No. S275272

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

LOS ANGELES POLICE PROTECTIVE LEAGUE,
Plaintiff and Respondent,
v.
CITY OF LOS ANGELES AND CHARLES BECK,
Defendants and Petitioner.

Review of a Decision of the Court of Appeal,
Second Appellate District, Division Seven, Case No. B306321
Los Angeles County Superior Court, Case No. BC676283

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, BLACK LIVES MATTER—LOS ANGELES, CHECK THE SHERIFF, FIRST AMENDMENT COALITION, AND JUSTICELA COALITION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 8.208(e) of the California Rules of Court, Amici certify that they know of no other person or entity that has a financial or other interest in this case.

Dated: March 6, 2023

By: */s/ Kathleen Hartnett*

Kathleen R. Hartnett

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Proposed amici request leave to file the accompanying amicus curiae brief in support of Petitioner City of Los Angeles.

Interest of the Amici Curiae

American Civil Liberties Union of Southern California and the **American Civil Liberties Union of Northern California** are California affiliates of the national American Civil Liberties Union ("ACLU"), a non-profit, non-partisan civil liberties organization with more than 1.7 million members dedicated to the principles of liberty and equality embodied in both the U.S. and California Constitutions, as well as to advancing governmental transparency and accountability. The ACLU has a longstanding interest in preserving the First Amendment rights of all and has engaged in legislative advocacy and participated in litigation to protect the rights of public citizens to file complaints of police misconduct. As part of that work, the ACLU represented habeas petitioner Darren Chaker in *Chaker v. Crogan* (9th Cir. 2005) 428 F.3d 1215, cert. denied (2006) 126 S.Ct. 2023, before the United States Court of Appeals for the Ninth Circuit; Defendants-Appellants Shaun Stanistreet and Barbara Atkinson before this Court in *People v. Stanistreet* (2002) 29 Cal.4th 497; and La France Hamilton in *Hamilton v.*

City of San Bernardino (C.D. Cal. 2004) 325 F.Supp.2d 1087, before the United States District Court for the Central District of California. All three cases concerned the same question at issue in this suit: whether California Penal Code Section 148.6 violates the U.S. and California Constitutions.

Black Lives Matter—Los Angeles ("BLM—LA") is the first chapter of Black Lives Matter and as such, is a part of Black Lives Matter Grassroots, the larger network of chapters around the world that do the on-the-ground work that has been moving since its inception in 2013. BLM—LA is a grassroots community-based organization dedicated to eradicating state-sanctioned violence in all its forms—and the white supremacy that upholds it—by building local power to intervene in violence inflicted on Black communities both by the state and by vigilantes. BLM—LA is the largest and most active chapter in the network, with nearly 500 trained and active members. The chapter's activities include engaging in local, statewide, and federal policy initiatives that disrupt practices of state violence; direct action to move those policies and furthering other demands and agendas, and supporting families impacted by state sanctioned violence.

The **Check the Sheriff** coalition is an intersectional alliance of community organizations, labor unions, and directly-impacted families of community members killed by Los Angeles

sheriff's deputies. Through clinics, the Check the Sheriff coalition has assisted community members with filing complaints with the Los Angeles Sheriff's Department and corresponding county government bodies providing civilian oversight. Because the Check the Sheriff coalition has been grounded and centered in directly-impacted families' experiences and needs, one of its top priorities has been to fully investigate and stop the department's harassment of families in retaliation for their seeking truth and justice, including filing complaints with the Sheriff's Department.

First Amendment Coalition ("FAC") is a nonprofit, public interest organization committed to freedom of speech, more open and accountable government, and public participation in civic affairs. Founded in 1988, FAC's activities include free legal consultations on First Amendment and access issues, educational programs, legislative oversight of bills in California affecting access to government and free speech, and public advocacy, including extensive litigation and appellate work. In particular, FAC has litigated leading cases about police transparency and accountability, including *Becerra v. Superior Court* (2020) 44 Cal.App.5th 897, review denied May 13, 2020.

The **JusticeLA Coalition** ("JusticeLA") is a coalition of grassroots organizations, advocates, and directly impacted

community members working to reduce the footprint of incarceration and to advocate for community-based accountability approaches regarding the Sheriff and Police Departments of Los Angeles County. JusticeLA's activities include support for families who are impacted by police violence; public education programs; court support for those involved in the criminal legal system; and legal, legislative, and budget advocacy at the county and state level.

How the Proposed Amicus Brief Will Assist the Court

This suit concerns whether municipalities in California will be compelled to enforce California Penal Code Section 148.6, and specifically Section 148.6(a)(2), which requires that any individual seeking to file a police misconduct complaint first sign an advisory acknowledging that they may be prosecuted if their complaint contains knowingly false statements "against any peace officer." Multiple federal courts have held that this provision unconstitutionally infringes on free speech in violation of the First Amendment. Nonetheless, Respondent Los Angeles Police Protective League ("LAPPL") seeks an order from this Court requiring the City of Los Angeles to enforce Section 148.6(a)(2).

Such an order would have dire ramifications. Community members throughout the state will risk retaliation by the very

law enforcement agencies they seek to hold accountable—a risk that will deter at least some from filing misconduct complaints and exercising their rights to free speech and to petition their governments for redress. Communities of color, and those that have historically experienced disproportionate rates of misconduct at the hands of the police, will be especially deterred from seeking to hold accountable officers whom they believe have committed misconduct, given their acute awareness of the dangers of retaliation.

Given amici's longstanding efforts to protect the rights of California's citizens, enhance government accountability and transparency, and curb the effects of police misconduct, amici are interested parties to this litigation. They bring a unique and important perspective about the detrimental consequences of enforcement of Section 148.6, particularly in communities of color and those that have historically experienced disproportionate rates of misconduct at the hands of the police. Notably, ACLU of Southern California has previously represented parties challenging the constitutionality of Section 148.6(a)(2) on at least three prior occasions, in *Hamilton*, *Stanistreet*, and *Chaker*. *See supra*.

INTRODUCTION

Federal courts have long held that the provision at issue in California Penal Code Section 148.6 is unconstitutional, and for good reason. The provision, which treats false statements *against* peace officers differently from false statements *in support* of them, was challenged successfully for the first time more than twenty years ago. In 1999, La France Hamilton, a Black man, was riding his bicycle on the streets of San Bernardino when two officers stopped him, pulled him off his bicycle, searched him, and handcuffed him. One officer grabbed him by the throat, kicked his legs out from under him, landed on top of him, and kneeled on his chest while continuing to choke him.

Once released from police custody with a civil citation for riding a bicycle without a license, Hamilton went to the San Bernardino Police Department to lodge a citizen's complaint. The watch commander gave Hamilton a complaint form and told him that if he knowingly filed a false complaint, he could be prosecuted under California Penal Code Section 148.6. The watch commander also told Hamilton he had already talked to one of the officers involved, who had reported to him that Hamilton did not have any injuries. When Hamilton displayed his visibly injured wrist, the watch commander responded that such an injury would result from "resisting arrest."

The form for filing a citizen's complaint echoed the watch commander's warning, with a printed statement telling Hamilton he could criminally prosecuted under Section 148.6 if any statements in his complaint against the officers were false. Given these ominous oral and written warnings, Hamilton left the station and declined to file the statement.

A few months later, two officers again stopped and detained Hamilton, this time because he was asking other people at a bicycle event whether they had city bicycle licenses. Once again, because of Section 148.6's threat of enforcement, Hamilton did not file a citizen's complaint about his wrongful detention by these officers.

Hamilton then sued the city of San Bernardino, challenging the legality of the false complaint statute. (*Hamilton v. City of San Bernardino* (C.D. Cal. 2000) 107 F.Supp.2d 1239.)[1] The federal district court denied the city's motion to dismiss, holding that Section 148.6 is facially unconstitutional as a content-based restriction on protected speech. (*Id.* at p. 1248.) Ultimately, the court granted Hamilton's motion for summary judgment and permanently enjoined San Bernadino's enforcement of Section 148.6. (*Hamilton, supra,* 325 F.Supp.2d at p. 1095.) A year later,

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[1] The facts recounted above reflect the district court's description of the facts in *Hamilton*.

the Ninth Circuit likewise held that Section 148.6 is unconstitutional in *Chaker v. Crogan*, granting a habeas petition to vacate a conviction under that provision. (*Chaker, supra,* 428 F.3d 1215.)

