring to the Gunds as “volunteers”⁹⁴ while citing the posse comitatus power and its relevance to the case.⁹⁵ The court also relied on section 3202 of the labor code,⁹⁶ which mandates that workers' compensation provisions be construed liberally to extend benefits as much as possible,⁹⁷ and reasoned that the California legislature intended for section 3366 to cover civilian actors who take on physical hazards in the name of the public.⁹⁸ Thus, the court concluded that the Gunds were public employees entitled only to workers' compensation.⁹⁹

Justice Joshua P. Groban, in his dissenting opinion, argued that Deputy Whitman's assessment of the situation, and his choice to downplay the risks involved substantially affected the Gunds' decision to act.¹⁰⁰ Groban noted that peace officers serve knowing the role and associated risks they are accepting, all while having “some level of preparation,” whereas civilians do not.¹⁰¹ Further, Justice Groban emphasized how previous cases have hinged on whether the activities in question would expose civilians to “physical risk,” in accord with section 3366.¹⁰² He determined that this criteria did not apply to the Gunds, who “reasonably understood that they were being asked to provide neighborly assistance,” and he thus took issue

91. See sources cited *infra* notes 142 and 145.

92. See *Gund*, 472 P.3d at 447–48. While the majority opinion did hint that the Gunds acted alone, it was the dissent that explicitly noted that they were unaccompanied by officers. *Id.* at 438–39; *id.* at 454–55 (Groban, J., dissenting).

93. *Id.* at 446 (majority opinion); see also *Gund v. County of Trinity*, 234 Cal. Rptr. 3d 187, 188–89, 192 (Cal. Ct. App. 2018) (“The trial court . . . rul[ed] plaintiffs were not ‘volunteers’ because they did not initiate the activity, and the deputy did not ask them if they would consider volunteering.”), *aff’d*, 472 P.3d 435 (Cal. 2020).

94. *Gund*, 472 P.3d at 439 n.4, 440, 446, 448 n.6, 451–52.

95. *Id.* at 442.

96. CAL. LAB. CODE § 3202 (Deering, LEXIS through ch. 14 of 2022 Reg. Sess.).

97. *Gund*, 472 P.3d at 443.

98. *Id.* at 445–46.

99. *Id.* at 449.

100. *Id.* at 456 (Groban, J., dissenting).

101. *Id.*

102. *Id.* at 454–57 (“[Section 3366 applies] only [to] those civilians who ‘assume the risk of death or serious injury to . . . protect[] . . . the public’” (quoting 4 CAL. L. REVISION COMM’N, *supra* note 49)).

with the majority's tendency to label workers' compensation as beneficial to them.¹⁰³ In his view, section 3366 did not apply under the circumstances because the words, facts, and context of Deputy Whitman's request indicated that he did not contemplate the Gunds having to perform an "active law enforcement service."¹⁰⁴

The *Gund* court erred in holding that the Gunds were employed as law enforcement by virtue of their responding to a 911 call for unspecified help.¹⁰⁵ First, *Gund* misapplied California's posse comitatus standard by ignoring the limited nature of its availability to law enforcement, which can summon civilian assistance only with knowledge that the circumstances involve some type of criminal activity.¹⁰⁶ Specifically, sheriffs may only summon the posse comitatus when faced with an emergency related to arrests, breaches of the peace, or the commission of a particular criminal offense.¹⁰⁷ Courts have adopted the parameters of state posse comitatus statutes to determine whether an officer has such grounds for demanding civilian aid.¹⁰⁸ The California Supreme Court first looked to the state's posse comitatus statute in the 1926 case of *Monterey County v. Rader*¹⁰⁹ and then again in the 1935 case of *City of Long Beach v. Industrial Accident Commission*.¹¹⁰ Other state courts, such as New Mexico's supreme court in the 1942 case of *Eaton v. Bernalillo County*, have looked to the same.¹¹¹

In determining that a posse comitatus was formed, the *Monterey* court held that the decedent was compelled and thus deputized by the sheriff to perform the duties of a deputy under the since-repealed section 150 because he had assisted in the arrest of particular criminals who opened fire on deputy sheriffs and were hiding in the vicinity.¹¹² The decedent was a random bystander commandeered into service on his way home from a social event, supplied a firearm, and stationed alongside the constabulary when he was shot and killed.¹¹³ In sum, the *Monterey* decedent performed

103. *Id.* at 457–58 (arguing that the majority overlooked the government's "special duty" to protect members of the public who collaborate with law enforcement to incentivize voluntary citizen intervention in the future) (citing *Schuster v. City of New York*, 154 N.E.2d 534, 537 (N.Y. 1958)).

