No. 05-1118

IN THE

Supreme Court of the United States

ALAN CROGAN, CHIEF PROBATION OFFICER,

Petitioner,

v.

DARREN DAVID CHAKER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. A California statute criminalizes knowingly false accusations of peace officer misconduct but permits knowingly false statements exonerating the accused peace officer. Was the Court of Appeals correct in concluding that the statute is viewpoint discriminatory in violation of the First Amendment?

2. The statute singles out for punishment only false accusations against peace officers but not false accusations against any other public officials or private individuals. Should the ruling below be upheld on the alternative ground that the statute constitutes impermissible content discrimination under the First Amendment?

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JURISDICTION

Respondent has no quarrel with the Petition's statement of the basis for jurisdiction but does dispute the identities of the Petitioners listed. Although the only defendant in the proceedings below was Petitioner Alan Crogan, the Petition, without formal motion, purports to add "the People of the State of California" as a party. For convenience, Petitioner will be referred to as "the State."

STATUTORY PROVISION

The State quoted only an excerpt of the statutory provision at issue, Cal. Penal Code § 148.6. This provision is quoted in full in the Statutory Addendum to this Opposition.

INTRODUCTION

This case has all the hallmarks of a *cert.* denial.

Applying established principles of viewpoint discrimination from recent Supreme Court precedent, the Court of Appeals unanimously concluded that a California statute, Cal. Penal Code § 148.6(a), is impermissibly viewpoint discriminatory. The statute imposes criminal penalties only on those who are deemed to have made false *accusations* of misconduct against peace officers, but the accused peace officer who falsely denies such charges, and a fellow officer or civilian crony who falsely exonerates him, can lie with impunity. The State does not assert that this Court's precedents are unclear or that this case raises important unanswered questions. The State just disagrees with the panel's application of standard viewpoint discrimination principles to this peculiar case.

Peculiar is the word. The State has scarcely ever enforced the statutory provision; its lawyers can recall only one other prosecution in the statute's 10-year life span. Only four other states have statutes featuring the same discriminatory penalty. And the State can fix the problem tomorrow—without sacrificing the right to prosecute purveyors of false accusations—simply by applying any criminal penalty to all false statements made in connection with investigations of police misconduct, without regard to whether they accuse or support the officer.

Precisely because this sort of provision is so uncommon, the lower courts have scarcely had a chance to assess its constitutionality. Thus, no circuit split has materialized; indeed, every other federal court to assess section 148.6 or a similar statutory provision—in four district court cases—has found it unconstitutional.

While the State correctly points out that the California Supreme Court has rejected a constitutional challenge to the statute, *see People v. Stanistreet,* 29 Cal. 4th 497 (2002), *cert. denied*, 538 U.S. 1020 (2003), it neglects to mention that the challenge there was different—a *content* discrimination challenge based upon the argument that California must criminalize all false complaints against all public officials if it wishes to penalize false complaints against peace officers. The California Supreme Court has yet to rule upon the claim of *viewpoint* discrimination the Court of Appeals addressed here.

Perhaps the California Supreme Court—and some of the state or federal courts that might consider challenges to the handful of other state statutes exhibiting a similar defect—will eventually disagree with the Court of Appeals's ruling on this First Amendment theory. If so, this Court will have ample opportunity to address the issue. But this Court

should not stretch to do so in this case, both because the issue has scarcely percolated in the lower courts and because this case is the wrong vehicle.

The issue comes wrapped in an awkward habeas corpus posture, which carries baggage that will present unwelcome distractions, at best, and prevent this Court from reaching the merits, at worst. First, there is no factual record on which to assess the State's proffered justifications for the differential penalty. Second, the State previously raised a veritable obstacle course of jurisdictional challenges, none of which is independently worthy of this Court's attention. Third, the Magistrate Judge, the District Court, and the Court of Appeals applied three different standards of review. Should this Court address only whether the arguments in defense of the statute are reasonable (as the Magistrate Judge did), or whether a challenge can be sustained purely on the basis of law that was clearly established (as the District Court did), its ruling will have no practical value beyond this case.

If this Court is eager to consider the constitutionality of this uncommon statutory scheme, it will shortly have a more suitable vehicle: Currently pending before the Ninth Circuit is an appeal of a ruling declaring the same statute unconstitutional in a civil lawsuit brought to challenge the statute directly.

It was presumably for these reasons that not a single judge in the Ninth Circuit found this case worthy of en banc review. This Court, too, should decline review.

STATEMENT[1]

Mr. Chaker Accuses a Police Officer of Misconduct

In 1996, Respondent Darren Chaker contracted with an auto body shop to repair his car. ER 22. The contract specified the repairs to be performed and estimated a $2,000 price tag. *Id.* In violation of California law, the body shop performed additional work without Mr. Chaker's approval and demanded $4,800, more than twice the estimate. *Id.; see* Cal. Bus. & Prof. Code § 9884.9. Mr. Chaker retrieved his car without paying for the additional work. ER 22.

The body shop contacted the El Cajon Police Department, and Detective Bill Bradberry and Officer Terry Johnston later arrested Mr. Chaker for theft of services. App. 5a. The trial court dismissed the case, finding Mr. Chaker factually innocent of the charge, because it was illegal for the body shop to perform the unauthorized work in the first place. ER 24; SER 34.

