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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DARREN DAVID CHAKER,

Petitioner,

vs.

ALAN CROGAN, SAN DIEGO COUNTY PROBATION DEPARTMENT,

Respondent.

Case No. 00CV2137 (BTM) (CGA)

PETITIONER'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AS TO CLAIM ONE

DATE/TIME: TBA
LOCATION: EL CENTRO BRANCH

COMES NOW, DARREN DAVID CHAKER, Petitioner, and files with this Court his Motion for Summary Judgment as to claim one (1), the unconstitutionality of Penal Code section 148.6, of his Writ of Habeas Corpus filed pursuant to Rule 4 of the Rules Governing 28 U.S.C. § 2254.

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NOTICE OF MOTION AND MOTION

TO COUNSEL FOR RESPONDENT IN THE ABOVE-ENTITLED MATTER:

PLEASE TAKE NOTICE that Petitioner Darren David Chaker hereby moves this Court for an order granting summary judgment in his favor on claim 1, the unconstitutionality of Penal Code section 148.6, of the Third Amended Petition for Writ of Habeas Corpus ("Petition"). The date and time of the hearing on this motion is to be set by the Court after the completion of briefing, in accordance with any Case Management Conference Order that the Court may order. This motion is based on this Notice of Motion and Motion for Summary Judgment and supporting memorandum of points and authorities and oral argument, the pleadings in this case, and the exhibits of state court filings already lodged with this Court.

Mr. Chaker seeks summary judgment as to claim 1 pursuant to Federal Rule of Civil Procedure 56, on the grounds that the statute in and of itself is adequate to move for summary judgment, as well as the pleadings and exhibits on file demonstrate that there is no genuine issue as to any material fact, and therefore Mr. Chaker is entitled to judgment on this claims as a matter of law.

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I. UNDISPUTED FACTS

The Office of the District Attorney filed a complaint against Petitioner on or about March 25, 1997. It alleged a violation of Penal Code § 148.6(a)(1), that Petitioner did unlawfully file an allegation of misconduct against a peace officer knowing the allegation to be false.

Section 148.6(a)(2) provides that "[a]ny law enforcement agency accepting an allegation of misconduct against a peace officer shall require the complainant to read and sign" an advisory, which must be printed in "boldface type." This advisory concludes with the following warning, directly beneath which citizen complainants must sign:

> **IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE.**
> (Penal Code §148.6(a)(2).)

On February 22, 1999, Petitioner was found guilty of violating PC 148.6(a)(1) as a result of his second jury trial. Petitioner was sentenced to 1) three years of summary probation, 2) two days of custody with two days credit for time served, 3) fined about $1,100 and, 4) 15 days[1] of public service.

Mr. Chaker pursued an appeal. The Court appointed Attorney S. Ward Heinrichs. The Appellate Division of the Superior Court affirmed Petitioner's conviction. The issue of the statute's constitutionality was not challenged at the trial or appellate

[1] The Court allowed Petitioner to perform volunteer work for a church in lieu of public work service.

level, but has only been raised by Mr. Chaker on writ.

Petitioner subsequently filed the instant Writ of Habeas Corpus. The Office of the District Attorney, for the Respondent, filed a motion to dismiss Petitioner's Writ when it was initially filed and again subsequent to Petitioner's Third Amended Writ. The Court denied the initial Motion to Dismiss and recommended on October 19, 2002, to dismiss some of the claims for procedural reasons when the second Motion to Dismiss was brought. However, the instant issue raised herein is not subject to dismissal nor was it challenged by the Respondent's second motion to dismiss. Hence, irrespective of the Court's decision to dismiss some of the claims in Petitioner's writ, the claim challenging the constitutionality of the statute is left standing.

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II. INTRODUCTION

The sole issue in this case is whether a criminal defamation statute that selectively targets citizen complaints critical of peace officers and **no other public officials** is unconstitutional on its face. Under Penal Code section 148.6, enacted in 1995,[2] citizen complaints of "peace officer" misconduct are treated differently from complaints alleging misconduct by elected officials, teachers, judges, and all other public officials. Section 148.6 thus *strips* citizen complaints against law enforcement officers of the absolute privilege from criminal defamation prosecutions applicable to citizen complaints of misconduct against all other public officials. Worse still, within the context of police complaint proceedings, California law treats the speech of citizen complainants less favorably than that of the peace officers against whom they are complaining, not to mention witnesses who support the officers' version of facts.

At the heart of the First Amendment is the principle that government may not so tilt the expressive playing field, particularly when it comes to criticism of public officials. Based on this core principle, past appellate and federal district court decisions have properly held Penal Code section

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[2] Although this brief, refers to "section 148.6" throughout, it should be noted that only Penal Code §148.6(a), and not §148.6(b), is properly before this Court. Penal Code §148.6(a), enacted in 1995, criminalizes knowingly false allegations of "peace officer" misconduct and requires citizen complainants to sign beneath a warning of possible criminal prosecution. Section 148.6(b), added in 1996, criminalizes the filing of a knowingly false "civil claim against a peace officer." While Respondent may believe that a similar analysis would apply to subsection (b), only subsection (a) is at issue in this case.

148.6 facially unconstitutional. (*People v. Stanistreet* (2001) 93 Cal. App. 4th 469 [113 Cal. Rptr. 2d 529], *opinion superseded by grant of review*, (2002) 115 Cal. Rptr. 2d 852.) The federal court in *Hamilton v. City of San Bernardino* (C.D. Cal. 2000) 107 F. Supp. 2d 1239, reached the same conclusion.

In *Hamilton*, an African-American man who had been stopped, pulled of his bicycle, and choked by police officers was deterred from filing a citizen complaint by the possibility of prosecution under section 148.6. (107 F. Supp. 2d at pp. 1240-41.) As the federal court in *Hamilton* held that this statute "impermissibly discriminates on the basis of the content of the speech which it criminalizes and, therefore, facially violates the First Amendment . . . ." (*Id.* at p.1248.)

Additionally, **all three courts** to have reached the merits have **struck down** Penal Code section 148.6's civil counterpart, Civil Code section 47.5, which creates a special cause of action for defamatory citizen complaints against peace officers. (*Walker v. Kiousis* (2001) 93 Cal. App. 4th 1432, 1457 [114 Cal. Rptr. 2d 69][3]; *Haddad v. Wall* (C.D. Cal. 2000) 107 F. Supp. 2d 1230, 1238; *Gritchen v. Collier* (C.D. Cal. 1999) 73 F. Supp. 2d 1148, 1153, *reversed on other grounds*, (9th Cir. 2001) 254 F.3d 807.)[4]

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[3] No Petition for Review or Request for Depublication was filed in *Walker*, and the opinion holding Civil Code §47.5 unconstitutional is now final.

[4] Respondent may argue that the Ninth Circuit's reversal in *Gritchen v. Collier* (9th Cir. 2001) 254 F. 3d 807, somehow undermines the constitutional analysis of the *Hamilton* court and of the Court of Appeal in this case. This is plainly incorrect. The Ninth Circuit made it quite clear it was **not** addressing the merits of the constitutional issue, but rather only holding that the case did not belong in federal court because the threatened libel suit brought by Officer Collier was not brought under "color of law" as

Each court carefully applied the constitutional test articulated by the United States Supreme Court in *R.A.V. v. City of St. Paul* (1993) 505 U.S. 377 [112 S. Ct. 2538, 120 L. Ed. 2d 305], for evaluating content-and-viewpoint-discrimination within a category of generally proscribable speech. It would be remarkable if Respondent could file a brief to acknowledge the content-and-viewpoint-based distinction drawn by section 148.6, much less properly to apply the *R.A.V.* test for evaluating this distinction. Nor can, presumptively, will Respondent confront the other means, noted by all the courts to have considered California's two peace officer defamation laws, by which officers' legitimate reputational interests may be protected *without* infringing on or chilling any speech. Literally, every court to review this statute have deemed it unconstitutional.

Indeed, as explained more fully below, California law already provides substantial protections for peace officers' reputational interests far beyond what other public officials enjoy, such as laws which ensure the confidentiality of peace officer personnel records and require false complaints to be removed from general personnel files. (Penal Code §§ 832.5(b), 832.7(a).) Moreover, as a matter of state law, complaints determined to be frivolous, unfounded, or exonerated may not be used for promotional or punitive purposes. (Penal Code §832.5(c)(2).)

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required by 42 U.S.C. Section 1983. (254 F.3d at pp. 811, 814.) This jurisdictional decision, which left untouched the First Amendment analysis of the district court, of course has no bearing on this appeal of a criminal conviction under an unconstitutional criminal statute.