104. *Id.* at 459.

105. *Id.* at 447 (majority opinion) ("Responding to a 911 call for assistance of an unknown nature is what the Gunds did, so they are properly deemed employees under section 3366.").

106. *See id.* at 442 (broadening posse comitatus power by effectively merging Penal Code former section 150 with Government Code section 3366).

107. *See* sources cited *supra* notes 60 and 61 and accompanying text.

108. *City of Long Beach v. Indus. Accident Comm'n*, 51 P.2d 1089, 1091 (Cal. 1935) (citing PENAL § 150); *Monterey County v. Rader*, 248 P. 912, 914 (Cal. 1926) (citing CAL. PENAL CODE § 150 (repealed 2020)).

109. 248 P. at 914.

110. 51 P.2d at 1091.

111. *Eaton v. Bernalillo County*, 128 P.2d 738, 742–43 (N.M. 1942).

112. *Monterey*, 248 P. at 913–14, 916.

113. *Id.* at 913.

quintessential crime-fighting functions necessitating workers' compensation as a matter of law.¹¹⁴

Nine years later, however, *Long Beach* held that a civilian asked to keep an eye on the suspects' vehicle was not deputized for purposes of section 150 because it was "not an extraordinary request" but one in which "an officer may have properly made of any citizen who happened to be near by [sic]."¹¹⁵ The civilian was a private detective who collaborated with local officers when he was shot at after initiating an investigation into two male suspects.¹¹⁶ In distinguishing *Monterey*, the *Long Beach* court reasoned that the police officers were not faced with any of the dire circumstances set forth in section 150—no attempt at arrest was made and no officer had reason to believe the suspects, about whom the civilian himself expressed concern, were in the process of committing any specific criminal offense.¹¹⁷ The court emphasized that, absent such an "extraordinary situation," sheriffs lack justification to organize a posse comitatus or "impress into service" a civilian for law enforcement.¹¹⁸ Thus, the *Long Beach* civilian was the functional equivalent of a neighborhood watch, necessitating no workers' compensation as a matter of law.

Likewise, in *Eaton*, the Supreme Court of New Mexico declined to apply posse comitatus status to a person asked to accompany a deputy on a non-emergency task not delineated in the state's posse comitatus statute.¹¹⁹ Thus, the widow, whose husband was controlling traffic at the request of the sheriff when he was struck by a car, could not receive workers' compensation on his behalf.¹²⁰ The court declared that the purpose of the posse comitatus was to enable an "*officer to obtain immediate assistance when suddenly confronted with a dangerous emergency in apprehending, securing, or conveying a person charged with, or convicted of, a crime.*"¹²¹ The court concluded that the situation was neither a state of emergency nor one otherwise warranting a call for the posse comitatus.¹²² Moreover, the task was one commonly and voluntarily

114. *Id.* at 913–14.

115. *Long Beach*, 51 P.2d at 1090–92.

116. *Id.* at 1090. The two men only became suspects once the civilian hailed a police officer from across the street. *Id.* The civilian was suspicious because the men were parked outside a bank with an obscured license plate, appeared nervous, and were seemingly watching him. *Id.*

117. *Long Beach*, 51 P.2d at 1091–92.

118. *See id.*

119. *Eaton v. Bernalillo County*, 128 P.2d 738, 742 (N.M. 1942). In New Mexico, it was a misdemeanor to "neglect or refuse" certain requests for assistance from law enforcement, including "in the execution of . . . any criminal case, or in the preservation of the peace, or in apprehending or securing of any person for the breach of the peace, or in the escape or rescue of persons arrested upon civil process." 1885 N.M. Laws 122 (current version at N.M. Stat. Ann. § 30-22-2 (1978)). This law, though amended, is still on the books today. *Id.*

120. *Eaton*, 128 P.2d. at 739, 745.

121. *Id.* at 743.