This appeal arises not out of that case but out of an accusation Mr. Chaker made against one of the arresting officers. While the theft-of-services charge was pending, Mr. Chaker wrote a letter to the El Cajon Police Department's Internal Affairs Department alleging that Det. Bradberry used excessive force during the arrest. App. 5a. The letter stated that Mr. Chaker peaceably submitted to the arrest but that "Det. Bradberry hit me on my ribs anyway"

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[1] The Petition for Writ of Certiorari is cited as "Pet.," and the Appendix to the Petition is cited as "App." The Excerpts of Record and the Supplemental Excerpts of Record before the Court of Appeals are cited as "ER" and "SER," respectively. The transcript of oral argument before the Court of Appeals is cited as "Tr."

and that "Det. Bradberry's use of force damaged my wrist, ribs." App. 5a n.1; *see* App. 44a.

Mr. Chaker signed the letter "under penalty of perjury." App. 5a. He did not, however, sign the formal advisory required under California law acknowledging that an accuser can be criminally prosecuted for filing a false accusation. *See* Cal. Penal Code § 148.6(b)(2).

Mr. Chaker is Convicted for Writing the Letter

A half-year later, and 16 months after the theft-of-services charge was dismissed, the San Diego District Attorney's office brought new criminal charges against Mr. Chaker for writing that one accusatory letter. App. 5a-6a. Investigators had concluded that the accusation was false, and the district attorney charged Mr. Chaker under a state statute making it a crime to "file any allegation of misconduct against any peace officer … knowing the allegation to be false." Cal. Penal Code § 148.6(a)(1).

Predictably, the trial devolved into a swearing contest. While all agreed that Mr. Chaker "did not resist at all" when Det. Bradberry arrested him, App. 44a-45a, the two stories diverged from there. Mr. Chaker swore that Det. Bradberry had unnecessarily twisted his wrist, causing him extreme pain, and had roughly wrenched him out of the van when he was half way in, injuring his head and ribs. App. 45a. Mr. Chaker's mother and his lawyer for the theft-of-services case testified that Det. Bradberry flew into a rage and threatened Mr. Chaker when Mr. Chaker served him with a lawsuit in open court. ER 21-24. Det. Bradberry and his partner, for their part, denied the charges of excessive force. App. 6a, 44a-45a. Law enforcement also produced a civilian witness who testified that the arrest appeared routine and that, from her vantage point inside the store where Mr. Chaker was

arrested, she did not hear complaints of pain or raised voices coming from the van outside. App. 6a; ER 12. Det. Bradberry also denied issuing any threats. App. 45a.

Unable to resolve the conflicting testimony, the first jury deadlocked. App. 42a. On retrial, a second jury resolved the credibility questions in favor of the officers and convicted Mr. Chaker. *Id.* The court sentenced him to two days in jail, plus community service, three years' probation, and fines and restitution. App. 6a. The Appellate Division affirmed the conviction. App. 7a.

Mr. Chaker Seeks Habeas Relief

Mr. Chaker filed three successive habeas corpus petitions in state court. The third, filed in 2001 in the California Supreme Court, challenged the constitutionality of section 148.6, the statutory provision under which he was convicted. Mr. Chaker invoked a recent decision from a federal court in California holding that the statute violated the First Amendment. ER 46I; *see La France Hamilton v. City of San Bernardino,* 107 F. Supp. 2d 1239 (C.D. Cal. 2000); *see also La France Hamilton v. City of San Bernardino,* 325 F. Supp. 2d 1087, 1095 (C.D. Cal. 2004) (permanently enjoining enforcement of section 148.6). The state court denied the petition on procedural grounds. App. 7a. Mr. Chaker then amended a federal habeas corpus petition he had previously filed to include a constitutional challenge to the statute. *Id.*

The Magistrate Judge believed the statute "probably violates the First Amendment." App. 38a. But he recommended denial of the petition in light of the habeas corpus statute's direction that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits … unless the adjudication of the claim … resulted in a decision that … *involved an unreasonable application of,*

clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d) & (d)(1) (emphasis added). The Magistrate Judge believed that habeas relief could not be granted on this claim because "reasonable jurists can obviously differ as to the constitutionality" of the statute. App. 38a.

The District Court, too, denied the claim. App. 7a, 27a-107a. The District Court rejected the Magistrate Judge's standard of review, adopting a different, but still deferential, standard: "[T]his Court is obligated to exercise its independent judgment regarding whether Petitioner's conviction violated the federal Constitution after carefully weighing all the reasons for a state court's judgment and determining whether that judgment was objectively unreasonable." App. 39a. But the District Court believed that habeas review of this case had to be limited only to arguments based upon "clearly established federal law," as opposed to arguments that might fill in gray areas or expand upon current doctrine. App. 46a, 57a, 60a, 61a. Through this deferential lens, the District Court declined to disturb the conviction. App. 60a-62a.

The Court of Appeals Finds the Statute Unconstitutional

The Court of Appeals unanimously reversed, directing the District Court to grant the writ. App. 26a. On its way to the merits, the Court of Appeals had to plod through a litany of new procedural grounds—including four purported jurisdictional arguments—that the State and its amici urged for affirming the dismissal. *See* App. 8a-12a; *see infra* at 26-27. Next, the Court of Appeals turned to the disagreement between the District Court and the Magistrate Judge as to the appropriate standard of review and concluded they were both wrong. The Court of Appeals adopted yet a third analysis, holding that de novo review was appropriate because "there

is no state court ruling on the merits of Chaker's First Amendment claim," and thus no opinion to which to defer. App. 12a.