Respondent's only presumptive principal argument may be that Penal Code section 148.6 is not really content-or viewpoint-discriminatory at all, but simply "fills a gap" left by previous decisional law interpreting Penal Code section 148.5. That argument would be patently incorrect, and rests on a misunderstanding of what section 148.6 really does. Far from treating citizen complaints against police officers the same as those made against other public officials, section 148.6 creates two tiers of citizen complaints. Citizen complaints about how public officials **other than** peace officers, perform their jobs, made with superiors or oversight agencies, remain absolutely privileged. Those complaints are not subject to prosecution under either section 148.6 or 148.5. By contrast, citizen complaints against peace officers – whether made with police chiefs, police commissions, or any other oversight body – are subject to criminal defamation prosecution. There can be no reasonable dispute, moreover, that with respect to citizen complaints of non-criminal misconduct, California law treats peace officers differently from all other public officials. Respondent's potential argument – that reading section 148.6 *in pari materia* with section 148.5 somehow remedies the content and viewpoint discrimination – flies in the face of the plain language of both statutes.

For all these reasons, this Court should grant the instant motion and hold that Penal Code section 148.6 is facially unconstitutional as have all Courts that have been asked this question.

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III. STATEMENT OF THE ISSUE

Whether California Penal Code section 148.6, which selectively targets citizen complaints against peace officers and no other public officials, impermissibly discriminates based on content or viewpoint in violation of the First and Fourteenth Amendments to the United States Constitution.

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POINTS AND AUTHORITIES

ARGUMENT

I.

SUMMARY JUDGMENT STANDARDS

Mr. Chaker is entitled to summary judgment under Federal Rule of Civil Procedure 56(c) because the evidence, viewed in the light most favorable to respondent, demonstrates that there is no genuine issue as to any material fact.[5] *See Tarin v. County of Los Angeles,* 123 F.3d 1259, 1263 (9th Cir. 1997). As demonstrated by the detailed undisputed facts cited in this pleading, Mr. Chaker has met his initial burden of establishing the absence of a genuine issue of material fact as to claim 1. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986).

Although summary judgment motions are usually brought at the conclusion of lengthy discovery, Petitioner asserts that there is no need for such since the statute itself is the only issue being presented to the Court and such a claim stands alone without the need for discovery since there is nothing to be 'discovered' other than the statute itself.

If Respondent fails, with respect to this claim, to submit *any* non-record evidence disputing the validity of Petitioner's argument against Penal Code section 148.6, his claim further establishes the absence of a genuine issue of material fact.

[5] "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

See id. at 325 (moving party's burden may be met by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case"). Because Petitioner has made this showing, Respondent cannot simply rely on his pleadings to argue the existence of a genuine issue of fact; rather, he must identify specific facts in dispute, and provide supporting evidence. *See Celotex*, 477 U.S. at 324 (nonmovant must oppose summary judgment using evidence in the form of "affidavits, depositions, answers to interrogatories, and admissions on file"); *Taylor v. List*, 880 F.2d 1040 (9th Cir. 1989) (same); *Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) (summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data); *Smith v. Mack Trucks*, 505 F.2d 1248, 1249 (9th Cir. 1974) (per curiam) (arguments and statements of counsel "are not evidence and do not create issues of material fact capable of defeating an otherwise valid motion for summary judgment"). Because Respondent will not, and cannot, introduce such evidence, Mr. Chaker is entitled to summary judgment as to claim 1.

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II.

PENAL CODE SECTION 148.6 IS UNCONSTITUTIONAL

The sole issue presented is whether Penal Code section 148.6 is unconstitutional on its face under the First and Fourteenth Amendments to the United States Constitution. The applicable standard of review to apply is the Supreme Court's decision in *R.A.V. v. City of St. Paul*, *supra*, 505 U.S. 377, setting forth the test for assessing content-discrimination within a category of proscribable speech.

California law generally protects citizen complaints against public officials from lawsuits for defamation or libel, but creates a lone exception for citizen complaints critical of peace officers. Supreme Court precedent prohibits government from engaging in such content- and viewpoint-based discrimination – even within subcategories of proscribable speech such as defamation, obscenity, or fighting words. (*Id.* at p. 387.) Thus, California may choose to ban all defamation proscribable under *New York Times v. Sullivan New York* (1964) 376 U.S. 254 [84 S. Ct. 710, 11 L. Ed. 2d 686] and *Garrison v. Louisiana* (1964) 379 U.S. 64, 67 [85 S. Ct. 209, 13 L. Ed. 2d 125], regardless of its subject matter or target.

Alternatively, California may choose to provide an absolute privilege for all citizen complaints, including speech critical of peace officers. What the state may not do, without running afoul of the First and Fourteenth Amendments, is to apply one defamation rule to citizen complaints against peace officers, and a different rule to those made against other public officials. That, however, is precisely the content- and

viewpoint based distinction created by Penal Code section 148.6.

A. While California Law Generally Protects Citizen Complaints Against Public Officials, Penal Code Section 148.6 Creates an Exception for Citizen Complaints of "Peace Officer" Misconduct.

In order to assess the facial constitutionality of Penal Code section 148.6, it is important to understand how California law treats citizen complaints generally. California law provides strong protection for citizens who speak up about the misconduct of public officials in the performance of their duties, by providing an "absolute privilege" from civil or criminal defamation actions arising from such citizen complaints. (*Imig v. Ferrar* (1977) 70 Cal. App. 3d 48 [138 Cal. Rptr. 540]; *Pena v. Municipal Court* (1979) 96 Cal. App. 3d 77 [157 Cal. Rptr. 584]; *People v. Craig* (1993) 21 Cal. App. 4th Supp. 1 [26 Cal. Rptr. 2d 184]; see also *Garrison*, *supra*, 379 U.S. at p. 67 [defining limitations on "state power to impose criminal sanctions for criticism of the official conduct of public officials."].) Subsequent to these decisions, however, the Legislature enacted two laws creating an exception to the general rule privileging citizen complaints of official misconduct from defamation actions. These two laws selectively withdraw the absolute privilege from one subcategory of citizen complaints and one subcategory only – namely, those alleging "peace officer" misconduct. (Penal Code §148.6(a)(1); Civil Code § 47.5.)

1. California Law Formerly Protected All Citizen Complaints of Official Misconduct – Including But Not Limited to Police Misconduct Complaints – From Criminal Prosecution.

Prior to enactment of Penal Code section 148.6 and Civil Code section 47.5, California law provided an absolute privilege for citizen complaints filed with the agencies charged with monitoring official misconduct:

> It is now well established that this privilege extends to transactions of administrative boards and quasi-judicial proceedings.
> . . . .
> [T]he California authorities have held that "a communication to an official administrative agency, which communication is designed to prompt action by that agency, is as much a part of the 'official proceeding' as a communication made after the proceedings have commenced." [Citations.

(*Imig*, *supra*, 70 Cal. App. 3d at p. 55.)

The Court in *Imig* proceeded to explain why an absolute privilege for citizen complaints, made with the public agencies responsible for remedying official misconduct, is "essential":

> The policy underlying the privilege is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing. As stated in *King v. Borges, supra*, 28 Cal.App.3d 27, 34, "It seems obvious that in order for the commissioner to be effective there must be an open channel of communication by which citizens can call his attention to suspected wrongdoing. That channel would quickly close if its use subjected the user to a risk of liability for libel. A qualified privilege is inadequate protection under the circumstances . . . ."

(*Id*. at pp. 55-56.)

The "absolute privilege" described in *Imig* protects citizen complaints of official misconduct from defamation actions, so long as they were made with the "appropriate authority" – that is, with the "public authorit[y] whose responsibility it is to investigate and remedy wrongdoing" by that official. (*Id*. at pp. 55, 57.) The absolute privilege therefore extends not only to citizen complaints of police misconduct made with a police chief or internal affairs, but also to citizen complaints against teachers made with the school board; to citizens complaints against welfare workers made with the local welfare commission; to citizen complaints against an elected public official made with a local ethics commission; and to citizen complaints against a judge made with the Commission on Judicial Performance. All of these would fall within the "absolute privilege" from defamation suits, so long as made with the public authorities responsible for monitoring that official's job performance.

Imig recognized that the necessity of preserving an "open channel of communication" is especially vital when its comes to citizen complaints of police misconduct, in light of the "power and deadly force" that the State places in the hands of law enforcement officers. (*Id.* at pp. 55-56) It bears emphasis, however, that the absolute privilege from civil defamation actions applies to all citizen complaints of official misconduct made with the appropriate public authorities – including **but not limited to** citizen complaints of police misconduct.

Subsequent California appellate decisions recognized that criminal libel prosecutions based on false citizen complaints would be equally destructive to this "open channel of communication."[6] In *Pena v. Municipal Court*, *supra*, 96 Cal.App.3d 77, the Court held that: "The public policy considerations expressed in *Imig* to bar a civil action on a citizen's grievance are equally applicable to a criminal action based on the contents of such complaint." (*Id.* at p. 82; *cf. Garrison*, *supra*, 379 U.S. at p. 67 [holding that criminal libel laws should be subjected to the civil libel rule articulated in *New York Times v. Sullivan*, *supra*, 376 U.S. 254].) Allowing "police officials to prosecute a citizen for filing a complaint against an officer," *Pena* recognized, "would have the tendency to 'chill' the willingness of citizens to file complaints . . . ." (96 Cal. App. 3d at p. 82.) That is particularly true where as in the instant case "the same entity against which the compliant is made will be investigating the accusations." (*Id.* at p. 83.) The *Pena* court thus held that a citizen complaint of police misconduct, made to the chief of police, was protected by this absolute privilege from criminal prosecution.