122. *Id.* at 742–43.

performed by civic-minded members of the community without ever raising employment issues.¹²³ Thus, no workers' compensation was necessitated by statute.¹²⁴

Had the *Gund* court followed the *Monterey* and *Long Beach* precedent and the reasoning of the *Eaton* court, it would have recognized the absence of some crime-related need for immediate civilian assistance before classifying the Gunds' as "employees" and barring their civil remedy in tort.¹²⁵ Similar to the private detective in *Long Beach*, the Gunds were asked to check on Constantino simply because they were nearer to the scene than the officer.¹²⁶ Further, as in *Long Beach*, there was no criminal suspect known or believed to be inside Constantino's home at the time Deputy Whitman requested the Gunds' assistance.¹²⁷ Being a friendly neighbor and checking on another's well-being is what civic-minded individuals do, which, like the community service-type conduct in *Eaton*, disqualifies the Gunds' from posse comitatus status.¹²⁸ And just as there was no dangerous emergency present in *Long Beach* or *Eaton* that fell within the criteria of their respective posse comitatus statutes, here, there was no dangerous emergency within the meaning of former section 150 and the general standard adopted therefrom, to Deputy Whitman's knowledge, when he called the Gunds for help.¹²⁹

It is inconsistent with the California Supreme Court's own longstanding precedent in *Monterey* and *Long Beach* to find, as it did in *Gund*, that people assisting law enforcement with tasks that are civic in nature and unrelated to enforcing the law against crime can be deputized as the posse comitatus.¹³⁰ Had the *Gund* court

123. *Id.* at 744.

124. *Id.*

125. Compare *Gund v. County of Trinity*, 472 P.3d 435, 438–39 (Cal. 2020) (finding the Gunds deputized when asked to "check on" their neighbor's likely "weather-related" issue), with *Monterey County v. Rader*, 248 P. 912, 913 (Cal. 1926) (finding civilian deputized when asked to defend against armed suspects), and *City of Long Beach v. Indus. Accident Comm'n*, 51 P.2d 1089, 1091–92 (Cal. 1935) (finding civilian not deputized when police lacked suspicion of criminal activity), and *Eaton*, 128 P.2d at 743 (finding civilian not deputized when asked to direct traffic).

126. Compare *Gund*, 472 P.3d at 438 (stating that the Gunds were requested because they were "much closer to Kristine's home" than Deputy Whitman), with *Long Beach*, 51 P.2d at 1091–92 (concluding that the request was "not an extraordinary" one because it could have been made to any nearby citizen).

127. Compare *Gund*, 472 P.3d at 438–39 (suspecting only weather-related, non-criminal activity), with *Monterey*, 248 P. at 913 (suspecting crime).

128. Compare *Gund*, 472 P.3d at 451 (praising the Gunds for being selfless neighbors who, with little information, "agreed to help their neighbor in a time of need"), with *Eaton*, 128 P.2d at 744 (finding that directing traffic in congested areas is not uncommon conduct).

In addition, the Gunds' actions would not constitute a use of the public police power because knocking on someone's door is not a uniquely public function; it can be done by any good neighbor. See *United States v. Ackerman*, 831 F.3d 1292, 1295–96 (10th Cir. 2016) (discussing how an activity constitutes a public function only if it goes beyond what an ordinary citizen can lawfully do).

129. *Gund*, 472 P.3d at 438–39 (describing Constantino's call for help as "weather-related").

130. See *Monterey*, 248 P. at 913–14, 916 (finding that the deceased was commandeered into service pursuant to statutory law); *Long Beach*, 51 P.2d at 1091 (finding that the civilian was not impressed into public service because there was no official demand to assist in an arrest); *Gund*, 472 P.3d at 442, 446.

properly assessed the posse comitatus claim, it would have concluded that the Gunds were not obligated to assist in conducting the welfare check at Constantino's home, and therefore could not have become members of the posse.¹³¹ The *Gund* court's conflating posse comitatus status and volunteer status not only contradicts its prior decisions but also rejects the distinct legal analyses that *Long Beach* and *Monterey*, and the persuasive reasoning in *Eaton*, warrant.¹³²

The *Gund* court's second error was ignoring California statutory law and binding federal and state precedent, which hold that civilians in the Gunds' position are not state actors absent the requisite legal authority to act alone as public employees to perform peace officer functions. California Penal Code sections 830.6 and 832.6 explicitly state that persons appointed or deputized to enforce the law, who have not already met the training requirements, must act under the direct supervision of a formal officer to have the requisite statutory enforcement authority.¹³³ Additionally, precedent in *Stapleton*¹³⁴ and the Ninth Circuit's 1982 case of *Forro Precision, Inc. v. International Business Machines Corp.*¹³⁵ provides that a private individual acts on behalf of the state only when law enforcement directly participates in the activity.¹³⁶

Forro tackled the issue of when legal authority attaches to entitle a civilian to immunity for his or her assistance in law enforcement activities.¹³⁷ There, *Forro* sued IBM for its private employees' participation in the search and seizure of business records from *Forro*'s offices.¹³⁸ The court relied on section 830.6, which provided

131. Deputy Whitman had no proper basis to summon the posse comitatus and commandeer the Gunds' services because the request to respond to a 911 call was not for the purpose of making an arrest, preventing any breach of the peace, or related to the pursuit of a criminal suspect. See CAL. PENAL CODE § 150 (repealed 2020); *Gund*, 472 P.3d at 441–42.