Turning, finally, to the merits, the Court of Appeals held that section 148.6 violated the First Amendment. Reviewing this Court's decisions in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and *Virginia v. Black*, 538 U.S. 343 (2003), the Court of Appeals noted that certain speech, such as "fighting words" or libel, does not warrant constitutional protection but that regulation of such low-value speech still may not be based on the speaker's viewpoint. App. 17a-21a. The court then observed that section 148.6 criminalizes only accusations that law enforcement officials later conclude were false and not lies of peace officers who falsely deny the allegations or the lies of fellow officers or witnesses who falsely exonerate them. App. 22a-24a. The court thus concluded that the statute impermissibly regulates speech on the basis of a speaker's viewpoint. App. 24a.

The State petitioned for rehearing en banc. Its petition led with an argument that the court lacked jurisdiction to entertain this habeas case because it was moot. *See* Petition for Rehearing En Banc at 6-9. The State also made the same First Amendment arguments it advances in this Petition. *Id.* at 9-17. The Court of Appeals denied the petition, noting that not a single one of the circuit's 24 active judges considered the case worthy of en banc review. App. 1a.

REASONS TO DENY THE WRIT

The parties agree on all the foundational principles: First, abusive, corrupt, or wayward police officers degrade our justice system and undermine the public's faith in law enforcement. Second, in order to deter and punish police abuses, the government must set up some system by which

victims of such abuses can bring them to the attention of the authorities. Third, the government should have some latitude to protect the integrity of the mechanism by which complaints are lodged and investigated.

None of these foundational principles is at stake in this case. California's complaint system remains intact; citizens are as free as ever to report police abuses. The Court of Appeals did not question California's interest in "assuring the integrity" of that process, Pet. 6, and cast no doubt on California's latitude, if it chooses, to achieve that goal by punishing citizens who make accusations that the police later conclude are false.

All the Court of Appeals held was that if California wishes to take that step, the penalty must swing both ways. California may not, in the name of protecting integrity, adopt a discriminatory penalty that could send a citizen to jail for making an accusation that the police later deem false but give a free pass to the officer who falsely denies the charge against him or the brother officer or civilian who falsely exonerates him. But, as the Court of Appeals observed, the "impermissible viewpoint-based bias ... is easily cured." App. 26a.

The State asks this Court to intervene, seeking a ruling that the State is permitted to punish only the accuser and not the accused or his supporters. This Court should deny the writ for four reasons. First, the issue is not of profound importance, even to the State of California, much less to the rest of the nation. Second, there is no conflict among the circuits, or even with the California Supreme Court, and few courts have had the opportunity to wrestle with the questions presented. Third, the issue is not novel, and the Court of Appeals was correct. Fourth, this case is not, in any event, a suitable vehicle for resolving the questions presented.

I. THE VALIDITY OF A RARE AND LITTLE-USED STATE LAW IS NOT A QUESTION OF PROFOUND NATIONAL IMPORTANCE, ESPECIALLY SINCE THE CALIFORNIA LEGISLATURE CAN EASILY REMEDY ANY FLAW

A. Few States Have Adopted California's Discriminatory Penalty Scheme.

While asserting that it is "important to the states" to preserve a lopsided penalty scheme, Pet. 13, the State, in the next breath, furnishes the best evidence that it is not: The State lists only "six other states," and not a single local government, "hav[ing] statutes similar" to California's. Pet. 14. Even by the State's own estimation, then, that means that nearly nine out of ten states—and countless local governments—have found more conventional and evenhanded ways to protect the integrity of their police misconduct investigations.

Even that meager estimate exaggerates the national importance by 50 percent. In truth, only four of the six states currently have statutes similar to California's. The two statutes the State misdescribes are themselves illustrative of why the question presented here is not a question of burning national importance.

First, the New Hampshire law invoked by the State applies to reports of all criminal offenses, not just police misconduct; and it prohibits falsely reporting that *anyone* has committed a crime, not just a police officer. *See* N.H. Rev. Stat. Ann. § 641:4 (2005); *State v. Hill,* 146 N.H. 568, 575, 781 A.2d 979, 986 (2001); *State v. Allard,* 148 N.H. 702, 707, 813 A.2d 506, 510-11 (2002). More importantly, this statute prohibits all false statements about a criminal offense whether those statements inculpate or exculpate the alleged

offender. N.H. Rev. Stat. Ann. § 641:4(II) (2005). The statute thus avoids the precise defect that doomed the California statute.

Conversely, the Nevada statute *did* share the same defect as the California statute, but the state legislature repealed the statute. *See* Nev. Sen. Bill No. 150 (repealing Nev. Rev. Stats. 199.325(1)). The repeal came in response to a district court decision finding the statute violated the First Amendment three years before the Ninth Circuit reached that same conclusion here. *Eakins v. Nevada,* 219 F. Supp. 2d 1113 (D. Nev. 2002). As if to underscore just how inconsequential the ruling is to a state's interests, Nevada did not bother appealing before repealing. Instead, before the Ninth Circuit even weighed in on the question, Nevada opted to cover reports of police abuse in a broader statute that penalizes false reports of crimes, whether or not committed by police officers. *See* Nev. Rev. Stat. Ann. § 207.280 (2004).