In *People v. Craig, supra*, 21 Cal. App. 4th Supp. 1, 5, the Court likewise applied the *Imig* privilege to a criminal prosecution, emphasizing that anything less than an absolute privilege would create the chilling effect cited in *Pena*. As *Craig* explained, "the importance of providing the community an

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[6] In *Garrison*, *supra*, 379 U.S. at p. 67, the U.S. Supreme Court described criminal libel statutes as the use of "state power to impose criminal sanctions for criticism of the official conduct of public officials."

avenue to report alleged misconduct by peace officers overrides concerns that this process may be abused by individuals to falsely report police misconduct." (*Id.* at p. 5.) Under *Imig*, *Pena*, and *Craig*, therefore, the "absolute privilege" for citizen complaints of official misconduct – made with agencies responsible for monitoring such misconduct – applies to both civil and criminal defamation actions.[7]

2. Through Section 148.6, the State Has Created a Two-Tiered System of Defamation Law – One Rule Applicable to Citizen Complaints of "Peace Officer" Misconduct, and Another Applicable to All Other Citizen Complaints of Official Misconduct.

Subsequent to the decisions in *Imig*, *Pena*, and *Craig*, the California Legislature carved out an exception to the "absolute privilege" generally extended to citizen complaints of official misconduct, for purposes of both civil and criminal law. Through enactment of Civil Code section 47.5 and Penal Code section 148.6, California law treats one subcategory of citizen complaints against public officials – and one subcategory only – differently from all others.

Civil Code section 47.5, enacted in 1982 in response to *Imig*, creates an exception to the rule protecting citizen complaints from civil defamation actions. In particular, it creates a civil defamation cause of action for knowingly false complaints of "peace officer" misconduct – but not misconduct

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[7] Because both *Pena* and *Craig* held that Penal Code section 148.5 did not reach citizen complaints of police misconduct, the courts did not reach the question whether a law criminalizing such reports would violate First Amendment rights. (*Pena*, *supra*, 96 Cal.App.3d at pp. 81, 83; *Craig*, *supra*, 21 Cal.App.4th Supp. at pp. 6-7.)

by other public officials.[8] For this reason, Civil Code section 47.5 has been held unconstitutional. (*Walker v. Kiousis*, *supra*, 93 Cal. App. 4th at p. 1457, *Haddad v. Wall*, *supra*, 107 F. Supp. 2d at p. 1238.)

Penal Code section 148.6, enacted in 1995 in response to *Craig*, creates an exception to the rule protecting citizen complaints from criminal defamation prosecutions. Just as section 47.5 did in the civil context, Penal Code section 148.6 targets citizen complaints of "peace officer" misconduct, but not misconduct by other public officials: "[E]very person who files any allegation of misconduct against any peace officer . . . knowing the allegation to be false, is guilty of a misdemeanor." (Penal Code §148.6(a)(1).)

Because Civil Code section 47.5 and Penal Code section 148.6 selectively target the same subclass of citizen complaints, they "serve the same purposes" and "should be subject to the same constraints and limitations." (*Hamilton*, *supra*, 107 F. Supp. 2d at p. 1243.) As the U.S. Supreme Court explained in *Garrison*: "Where criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same

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[8] California Civil Code section 47.5 provides:

> Notwithstanding [Civil Code] Section 47, a peace officer may bring an action for defamation against an individual who has filed a complaint with that officer's employing agency alleging misconduct, criminal conduct, or incompetence, if that complaint is false, the complaint was made with knowledge that it was false and that it was made with spite, hatred, or ill will. Knowledge that the complaint was false may be proved by a showing that the complainant had no reasonable grounds to believe the statement was true and that the complainant exhibited a reckless disregard for ascertaining the truth.

limitations." (379 U.S. at p. 67.)

Together, Civil Code section 47.5 and Penal Code section 148.6(a) create two tiers of citizen complaints for purposes of state defamation law. On one hand, California law still absolutely protects the ability of individuals to file citizen complaints with the entities responsible for monitoring the job performance of public officials **other than police officers**. People who make such complaints still have the "free and open access to governmental agencies" recognized as "essential" by the legislature and courts. On the other hand, those making citizen complaints of "peace officer" misconduct are *stripped* of this absolute privilege. Such complaints are subject only to a "qualified privilege" – exactly what California case authority recognized to be "inadequate" to protect the "open channel of communication" between public authorities and the agencies they serve. (*Imig*, *supra*, 70 Cal. App. 3d at pp. 55-56; see also *Pena*, 96 Cal. App. 3d at pp. 82-83.)

Petitioner acknowledges that Penal Code section 148.6 was enacted in response to the decision in *Craig*, just as Civil Code section 47.5 was enacted in response to the decision in *Imig*. (*Walker*, *supra*, 93 Cal. App. 4th at p. 1440.) But Respondent would be incorrect to argue that Penal Code section 148.6 simply "fills a gap" left open by these cases. In reality section 148.6 **creates** a gap in the "absolute privilege" that otherwise applies to citizen complaints of official misconduct lodged with superiors or oversight agencies. Respondent would thus be quite wrong to claim that reading sections 148.5 and 148.6 *in pari materia* creates a "coherent legislative scheme" that treats citizen complaints against all public officials the same. Rather, citizens who want to complain about or criticize the

job performance of other public officials (i.e., those who are not peace officers) can file a complaint with their superior or watchdog agencies without fear of criminal or civil sanctions if their complaint is disbelieved. Only citizens who want to complain about or criticize the misconduct of peace officers have to **fear** that the complaint could result in a criminal or civil defamation actions.

Proper application of the *pari materia* rule makes that quite clear. As other courts have recognized, the statutes that should be read together are Civil Code section 47.5 and section 148.6. Both laws single out peace officers for "special protection," by providing civil and criminal sanctions against knowingly false citizen complaints of "peace officer" misconduct, sanctions that are not available with respect to knowingly false complaints against other public officials.

While many states have laws like section 148.5, which target false crime reports,[9] Petitioners' research into the laws of the other 49 states has uncovered only four that have criminal laws specially targeting citizen complaints of peace officer misconduct. At the time of section 148.6's enactment in 1995, no other state had such a law. Since then, the states of Minnesota (1998), Nevada (1999), Wisconsin (2001), and Ohio

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[9] Petitioners' research reveals that at least 19 other states have statutes criminalizing false crime reports. (Arizona Revised Stat. § 13-2907.01; Arkansas Stat. § 5-54-122; Delaware Code § 1245, District of Columbia Stat. § 5-117.05; Florida Stat. § 837.05; Indiana Stat. 35-44-2-2; Iowa Code § 718.6; Kansas Stat. § 21-3818; Kentucky Revised Stat. § 519.040; Maryland Code 1957, Art 27, § 150; Missouri Stat. 525.080; Nebraska Revised Stat. § 71-15-141; Nevada Revised Stat. §207.280; New York Penal § 240.50; Oregon Stat. § 807.620; Rhode Island Stat. § 11-32-2; South Carolina Stat. § 16-17-722; Texas Penal § 37.08; West Virginia Stat. § 61-5-17.)

(2001) have enacted laws comparable to section 148.6(a)(1).[10] California appears to be the **only** state, however, to require by law that citizens sign complaints of "peace officer" misconduct under a warning that they may be prosecuted for filing a knowingly false complaint. (See Penal Code §148.6(a)(2).)

B. Penal Code Section 148.6 Violates the Rule Against Content-and-Viewpoint-Discrimination Within a Category of Generally Proscribable Speech.

1. *R.A.V. v. City of St. Paul* Articulates the Constitutional Rule Applicable to Content-and Viewpoint-Based Distinctions Within a Category of Generally Proscribable Speech Such as Defamation.

It is settled First and Fourteenth Amendment law that government may not engage in content-based discrimination, much less viewpoint-based discrimination, by selectively targeting speech on "disfavored subjects." (*R.A.V. v. City of St. Paul*, *supra*, 505 U.S. at p. 391.) "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . . Any restriction on expressive activity because of its content would completely undercut the

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[10](Nevada Revised Stat. §199.325 [misdemeanor to "knowingly file[] a false or fraudulent written complaint or allegation of misconduct against a peace officer for conduct in the course and scope of his employment."]; Minnesota Stat 609.749, subd. 2(b)(7) [gross misdemeanor to "knowingly make[] false allegations against a peace officer concerning the officer's performance of official duties with intent to influence or tamper with the officer's performance of official duties."]; Wisconsin Stat. §946.66 [Class A forfeiture to "knowingly make[] a false complaint regarding the conduct of a law enforcement officer"]; Ohio Stat. §2921.15 [misdemeanor of first degree to "mak[e] a false allegation of peace officer misconduct"].) **None** of these laws require a written warning like that required by Penal Code §148.6(a)(2).