Despite these compelling and long-standing federal decisions, LAPPL seeks to require the City of Los Angeles to enforce Section 148.6(a)(2)'s requirement that any citizen filing a police misconduct complaint sign the advisory regarding false complaints before their misconduct complaint is accepted. According to LAPPL, this outcome is required by this Court's decision in *Stanistreet*. The Court of Appeal agreed with LAPPL that that "*Stanistreet* . . . control[s] [the] decision here." (*Los Angeles Police Protective League v City of Los Angeles* (Ct. App. 2d 2022) 78 Cal.App.5th 1081, 1097 ("*LAPPL*").)

As the City of Los Angeles has correctly explained, *Stanistreet* did not consider the issues presented here: (QP1) whether Section 148.6, subdivision (a), and specifically subdivision (a)(2) constitute improper viewpoint discrimination because it treats false statements *against* peace officers differently from false statements *in support* of them; and (QP2) whether Section 148.6, subdivision (a), and specifically subdivision (a)(2) constitute an impermissible burden that deters citizens from filing police misconduct complaints. (Petitioner's

Opening Brief ("Pet. Br.") at 20–24.) *Stanistreet* therefore does not resolve this case. What is more, the claims presented here undermine the reasons this Court gave in *Stanistreet* to uphold Section 148.6.

We now know much more about the nature and perniciousness of police misconduct—and its consequences—than we did twenty years ago when this Court decided *Stanistreet*. Likewise, we now better understand how a threat of criminal prosecution like Section 148.6 is likely to deter citizens from filing valid police misconduct complaints, and that it will particularly chill individuals in communities of color and those who have historically been the most frequent targets of police misconduct. Indeed, both California's Racial and Identity Profiling Advisory Board ("RIPA Board") and the U.S. Department of Justice have advised against warnings like this, given their likelihood to chill valid complaints of misconduct. (*See* RIPA Board, Annual Report, at 183 (2023); U.S. Dep't Just., *Standards and Guidelines for Internal Affairs: Recommendations from a Community of Practice*, at p. 17, https://cops.usdoj.gov/ric/Publications/cops-p164-pub.pdf.) Enforcement of Section 148.6(a)(2) will therefore undermine efforts to address police misconduct in California communities.

As federal courts recognized two decades ago in *Hamilton* and *Chaker*, Section 148.6 is unconstitutional. This is so for at least three reasons. ***First***, the statute prohibits false statements only if made *against* peace officers, but not if made in *support* of them: "Every person who files any allegation of misconduct *against* any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, knowing the allegation to be false, is guilty of a misdemeanor." (Cal. Pen. Code, § 148.6, subd. (a)(1) (emphasis added).) By drawing a line between permissible and impermissible speech based on the speech's substance and perspective, this prohibition constitutes an impermissible content-based and viewpoint-based restriction on speech that violates the guarantees of free speech under First Amendment of the U.S. Constitution and the California Constitution.

Second, Section 148.6 also violates the Free Speech guarantees of the First Amendment and the California Constitution because it imposes an impermissible burden that chills the speech rights of citizens. Specifically, before a law enforcement agency may even "accept[] an allegation of misconduct *against* a peace officer," Section 148.6(a)(2) compels any "complainant to read and sign" an admonition stating, in relevant part: "IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN BE

PROSECUTED ON A MISDEMEANOR CHARGE." (Cal. Pen. Code, § 148.6, subd. (a)(1) (emphasis added).) By threatening criminal prosecution and requiring a written acknowledgment—indeed, almost a tacit agreement to be prosecuted—the provision and required signed advisory create an imposing burden that can deter even citizens with legitimate complaints like Mr. Hamilton. Citizens, particularly those who have been mistreated by police officers, can hardly be expected to assume that officers will be truthful in their responses to misconduct complaints. Citizens will be wary of filing valid complaints if, for example, they have limited evidence, or do not recall every detail of their encounter, because officers could simply lie about what happened and claim the complaint was false. Pursuing a misconduct charge already requires tremendous bravery, and allowing a proviso warning of criminal prosecution will surely chill such complaints. As amici explain, enforcement of this requirement would especially chill individuals in communities of color and those who have historically been the most frequent targets of police misconduct.

Third, Section 148.6 violates the Petition Clause of the California Constitution, which guarantees the people "the right to . . . petition government for redress of grievances." (Cal. Const., art. I, § 3, subd. (a).) In *City of Long Beach v. Bozek*, this Court held that California's Petition Clause prohibits a

governmental entity from maintaining an action for malicious prosecution even against an individual who had maliciously, and without probable cause, sued that municipality. (*City of Long Beach, supra,* 31 Cal.3d 527). As this Court explained, the right to petition is "absolutely privileged," even where the litigant's suit was premised on false allegations "done with 'actual malice'; *i.e.*, with knowledge of the falsity of the allegations made in the complaint." (*Id.* at p. 534.) There is no principled basis for distinguishing civil tort suits premised on knowingly false allegations from police misconduct complaints: both are indisputably petitions for redress for those "who perceive themselves to be aggrieved by the activities of governmental authorities," and both incur sometimes burdensome costs on governmental entities. (*Id.* at p. 536.) Therefore, while enforcement of Section 148.6 violates the First Amendment of the U.S. Constitution, the California Petition Clause affords this Court an adequate and independent state-law basis to enjoin enforcement of Section 148.6. (*See Michigan v. Long* (1983) 463 U.S. 1032, 1042 (recognizing that constitutional judgments of a state's highest court may "rest on adequate and independent state grounds").)

ARGUMENT

I. SECTION 148.6 UNCONSTITUTIONALLY DISCRIMINATES ON THE BASIS OF CONTENT AND VIEWPOINT.

The First Amendment guarantees that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (*Police Dep't of City of Chicago v. Mosley* (1972) 408 U.S. 92, 95.) Accordingly, content-based speech regulations are "presumptively invalid." (*R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 382.) Nor may government entities discriminate against speech based on the ideas or opinions that speech conveys (*Iancu v. Brunetti* (2019) 139 S.Ct. 2294, 2299), because government discrimination among viewpoints "is a 'more blatant' and 'egregious form of content discrimination.'" (*Reed v. Town of Gilbert, Ariz.* (2015) 576 U.S. 155, 168 (citation omitted); *see also Iancu*, *supra,* 139 S.Ct. at p. 2302 (Alito, J., concurring) ("Viewpoint discrimination is poison to a free society.").) Additionally, allegations of peace officer misconduct are indisputably matters of public concern, and speech on such matters "occupies the highest rung of the heirarchy [sic] of First Amendment values," and is entitled to "special protection." (*Connick v. Myers* (1983) 461 U.S. 138, 145 (quotation omitted).)

On appeal, LAPPL contends that Section 148.6 is constitutional because it proscribes only "knowingly defamatory statements and not speech protected by the First Amendment." Ans. Br. at 29–31. Even if that interpretation of the scope of Section 148.6—limiting it to defamatory false statements—is correct,[2] although there are "a few limited areas" in which speech

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[2] The basis for this assertion appears to be primarily that "[i]n the action below parties stipulated to the harm, that officers are adversely impacted professionally and personally by civilian complaints which are knowingly false," and so "the City concedes that there is a 'harm associated with a false statement'." (Ans. Br. at 17, 37.)

As a legal matter of first impression, this Court is not bound by the parties' stipulation that all false statements contained within a misconduct complaint are defamatory. (*Cf.* Cal. Civ. Code, § 45 (defining libel as a "a false and unprivileged publication . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation"); *see also PG&E Corp. v. Pub. Utilities Com.* (2004) 118 Cal. App. 4th 1174, 1195 (noting that while this Court is free to "tak[e] into account the interpretation of a state agency, "such agency interpretations are not binding or necessarily even authoritative") (quoting *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7–8)).) Neither LAPPL nor the City speaks for the California Department of Justice or the Attorney General, the State's "chief law officer" (Cal. Const. art. V, § 13), and neither party's position is entitled any special weight when interpreting the provision. (*Cf. Bonnell v. Medical Bd. of California* (2003) 31 Cal.4th 1255, 1265) (declining to defer to agency interpretation of "a legislative enactment applicable to a wide range of administrative agencies" as opposed to "its interpretation of a self-promulgated regulation").)

can be regulated "because of their constitutionally proscribable content (obscenity, defamation, etc.)," such areas cannot "be made the vehicles for content discrimination unrelated to their distinctively proscribable content." (*R.A.V.*, *supra*, 505 U.S. at p. 384–85). "Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." (*Id.* at p. 384.)