132. See *Long Beach*, 51 P.2d at 1091 (finding no employment contract exists where a person is not impressed into public service by an official); *Monterey*, 248 P. at 913–14 (holding that the posse comitatus is not a volunteer organization because the law imposes a duty to serve); *Eaton*, 129 P.2d at 744 (finding nonemployee status for persons who volunteer upon official but non-compulsory request); see also *Edwards v. Hollywood Canteen*, 167 P.2d 729, 731–32 (Cal. 1946) (citations omitted) (differentiating between compulsory service rendered in public emergency which gives rise to public employee status, and volunteer service).

133. CAL. PENAL CODE § 830.6(c) (Deering, LEXIS through ch. 14 of 2022 Reg. Sess.) (vesting a person “summoned to the aid of any uniformed peace officer” with such law enforcement powers as the officer “expressly delegate[s] to him or her” or deems “necessary to properly assist the officer”); PENAL § 832.6(a) (requiring a properly “deputized or appointed” law enforcement officer to have either “completed [a proscribed] basic training course,” or to be working under the “immediate supervision” of someone who has, to exercise legal authority as a peace officer).

134. 447 P.2d 967, 969–70 (Cal. 1968) (explaining that citizens lose their “private status” once they are “jointly engaged with state officials” (quoting *United States v. Price*, 383 U.S. 787, 794 (1966))).

135. 673 F.2d 1045, 1054 (9th Cir. 1982).

136. See also *Corngold v. United States*, 367 F.2d 1, 5–6 (9th Cir. 1966) (finding government action where federal agents oversaw the citizen's opening of boxes to inspect their contents); *United States v. Walther*, 652 F.2d 788, 791–92 (9th Cir. 1981) (emphasizing that “[m]ere governmental authorization” of an activity is insufficient to constitute government action without an officer taking “an active role”).

137. *Forro*, 673 F.2d at 1054.

138. *Id.* at 1049, 1051.

that a civilian aiding law enforcement “has such powers as the supervising officer may delegate.”¹³⁹ Because the police were in charge of conducting the search, and because IBM’s employees acted under their direct supervision at all times while helping them execute a validly-issued search warrant, the Ninth Circuit immunized the IBM employees from personal liability under section 830.6.¹⁴⁰ The court reasoned that California’s policy of encouraging civilian cooperation with the police is important, and that members of the public should not have to assess the future implications of their actions before agreeing to render aid.¹⁴¹

Stapleton articulated the distinctions between private and state action by civilians.¹⁴² There, the California Supreme Court held that a private citizen who voluntarily assists law enforcement constitutes an agent of the police only if there exists “official [police] participation in the planning and implementation of the overall operation.”¹⁴³ In *Stapleton*, an employee for a private credit card corporation assisted police officers in searching the home and vehicle of a suspect who had an outstanding arrest warrant for fraud.¹⁴⁴ The employee was given instructions by the police upon arriving at the suspect’s house and did not begin that search until instructed.¹⁴⁵ The employee did, however, take it upon himself without consulting any officer to search the suspect’s car, in which he found contraband.¹⁴⁶ The *Stapleton* court, following U.S. Supreme Court rule,¹⁴⁷ found that the employee had “joined” an operation coordinated by law enforcement and was “jointly engaged with state officials,” even during his own search, and thus did not have “private status.”¹⁴⁸

The courts in *Forro* and *Stapleton* properly analyzed the extent of official participation in police activity to determine whether a private party acted on behalf of the state.¹⁴⁹ The police in *Forro* directed an investigation while closely supervising the private employees, who were thus conferred peace officer powers to conduct the search.¹⁵⁰ In *Stapleton*, the police officers orchestrated the fraud-related operation

139. *Id.* at 1054.

140. *Id.* at 1053–54.

141. *Id.* at 1054 (first citing *Peterson v. Robison*, 277 P.2d 19, 24 (Cal. 1954); and then citing *Sokol v. Pub. Utils. Comm’n*, 418 P.2d 265, 272 (Cal. 1966)).

142. *Stapleton v. Superior Court*, 447 P.2d 967, 968–70 (Cal. 1968).