'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" (*Police Dept. v. Mosley* (1972) 408 U.S. 92, 96 [92 S. Ct. 2286, 33 L. Ed. 2d 212], citation omitted.)

This policy is at its zenith when it comes to citizens' complaints of wrongdoing by public officials such as police officers: "[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." (*Houston v. Hill* (1987) 482 U.S. 451, 461 [107 S. Ct. 2502, 96 L. Ed. 2d 398].) As Judge Kozinski has written for the Ninth Circuit: "[W]hile police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment." (*Duran v. City of Douglas* (9th Cir. 1990) 904 F.2d 1372, 1378.)

Even when it comes to speech that generally falls **outside** the protection of the First Amendment – such as obscenity, defamation, or "fighting words" – government may not selectively prohibit expression based on its content, message, or viewpoint. Writing for the *R.A.V.* Court, Justice Scalia recognized that government could, "consistent with the First Amendment" regulate certain categories of speech – such as defamation, obscenity, and fighting words – *"because of their constitutionally proscribable content."* (*Id.* at p. 383, original italics.) The greater power to prohibit obscenity or defamation outright, however, does not include the unfettered power to draw content- or viewpoint-based distinctions within these categories. Thus,

for example, "government may proscribe libel, but may not make the further content discrimination of proscribing *only* libel critical of the government." (*Id.* at p. 384, original italics.) By the same token, government may proscribe obscenity, but may not "enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government . . . ." (*Ibid.*)

R.A.V. thus expressly holds that the First Amendment limits content- and viewpoint based discrimination even within categories of so-called "unprotected" speech. (*Id.* at p. 386 fn.5.) Applying this principle, the *R.A.V.* Court concluded that the St. Paul ordinance violated the First Amendment, because it prohibited one content-based subcategory of proscribable speech – in that case, "fighting words" conveying a message of racial or ethnic intolerance.[11] Even though the ordinance only applied to "fighting words" which may be proscribed outright without violating the First Amendment, it was held unconstitutional because:

> St. Paul has not singled out an especially offensive mode of expression – it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility alone would be

[11] The ordinance at issue in *R.A.V.* prohibited the "plac[ing] on public or private property a symbol, object, appellation characterization, or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender . . . ." (505 U.S. at p. 380 [quoting ordinance].)

enough to render the ordinance presumptively invalid . . . .

(*Id.* at pp. 391, 393-94.)

While the city could have enacted a ban on **all** constitutionally proscribable "fighting words," it could not **selectively** ban a particular class of fighting words based on its content, message, or viewpoint. (*Id.* at pp. 391, 393-94.) The *R.A.V.* Court recognized that there were "compelling interests" supporting St. Paul's ordinance, but struck down the measure because its content-based discrimination was not "reasonably necessary" to serve these interests. (*Id.* at pp. 395-96.)

2. Section 148.6 Constitutes Impermissible Content- and Viewpoint-Based Discrimination By Selectively Targeting Speech Critical Of Peace Officers.

Petitioner argues that Penal Code section 148.6 is limited to defamatory speech that may be proscribed under *New York Times* and *Garrison* – that is, to speech which meets the "actual malice" requirement. But as *R.A.V.* holds, the fact that a law covers only proscribable speech does not end the content-discrimination inquiry, but only begins it.[12]

Assuming that Penal Code section 148.6 only covers speech

[12] The lower court's content-discrimination analysis – like all the other courts to have struck down Penal Code section 148.6 or its civil counterpart – **assumes** that the statute incorporates the *New York Times* "actual malice" test for proscribable defamation. (*New York Times*, *supra*, 376 U.S. at pp. 279-80; *Garrison*, *supra*, 379 U.S. at pp. 64, 69 [applying actual malice test to criminal defamation statute]; *cf. R.A.V.*, *supra*, 505 U.S. at pp. 380-81 [ordinance interpreted as limited to "fighting words" that may generally be proscribed under the First Amendment].)

that may be proscribed outright, it is still presumptively invalid under the line of cases culminating in *R.A.V.* because it discriminates based on content and viewpoint. In particular, it **selectively** criminalizes speech based on the content and viewpoint of the speech. As *Hamilton* explained:

> [B]y Section 148.6 California is classifying certain defamatory statements made against peace officers differently than similar complaints made against all other public officials and in so doing it creates a distinction based on the content of the complaint—whether the targets of the complaint are peace officers or other public officials.

(107 F. Supp. 2d at p. 1244; see also *Walker*, *supra*, 93 Cal. App. 4th at p. 1453.)

Like the ordinance struck down in *R.A.V.*, section 148.6 "goes even beyond mere content discrimination, to actual viewpoint discrimination." (*R.A.V. supra*, 505 U.S. at p. 391.) The statute and the required statutory advisory make it clear that only knowingly false statements "AGAINST AN OFFICER" can be criminally punished. (Penal Code §148.6 (a)(2).) However, there is no threat of criminal punishment for knowingly false statements that **the officer** might make about **the citizen** in response to the complaint.

In a disputed traffic stop, for example, a citizen complaint that the officer behaved rudely could be the subject of a criminal prosecution, if the authorities decided that it was knowingly false; but if the officer responded to the complaint by insisting that it was the citizen who had been drinking, the citizen would have no criminal (or civil) remedy even if the officer's statement was knowingly false. So too, if

a citizen complaint alleges a racial slur made by an on-duty police officer, that complaint could result in a criminal prosecution if deemed knowingly false. But if the officer responds with a knowingly false statement, asserting for example that the citizen provoked the encounter through aggressive conduct, that statement would not be subject to civil or criminal sanctions. Similarly, a citizen observing the incident and filing a report **supporting** the officer's version of the facts would also be absolutely protected under California law.

The *R.A.V.* Court specifically held that government may not engage in such viewpoint-based discrimination: "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules." (505 U.S. at p. 392; see also *New York Times*, *supra*, 376 U.S. at pp. 282-83 ["It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."].) What the *Walker* court recognized as impermissible viewpoint discrimination in Civil Code section 47.5 is equally applicable to Penal Code section 148.6:

> Rather than carving out an exception for *all* defamatory statements made in an official investigation of alleged police misconduct, section 47.5 makes actionable only a defamatory complaint *against* a police officer. A defamatory statement *by* the police officer, or another witness, about the complainant or anyone else involved in the proceeding is not actionable.

(93 Cal. App. 4th at p. 1449, original italics.)

As a general matter, of course, there is nothing wrong

with "special interest" legislation intended to benefit a particular group – that is how the legislative process works. As demonstrated by the protections for the confidentiality of personnel records, protections against unfounded complaints being used for promotional purposes, and the Public Safety Officers Procedural Bill of Rights, the peace officer lobby has been very successful in protecting its interests through this process. (See Gov. Code §3300 *et seq.*; Penal Code §§ 832.5(c), 832.7.) The First Amendment, however, limits government's ability to grant special protections to certain groups where speech is involved. (See *R.A.V., supra*, 505 U.S. at p. 391 [First Amendment forbids "special prohibitions on those speakers who express views on disfavored topics."].) The California Legislature may well have been convinced that false citizen complaints about peace officers pose a special harm, just as the St. Paul City Council was convinced that fighting words conveying a message of racial hatred are especially noxious. As *R.A.V.* explained: "The politicians of St. Paul are entitled to express that hostility [toward this message] – but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree." (505 U.S. at p. 396.)

So too in this case, state politicians may express their disapproval of those who make false citizen complaints against the police. The Legislature may also act on this disapproval, by enacting procedural protections to prevent officers from being harmed by false complaints, as has been done through the Bill of Rights. What the California legislature may not do is to impose "unique limitations" on citizen complaints critical of

peace officers, by withdrawing the defamation privilege that applies to citizen complaints lodged against all other public officials.

3. Penal Code Section 148.5 Does Not Cure Section 148.6's Facial Content - and - Viewpoint-Discrimination.

Respondent could place great reliance on Penal Code section 148.5, arguing that this statute somehow cures the content- and viewpoint- discrimination that is plain on the face of section 148.6. This argument, however, depends upon ignoring or inviting this Court to rewrite the unambiguous language of section 148.6. Respondent would be comparing apples and oranges, because the two statutes are not directed at the same type of expressive activity. Specifically: (1) section 148.6 (unlike section 148.5) applies to allegations of **non-criminal** misconduct; (2) section 148.6 (unlike section 148.5) covers citizen complaints made with the agencies responsible for supervising the conduct of the public officials complained against; and (3) section 148.6 (unlike section 148.5) requires a stern, boldfaced warning that those complaining of peace officer misconduct, but not misconduct by other public officials, must sign.