As a practical matter, moreover, such a contention is doubtful. As amici illustrate below, the nature of some "false" statements in police misconduct complaints are unlikely to have a tendency to harm given the fine-grained nature of what makes those allegations "false." (*See infra* Section II.A). And as the City notes in its Reply, Section 148.6 imposes no burden on the State to establish an injury to a specific officer to secure a conviction against the complainant. (Reply to Answer Brief ("Rep. Br.") at 15–16.)

Finally, LAPPL's asserted interpretation would also yield the bizarre result of setting a lower burden for a municipality to secure a criminal conviction for filing a false and defamatory misconduct complaint than that imposed on an officer seeking civil liability for the same complaint. This is because while Section 148.6's civil analogue, Section 47.5, permits an officer to bring a defamation action against a false complainant, it requires as an element *both* "knowledge that [the complaint] was false," *and* evidence it was "made with spite, hatred, or ill will." (Cal. Civ. Code, § 47.5.) This Court should resist an interpretation of Section 148.6 that would yield the paradoxical result of making it easier to prove criminal liability than civil liability for the exact same conduct.

A. Section 148.6 impermissibly prohibits statements critical of peace officers while permitting statements in support of peace officers.

Section 148.6 does what *R.A.V.* expressly prohibited: discriminate on the basis of content and viewpoint by targeting "only [statements] critical of the government." (*R.A.V.*, *supra*, 505 U.S. at p. 384.) Specifically, Section 148.6 subjects "any allegation of misconduct against any peace officer, . . . knowing the allegation to be false," to criminal penalty. (Cal. Pen. Code, § 148.6(a)(1).) It does not, however, proscribe false statements made in *support* of such officers. It thus creates a regime, based on content and viewpoint, that renders one false statement permissible and the other prosecutable. This is precisely what the Constitution forbids. (*See United States v. Alvarez* (2012), 567 U.S. 709, 723 (holding as unconstitutional the Stolen Valor Act, 18 U.S.C. § 704, which proscribed a narrow category of false statements, and declining to "endorse" that a "government authority [may] compile a list of subjects about which false statements are punishable").)

Other courts have applied *R.A.V.* to conclude that analogous prohibitions on false and potentially derogatory speech are unconstitutional content-based restrictions on speech. In *Grimmett v. Freeman*, for example, the U.S. Court of Appeals for

the Fourth Circuit recently considered a challenge to a 90-year-old North Carolina law that made it a crime to publish a "derogatory report[]" about candidates for public office where the speaker "know[s] such report to be false or" acts "in reckless disregard of its truth or falsity." (*Grimmett v. Freeman* (4th Cir. 2023) 59 F.4th 689, 690 (quoting N.C. Gen. Stat. § 163-274(a)(9)).) The court concluded that the provision drew impermissible content-based distinctions in identifying which speech to criticize, because it did not reach "all 'derogatory reports,'" but instead limited "its prohibition to statements about a certain subject ('any candidate in any primary or election') of a particular nature." (*Id.* at p. 694)

In so doing, the court concluded the statute ran "headlong into *R.A.V. v. City of St. Paul*." (*Ibid.*) There, as here, the problem was that the proscription did "not reach all 'derogatory reports' made with 'reckless disregard of [their] truth or falsity,'" but instead "limit[ed] its prohibition to statements about a certain subject." (*Ibid.* (quoting N.C. Gen. Stat., § 163-274(a)(9).) There, as here, the statute fell "within *R.A.V.*'s holding that a State may not 'prohibit[ ] otherwise permitted speech solely on the basis of the subjects the speech addresses'." (*Id.* at p. 694 (quoting *R.A.V.*, *supra*, 505 U.S. at p. 381).) And there, as here, and "[a]s in *R.A.V.*, the Act's limitation to speech addressing only

certain topics renders it facially unconstitutional." (*Id.* at p. 696.) *Grimmett* clearly illustrates why LAPPL's position here is untenable.[3] That provision, moreover, is arguably less problematic than Section 148.6, since it does not—as Section 148.6 does—distinguish between *viewpoints* within its content-based distinction (for example, prohibiting false derogatory reports alleging a candidate is "anti-police" but not such reports alleging they are "pro-police").

B. None of *R.A.V.*'s limited exceptions for content-discriminatory speech restrictions applies here.

In an attempt to rescue Section 148.6's impermissible discrimination, LAPPL contends that one or several of the narrow exceptions recognized in *R.A.V.* for permissible content-discriminatory speech prohibitions applies here, because 148.6 applies only to unprotected (*i.e.*, defamatory) speech. (Ans. Br. at 33–37.) But even if LAPPL rightly construes the reach of the proscription, none of *R.A.V.*'s exceptions saves Section 148.6's content- and viewpoint-based distinctions between false

[3] The City's Opening and Reply Briefs thoroughly identify other reasons why Section 148.6 discriminates on the basis of viewpoint, which amici do not repeat here. (*See* Pet. Br. at 20–24; Rep. Br. at 11–15.)

statements against law enforcement officers and false statements supporting them, including those by the officer.

Below, the Court of Appeal erred in agreeing with LAPPL, primarily relying on this Court's reasoning in *Stanistreet* in determining that Section 148.6 satisfies *R.A.V.*'s exceptions. (*See LAPPL*, *supra*, 78 Cal.App.5th at p. 1097.) Although the appellate court recognized that the content- and viewpoint-discrimination arguments raised in this appeal are "different" from those in *Stanistreet*, it nonetheless erroneously held that the "reasoning in *Stanistreet* applies" and "control[s]."

In *Stanistreet*, this Court considered a different argument as to why Section 148.6 is unlawfully content-based: that the statute affords peace officers greater protection than *other government workers*, such as "firefighters, paramedics, teachers, elected officials or others." (*Stanistreet*, *supra*, 29 Cal.4th at pp. 468–69.) The Court concluded that such disparate treatment is consistent with the First Amendment because complaints against peace officers uniquely "require investigation or lengthy retention." (*Id.* at p. 469.) However, the Court did *not* consider the content- and viewpoint-based discrimination argument raised here: that Section 148.6 discriminates between false speech critical of and in support of peace officer conduct. *Stanistreet* is therefore inapposite and does not control here.

To the extent *Stanistreet* does control here, however, it erroneously applied the *R.A.V.* exceptions, and, accordingly, should be reconsidered. *R.A.V.*'s exceptions permit content-based discrimination only when the proscription on speech does not "raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." (*R.A.V.*, *supra*, 505 U.S. at p. 387 (quotation omitted).) That is precisely what Section 148.6 threatens to do here (*see infra* Part II), and, in any event, none of the exceptions identified in *R.A.V.* apply.

1. The basis for Section 148.6's content discrimination is not the "very reason" an entire class of speech is proscribable and thus does not satisfy *R.A.V.*'s first exception.

R.A.V.'s first exception recognizes that in limited circumstances, "[w]hen the basis for the content discrimination consists entirely of *the very reason* the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." (*R.A.V.*, *supra*, 505 U.S. at p. 388.) Thus "[a] State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages." (*R.A.V.*, *supra*, 505 U.S. at p. 388.)

Below, the Court of Appeal largely rested its reasoning on *Stanistreet*'s own application of this exception. (*See* 78 Cal.App.5th at p. 1095.) However, considering a *different* content-based distinction—between peace officers and other government officers—this Court in *Stanistreet* concluded that the very "reason the entire class of speech at issue . . . is proscribable has 'special force' . . . when applied to false accusations against peace officers," because agencies are legally obligated to investigate and retain complaints, analogizing to *R.A.V.*'s example of a prohibition on threats of violence only against the President but not other federal government officials. (*Stanistreet*, *supra*, 29 Cal.4th at pp. 471–72.) Whether that explanation justifies singling out peace officers (as compared to other government officers), it does not justify proscribing only false statements *against* them (and not for them). *Stanistreet*'s reasoning is therefore inapplicable here, and Section 148.6 fails to satisfy this exception, for at least three reasons.

First, Section 148.6 does not penalize the subset of false statements about peace officers that are the most inflammatory, derogatory, or likely to deter, impede, or undermine the investigation of a misconduct allegation (either in support or opposition to such officers). (*Cf. R.A.V.*, *supra*, 505 U.S. at p. 388 (permitting prohibitions only on "obscenity which is the most

patently offensive *in its prurience*").) Rather, Section 148.6 penalizes *all* messages which are critical of, or "against," peace officers.