The remaining four state statutes featured in the Petition were passed within the last decade—three in the past five years alone. *See* Minn. Stat. § 609.505(2) (2005) (effective Aug. 1, 2005); Ind. Code Ann. § 35-44-2-2(d)(5) (2006) (effective June 30, 2003); Ohio R.C. Ann. § 2921.15(B) (2006) (effective Mar. 22, 2001); Wis. Stat. Ann. § 946.66 (2006) (effective May 12, 1998). The State offers no reason to believe that the discriminatory penalty was integral to the thinking of those legislatures in adopting those statutes.

B. Even for California, It is Not Critically Important to Maintain the Discriminatory Approach, and the Flaw Is Easily Remedied.

Even for California, the facts belie the State's claim that the Court of Appeals has dealt a "grave" blow, Pet. 6, to "[t]he integrity of the peace officer misconduct reporting system," Pet. 10.

The only evidence the State points to in support of this assertion is this observation: "The Los Angeles District Attorney's Office, the largest ... in the state, as well as other [unnamed] district attorney's offices in the state, has advised the law enforcement agencies ... that attempts to enforce section 148.6 may result in federal civil rights liability for an officer who arrests for a violation of the statute." *Id.* To assess how grave a problem that is, one might ask, "How many people have been charged under this section?" Tr. 63. That was what the Court of Appeals asked the State during oral argument. The State's response was that section 148.6 is "a rarely enforced statute." *Id.* The State had "researched" the question and was able to come up with only one other prosecution in the decade-long history of the statute—the one that yielded the California Supreme Court's decision on section 148.6. *Id.* Calling this "an important state penal statute," Pet. 10, is like calling the appendix an important bodily organ.

Notably, the Court of Appeals did not create the status quo the State bemoans. More than five years ago, a federal court in the Central District of California—which embraces Los Angeles and its large prosecutorial force—declared the statute invalid in a civil suit brought to challenge the law on its face, *see Hamilton v. City of San Bernardino,* 107 F. Supp. 2d 1239 (C.D. Cal. 2000), and nearly two years ago,

the same court permanently enjoined enforcement of the statute on the ground that it is unconstitutional, *see Hamilton v. City of San Bernardino,* 325 F. Supp. 2d 1087, 1095 (C.D. Cal. 2004). As the Court of Appeals pointed out, the defect "is easily cured." App. 26a. All the legislature has to do is amend the law to treat all witnesses the same. *Id.* Yet, the state legislature has not seen fit to step into the breach and amend the statute.

The legislature has sat idle, not because of political gridlock, but because of legislative apathy. Section 148.6, backed by a powerful law enforcement lobby, originally passed with overwhelming majorities in both the State Senate (32-2) and State Assembly (70-3). With similar margins, the legislature has since passed two bills adding, and then enhancing, a related provision to protect officers from false complaints. *See* Cal. Penal Code § 832.5(c).[2] The legislature could and would fix the flaw—tomorrow—if law enforcement sensed a pressing need. *See infra* at 24-26 (rebutting the State's asserted "policy concerns" about the proposed fix). The legislature's idleness is evidence of the statute's true salience.

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[2] In 1996, the legislature added a provision (codified as Cal. Penal Code § 832.5(c)) requiring that "frivolous," "unfounded," or "exonerated" complaints of misconduct be removed from officers' personnel files and placed in a separate file. *See* Stats. 1996 ch. 1108 § 1 (AB 3434). The bill passed the State Senate by a vote of 27-2 and the Assembly by a margin of 64-7. In 1998, the legislature expanded the protection by prohibiting use of the removed complaints in decisions on promotions or sanctions. *See* Stats. 1998 ch. 25 § 1 (AB 1016). This bill passed the Senate, 36-0, and the Assembly, 75-1.

It is no wonder that not a single judge among the Ninth Circuit's 24 active judges considered this case important enough to warrant en banc review.

II. THE COURT OF APPEALS'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT, INCLUDING THE CALIFORNIA SUPREME COURT.

The State does not assert that the Court of Appeals's ruling conflicts with the ruling of any other circuit. To the contrary, except for the District Court in this case, every federal judge to consider this sort of statute has found it unconstitutional, including the Magistrate Judge and all three members of the appellate panel in this case, plus three other federal district judges in four cases.[3]

Because the handful of similar state statutes are so new and so rarely enforced, there has been virtually no other legal activity beyond these few cases. With only one exception, the statutes that the State considers comparable—from Minnesota, Indiana, Ohio, Wisconsin, New Hampshire, and Nevada (as amended)—have not yet been judicially tested. The only exception is a ruling from a municipal judge in Ohio, declaring that state's statute unconstitutional. *See State v. English,* 120 Ohio Misc. 2d 16, 776 N.E.2d 1179

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[3] *See Hamilton v. City of San Bernardino*, 325 F. Supp. 2d 1087, 1095 (C.D. Cal. 2004) (striking Cal. Penal Code § 148.6); *Eakins v. Nevada*, 219 F. Supp. 2d 1113, 1121 (D. Nev. 2002) (striking Nevada statute); *Gritchen v. Collier*, 73 F. Supp. 2d 1148, 1153 (C.D. Cal. 1999) (striking "civil equivalent" of § 148.6), *rev'd on other grounds*, 254 F.3d 807 (9th Cir. 2001); *Haddad v. Wall*, 107 F. Supp. 2d 1230, 1238 (C.D. Cal. 2000) (same), *vacated on other grounds*, 48 Fed. Appx. 279 (9th Cir. 2002) (unpublished opinion).