A. Penal Code Section 148.6, Unlike Penal Code Section 148.5, Applies to Complaints of *Non-Criminal* as Well as Criminal Misconduct.

Respondent could attempt to align Penal Code sections 148.5 and 148.6 by narrowing the latter statute's reach to false reports of criminal activity, rather than of misconduct

generally. While Petitioner correctly notes that statutes should be interpreted in accordance with legislative intent (*id.* at p. 9), it is a cardinal principle of statutory interpretation that: "To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning." (*DaFonte v. Up-Right, Inc* (1992) 2 Cal.4th 593, 601 [7 Cal. Rptr. 2d 238].)

By its express terms, Penal Code section 148.6(a)(1) applies to allegations of "misconduct against any peace officer," not simply to allegations of criminal misconduct. Any attempt by Respondent to equate Penal Code section 148.5 and Penal Code section 148.6(a)(1) would be patently incorrect, since section 148.5 allows prosecution only of false reports "that a felony or misdemeanor has been committed." (Penal Code § 148.5(a), (b), (c), & (d).) There is not a shred of evidence anywhere in the legislative history that could be submitted by Respondent to support the argument that section 148.6(a)(1) is limited to complaints of **criminal** misconduct. To the contrary, the legislative history at several points states that the statute would apply to "any allegation of misconduct," without any suggestion that allegations of non-criminal misconduct would be excluded. The Enrolled Bill Report of the California Highway Patrol states that the statute was designed to target "trivial complaints against peace officers" as well as "fraudulent" ones.

Penal Code section 148.6 thus targets speech outside the scope of section 148.5, namely citizen complaints of police misconduct that **do not** involve felonies or misdemeanors. For example, if a motorist were stopped while driving alone by a

peace officer and believes she was treated rudely or aggressively, the mere filing of citizen complaint against the officer can result in criminal charges being lodged against her under section 148.6 if she is not believed. On the other hand, a knowingly false complaint of similar treatment made against a firefighter, school administrator, or DMV employee is **not** grounds for prosecution under section 148.5. Penal Code section 148.5 could never be applied against such a complaint of non-criminal misconduct, because the statute is explicitly limited to false complaints of felonies or misdemeanors.

Respondent could argue that sections 148.5 and 148.6 should be read alongside one another. Doing so, however, only crystallizes the distinction between the two statutes. In four different places, section 148.5 limits its scope to allegations that a "felony or misdemeanor" has been committed. (Penal Code §148.5(a), (b), (c), & (d).) On the other hand, section 148.6 contains no such limitation, applying to all allegations "of misconduct against any peace officer," regardless of whether the misconduct is criminal. If the Legislature had intended to limited section 148.6(a) to complaints of **criminal** misconduct by police officers, it plainly knew how to do so. (See *Russello v. United States* (1983) 464 U.S. 16, 23 [104 S. Ct. 296, 78 L. Ed. 2d 17] [when language is used in one section of a statute but not another section, "'it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion . . . .' [Citation.]"].)

The prior courts that ruled the statute is unconstitutional

were therefore correct to conclude that, after enactment of section 148.6, citizen complaints of peace officer misconduct are treated differently than citizen complaints against all other public officials. Indeed, even the Appellate Division in *Stanistreet* recognized that this section results in non-criminal misconduct by peace officers being treated differently from citizen complaints of non-criminal misconduct by all others. (App. Div. slip op. at p. 6 [section 148.6 "covers non-criminal misconduct, which is not prosecutable under either section [148.5 or 148.6] as to anyone except peace officers."].) The *Hamilton* court likewise interpreted section 148.6 in accordance with its plain language to encompass "false allegations of misconduct, whether civil or criminal." (107 F. Supp. 2d at p. 1244.)[13] The only other court to have construed Penal Code section 148.6 has also interpreted its unambiguous language to include complaints of noncriminal misconduct by peace officers. (*San Diego Police Officers Ass'n*, *supra*, 76 Cal. App. 4th at p. 23 ["subdivision (a) [of Penal Code §148.6] applies only to citizens' complaints of police misconduct during the performance of an officers' duties that may or may not rise to the level of criminal offense"].)

None of the cases Respondent could cite would support a contention that "misconduct" should be construed to mean "felony or misdemeanor." In *People v. Superior Court (Anderson)* (1984) 151 Cal. App. 3d 893, 895 [194 Cal. Rptr. 150], the court

[13] Respondent may try to assert the protestation that the *Hamilton* opinion issued "at an early procedural stage" and that it deals with "the 'classic' police misconduct allegation" misses the mark. *Hamilton* properly held section 148.6 unconstitutional as a matter of law because of its facial content discrimination.

interpreted a statute criminalizing "any threat or violence," giving the term "threat" its obvious, common-sense meaning in context. The court interpreted the term to include "threats of violence but not . . . threats of lawful conduct." Likewise, the court in *In re Andre P.* (1991) 226 Cal. App. 3d 1164, 1174 [277 Cal. Rptr. 363], gave a common-sense interpretation to a criminal law forbidding willfully resistance, delay, or obstruction of police officers, construing it to exclude protected speech. (*Id.* at p. 1174.)

What Respondent may ignore is the limitation that the terms of the statute must be "reasonably susceptible" to the narrowing construction. (*Welton v. City of Los Angeles* (1976) 18 Cal. 3d 497, 505[134 Cal. Rptr. 668]; see also *In re Andre P.*, *supra,* 226 Cal. App 3d at p. 1174 ["fair and reasonable interpretation"].) By contrast, construing "misconduct" to mean "felony or misdemeanor" would require a rewriting of the statute. Petitioner's cases, moreover, do not allow a facial **content-discrimination** problem to be cured by a narrowing construction; these cases have instead to do with "overbreadth" problems being cured in this manner. (See, e.g., *Welton, supra*, 18 Cal. 3d at pp. 505-07.) The facial distinction that this statute draws between citizen complaints of "peace officer" misconduct and those against all other public officials cannot be cured by anything less than a manifest rewriting of the statute.

In essence, Respondent would effectively ask this Court to rewrite the statute, by replacing the word "misconduct" with "a

felony or misdemeanor." In *Metromedia, Inc. v. City of San Diego* (1982) 32 Cal. 3d 180 [185 Cal. Rptr. 260], however, this Court held that "rewrit[ing] the statute in accord with the presumed legislative intent" is "a legislative and not a judicial function." (*Id.* at p. 187, citation omitted; see also *Eberle v. Municipal Court* (1976) 55 Cal. App. 3d 423, 433 [127 Cal. Rptr. 594] ["wholesale rewriting" of a statute by a judicial authority would constitute a "flagrant breach of the doctrine of separation of powers"].) "[A] statute '. . . is to be interpreted by the language in which it is written, and courts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any of its express provisions.'" (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1097 [282 Cal. Rptr. 841], citation omitted.) The construction of section148.6 that Petitioner urges would do precisely what these cases forbid.

Perhaps recognizing that section 148.6 by its plain terms includes complaints of both criminal and noncriminal misconduct, Respondent's potential argument – without citing any evidence – that complaints of non-criminal misconduct constitute a small category of complaints regarding 'misconduct.' This argument disregards the fact that citizens may wish to complain about a number of things relating to a peace officer's job performance that do not rise to the level of criminal conduct. For example, complaints of alcohol on an officer's breath, use of racist slurs, homophobic remarks, and insensitivity to victims of domestic abuse would not constitute complaints of criminal acts.

Whether or not these constitute a majority of citizen

complaints , they clearly fall within the scope of section 148.6(a). It is equally clear that similar complaints made against other public officials would not fall within the scope of section 148.5, section 148.6, or any other law. The differential treatment accorded to citizen complaints of non-criminal misconduct by peace officers, as contrasted with other public officials, demonstrates its content-discriminatory character.[14]

B. Section 148.6 Targets Citizen Complaints of "peace officer" Misconduct, While Leaving Untouched Complaints Made to The Authorities Charged With Monitoring Other Public Officials.

Even assuming *arguendo* that section 148.6(a) were limited to citizen complaints of criminal misconduct, Petitioner would still be wrong to argue that the statute accords no "greater protection to peace officers than is given to non-peace officers

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[14] As set forth in the text above, Penal Code section 148.6 cuts a wider swath than Petitioner contends in one respect, namely insofar as it applies to citizen complaints involving both criminal and non-criminal misconduct by peace officers. In another respect, however, section 148.6 may be narrower than Petitioner suggests. In *San Diego Police Officer Ass'n v. San Diego Police Dep't* (1999) 76 Cal. App. 4th 19 [90 Cal. Rptr. 2d 6], the Court of Appeal construed subdivision (a) to apply "only to citizens' complaints of police misconduct during the performance of an officer's duties . . . ." (*Id.* at p. 23.)