Second, the "very reason" for the provision cannot simply be that proscribing large swaths of particular kinds of speech preserves government resources. Below, the Court of Appeal determined that the "very reason" for the prohibition covering only statements against officers is that "the potential harm of a knowingly false statement is greater" in those circumstances because "the agency receiving the complaint is legally obligated to investigate it and to retain the complaint and resulting reports or findings for at least five years." (*LAPPL*, *supra*, 78 Cal.App.5th at p. 1095.) But that provides no basis for a proscription of only false statements *against* peace officers, since false statements *in support* of peace officers pose an equal, if not greater, risk of rendering misconduct investigations ineffective, inaccurate, and wasteful. Such a regime would further undermine deterrence and lead to more misconduct, with concomitant waste of government resources. (*Cf. Chaker*, *supra*, 428 F.3d at p. 1226 (any "asserted interest in saving valuable public resources and maintaining the integrity of the complaint process is . . . called into question" given that it proscribes "only

the knowingly false speech of those citizens who complain of peace officer conduct").)

Indeed, false statements *in support* of officers made during the course of law enforcement investigations can severely compromise law enforcement operations. For instance, not only can the state not rely on false evidence to secure a conviction, but it has an affirmative obligation to disclose the discovery of any such false evidence—whether the "result of negligence or design"—to the defendant. (*Giglio v. United States* (1972) 405 U.S. 150, 154; *see also Napue v. People of State of Ill.* (1959) 360 U.S. 264, 269). State law enforcement agencies thus have just as much incentive to ensure that false statements *in support* of peace officers are ferreted out as well. If the "very reason" for Section 148.6's prohibition is to ensure the accuracy of misconduct investigations and preserve governmental resources necessary to conduct them, then its selective prohibition does not achieve those goals.

Third, even if the speech proscribed by Section 148.6 *does* pose a greater risk (and it does not), "the very reason" for content-based discrimination cannot merely be that the speech entails a risk of greater harm. If it could, then the City of St. Paul's ordinance in *R.A.V.* would have been constitutional. That ordinance prohibited cross-burning done to "arouse[] anger,

alarm or resentment in others on the basis of race, color, creed, religion or gender." (*R.A.V.*, *supra*, 505 U.S. at p. 380.) Given the history of racial intimidation tied to the symbolic burning of the cross, St. Paul had every reason to reduce the risk of harm stemming from burning it for those reasons. (*See Hamilton*, *supra*, 325 F.Supp.2d at p. 1091 & n. 5.) Yet the *R.A.V.* Court flatly rejected that justification for the content-based distinction. (*See R.A.V.*, *supra*, 505 U.S. at 392 (exhorting that while "diverse communities [should] confront" "messages based on virulent notions of racial supremacy," "in whatever form they appear," "the manner of that confrontation cannot consist of selective limitations upon speech").)

2. False statements against peace officers do not cause any "secondary effects" that would trigger *R.A.V.*'s second exception.

R.A.V.'s second basis for permitting differential treatment even to a content-defined subclass of proscribable speech is that the subclass "happens to be associated with particular 'secondary effects' of the speech, so that the regulation is justified without reference to the content of the . . . speech." (*R.A.V.*, *supra*, 505 U.S. at p. 389.) For example, the Supreme Court has upheld restrictive zoning laws that prohibit operation of adult film theaters in residential neighborhoods where municipalities have

established that their secondary effects "contribute to neighborhood blight." (*City of Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 51).[4] On appeal, LAPPL contends that Section 148.6 meets *R.A.V.*'s "secondary effects" exception. (*See* Ans. Br. at 34–36.) That contention is wrong, as a matter of both law and logic.

Below, the Court of Appeal, relying on *Stanistreet*, pointed to claimed secondary effects such as the public resources "required to investigate these complaints, resources that could otherwise be used for other matters," that "the complaints may be discoverable in criminal proceedings," and that "(false) commendations of officers do not trigger mandatory investigation and retention requirements that demand use of public resources." (*LAPPL*, *supra*, 78 Cal.App.5th at p. 1096.) (The *Stanistreet* Court similarly justified Section 148.6's distinction between peace officers and other government officers on the basis that

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[4] The U.S. Supreme Court has never upheld a restriction on speech based on the secondary effects doctrine outside of the context of regulations of "sexually-oriented businesses." (*See* Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After* Reed v. Town of Gilbert, 57 Santa Clara L. Rev. 385, 386 n. 1 (2017), http://digitalcommons.law.scu.edu/lawreview/vol57/iss2/3 (citing *City of L.A. v. Alameda Books, Inc.* (2002) 535 U.S. 425, 434; *Playtime Theatres, Inc.* (1986), *supra*, 475 U.S. at pp. 41, 44, 47–48, 50–52; *Young v. Am. Mini Theatres, Inc.* (1976) 427 U.S. 50, 70)).

complaints against the former trigger secondary effects like mandatory investigations, which waste public resources to investigate and "adversely affect the accused peace officer's career." (*Id.* at p. 509.))

However, these are not the secondary effects of the filing of the allegation—they are the *primary* effect. The *sole* purpose of such a misconduct filing *is that it will be investigated*. In *Boos v. Barry*, the U.S. Supreme Court described the "secondary effects" exception as applying only where "the justifications for regulation have nothing to do with content" and are not premised on "the direct impact of speech on its audience." (*Boos v. Barry* (1988) 485 U.S. 312, 320–21.) Here, by contrast, the regulation has everything to do with the content of the speech, and the administrative investigation is the "direct impact" and "primary effect" of that speech. (*Cf. Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 574 (Thomas, J., concurring in part and concurring in the judgment) (joining majority in striking down Massachusetts's restrictions on tobacco advertising because "Massachusetts is not concerned with any 'secondary effects' of tobacco advertising—it is concerned with the advertising's *primary effect*, which is to induce those who view the advertisements to purchase and use tobacco products" (citing *Boos*, *supra*, 485 U.S. at p. 321)).) And even if preserving public

resources and ensuring truthful adjudications could be considered permissible "secondary effects" under *R.A.V.*, Section 148.6's lopsided prohibition undermines them. (*See supra* Section I.B.1.)

To the extent that LAPPL argues that Section 148.6 was enacted to shield police officers from reputational or emotional harm, such harm is also not a secondary effect of false speech—it is the direct effect of a false allegation of misconduct. (*See Barry*, 485 U.S. at p. 321 ("Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton* ").) Any such assertion is thus "inconsistent with [the Supreme Court's] longstanding refusal to punish speech because the speech in question may have an adverse emotional impact on the audience." (*Id.* at p. 322.)

Section 148.6 does, however, chill a significant amount of valuable, protected speech, including *legitimate* and *non-false* allegations of police misconduct. (*See infra* Part III.) Thus, even if the statute did reduce undesirable "secondary effects" of speech, any such reduction would be dwarfed by the amount of speech it chills. (*Cf. Alameda Books, Inc.*, *supra*, 535 U.S. at p. 445 (Kennedy, J., concurring) ("[A] significant decrease in secondary effects" may be permissible where there is only "a trivial decrease in the quantity of speech").

3. *R.A.V.*'s third exception does not apply because there is a "realistic possibility that official suppression of ideas is afoot."

Last, LAPPL contends that Section 148.6 is constitutional because "there is no realistic possibility that official suppression of ideas is afoot." (Ans. Br. at 36 (citing *Stanistreet*, *supra*, 29 Cal.4th at 509 and quoting *R.A.V.*, *supra*, 505 U.S. at p. 390).) This contention is wrong. As recognized in *Hamilton*, there is a very realistic possibility that legitimate speech will be suppressed by Section 148.6. In *Hamilton*, the plaintiff, a Black man, alleged that he had multiple encounters with police officers resulting in excessive use of force, but "[a]s a result of both the written and oral threat of prosecution under Section 148.6, Plaintiff did not file a citizen's complaint against the officers for unreasonable stop, search, seizure and use of excessive force against him." (*See Hamilton*, *supra*, 107 F.Supp.2d at p. 1241.)