143. *Id.*

144. *Id.* at 968.

145. *Id.*

146. *Id.* (asking “whether anyone had searched the [suspect’s] car” and then “discover[ing sixty] canisters containing a tear gas-like substance”).

147. *Id.* at 968–71 (first citing *Byars v. United States*, 273 U.S. 28, 33 (1927); and then citing *United States v. Price*, 383 U.S. 787, 794 (1966)).

148. *Id.* at 969–70 (quoting *Price*, 383 U.S. at 794).

149. *Forro Precision, Inc. v. Int’l Bus. Machs. Corp.*, 673 F.2d 1045, 1053–54 (9th Cir. 1982); *Stapleton*, 447 P.2d at 968–71.

150. 673 F.2d at 1053–54.

and gave ongoing instruction to the private employee, transforming him into a state actor.¹⁵¹ At the heart of each case is the physical presence of law enforcement, which is a necessary element in delegating legal authority to civilians.¹⁵² In stark contrast, *Gund* never discussed Deputy Whitman's involvement with the Gunds, or his lack of instruction and supervision.¹⁵³ Instead, the *Gund* court based its determination that the Gunds were public employees solely on the definition of "active law enforcement service," which it broadly defined,¹⁵⁴ and ignored whether or not such legal authority had actually attached as a matter of law.¹⁵⁵

Had the *Gund* court applied the proper precedent from *Forro*, namely, that volunteers enjoy peace officer powers only by virtue of officer supervision,¹⁵⁶ it would have found that the Gunds could not have performed "active law enforcement service" when they filled in for Deputy Whitman.¹⁵⁷ For the Gunds, not trained as volunteers, to have the authority necessary to serve as employees of the sheriff's department, they would have needed to be directly supervised by a peace officer.¹⁵⁸ Unlike the police officers in *Forro*, who enlisted the help of and then instructed civilians under their immediate supervision,¹⁵⁹ Deputy Whitman merely sent a fleeting request to the Gunds over the phone to go "check on" their neighbor's welfare.¹⁶⁰

Furthermore, the Gunds' circumstances were nothing like the private employee's in *Stapleton*, who acquired public status because he worked closely with and was nearby to officers, so that he was engaged in police activity.¹⁶¹ The *Gund* court's holding that the Gunds were public employees was therefore wrongly centered on the rationale that

151. 447 P.2d at 968–71.

152. See *Forro*, 673 F.2d at 1053–54 (confirming that supervising officers may delegate peace officer authority); *Stapleton*, 447 P.2d at 969–70 (finding police participation in a "joint operation" sufficient to permit a private agent's actions).

153. See *Gund v. County of Trinity*, 472 P.3d 435, 456–57 (Cal. 2020) (Grobman, J., dissenting) ("Ms. Gund entered the house alone and unarmed, neither of the Gunds demonstrating any concern for her safety.").

154. *Id.* at 441–442, 445–446 (majority opinion). The court interpreted "active law enforcement service" to include peace officer tasks that are "directly concerned with . . . enforcing laws, investigating and preventing crime, and protecting the public." *Id.* at 441–442, 447.

155. See *id.* at 447 ("[I]t's enough to conclude that responding to a 911 call for assistance of an unknown nature . . . falls well within the lines defining 'active law enforcement service.'").

156. See *Forro*, 673 F.2d at 1053–54.

157. Compare *Gund*, 472 P.3d at 439 (detailing how the Gunds drove to and entered Constantino's house by themselves), with *Forro*, 673 F.2d at 1054 (requiring police supervision for a citizen to act as law enforcement).

158. See CAL. PENAL CODE § 832.6 (Deering, LEXIS through Ch. 14 of 2022 Reg. Sess.); see also *Gund*, 472 P.3d at 454–55 (Grobman, J., dissenting) ("Corporal Whitman asked two untrained, unarmed middle-aged civilians to risk injury or death . . . without the aid of trained law enforcement officers.").

159. 673 F.2d at 1053–54.

160. *Gund*, 472 P.3d at 437–39 (majority opinion).