If this interpretation is correct, then the conduct of Petitioner in this case is **not** covered by section 148.6. For in this case, Petitioners' citizen complaint involved conduct later to be determined as a result of an unlawful detention. (*Stanistreet*, *supra*, 93 Cal. App. 4th at p. 473 ["So, too, here the alleged conduct falls outside the scope of the officer's duties."].) Because the alleged peace officer misconduct occurred outside the scope of that officer's official duties, it falls outside the scope of section 148.6, as interpreted in *San Diego Police Officers Ass'n*. Under this interpretation, therefore, the convictions of Petitioner must be reversed, regardless of whether this statute is facially unconstitutional. (See *California Teachers Ass'n v. Board of Trustees* (1977) 70 Cal. App. 3d 431, 442 [138 Cal. Rptr. 817] ["Courts should follow a policy of judicial self-restraint and avoid unnecessary determination of constitutional issues."].)

in section 148.5." Section 148.6(a) allows criminal prosecutions based on complaints made with authorities responsible for monitoring police misconduct – including police chiefs, police commissions, and citizen review boards. Section 148.5, on the other hand, is limited to false crime reports made to those whose responsibility is to enforce the criminal law (i.e., prosecutors, law enforcement agencies, and grand juries). It does not target citizen complaints about the job performance of public officials made to their superiors or watchdog agencies, and therefore does not breach the "absolute privilege" for such statements.

Some examples are helpful in illuminating this distinction. Even after enactment of Penal Code section 148.6, parents who make citizen complaints of misconduct by teachers with a principal or local school board are protected from libel actions, either criminal or civil. (See *Frisk v. Merrihew* (1974) 42 Cal. App. 3d 319, 324 [116 Cal. Rptr. 781]; *Martin v. Kearney* (1975) 51 Cal. App. 3d 309, 311 [124 Cal. Rptr. 281].) Such citizen complaints are not subject to prosecution under section 148.5 – even putting aside its limitation to **criminal** misconduct – since that statute applies only to statements made to district attorney offices, law enforcement agencies, and grand juries. Nor, of course, would such citizen complaints be subject to prosecution under section 148.6, which is *explicitly limited* to complaints of "peace officer" misconduct.

Likewise, a false citizen complaint against a city council member, made with the city's ethics commission, is not subject

to prosecution under either section 148.5 or section 148.6. Such a statement would not fall within the scope of section 148.5, since it is not made to a district attorney office, law enforcement agency, or grand jury; nor, of course, would it be covered by section 148.6(a)(1).

That section 148.5 does not target citizen complaints made with the agencies responsible for oversight of other public officials is clarified by *Pena*, *Craig*, and *Imig*. Both *Pena* and *Craig* interpreted section 148.5 to incorporate the privilege set forth in *Imig* and its predecessors. (*Pena*, *supra*, 96 Cal. App. 3d at pp. 82-83; *Craig*, *supra,* 21 Cal. App. 4th Supp. at pp. 5-7.) The *Imig* privilege protects all "communication[s] between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing." (70 Cal. App. 3d at p. 55.) Put another way, the absolute privilege articulated includes **but is not limited to** citizen complaints of police misconduct made with superiors or oversight boards. This privilege also extends to citizen complaints against other public officials made with the public authorities responsible for investigating their alleged misconduct.

After enactment of section 148.6, those who make complaints about public officials to the agencies responsible for monitoring their misconduct remain protected from criminal prosecution for defamation; only those who complain of "peace officer" misconduct are subject to prosecution for criminal defamation.

C. The Stern, Boldfaced Warning Required by Section

148.6(a)(2) Applies Only to Citizen Complaints of Peace Officer Misconduct, not to Complaints of Misconduct by Other Public Officials.

The third and final respect in which citizen complaints of peace officer misconduct are treated differently from citizen complaints of misconduct by all other public officials is embodied in Penal Code section 148.6(a)(2). This subdivision requires that law enforcement agencies accepting citizen complaints of peace officer misconduct "require the complainant to read and sign" an advisory which is to be printed "all in boldface type." (Penal Code §148.6(a)(2).) Immediately over the signature line, this advisory warns: "**IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE**." (*Id.*)

It is undisputed that only those who seek to file citizen complaints of "peace officer" misconduct are required by law to read and sign this warning – which is sufficient to intimidate all but the most intrepid witness or victim of police misconduct. That is particularly true given that, as the *Pena* and *Craig* courts noted, the very entity being accused of misconduct is also the one that would investigate whether or not a defamatory citizen complaint has been made. (*See Pena,* 96 Cal. App. 3d at p. 83; *Craig*, 21 Cal. App. 4th Supp. at p. 5.) *Pena*'s recognition that possible criminal prosecution "would have the tendency to 'chill' the willingness of citizens to file complaints," applies with even greater force where citizen complainants are admonished that they may be investigated and prosecuted if their complaints are deemed false.

The facts of *Hamilton*, *supra*, 107 F. Supp.2d 1239, dramatically bring this reality to life, illustrating just how section 148.6 works to discourage legitimate citizen complaints of peace officer misconduct. In *Hamilton*, an African-American man was stopped by two police officers while riding his bicycle, searched, and handcuffed. (*Id.* at p. 1240.) One of the officers "grabbed Plaintiff around the throat, kicked his legs out from under him, landed on top of him, and placed a knee on his chest while continuing to choke him." (*Ibid.*) Mr. Hamilton then went to the police station to file a citizen's complaint, and the watch commander presented him with a form containing the (a)(2) warning as required by law. (*Id.* at p. 1241.) When Mr. Hamilton showed his injured wrist, the watch commander pointedly informed him that this was the "kind of injury which resulted from resisting arrest." (*Ibid.*) Not surprisingly – and quite prudently under the circumstances – Mr. Hamilton decided not to lodge a citizen complaint rather than risk criminal prosecution. (*Ibid*.)

Any halfhearted attempts by Respondent to argue that the (a)(2) admonition is really meant to "encourage" citizen complaints fly in the face of reality. This explanation is flatly implausible – especially given the legislative history of the statute demonstrating that the law was passed at the strong urging of the police officer organizations. The legislative history expressly acknowledges that the purpose behind the "admonition signature requirement . . . [was] to reduce and/or eliminate fraudulent as well as trivial complaints against peace officers." Nor could Respondent begin to explain why citizen

complaints of peace officer misconduct should be treated differently from citizen complaints against all other public officials for purposes of the warning required by subdivision (a)(2). Petitioner's argument thus begs the question why a similar "admonition" should not be given to all those filing citizen complaints of misconduct by other public officials. The obvious answer, of course, is that those who file false citizen complaints against other public officials with the agencies responsible for investigating their misconduct are **not** subject to criminal defamation prosecutions – under section 148.6(a)(1) or any other law.

To be clear, Petitioner does not contend that the chilling effect arising from (a)(2)'s mandatory boldfaced warning, standing alone, would render section 148.6(a) facially invalid. If, for example, the same warning were given to all citizen complainants – regardless of what kind of public official is the subject of their complaint – then Petitioner would be correct to assert that California law treats complaints of peace officer misconduct just like all other allegations of misconduct. Section 148.6(a)(2)'s warning, however, both clarifies and compounds the differential treatment that California law affords to citizen complaints of "peace officer" misconduct.[15]

4. <u>While Defendants Believe That Section 148.6(a)(1) Applies Even If the (a)(2) Warning Is Not Signed, the Statute Discriminates Based on Content and Viewpoint</u>

[15] As explained below, if there is any question posed by this Court, Petitioner believes that section 148.6(a)(1) allows for prosecution of complainants whether or not they sign the warning. Regardless, it does not alter the content-discriminatory character of the statute.

Regardless of How It Is Interpreted.

A question the Court may have is if: (1) whether the criminal sanction of Penal Code section 148.6, subdivision (a)(1), applies to all knowingly false allegations of misconduct against a peace officer or only to those allegations made pursuant to the provisions of subdivision (a)(2) of that section; and (2) the significance, if any, of the answer to the legal issue of this case. As explained below, Petitioner believes that (a)(1) applies to all knowingly false allegations of peace officer misconduct, regardless of whether they are made pursuant to (a)(2). The answer to this question, however, has no impact on the statute's content-and-viewpoint-discriminatory character or on the ultimate question of constitutionality.

A. Section 148.6(a)(1) Allows for Citizen Complainants to be Prosecuted Regardless of Whether They Read and Sign Beneath the (a)(2) Warning.

In response to the first question, Petitioner believes that subdivision(a)(1) allows prosecution of citizen complainants whether or not they read and sign beneath the (a)(2) admonition. As set forth above, subdivision (a)(1) allows for the criminal prosecution of "[e]very person who files any allegation of misconduct against any peace officer . . . knowing the allegation to be false." Subdivision (a)(2), in turn, directs law enforcement agencies "accepting an allegation of misconduct against a peace officer to read and sign" the admonishment, which concludes with a warning that: **"IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN**

BE PROSECUTED ON A MISDEMEANOR CHARGE."