Section 148.6's legislative history, moreover, reflects that its *intended effect* was to suppress complaints about peace officers. The Legislature's purpose in enacting the bill was clearly and unequivocally to "deter false allegations of misconduct against peace officers" without regard for its chilling effect. (Cal. Bill Analysis, A.B. 1732 Sen. at 6, 7/11/1995.) Indeed, the Legislature considered—and wrongly dismissed—concerns that the "bill [would] 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 accusation[]." (*Id.* at p. 6 (emphasis omitted).) By enacting the law, the Legislature determined instead that police "officer job mobility, promotional opportunity and morale outweigh the interests of assuring the utmost freedom of communication between citizens and public authorities whose responsibility is to investigate []police[] wrongdoing[]." (*Ibid.* (emphasis omitted).) The Legislature may have made a political calculus to accept the risk of official suppression in enacting the law, but that calculus is precisely what the First Amendment prohibits, as illustrated by *R.A.V.*

Nor could *Stanistreet* have addressed the wealth of information that has emerged since 2002 about how certain communities are affected by police misconduct, and the need to take seriously their complaints about that misconduct. (*See infra* Sections II.B–C.) *Stanistreet* therefore failed to completely analyze the chilling effect arguments, as discussed below.[5]

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[5] Notably, however, Justice Werdegar in her concurrence in *Stanistreet* did recognize the reasonable possibility that speech would be chilled, since "complainants cannot help but be aware of the[] realit[y]" that they may "face both criminal prosecution and the burden and expense of retaining a defense attorney." (29 Cal.4th at 509, at p. 514 (Werdegar, J., concurring).) As a result,

C. Section 148.6 fails strict scrutiny.

Because none of *R.A.V.*'s exceptions apply, Section 148.6 can only be upheld if this Court concludes that it is narrowly tailored to satisfy a compelling government interest. (*See R.A.V.*, *supra*, 505 U.S. at p. 395.) That is so because content- and viewpoint-based restrictions on speech are subject to strict scrutiny under both the U.S. Constitution (*see Valley Broad. Co. v. United States* (9th Cir. 1997) 107 F.3d 1328, 1331 (citing *R.A.V.*, 505 U.S. at pp. 395–96)), and the California Constitution. (*International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles* (2010) 48 Cal.4th 446, 457; *Walker v. Kiousis* (2001) 93 Cal. App. 4th 1432, 1446). "Strict scrutiny leaves few survivors." (*Alameda Books, Inc.*, *supra*, 535 U.S. at p. 455 (Souter, J., concurring).) Section 148.6 is not one of those rare survivors, as it fails both prongs of this test: it is not narrowly drawn, and it does not serve a compelling state interest. (*See generally* Pet. Br. at 45–49; Rep. Br. at 38–40.).

First, Section 148.6 is not narrowly tailored to an interest in ensuring accuracy in misconduct investigations, because it punishes false allegations only by the complainant, and not by the officer or a witness supporting the officer. Section 148.6 also

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"some complainants are likely to choose *not* to go forward – even when they have legitimate complaints." (*Ibid.*)

is not narrowly tailored to an interest in preserving public resources, because again, it only punishes complainants' false statements, and not false statements by officers, which equally risk prolonging investigations and wasting resources. Indeed, if anything, false statements by officers are particularly harmful, given that they come from an agent of the Government, sworn to protect the people, and with the power to deprive citizens of their liberty.

Second, far from effectuating a compelling state interest, Section 148.6 undermines the government's purported interests in ensuring the integrity and accuracy of misconduct investigations, enhancing community trust in policing, and improving the efficacy of its law enforcement agencies. (*See* Section II.B, *infra*.) Valid complaints will go unfiled, leaving misconduct unchecked. And when a complainant does not sign the advisory required by 148.6(a)(2), the law enforcement agency may fully ignore the allegations contained therein, thereby stymying the agency's interest in investigating all viable complaints and pursuing corrective action where appropriate.

II. SECTION 148.6 IS AN OVERBROAD AND IMPERMISSIBLE BURDEN THAT CHILLS CONSTITUTIONALLY PROTECTED SPEECH

Even if Section 148.6 satisfied one of the *R.A.V.* exceptions for permissible content- and viewpoint-based distinctions (it does not), the statute would still offend the First Amendment because it imposes an impermissible burden on filing misconduct complaints (QP2). Specifically, Section 148.6, subsection (a), and particularly subsection (a)(2), chills protected speech by requiring citizens to sign an advisory warning them of criminal consequences stemming from filing a police misconduct report. As *Hamilton* shows, this advisory may meaningfully deter even citizens who intend to file truthful misconduct complaints. Indeed, the advisory risks chilling several forms of protected speech, including complaints containing true allegations backed with little or no evidence, misconduct complaints concerning legally ambiguous allegations, and partially inaccurate but not knowingly false allegations.

The chilling effect from Section 148.6's broad sweep is especially pronounced in communities of color and those communities that have historically been most likely to experience police misconduct, and who most need an outlet for complaints. For these reasons, California's Racial and Identity Profiling Advisory Board ("RIPA Board") has recommended "eliminat[ing]

[Section 148.6's] requirement that law enforcement agencies obtain a signed advisory from complainants referencing the possibility of criminal sanctions. (RIPA Board, Annual Report, at 183 (2023).)

A. Section 148.6 substantially encroaches upon, and chills, First Amendment-protected activity.

The U.S. Supreme Court has long been cognizant of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." (*Nat'l Ass'n for Advancement of Colored People v. Button* (1963) 371 U.S. 415, 433.) Any criminal prohibition on speech "raises special First Amendment concerns because of its obvious chilling effect on free speech," which "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." (*Reno v. Am. Civil Liberties Union* (1997) 521 U.S. 844, 871–72; *see also People v. Fogelson* (1978) 21 Cal.3d 158, 163 ("Faced with a regulation that threatens to impose sanctions upon free speech . . . significant numbers of persons may elect not to exercise those rights rather than undergo the rigors of litigation and the risk of eventual punishment.").) The overbreadth doctrine thus prohibits the government from banning unprotected speech if a substantial amount of protected speech is

prohibited or chilled in the process.[6] (*Ashcroft v. Free Speech Coal.* (2002), 535 U.S. 234, 237.)

Even if Section 148.6(a)(2)'s signed advisory requirement were to validly suppress some quantum of false and defamatory speech, enforcement of the provision would still chill protected speech in multiple forms, such as complaints containing true allegations backed by minimal evidence, misconduct complaints concerning situations whose legality is unclear, and inaccurate but not knowingly false complaints. Last, the LAPPL is wrong to the extent it contends that Section 148.6's *mens rea* element cures it of these constitutional defects, particularly because of the well-recognized vagaries of memory that impact live witnesses, including traumatized individuals and subjects of intense brutality—precisely the people for whom the ability to freely file complaints alleging police misconduct will be most critical.

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[6] The same is true under the California Constitution. (*See Fogelson*, *supra*, 21 Cal.3d at p. 167 (determining that an ordinance that banned soliciting contributions on public property without a permit was facially unconstitutional when challenged under the U.S. Constitution and the California Constitution because it prohibited constitutionally protected forms of solicitation).)

1. Section 148.6 chills the filing of misconduct complaints containing truthful but under-substantiated allegations.

Hamilton provides a useful illustration of how Section 148.6 operates to deter truthful misconduct complaints. Because the advisory threatens the possibility of a misdemeanor prosecution, individuals like Mr. Hamilton will frequently hesitate to file a misconduct complaint even when their allegations (*e.g.*, suffering injuries from officers' use of force) are entirely true, out of fear that the officer(s) could simply deny the allegations and seek retaliation. In many encounters with the police, citizens have little or no evidence documenting the events that unfolded, and so the filing of a complaint may rely on little more than a complainant's word against the word of a sworn officer of the law, who often has powerful incentives to deny the complaint and thwart an investigation. Given both the need to live in the community patrolled by the officer(s), and the risk of retaliation, Section 148.6 will chill the "willingness of citizens to file complaints" who fear they have "weak evidence," but worthy claims. (*See Pena v. Mun. Ct.* (Cal. Ct. App. 1979) 96 Cal. App. 3d 77, 83; *Alvarez*, *supra*, 567 U.S. at p. 734 (Breyer, J., concurring) (recognizing that if the government may prosecute

knowingly false statements, "those who are unpopular may fear that the government will use that weapon selectively").)