161. Compare *id.* at 439 (noting that the Gunds acted alone), with *Stapleton v. Superior Court*, 447 P.2d 967, 968–71 (Cal. 1968) (finding state actor status when private citizen searched the suspect's property with local police).

merely agreeing to do a task commonly associated with police work is sufficient to engage in “active law enforcement service.”¹⁶² However, unlike the actors in most cases dealing with civilian aid of law enforcement,¹⁶³ especially those in *Forro* and *Stapleton*, the Gunds acted completely on their own when performing the requested task and not at all in conjunction with police.¹⁶⁴ Given that absolutely no law enforcement officials were present throughout the Gunds’ “welfare check,” there was no opportunity to ever work with Deputy Whitman or to receive official guidance on how to handle the situation.¹⁶⁵ Therefore, they could not have performed peace officer functions pursuant to section 3366, and thus were not employees of the sheriff’s department.¹⁶⁶

The *Gund* court’s decision to ignore relevant case law and bypass state statutory law, which has carefully limited the authority of law enforcement officers, strips Californians of their civilian status and bars potential recovery in tort for any aid provided to law enforcement, no matter how trivial.¹⁶⁷ Ultimately, this precedent-setting refusal to hold Trinity County and its officials liable for negligently placing civilians in harm’s way will have a chilling effect on persons otherwise willing to aid police work.¹⁶⁸ Deputy Whitman put the Gunds in grave danger when he misrepresented the situation that left them utterly disfigured in the line of duty,¹⁶⁹

162. See *Gund*, 472 P.3d at 451 (interpreting section 3366 to encompass “activities objectively associated with functions such as public protection or criminal investigation and enforcement, without regard to whether . . . a volunteer subjectively understands the risks” involved).

163. See, e.g., *United States v. Walther*, 652 F.2d 788, 791–92 (9th Cir. 1981) (routine luggage inspection); *Corngold v. United States*, 367 F.2d 1, 12–13 (9th Cir. 1966) (container inspection); *City of Long Beach v. Indus. Accident Comm’n*, 51 P.2d 1089, 1090–91 (Cal. 1935) (investigatory aid); *People v. Wolfgang*, 221 P. 907, 908, 911 (Cal. 1923) (neighborhood watch); *Page v. City of Montebello*, 169 Cal. Rptr. 447, 449–50 (Cal. Ct. App. 1980) (civilian informant); *Tucker v. Superior Court*, 148 Cal. Rptr. 167, 168–69 (Cal. Ct. App. 1978) (proffering suspect’s personal effects).

164. Compare *Gund*, 472 P.3d at 438–39 (working alone), with *Forro*, 673 F.2d at 1054 (working under official control and direction), and *Stapleton*, 447 P.2d at 968–70 (working from police instruction).

165. *Gund*, 472 P.3d at 454–55 (Groban, J., dissenting).

166. The Gunds did not meet any of the statutory prerequisites for having peace officer authority to “enforce[e] laws, investigat[e], or prevent[] crime.” *Gund*, 472 P.3d at 445 (defining “active law enforcement service”) (majority opinion); CAL. PENAL CODE §§ 830.6, 832.6 (Deering, LEXIS through ch. 14 of 2022 Reg. Sess.) (codifying the requirements needed to acquire peace officer authority).

It is also important to note that either a state constitution or statute must warrant a public officer’s authority to act. *City of Los Angeles v. Indus. Accident Comm’n*, 47 P.2d 1096, 1098–99 (Cal. Ct. App. 1935), *abrogated on other grounds by* *County of Los Angeles v. Workers’ Comp. Appeals Bd.*, 637 P.2d 681, 687–88 (Cal. 1981).

167. *Gund*, 472 P.3d at 458 (Groban, J., dissenting) (acknowledging that the Gunds cannot seek punitive damages or compensation for their pain and suffering).

168. *Id.* at 443–44 (majority opinion). On the Gunds’ separate constitutional claim, the Ninth Circuit held that Deputy Whitman’s conduct was unlawful and denied him qualified immunity, stating that it “does not shield a state actor from liability when his conduct exposes a civilian to assault.” *Gund v. County of Trinity*, 624 F. App’x 519, 520 (9th Cir. 2015).

169. See *Gund*, 624 F. App’x at 520 (holding that the deputy violated the Gunds’ constitutional right to bodily security); *Gund*, 472 P.3d at 439, 448 (detailing the Gunds’ injuries and admitting that Deputy Whitman’s omissions left them unsuspecting of danger).

only for the couple to be awarded workers' compensation for their medical bills and nothing more.¹⁷⁰ This case had severe repercussion for the Gunds in California, and because our country's history with the posse comitatus power¹⁷¹ includes several doctrines embraced across state lines,¹⁷² its incorrect decision could affect any of us.

170. *Gund*, 472 P.3d at 449.

171. See discussion *supra* pp. 81–84.

172. See *supra* notes 53 and 55 and accompanying text.