There is nothing in the text of subdivision (a)(1) requiring that complainants have read and signed the (a)(2) warning for them to be subjected to prosecution. Therefore, one need look no further than this plain and unambiguous language to answer the first question. There is also nothing in the legislative history to suggest that this Court should read into subdivision (a)(1) a requirement that citizen complainants can only be prosecuted if they read and sign beneath the (a)(2) admonition.

This reading of (a)(1) is buttressed by the Attorney General's opinion regarding section 148.6. (79 Opns. Cal. Atty. Gen. 163 [1996 Cal. AG LEXIS 26](1996).) The Attorney General was asked to address the question: " May a law enforcement agency investigate an allegation of police misconduct if the prescribed information advisory form has not been signed by the person filing the allegation?" (*Id.* at p. *1.) The Attorney General concluded that law enforcement agencies retain the jurisdiction to investigate citizen complaints even in cases where citizen complainants do not sign beneath the warning – whether for fear of retaliation or for some other reason. (*Id.* at p. *5.) The Attorney General recognized that law enforcement agencies had a "mandatory, not permissive or discretionary" duty to require the complainant to read and sign" the (a)(2) advisory. (*Ibid.*) However, the Attorney General also recognized that a citizen complainant may refuse to sign and may choose to submit an anonymous complaint "because of a fear of official retaliation, concern about social ostracism, or merely

a desire to preserve his or her privacy." (*Ibid.*) The Attorney General concluded that law enforcement agencies have the authority to investigate complaints whether or not the (a)(2) warning is signed. (*Ibid.*)

If law enforcement agencies retain this authority to investigate unsigned citizen complaints, there is no reason to question that the Legislature also intended that such complaints be subject to prosecution under (a)(1). Certainly, if the Legislature had intended that prosecutions be limited to cases in which citizen complaints were actually signed, it could easily have done so by simply adding the words "pursuant to subdivision (a)(2)" to subdivision (a)(1).

B. Section 148.6 is Unconstitutional, Whether or Not Citizen Complainants Who do Not Sign the (a)(2) Admonition May be Prosecuted.

Regardless of whether citizen complainants who do not read and sign the (a)(2) warning may be prosecuted under (a)(1), the statute is still facially content-discriminatory and therefore unconstitutional. The statute draws a content-and-viewpoint-based distinction between citizen complaints of peace officer misconduct – particularly non-criminal misconduct – and citizen complaints of misconduct by all other public officials.

Respondent may raise the possibility that reading (a)(1) as "limited to situations in which the advisement is given and signed" might reduce the chilling effect of the statute. In particular, Respondent could even suggest that citizen complainants who know that this is the rule could still file their complaints; so long as they refused to sign them,

Petitioner reasons, they would be immunized from criminal prosecution. This argument overlooks the fact that, under (a)(2), law enforcement agencies have an obligation to "require" citizen complainants to sign this warning. This obligation, of course, applies only to those who seek to file citizen complaints of peace officer misconduct, and not citizen complaints of misconduct by other public officials. Irrespective of whether (a)(1) allows prosecution of those who resist this requirement, the statute still unequally burdens those who seek to complain about peace officer misconduct. This construction of (a)(1) therefore does not eliminate the statute's content-based discrimination between citizen complaints of peace officer misconduct and those alleging other forms of official misconduct.

Moreover, as a practical matter, it strains credulity to believe, that the chilling effect of either (a)(1) or (a)(2) will be appreciably diminished by creating a legal rule under which citizen complainants who refuse to sign the required admonition can escape prosecution. Even assuming that a few ultra-savvy citizen complainants might find a way around subdivision (a)(2)'s requirement – i.e., by submitting a false complaint and refusing to sign, thereby immunizing themselves from criminal prosecution – this interpretation would **not** eliminate the statute's content discriminatory character. In particular, subdivision (a)(1) still allows prosecutions for false peace officer complaints, where prosecutions for false complaints against other public officials would be forbidden.

As the Court of Appeal in *Pena* observed, the mere

possibility of a criminal prosecution for filing a false complaint – even without the admonition required by (a)(2) – tends to "'chill' the willingness of citizens to file complaints, particularly on weak evidence and when the same entity against which the complaint is made will be investigating the accusations." (96 Cal. App. 3d at p. 83.) This chilling effect is only exacerbated by the (a)(2) warning, regardless of whether the government actually follows through by initiating a prosecution. And because this statute discriminates based on content by specifically targeting citizen complaints against "peace officer[s]," even the "realistic possibility" of such a chilling effect is sufficient to render it presumptively invalid. (*R.A.V.*, *supra*, 505 U.S. at p. 390.)

C. Section 148.6 Does Not Fall Within Any of *R.A.V.*'s Delineated Exceptions to the Rule Against Content-and Viewpoint-Discrimination.

Respondent may go as far to argue that, even if section 148.6 discriminates on the basis of the content and viewpoint of speech, that such discrimination is constitutionally acceptable under all three of the exceptions delineated in *R.A.V.* Any potential argument by Respondent in this regard would have been rejected not only by the court below, but also by the district courts in *Hamilton*, *Gritchen*, *Haddad* and by the Court of Appeal in *Walker.* This Court should likewise reject these arguments.

1. The Basis for Section 148.6's Content-and Viewpoint-Discrimination Does Not "Consist[] Entirely of the Very Reason the Entire Class of Speech is Proscribable."

Another potentially flawed argument Respondent could contend is that the distinction drawn by section 148.6 is justifiable because it "consists entirely of the very reason the entire class of speech is proscribable." quoting *Boos v. Barry, 485 U.S. 312, 321, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988)*

III.

AS THE SUPREME COURT HELD IN R.A.V., MOSLEY AND CAREY, THE CONSTITUTION PROHIBITS GOVERNMENT FROM *SELECTIVELY* BANNING OTHERWISE PROSCRIBABLE SPEECH BASED ON CONTENT OR VIEWPOINT

It is settled law under both the First Amendment and the Equal Protection Clause that government may not engage in content-based discrimination, much less viewpoint-based discrimination, by selectively targeting speech on "disfavored subjects." R.A.V., 505 U.S. at 391. "[A]bove all else, the

[16] In *Gomes*, the Court of Appeal clearly articulated the heightened need to protect rather than to restrict citizen complaints against police officers:

> It is indisputable that *law enforcement is a primary function of local government* and *that the public has a far greater interest in the qualification and conduct of law enforcement officers,* even at, and perhaps, *especially at*, an *'on the street' level* than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions. *The abuse of a patrolman's office can have great potentiality for social harm*; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws."

(136 Cal. App. at p. 933, original emphasis [quoting *Coursey v. Greater Niles Township Publishing Corp.* (Ill. 1968) 239 N.E.2d 837, 841].)

[17] The California Supreme Court's opinion in *In re. M.S.* (1995)10 Cal. 4th 698 [42 Cal. Rptr. 2d 355], further illuminates the speech/conduct distinction underlying *Steven S.*. In *M.S.*, this Court upheld a statute prohibiting "unlawful conduct" rather than expression, specifically interference with the "exercise of constitutional or statutory rights by means of force or threat of force." (*Id.* at pp. 714, 722.)

First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content .... Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" Police Dept. v. Mosley, 408 U.S. at 96 (1972) (quoting New York Times v. Sullivan, 376 U.S. at 270).

As the Supreme Court has explained:

> In our view, the First Amendment imposes ... a "content discrimination" limitation upon a State's prohibition of proscribable speech .... The rationale of the general prohibition, after all, is that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'

R.A.V., 505 U.S. at 387 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991)).

This prohibition against content, message, and viewpoint based discrimination applies even to government attempts to regulate so-called "unprotected" speech. Id. at 505 U.S. at 386 n.5. Though government may proscribe certain classes of speech, such as defamation and libel, it may not discriminate within that class based on content, subject matter, or viewpoint. For example, in Police Dept. v. Mosley and Carey v. Brown, the

Supreme Court struck down laws that permitted labor-related picketing, while prohibiting picketing on all other subjects.[18] In both cases, the Court was careful to emphasize that its holding imposed no bar to more general prohibitions against picketing. See Mosley, 408 U.S. at 98 ("This is not to say that all picketing must always be allowed."); Carey, 447 U.S. at 470 ("even peaceful picketing may be prohibited when it interferes with the operation of vital government facilities, or when it is directed toward an illegal purpose")(citations omitted). What the government could **not** constitutionally do was to "select which issues are worth discussing or debating in public facilities." Mosley, 408 U.S. at 96 (emphasis added). The government may **not** attempt to "pick and choose among the views it is willing to have discussed ...." Id. at 98 (quoting Cox v. Louisiana, 379 U.S. 559, 581, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965)(Black, J., concurring)).