(Elyria Muni. Ct. 2002). Even there, the courts continue to enforce the statute. *Baldwin's Ohio Practice Criminal Law,* § 110.10. All of which means that the First, Sixth, Seventh, and Eighth Circuits—and the trial and appellate courts in those states—will have ample opportunity to weigh in on the constitutional questions and air any disagreement with the Court of Appeals's ruling in this case.

The State does not suggest otherwise. Its argument of irrevocable conflict focuses only on a single opinion from the California Supreme Court. Pet. 8 (citing *People v. Stanistreet,* 29 Cal. 4th 497 (2002), *cert. denied*, 538 U.S. 1020 (2003)). But that case is not in conflict with the opinion presented here for review because the two cases examined *different* challenges to the statute.

As we have seen, in this case, the Court of Appeals premised its holding on a viewpoint discrimination argument: that section 148.6 amounted to unconstitutional *viewpoint* discrimination because it punished only accusations against peace officers *and not statements in support of peace officers*. *See* App. 24a. The California Supreme Court did not address that argument. It addressed a completely different *content* discrimination argument, that "section 148.6 gives protection to peace officers that the Legislature has not given to others.... 'It is not a crime to knowingly make such an accusation against a firefighter, a paramedic, a teacher, an elected official, or anyone else.'" *Stanistreet*, 29 Cal. 4th at 503 (quoting intermediate court's ruling); *see id.* at 507 (quoting argument from brief).

In rejecting that argument, the California Supreme Court said nothing about the theory the Court of Appeals addressed here. It never even mentioned the words "viewpoint discrimination." Conversely, here, the Court of Appeals, acknowledged the difference between the two arguments,

noting that Mr. Chaker *also* presented the content discrimination theory—the very theory rejected by the California Supreme Court. App. 24a n.10; *see supra* at i (preserving alternative theory for affirming).

Simply put, the purported conflict is not "true, permanent, genuine, and current," Pet. 10; it is false, avoidable, hypothetical, and remote. Since there is no pressing need to take the case now, this Court should allow this issue to percolate in the lower courts to see whether a genuine conflict ever materializes.

III. THE COURT OF APPEALS'S RULING WAS A STRAIGHTFORWARD AND CORRECT APPLICATION OF RECENT SUPREME COURT DECISIONS TO A NEW SET OF FACTS

In concluding that California's discriminatory speech penalty was unconstitutional, the Court of Appeals conducted a painstaking analysis of the controlling precedents. The central precedent is *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which held that even where a state has the power to proscribe speech (there, fighting words), it may not "impose special prohibitions on those speakers who express views on disfavored subjects," much less on those who express disfavored subjects. *Id.* at 391. This Court applied this principle more recently to another statute in *Virginia v. Black*, 538 U.S. 343 (2003).

The State urges this Court to revisit the doctrinal arena again just three years later. While noting that this Court has resolved some "vexing, yet critical" issues in this field, Pet. 5, the State does not contend that this Court's analysis left open any "vexing" question that lies at the heart of this case. Rather, the State's challenge to the Court of Appeals's analysis revolves around more mundane disagreements about

how best to apply the established principles to the peculiar—and uncommon—regulation presented here. This Court should deny *certiorari* both because these fact-bound disputes are not worthy of its attention and because the Court of Appeals correctly resolved them.

A. The Court of Appeals's Ruling Applied Established Precedents Faithfully to Find the Statute Viewpoint Discriminatory.

The Court of Appeals's analysis unfolded in three basic steps, the first two of which the State scarcely challenges. First, the Court of Appeals observed that *R.A.V.*'s holding about fighting words applies with equal force to libel, which is to say, to statutes, like section 148.6, that impose criminal penalties for allegedly false statements. While the State half-heartedly "suggest[s]" that perhaps *R.A.V.*'s principles are inapplicable to libel statutes, it does not suggest that this Court, or any court, has ever hinted at such a carveout. *See* Pet. 13. To the contrary, in reaching its conclusion about fighting words, this Court took for granted that "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *R.A.V.*, 505 U.S. at 384 (emphasis in original).

Second, the Court of Appeals concluded that this is exactly what section 148.6 does. As a factual matter, the Court of Appeals concluded that section 148.6 proscribes only libel (knowingly false accusations) critical of certain government officials (peace officers) in connection with investigations of police misconduct, while allowing other participants in the same investigation to lie with impunity. App. 22a. The Court of Appeals illustrated how the differential treatment plays out specifically on the facts of this case:

> At Chaker's criminal trial, the witness who observed Chaker's arrest testified that she saw no signs of excessive force during Chaker's arrest. However, had the witness made this statement to the investigator charged with investigating Chaker's complaint, knowing the statement to be false, the witness would not have faced criminal sanction under section 148.6. Similarly, had Officer Bradberry made a knowingly false statement to the investigator charged with investigating Chaker's complaint, Officer Bradberry would not have faced criminal sanction under section 148.6. It is only Chaker, who filed a complaint of peace officer misconduct complaining that Officer Bradberry mistreated him in the course of the arrest, who faced criminal liability under section 148.6.