2. Section 148.6 chills allegations about police conduct whose legality is unclear.

Section 148.6 also risks chilling misconduct complaints from individuals whose complaints involving allegations of police conduct whose legality is unclear. Problematically, while Section 148.6(a)(1) provides that "[e]very person who files any allegation of misconduct against any peace officer . . . knowing the allegation to be false, is guilty of a misdemeanor," the statute fails to define either "misconduct" or "allegation." Similarly, while Section 148.6(a)(2) requires law enforcement agencies to advise complainants that they "have the right to make a complaint against a police officer for any improper police conduct . . . if [they] make a complaint against an officer knowing that it is false, [they] can be prosecuted on a misdemeanor charge," the advisory contains no explanation of "improper police misconduct" nor of what constitutes a "false" complaint (emphasis omitted).

Citizens may have different understandings of the kind of behavior that is considered "misconduct" or "improper police conduct" as compared to what is actually *illegal*. For example, an officer's use of force may in fact be legal, but it may credibly seem

like misconduct to that individual. Indeed, Black's Law Dictionary defines misconduct as "improper behavior"—a standard which is inherently susceptible to subjective impressions of impropriety. ("Misconduct," *Black's Law Dictionary* (11th ed. 2019).)

A reasonable prospective complainant thus may worry they could be prosecuted under Section 148.6 if they filed a misconduct complaint for behavior that was legal but that in their eyes was improper, such that they could be accused of "*knowing*" their complaint did not allege misconduct (as legally defined). Citizens similarly might not understand *how much* misconduct is necessary to justify an "allegation" of misconduct, and may be hesitant to express their views on police activity they view as improper, but that they worry may not suffice to satisfy a formal allegation of misconduct. Such apprehensions may be particularly pernicious when concerns about police misconduct intersect with suspicions of race- or identity-based profiling, and when the potential complainant is told she may raise her voice only at the risk of criminal prosecution. Thus, for example, a driver who suspects she was pulled over because she was profiled by race—but when the officer's behavior during the traffic stop was not, itself, demonstrable misconduct—may be unsure

whether her allegations would suffice to constitute legal misconduct.

3. Section 148.6 chills allegations that may contain both accurate and inaccurate assertions.

Section 148.6 is further problematic as it criminalizes any "allegation" that is "false," but without any clarification as to whether just one or every fact contained in the misconduct complaint constitutes an "allegation." A reasonable reader of the advisory may think a misconduct complaint must be accurate to the letter or else risk prosecution due to *any* potential falseness in the complaint. (*Cf. Alvarez*, *supra*, 567 U.S. at p. 736 (Breyer, J., concurring) ("a speaker might still be worried about being *prosecuted* for a careless false statement").

Consider, for example, a complainant who vaguely remembers, but cannot be sure, that, after an officer tackled him for riding a bicycle without a license, the officer hit him *four* times before the complainant struck back. If the officer recalls he only hit him *twice*, or twice before and twice *after* the complainant struck him, is the complainant's allegation criminally false within the meaning of Section 148.6? The gravamen of the individual's complaint—that he was stopped and force was used against him simply for riding without a license—is

true, but Section 148.6's operation will often ensure such a complaint never comes to light.

4. Section 148.6's "knowing" *mens rea* requirement does not cure this overbreadth.

LAPPL now contends that Section 148.6 is not overbroad because its reach is limited only to *knowingly* false and defamatory speech. *See* Ans. Br. 29–31. As noted above, it is an open question whether Section 148.6 also criminalizes false speech that is *not* defamatory. (*See supra* note 2.) Moreover, "[g]iven the potential haziness of individual memory . . . there remains a risk of chilling that is not completely eliminated by *mens rea* requirements." (*Alvarez*, 567 U.S. at p. 736 (Breyer, J., concurring) (concluding Stolen Valor Act criminalizing only knowingly false statements nonetheless violated the First Amendment). For example, a speaker might still be worried about being prosecuted for a careless false statement, "even if he does not have the intent required to render him liable." (*Ibid.*) And a speaker may justifiably worry that, like the Stolen Valor Act, Section 148.6 "may be applied . . . subtly but selectively to speakers that the Government does not like." (*Id.* at p. 737.)

Enforcing Section 148.6 would impose significant First Amendment harm, both because citizens may have hazy

recollections of the details of intense encounters with the police and because they may worry about filing a misconduct complaint alleging impropriety that does not, as a legal matter, rise to the level of misconduct, when their own liberty is at stake.

B. Section 148.6's chilling effect undermines police accountability and community trust—curtailing, rather than enhancing, the core justification for the provision.

Section 148.6's chilling effect also undermines a purported government interest for the provision—that "false citizens' complaints of misconduct" would keep officers from effectively performing their duties. (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1732 (1995-1996 Reg. Sess.).) By chilling complaints of misconduct, and thus preventing investigations into such misconduct, Section 148.6 hinders officers' ability to do their jobs well. Police departments "need[] the confidence and cooperation of the[ir] community" to "keep the peace and enforce the law." (*Pasadena Police Officers Ass'n v. City of Pasadena* (1990) 51 Cal.3d 564, 568.) Officer misconduct "impair[s] the public's trust in its police department" and "harm[s] . . . the department's efficiency and morale." (*Ibid.*) And silencing complainants further erodes that trust.

1. The California RIPA Board has recognized Section 148.6's likely chilling effect, a concern echoed by the U.S. Department of Justice.

The State's own RIPA Board has recommended that Section 148.6(a)(2)'s required advisory be eliminated because it likely unconstitutionally chills citizens' protected speech. The RIPA Board, established by the California Attorney General to "eliminat[e] racial and identity profiling, and improv[e] diversity and racial and identity sensitivity in law enforcement" (Cal. Pen. Code, § 13519.4, subd. (j)(1), has repeatedly expressed "longstanding concern" with Section 148.6 given the law's "deterrent impact on civilian complaints." (RIPA Board, Annual Report, at 182 (2023); *see also* RIPA Board, Annual Report, at 124 n. 294 (2021) ("The requirements set out by the Penal Code can have a chilling effect on the submission of civilian complaints").)

The U.S. Department of Justice has also recommended against any practices that may discourage or dissuade citizens from filing misconduct complaints, including oral or written "warnings of prosecution or potential prosecution for filing a false complaint." (U.S. Dep't Just., *Standards and Guidelines for Internal Affairs: Recommendations from a Community of*

Practice, at p. 17, https://cops.usdoj.gov/ric/Publications/cops-p164-pub.pdf.)

2. It is an unfortunate reality that police officers have falsified reports in numerous high-profile misconduct cases.

Citizens may be especially chilled in seeking to file misconduct complaints given their awareness of numerous well-documented and high-profile incidents in which police officers were found to have lied about and covered up their conduct. For example, the recent police beating and killing of Tyre Nichols illustrates that police officers sometimes lie or omit details in incident reports to cover up unlawful conduct. (Jessica Jaglois, Nicholas Bogel-Burroughs & Mitch Smith, *Initial Police Report on Tyre Nichols Arrest is Contradicted by Videos*, N.Y. Times (Jan. 30, 2023), https://www.nytimes.com/2023/01/30/us/tyre-nichols-arrest-videos.html ("A police report written hours after officers beat Tyre Nichols was starkly at odds with what videos have since revealed, making no mention of the powerful kicks and punches unleashed on Mr. Nichols and instead claiming that he was violent.").)

This high-profile incident is only "the latest instance nationwide in which video evidence . . . offered a starkly different account of police violence from what officers had reported

themselves." (*Ibid.*) A recent *Washington Post* analysis of seven high-profile police use-of-force cases—from the fatal injury of Freddie Gray in police custody in 2015 to the death of Nichols last month—"found a familiar pattern: The initial police version of events was misleading, incomplete or wrong, with the first accounts consistently in conflict with the full set of facts once they finally emerged." (Ashley Parker & Justine McDaniel, *From Freddie Gray to Tyre Nichols, Early Police Claims Often Misleading*, Wash. Post (Feb. 17, 2023), https://www.washingtonpost.com/nation/2023/02/17/police-shootings-false-misleading.)