The Mosley Court thus struck down a ban on non-labor-related picketing near schools. Although the City of Chicago could have banned all forms of disruptive picketing irrespective

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[18] These courts grounded their analysis on the Equal Protection Clause rather than the First Amendment, while recognizing the overlap between the two in this context: "Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely intertwined with the First Amendment interests; the Chicago ordinance affects picketing, which is expressive conduct; moreover, it does so by classifications formulated in terms of the subject of the picketing." Mosley, 408 U.S. at 94-95; see also R.A.V., 505 U.S. at 384 n.4 ("This Court itself has occasionally fused the First Amendment into the Equal Protection Clause ....")(citing Mosley and Carey).

of content without violation the Constitution, Mosley holds that "selective exclusions ... must be carefully scrutinized." Id. at 98-99. In particular, such selective bans "must be tailored to serve a substantial governmental interest." Id. at 99. By allowing labor-related picketing but prohibiting other picketing, the City of Chicago had engaged in impermissible content-based discrimination:

> Far from being tailored to a substantial governmental interest, the discrimination among pickets is based on the content of their expression. Therefore, under the Equal Protection Clause, it may not stand.

408 U.S. at 102; see also Carey, 447 U.S. at 461-62 (relying on Mosley to strike down Illinois law differentiating between labor and nonlabor picketing).

Following Mosley, Carey, and numerous other cases banning content-based discrimination, the Court in R.A.V. struck down a criminal ordinance that selectively banned a subcategory of proscribable speech acts. The ordinance at issue in R.A.V. made it a misdemeanor to "place[] on public or private property a symbol, object, appellation, characterization, or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender ...." 505 U.S. at 379 (quoting

statute).

Writing for the R.A.V. Court, Justice Scalia properly recognized that government could, "consistent with the First Amendment," regulate certain categories of speech – such as defamation, obscenity, and fighting words – "*because of their constitutionally proscribable content*." Id. at 383 (emphasis in text). The government may not, however, engage in "content discrimination unrelated to the[] distinctively proscribable conduct." Id. at 384. Thus, for example, "government may proscribe libel, but may not make the further content discrimination of proscribing *only* libel critical of the government." Id. (emphasis in text). By the same token, government may proscribe obscenity, but may not "enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government ...." Id. at 384. While the Constitution permits general rules prohibiting obscenity or libel, "selective limitations upon speech," even within these categories, are subject to strict scrutiny. Id. at 392 (emphasis added). The Court explained: "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." Id. at 391.

Applying this principle, the R.A.V. Court concluded that the St. Paul ordinance violated the First Amendment, because it prohibited one content-based subcategory of proscribable speech

– in that case, "fighting words" conveying racial, gender, or ethnic intolerance. While the city could have enacted a ban on all constitutionally proscribable "fighting words," including but not limited to burning crosses on someone's front yard, it could not selectively ban a particular class of fighting words:

> [T]he ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion, or gender." ... Those who wish to use "fighting words" in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality – are not covered ....
> St. Paul has not singled out an especially offensive mode of expression – it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility alone would be enough to render the ordinance presumptively invalid ....

Id. at 391, 393-94. The Court recognized that there were "compelling" reasons underlying the St. Paul ordinance, but still struck down the measure because its content-based discrimination was not "reasonably necessary" to serve these interests. Id. at 395-96.

IV.

THE DISTINCTION DRAWN BY PENAL CODE §148.6 DOES NOT SATISFY STRICT SCRUTINY OR, INDEED, ANY LEVEL OF CONSTITUTIONAL SCRUTINY

Laws drawing content-based distinctions – even within a category of generally proscribable speech – are subject to strict scrutiny, and can pass constitutional muster *only if* they are "narrowly tailored" to serve "compelling interests." 505 U.S. at 395-96; see also Gritchen, 73 F. Supp. 2d at 1153. There is no compelling, substantial, or even legitimate justification that can support the distinction between citizen complaints against police officers and all other citizen complaints.

To the contrary, Penal Code §148.6 hinders the weighty interest in promoting an "open channel" of communication between the People and their government – an interest that is of particular importance in the area of law enforcement. Imig, 70 Cal. App. 3d at 56. As the federal district court said in striking down Penal Code §148.6's civil counterpart, this law "may in fact hinder the policies underlying [California Civil Code] §47, by blocking the 'open channel' of communication between citizens and their government, at least as to one group of public officials." Gritchen, 73 F. Supp. 2d at 1153. As the court also recognized: "No showing has been made that there is a serious problem of false complaints against police." 73 F. Supp. 2d at 1153. Respondent, presumptively, cannot make any showing in this case either, with respect to Penal Code §148.6.

Nor can the State, though notified of the pendency of this case, make any attempt to defend Penal Code §148.6. See "Proof of Service 'Notice of Challenge to the Constitutionality of California Penal Code §148.6' **(filed and served on Attorney General October 30, 2002).**

In order to survive heightened scrutiny, Respondent must justify the distinction between police officers and all others who are subject to official complaints. Not only will Respondent fail to justify this distinction; if anything, the importance of keeping an "open channel of communication" is even more pronounced with respect to law enforcement. As Imig recognized, the rationale for protecting citizen complaints against public officials is especially strong where police officers are concerned, "in light of the power and deadly force the state places" in their hands. Imig, 70 Cal. App. 3d at 56. As the Ninth Circuit similarly observed in Duran: "[T]he freedom of individuals to oppose or challenge police action verbally" is "one important characteristic by which we distinguish ourselves from a police state." Duran, 904 F.2d at 1378 (citing Hill, 482 U.S. at 462-63).

Even if there were some conceivable compelling interest supporting the selective targeting of complaints against peace

officers, the burden is on the **government** to show that the statute is narrowly tailored to serve the proffered interests. See, e.g., Boos v. Barry, 485 U.S. 312, 321, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988); Carey, 447 U.S. at 461-62. Assuming *arguendo* that there is some cognizable interest in providing special "protection" to police officers, over and above those enjoyed by all other public officials, Penal Code §148.6 is not narrowly tailored – or even rationally related – to serve that interest. As the Gritchen court observed:

> Even if the state interest behind the content discrimination in § 47.5 were compelling, the provision is not narrowly tailored to fit that interest. Significant protections from false complaints are already afforded to police officers by their internal oversight agencies, in addition to the possibility of perjury charges for false complainants. See Plaintiff's Reply, pp. 24-25.[19] If these protections are insufficient, California may strengthen existing safeguards or provide procedures to ensure police officers' careers are not put in jeopardy until after a complaint's truth is verified.

73 F. Supp. 2d at 1153.

Respondent may incorrectly assert that 'part of [Judge Taylor's] rationale' in Gritchen, for finding no compelling justification for singling out police officers, was "that police officers are already protected adequately through the criminal provisions punishing knowingly false reports, i.e., § 148.6."

While it is certainly true that there are permissible means by which to prevent officers' reputations from being harmed without infringing on speech, there is *no suggestion* in Gritchen or anywhere else that Section 148.6 is one of those. At no point was their **any** indication, either by the district court or the Gritchen plaintiff, that Section 148.6 provided an adequate alternative means by which to protect officers without infringing on speech. The Gritchen reply brief (referred to by the district court) and the evidence cited therein make reference to neutral **perjury laws** which, unlike Civil Code §47.5 and Penal Code §148.6, do not single out speech for disfavorable treatment based on the identity of the person criticized. Perjury laws, instead, proscribe willfully and knowingly made false statements under oath, towards whomever or whatever they are directed. See Penal Code §118 (defining perjury).

As documented in the expert evidence submitted in Gritchen, the means by which to make sure that officers' reputations are protected, **without** invading free speech, include the following:

$ Civilian oversight agencies only consider complaints that have been sustained after a thorough investigation.

$ [M]ost agencies do not publicize the names or allegations against officers unless they have been sustained, or proven to have been true.

$ Police officers who wish to challenge “sustained” findings

as to complaints made by civilian oversight agencies already have the protections of several legal rights and administrative procedures.

$ California law protects the confidentiality of citizen complaints contained in peace officer personnel files. Dunlap Decl. ¶20; see also Penal Code § 832.7(a).

$ California law allows police officers to have citizen complaints found to be frivolous or unfounded removed from their files. (citing Penal Code §832.5(c)).

The existence of other means by which to protect peace officers' reputational interests -- means that do not impede First Amendment rights -- undercuts any conceivable claim that Penal Code §148.6 survives the strict scrutiny that Supreme Court precedent requires. Respondent would be wrong to suggest that Gritchen in any way sanctions Section 148.6. To the contrary, Gritchen makes crystal clear that the distinction between police officers and other public officials, drawn by Penal Code §148.6 and Civil Code §47.5 alike, cannot pass constitutional muster. Penal Code §148.6 cannot survive any level of constitutional scrutiny, much less the heightened scrutiny mandated by the Supreme Court in R.A.V, Carey, and Mosley, and the federal district court in Gritchen.

V.

CONCLUSION

For the reasons set forth above, Mr. Chaker respectfully requests that this Court grant his Motion for Summary Judgment with respect to claim 1, grant Mr. Chaker's Petition for Writ of Habeas Corpus, and vacate Mr.Chaker's judgment of conviction.

Dated this day 30 day of October, 2002

Darren D. Chaker
Petitioner