App. 24a. Although the State unsuccessfully quarreled with this factual premise below, at least as it relates to the accused officer, *see* App. 25a-26a, its Petition does not press that argument.

Third, from this factual observation, the Court of Appeals found "the Supreme Court's analysis in *R.A.V.* controlling." App. 24a. As the Court of Appeals explained, "Like the ordinance at issue in *R.A.V.*, section 148.6 regulates an unprotected category of speech, but singles out certain speech within that category for special opprobrium based on the speaker's viewpoint." *Id.* Specifically, "[o]nly knowingly false speech *critical* of peace officer conduct is subject to prosecution under section 148.6." *Id.* (emphasis in original). In contrast, "[k]nowingly false speech *supportive* of peace officer conduct is not similarly subject to prosecution." *Id.* (emphasis in original). Accordingly, the Court of Appeals held, "the statute impermissibly regulates speech on the basis of a speaker's viewpoint." *Id.* (footnote omitted).

The State rejects this logic as "facile," asserting that "[a] knowingly false statement ... is neither 'critical' nor 'supportive,'" but "simply false." Pet. 19. "Such false statements," the State argues, "do not express a 'viewpoint' as that term is understood for purposes of the Free Speech Clause." *Id.* To the contrary, when this Court observed that "the government ... may not ... proscrib[e] *only* libel critical of the government," *R.A.V.*, 505 U.S. at 384, it confirmed that lies are at least as prone to advancing viewpoints as fighting words or obscenity. The relevant question is whether one perspective within a discrete forum triggers the penalty while the opposite perspective does not—whether the government is trying to "license one side of a debate" and burden the other. *Id.* at 392. The debate over whether a peace officer is guilty of misconduct is no exception to the rule, and the fact that this debate unfolds in the course of an investigation, and "not a debating society, a community bulletin board, a public park or sidewalk" is of no constitutional relevance. Pet. 19.

The State also argues, in various ways, that the Court of Appeals erred in focusing on the *investigation* rather than narrowly on the *complaint*. In one formulation, the State argues that section 148.6 creates a "special forum," which it describes as a "peace officer misconduct reporting 'forum,'" and is therefore justified in regulating only the accusations of misconduct. Pet. 17-18 (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), a "limited public forum" case). Putting aside that there is no such breed in this Court's forum taxonomy as a "special forum," the flaw in the State's analysis is that it is misdescribing the forum. If the point of the forum were to air gripes about peace officers in the interest of catharsis, it might be appropriate to call this a "peace officer misconduct reporting 'forum.'" But since, as the State recognizes, the purpose is

"to receive such complaints" in order to "investigate [them and] report and keep records concerning such investigations," the only appropriate description of the "forum" is a "peace officer misconduct *investigation* forum," or, as the State itself puts it elsewhere in its Petition, "a 'special forum' … to ensure police accountability." Pet. 8; *see also* App. 22a. The complaint is simply the mechanism by which the civilian gains access to the investigation. *See* App. 17a ("our First Amendment analysis focuses solely on the application of section 148.6 within the context of the complaint investigation process"). Having established that forum for both sides of the debate, the State is not free to burden one side and let the other side "fight freestyle." *R.A.V.*, 505 U.S. at 392; App. 24a.

In a related vein, the State disputes the "premise that all false reports or statements concerning allegations of peace officer misconduct, whether the initial false allegation which prompts an investigation *or* a false statement in the course of such an investigation, are equally pernicious and deserving of regulation." Pet. 11 (emphasis in original). As the State sees it, the false accusation—or, as the State calls it, "the false alarm"—is "more pernicious, and therefore more deserving of regulation," than an abusive officer's lie denying the abuse or a trumped-up witness's lie exonerating the abusive officer. Pet. 15.

The State could not possibly make the assertion that the accuser's lies are worse than police lies if it focused on the primary purpose served by California's police-complaint scheme—to ensure that police abuses are exposed and punished. *See* App. 22a. Just as disabling a real fire alarm to let a building burn inflicts more damage than setting off a false alarm, so, too, false denials of misconduct undermine the purposes of an investigatory structure more than false accusations. The victim of a false alarm—the unfairly

accused officer—has a statutory right to wipe his record clean and can suffer no lasting consequences. *See supra* at 13 n.2. In contrast, the victims of a corrupt officer will multiply over time, will suffer far more, and will obtain neither justice nor redress as long as the officer gets away with his lies.

Instead, the only way the State can support its counterintuitive assertion is by focusing exclusively on one dimension of the problem of false statements, the wasted resources, to the exclusion of the overarching goal. Even if such a myopic focus were proper, the Court of Appeals persuasively demonstrated that "a peace officer or witness who lies during an investigation is equally to blame for wasting public resources by interfering with the expeditious resolution of an investigation." App. 22a. As the court pointed out, "[t]he state's asserted interest in saving valuable public resources and maintaining the integrity of the complaint process is therefore called into question by its choice to prohibit only the knowingly false speech of those citizens who complain of peace officer conduct." *Id.* (citation omitted).