Given this reality, if anything, the State should strive to make coming forward with misconduct allegations against peace officers *easier* for citizens—not threaten them with criminal sanctions for making such reports. Individuals aware of these high-profile incidents would have good reason to fear that police will lie when confronted with truthful complaints, because "many police misconduct situations . . . [will] inevitably . . . come down to the word of the citizen against the word of the police officer or officers." (*Stanistreet*, *supra*, 29 Cal.4th at pp. 513–14 (Werdegar, J., concurring).) As Justice Werdegar, joined by Justice Moreno, recognized in *Stanistreet*, if the police officers lie, then "the citizen (whether guilty or innocent) may . . . face both criminal

prosecution and the burden and expense of retaining a defense attorney" under Section 148.6. (*Id*. at p. 514.) As a result, "[p]rospective complainants cannot help but be aware of these realities when deciding whether to go forward with their complaints by signing the statute's required admonition," and "some complainants are likely to choose *not* to go forward—even when they have legitimate complaints." (*Stanistreet*, *supra*, 29 Cal.4th at p. 514 (Werdegar, J., concurring).)

C. Section 148.6 especially chills those in communities with historical and legitimate bases to mistrust the police.

Section 148.6 is especially likely to chill the speech of persons from communities of color and those who have historical bases to mistrust the police and doubt the fairness of the criminal legal system. This effect undermines the very purpose of Section 148.6—to improve the efficiency and efficacy of police departments and enhance public trust in the police.

1. Black and Brown communities have been disproportionately subject to policing.

Ready access to the misconduct complaint system is especially necessary for communities of color, because law enforcement and criminal justice systems have historically disproportionately policed Black and Brown communities. As

Justice Liu has previously observed, "[c]ountless studies show that Black Americans are disproportionately subject to police and court intervention, even when they are no more likely than [W]hites to commit offenses warranting such coercive action." (*People v. Triplett* (2020) 267 Cal. Rptr. 3d 675, 689 (Liu, J., dissenting); *see also Washington v. Lambert* (9th Cir. 1996) 98 F.3d 1181, 1187 ("In balancing the interests in freedom from arbitrary government intrusion and the legitimate needs of law enforcement officers, we cannot help but be aware that the burden of aggressive and intrusive police action falls disproportionately on African–American, and sometimes Latino, males."); Akwasi Owusu-Bempah, *Race and Policing in Historical Context: Dehumanization and the Policing of Black People in the 21st Century*, 21 Theoretical Criminology 23, 24 (2017) ("Blacks . . . are generally more likely to be stopped, searched, and arrested by the police, [and] are more likely to be the victims of police use of force").)

For example, Black and Brown pedestrians and drivers are stopped at disproportionately higher rates than are White pedestrians and drivers.[7] Black and Brown people also face

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[7] (*See, e.g.*, Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. Am.

disproportionately harsher treatment during these stops, including being searched and arrested more often despite having comparable rates of being found with contraband.[8] This disproportionate treatment has contributed to Black Americans being overrepresented in California's criminal justice system. (*People v. Buza* (Cal. 2018) 413 P.3d 1132, 1158 (Liu, J., dissenting) ("African Americans, who are 6.5 percent of

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Stat. Ass'n 813, 822 (2007) (finding Black Americans were stopped 23% more often than Whites and Hispanics were stopped 39% more often than Whites); Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Hum. Behav. 736 (2020) (analyzing about 100 million traffic stops and finding that the annual per-capita stop rate for Black drivers is disproportionately higher than for White drivers).)

[8] (*See* Pierson et al., *supra*, at p. 739 (finding that stopped Black and Hispanic drivers were searched about twice as much as stopped White drivers, despite Black drivers having comparable rates of being found with contraband and Hispanic drivers being less likely to be found with contraband); Voigt et al., *Language from Police Body Camera Footage Shows Racial Disparities in Officer Respect*, 114 PNAS 6521, 6521 (2017) ("[O]fficers speak with consistently less respect toward [B]lack versus [W]hite community members, even after controlling for the race of the officer, the severity of the infraction, the location of the stop, and the outcome of the stop."); Roland G. Fryer Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. Pol. Econ. 1210, 1213 (2019) ("[B]lacks and Hispanics are more than 50 percent more likely to have an interaction with police that involves any use of force . . . . [A]s the intensity of force increases . . . the racial difference remains surprisingly constant . . . . [B]lacks are 21 percent more likely than [W]hites to be involved in an interaction with police in which at least a weapon is drawn, and the difference is statistically significant.").)

California's population, made up 20.3 percent of adult felony arrestees in 2016" (citation omitted).).)

Amicus ACLU of Southern California has previously documented disproportionate rates of policing in the City of Los Angeles. "Pedestrian and motor vehicle stops of the Los Angeles Police Department . . . . [reveal] that African Americans and Hispanics are over-stopped, over-frisked, over-searched, and over-arrested . . . . [despite] these frisks and searches [being] . . . substantially less likely to uncover weapons, drugs or other types of contraband." (Ian Ayres & Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department*, ACLU of Southern California (Oct. 2008).)[9] Between 2013 and 2021 in Los Angeles, Black people were 5.7 times more likely, and Hispanic people were twice as likely to be arrested for low-level, non-violent offenses than were White people. (*See* Cal., Nat'l Police Scorecard, policescorecard.org/ca/police-department/los-angeles (last visited Nov. 28, 2022).) However, the "bar for searching [B]lack and Hispanic drivers is generally lower than for searching [W]hite

[9] (*See also Triplett*, *supra*, 267 Cal. Rptr. 3d at p. 689 (Liu, J., dissenting) ("Black drivers in Los Angeles are substantially more likely to be pulled over, searched, and detained or handcuffed by the police than [W]hite drivers," despite White drivers being "more likely to be found with illegal items.").)

drivers . . . . [which] strongly suggests discrimination against [B]lack drivers." (Pierson et al., *supra*, at p. 739; *see also People v. McWilliams* (Cal. Feb. 23, 2023) No. S268320, 2023 WL 2173661, at *12 (Liu, J., concurring) ("For every search of a Black person that yields contraband, there are far more — and disproportionately more — searches of Black people that turn up nothing . . . . [which is] detrimental to building trust between minority communities and law enforcement); Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. Am. Stat. Ass'n 813, 822 (2007) ("The differences in stop rates among ethnic groups are real, substantial, and not explained by previous arrest rates or precincts.").) These disparities may be explained by "the operation of implicit biases, including the unconscious association between Blackness and criminality." (*McWilliams, supra,* 2023 WL 2173661, at *12 (Liu, J., concurring).)

2. Section 148.6 is likely to disproportionately chill Black and Brown citizens from filing misconduct complaints.

Enforcement of Section 148.6, and in particular subsection (a)(2)'s signed advisory requirement, will disproportionately chill the speech of people of color and those who have historically been

subjected to disproportionate rates of police misconduct. It is likely to chill complaints from these communities precisely because they have well-documented grounds, arising from first-hand experience, to distrust the criminal justice system's fairness. "[I]t is a troubling reality, rooted in history and social context, that our [B]lack citizens are generally more skeptical about the fairness of our criminal justice system than other citizens." (*People v. Harris* (2013) 57 Cal.4th 804, 865 (Liu, J., concurring).)

Racial disparities also impact how misconduct complaints are resolved. (Faber & Kalbfeld, *supra*, at p. 1037 ("Of the 10,077 [misconduct] complaints in our sample [in Chicago] . . . [t]here were . . . dramatic racial disparities. A mere 1.9 percent of complaints by [B]lacks were sustained, compared to 6.7 percent for Latinos and 19.7 percent for [W]hites.").) Given these odds, it would be rational for Black and Brown people to file fewer misconduct complaints.

This can exacerbate a lack of accountability and increase the risk that officers who have negative interactions with communities of color remain in law enforcement because they are not consistently identified and disciplined. Law enforcement agencies' misconduct investigations already suffer from such deficiencies. (*See* Cal. State Auditor Rep. 2021-105, Law

Enforcement Departments Have Not Adequately Guarded Against Biased Conduct 74 (2022) ("Poor [misconduct] investigation practices of [the] Los Angeles Sheriff's Department] . . . not only have impaired their identification of individual instances of biased conduct but have also hindered their ability to monitor the prevalence of biased conduct by their officers.").) Section 148.6's chilling effect makes it even more difficult to effectively "monitor the prevalence of biased conduct" by officers.

3. Per California's Racial & Identity Profiling Advisory Board, Section 148.6(a)(2) has *already* chilled complaints alleging racial profiling and identity-based misconduct.

The RIPA Board has observed uneven rates of reporting racial profiling and identity-based misconduct complaints across the State of California, and identified as one cause the uneven enforcement of Section 148.6(a)(2)'s signed advisory requirement. In other words, as recognized in *Hamilton*, the requirement at issue has *already* chilled speech.