The State incorrectly describes this last point as an impermissible "underinclusiveness" test. Pet. 11. As the State puts it, "the Ninth Circuit adverted exclusively to an underinclusiveness analysis based upon the notion there is a suspect exemption of certain speech from the reach of the statute—speech '*supportive*' of a police officer." *Id.* (emphasis in original). This was the very same criticism this Court rebutted in *R.A.V.* *See* 505 U.S. at 387. As the Court explained, "the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation"—and obviously, a "viewpoint discrimination" limitation—"upon a State's prohibition of proscribable speech." *Id.* The argument that the Court of Appeals

adopted, like the argument this Court adopted in *R.A.V.*, is an argument about viewpoint. That analytical truth is not undermined by the fact that the Court of Appeals, at one point in a lengthy opinion, imprecisely used the word "under-inclusiveness" to describe the viewpoint discrimination. App. 23a.

B. The Court of Appeals Did Not Err In Declining to Enumerate the Three *R.A.V.* Exceptions and Address Them Individually.

Completely apart from the inherent logic of the Court of Appeals's analysis, the State argues that the court below erred in failing to "mention" explicitly "the three categories which render content regulation permissible under the First Amendment." Pet. 11. The State is referring to this Court's observation in *R.A.V.* that there are circumstances in which "*content* discrimination among various instances of a class of proscribable speech ... does not pose th[e] threat" that "'the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *R.A.V.*, 505 U.S. at 387 (emphasis added) (quoting *Simon & Schuster*, 502 U.S. 105, 116 (1991)).

There are two responses to this criticism. First, the Court of Appeals was not obliged to consider these three circumstances, because it found not merely content discrimination but outright viewpoint discrimination. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995) ("viewpoint discrimination," unlike content discrimination, "is presumed impermissible when directed against speech otherwise within the forum's limitations"); *Turner Broadcasting System v. FCC*, 512 U.S. 622, 641-43 (1994) (intermediate scrutiny for regulation is unavailable where the regulation discriminates on the basis

of viewpoint). This Court has not held that these exceptions could salvage a viewpoint discriminatory statute. More importantly, although the Court of Appeals did not enumerate all three exceptions and address them one by one, it *did* acknowledge the exceptions, App. 19a, and rejected as meritless claims regarding the only two exceptions that could arguably apply.

In particular, the Court of Appeals quoted verbatim the exception that applies where "'the basis for the content discrimination consists [entirely] of the very reason the entire class of speech at issue is proscribable.'" *Id.* (quoting *R.A.V.*, 505 U.S. at 388). The Court could not have been clearer that it believed that "the very reason the entire class of speech at issue is proscribable"—because false speech undermines the integrity of the investigation and wastes resources—does *not* justify California's lopsided punishment. App. 22a.

Similarly, the Court of Appeals rejected the third exception, which applies where "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. The Court of Appeals held that "'[s]uspicion that viewpoint discrimination is afoot is at its zenith'" in this case because "section 148.6 is necessarily limited to criticism of government officials—peace officers." App. 23a. As the Court of Appeals observed, because "the same entity against which the complaint is made will be investigating the accusations" of misconduct, criminalizing false allegations against the police inevitably tends to "'chill' the willingness of citizens to file [even legitimate] complaints." App. 14a (citation and internal quotations omitted). Limiting liability for false statements to only those who make the accusation exacerbates this chilling effect without advancing the stated

aim of preserving the integrity of the citizen complaint process. App. 22a-24a.

All that remains is the second exception, where "a content-defined subclass of proscribable speech … happens to be associated with particular 'secondary effects.'" *R.A.V.*, 505 U.S. at 389. But that exception is obviously inapposite, which is presumably why the State does not mention it and the Court of Appeals did not address it. The accusations are subject to punishment because the State wishes to eliminate the category of speech—false complaints—not because of some secondary effects they yield. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986) (defining secondary effects); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (same).

In the end, the State urges this Court to grant review because the Court of Appeals did not explicitly say it was doing what it was quite plainly doing. If this Court does not sit as a court of errors, it certainly does not sit to discipline lower courts to show all their work en route to the right answer.

C. The State Has No Compelling Interest In Adhering to a Discriminatory Penalty Structure

The State does not argue—at least not explicitly—that its interests in adhering to the lopsided penalty structure could satisfy strict scrutiny. But it does complain that the more evenhanded structure—in which "the State … simply outlaw[s] all false statements to law enforcement officials in the course of an official investigation" of police misconduct—"raises significant policy concerns." Pet. 16-17. The State mentions two concerns in particular, neither of which overcomes the First Amendment defect.

First, the State asserts that evenhanded regulation of all statements in the course of an investigation of police misconduct would "potentially chill a broad range of statements in a myriad of circumstances." Pet. 17. As we have seen, there is no question that the prospect of a criminal penalty could chill potential *complainants* with legitimate complaints. *See Friedman v. United States*, 374 F.2d 363, 369 (8th Cir. 1967); App. 14a. It is much harder to see how extending the penalty would "chill" the participation of others. Surely, the officer who is the target of the misconduct complaint will not be chilled from participating to defend himself, except to the extent that the added penalty might "chill" his inclination to lie. The same is true of the fellow officer, or innocent bystander, who would offer exonerating testimony. No doubt, the criminal penalty will make each think twice about lying to save the accused officer's hide, but it is unlikely to chill them from participating at all.

In a related vein, the State insists such an evenhanded approach "could work great mischief in the hands of an unscrupulous or biased police officer or prosecutor." Pet. 16-17. But it does not say how. Under the version of section 148.6 the legislature passed, the "unscrupulous … police officer" accused of misconduct has every incentive to lie. Placing the threat of prosecution on him merely counterbalances the incentive structure. In referring to a "biased police officer or prosecutor," the State is evidently focusing on the law enforcement personnel conducting the investigation. A biased investigator may confront two scenarios: (1) he erroneously believes the accusation is a lie and is bent on prosecuting the accuser; or (2) he erroneously believes the accused officer's defense is a lie and is bent on prosecuting the accused officer for propounding the defense (and not just for the underlying conduct) and every witness

who supports his false story. There is little reason to believe scenario 2 would materialize with much frequency, but even if it arises, it cannot be possibly more likely than scenario 1. If the State is content to live with the potential mischief caused by scenario 1, then it cannot credibly claim to be concerned about the potential mischief of scenario 2.

IV. THIS HABEAS CORPUS CASE IS NOT A PROPER VEHICLE FOR RESOLUTION OF THE ISSUE PRESENTED ON THE MERITS

Even if the questions presented in this case were suitable for this Court's review, the Court should await another opportunity to address these issues, for this habeas corpus appeal is an unsuitable vehicle. For three reasons, the unique procedural posture means that this case does not present the merits question cleanly and possibly not at all.

First, Mr. Chaker was denied an evidentiary hearing in which to explore, and challenge, the State's justifications for section 148.6's differential penalty. *See* App. 36a, 45a. The record is, therefore, limited to little more than snippets of legislative history.

Second, on appeal, the State and its amici raised four arguments that the Court of Appeals had to address because they were (or were asserted to be) jurisdictional. *See* App. 8a-10a & n.4 (addressing one argument on jurisdiction, one on mootness, one on standing, and one couched as a jurisdictional bar arising from the statute of limitations). For example, the State's leading argument on appeal, and in its en banc petition, was that Mr. Chaker's habeas corpus petition became moot once his probation had expired. *See* App. 8a-9a. The Court of Appeals rejected this particular jurisdictional argument on the strength of this Court's precedent that a habeas petition that is pending beyond the

petitioner's custody becomes moot only if there is no possibility of collateral legal consequences that flow from the conviction, *see Sibron v. New York*, 392 U.S. 40, 57 (1968), as embellished by Ninth Circuit law pronouncing an irrebutable presumption that there are always "collateral consequences" from any conviction, including a misdemeanor conviction. *See Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994); *Larche v. Simons*, 53 F.3d 1068, 1070 n.1 (9th Cir. 1995). In its petition for rehearing en banc, the State asserted that the Ninth Circuit presumption is incorrect in light of intervening authority from this Court. *See Spencer v. Kemna*, 523 U.S. 1 (1998).

This position is incorrect, for reasons Mr. Chaker explained below. But the point here is a simpler one: The State does not suggest that this issue is independently *cert.*-worthy, and for good reason: (1) the Ninth Circuit standard is consistent with the law of other circuits; (2) Mr. Chaker can demonstrate a concrete collateral consequence independent of any presumption; and (3) the circumstance is unlikely to arise again, except perhaps where, as here, the state has waived other habeas defenses designed to limit the longevity of habeas relief, like the statute of limitations, procedural default, and independent and adequate state grounds. *See* App. 9a-12a (finding these defenses waived). Nevertheless, if this Court accepts this case for review, it will have to labor through the issue anyway—along with each of the other three jurisdictional arguments—before reaching the merits. In the best case scenario, this Court will waste inordinate resources to get to the merits. But if the State has its way, this Court will never even reach the merits of the question the State presses for review.

Third, even if this Court does reach the merits, the State will undoubtedly try to persuade it to apply a standard of review that disposes of this habeas case without definitively

resolving the constitutional question. As noted above, the State had persuaded the Magistrate Judge that he was required to deny habeas relief even though he believed the statute was unconstitutional, and had persuaded the District Court to apply only "clearly established federal law" and some level of deference to the state court judgment. *See supra* at 6-7.

As the Court of Appeals understood, de novo review was appropriate, since there was not a state court ruling on the merits to which to defer. App. 12a; *see Wiggins v. Smith,* 539 U.S. 510, 534 (2003). Moreover, the State has waived any more deferential standard of review by not pressing it in its Petition to this Court. But that will not necessarily stop the State from urging the Court to adopt a deferential standard in this case. If it tries to do so, this is yet another issue this Court will have to plod through en route to the merits. And in the event the State succeeds, it will not have managed to save the statute; it will simply have managed to secure from this Court an unedifying ruling that there are arguments in defense of the statute that are reasonable or arguments against the statute that had not yet been "clearly established" when the habeas petition was filed.

At best, then, the State is asking this Court to navigate a procedural obstacle course to reach the question presented for review. At worst, the State is presenting an issue that the Court will find itself constrained not to reach. Either way, this Court would be better served by awaiting a more suitable vehicle—whether on direct appeal from a conviction or on a facial challenge to the statute.

One such case is practically at the Court's doorstep. The district court's ruling in *Hamilton v. City of San Bernardino,* 325 F. Supp. 2d 1087 (C.D. Cal. 2004), enjoining section 148.6 as facially unconstitutional, is currently pending on

appeal in the Ninth Circuit. If this Court is eager to decide the issue presented, it would be well advised to wait the extra few months for that case, which presents the issue cleanly and on a full summary judgment record.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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