The Board is "particularly concerned by [Section 148.6's] deterrent effects on complaints alleging racial and identity-based profiling." (RIPA Board, Annual Report, at p. 182 (2023).) The Board found "notable disparities in the total complaints and

racial identity profiling allegations reported by [California] agenc[ies]." (RIPA, Annual Report, at p. 11 (2020).) Because the "Ninth Circuit and California Supreme Court . . . c[a]me to opposite conclusions regarding" Section 148.6's constitutionality in *Chaker* and *Stanistreet*, some agencies have enforced its advisory requirement while some have not. (*Id.* at p. 74 n. 108.) For example, some agencies require complainants to sign paperwork with language from the advisory while others allow complainants to file complaints anonymously without signing an advisory. (RIPA Board, Annual Report, at p. 11 n.657 (2022).) Rather than allow such "notable disparities" from an *ad hoc* approach to "the potential deterrent impact of Penal code section 148.6," this Court can provide uniformity by recognizing that enforcing the provision is unconstitutional. (RIPA Board, Annual Report, at p. 11 (2020).)

* * *

Section 148.6's impact on communities of color cannot be squared with the California State Government's stated goals of "improv[ing] diversity and racial and identity sensitivity in law enforcement" and "foster[ing] mutual respect and cooperation between law enforcement and members of all racial, identity, and cultural groups." (Cal. Pen. Code, § 13519.4.) Instead, Section 148.6 "continu[es] the lack of accountability for police harassment

and violence against African Americans" and other people of color." (*B.B. v. County of Los Angeles* (2020) 10 Cal. 5th 1, 34 (Liu, J., concurring).) Put simply, recognizing the unconstitutionality of Section 148.6 would "confront the injustices that have led millions to call for a justice system that works fairly for everyone." (Cathal Conneely, Supreme Court of California Issues Statement on Equality and Inclusion, Cal. Courts Newsroom (June 11, 2020), https://newsroom.courts.ca.gov/news/supreme-court-california-issues-statement-equality-and-inclusion.)

III. SECTION 148.6 VIOLATES THE PETITION CLAUSE OF THE CALIFORNIA CONSTITUTION

In addition to violating the constitutional provisions detailed above, Section 148.6 also violates the Petition Clause of the California Constitution (*see* Cal. Const., art. I § 3, subd. (a)), which "guarantees the rights to petition government for redress of grievances" (*Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8* (2012) 55 Cal.4th 1083, 1091 (quotation omitted)), and "is of parallel importance to the right of free speech." (*City of Long Beach, supra,* 31 Cal. at p. 535.) As this Court has explained, "[a]lthough [the Petition Clause] has seldom been independently analyzed, it does contain an inherent meaning and scope distinct from the right of free speech." (*City*

of Long Beach, *supra*, 31 Cal.3d at p. 535.) The California Constitution's protection for the right to petition extends further than that provided under the federal First Amendment. (*Robins v. Pruneyard Shopping Ctr.* (1979) 23 Cal.3d 899, 910 aff'd (1980) 447 U.S. 74 (holding that the California Constitution protects rights of expression on nongovernmental property beyond any protection provided by the federal Constitution in part because "[t]he California Constitution broadly proclaims speech and petition rights"); *see also City of Long Beach*, *supra*, 31 Cal.3d at p. 534 n. 4 ("The legislative history of California Constitution article I, section 3, reveals an intent to make the California provision at least as broad as the First Amendment right of petition").) The "right [to petition] in California is, moreover, vital to a basic process in the state's constitutional scheme [to] direct initiation of change by the citizenry through initiative, referendum, and recall." (*Pruneyard Shopping Ctr.*, *supra*, 23 Cal.3d at pp. 907-908.)

Under the California Constitution, the right to petition "includes the basic act of filing litigation or otherwise seeking administrative action." (*Sargon Enterprises, Inc. v. Browne George Ross LLP* (2017) 15 Cal.App.5th 749 (citing *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115).) This Court determined that the 1974 amendment to the

California Constitution "was clearly intended to broaden the right of petition to make it extend to petitions to all branches of government, not merely to the Legislature." (*City of Long Beach*, *supra*, 31 Cal.3d. at pp. 534 n. 4.).

A. The California Constitution's Petition Clause protects the right to petition the government for redress even of false grievances.

In *City of Long Beach*, this Court held that California's Petition Clause prohibits a governmental entity from maintaining an action for malicious prosecution against an individual who previously sued that entity without probable cause and with malice. (*Id.* at p. 527.) As this Court explained, under the Petition Clause, the right to petition is "absolutely privileged," even where the litigant's suit was premised on false allegations "done with 'actual malice'; *i.e.*, with knowledge of the falsity of the allegations made in the complaint." (*Id.* at p. 534.) Emphasizing that "[i]t is essential to protect the ability of those who perceive themselves to be aggrieved by the activities of governmental authorities to seek redress through all the channels of government," the Court recognized that a tort action against a municipality is one such means and that if cities were permitted to bring malicious prosecution actions against those who unsuccessfully sued them, "the institution of legitimate as

well as baseless legal claims will be discouraged" in an unconstitutional way. (*Id.* at p. 535.)

B. *City of Long Beach*'s reasoning logically extends to misconduct complaints against peace officers.

There is no principled basis for distinguishing civil tort suits premised on knowingly false allegations, as in *City of Long Beach*, from—as here—police misconduct complaints containing the same: both are petitions for redress from those "who perceive themselves to be aggrieved by the activities of governmental authorities." (*Ibid.*) If anything, *City of Long Beach*'s reasoning applies with greater force here.

First, the risk of chilling citizens' speech is more acute concerning police misconduct complaints. *City of Long Beach* reasoned that the "imposition of civil sanctions, even if only for statements purportedly made with actual malice," would cause "a severe chilling effect" on "the legitimate exercise of the right to express beliefs freely." (*Id.* at p. 535.) Here, the need for members of the community to file misconduct complaints against officers is at least as important as the need to seek monetary damages for such misconduct. (*See Duran v. City of Douglas, Ariz.* (9th Cir. 1990) 904 F.2d 1372, 1378 ("The freedom of individuals to oppose or challenge police action verbally without

thereby risking arrest is one important characteristic by which we distinguish ourselves from a police state"*; see generally* Part II, *supra.*) Moreover, the chill is likely to be even greater, given that the threatened sanction here is criminal rather than civil.

Second, *City of Long Beach* emphasized that alternative and less chilling channels remained to discourage false complaints against police officers. Likewise here, barring enforcement of Section 148.6 would not impact, for example, the availability of defamation suits; nor would such a ruling prevent the Legislature from passing a law that did not embody viewpoint and content discrimination and that did not have a broad chilling effect.

Third, *City of Long Beach* rejected the argument that municipalities' cost concerns can justify infringing the right to petition. Describing as the City's "most persuasive argument" that malicious prosecution was necessary "to compensate municipalities for expenses incurred in defending against baseless suits" and to "deter the[ir] proliferation," (*City of Long Beach*, *supra,* 31 Cal.3d at pp. 537–38), this Court nonetheless recognized the disproportionate harm stemming from such a remedy. Whereas municipalities could seek an award of attorney's fees at the end of any frivolous litigation to compensate for lost expenses, initiating a new malicious prosecution suit

would shift the burden too far in the other direction, requiring the former plaintiff to "hire new counsel" and "incur[] considerable expense" to defend it, rendering a harm disproportionate to any benefit for the city. (*Id.* at p. 538.) In this respect, Section 148.6 is even less justified than the provision at issue in *City of Long Beach*: here the complainant would need to hire defense counsel to counter *criminal* charges. Plus, the provision does nothing to aid law enforcement agencies in recouping the costs incurred as part of an administrative investigation. If anything, initiation of a criminal prosecution against a citizen is not only a disproportionate remedy for a false allegation of police misconduct, but also one that would require *additional* costs to the municipality to prosecute, further demonstrating that Section 148.6 does not serve a compelling governmental interest.

C. *City of Long Beach* affords this Court the opportunity to resolve this suit under the California Constitution alone.

City of Long Beach therefore furnishes an adequate and independent basis for this Court to declare Section 148.6 unenforceable. In that litigation, after the City of Long Beach sought review by the U.S. Supreme Court from this Court's decision, that Court granted the petition for a writ of certiorari,

vacated, and remanded to this Court, "to consider whether its judgment is based upon federal or state constitutional grounds, or both." (*City of Long Beach v. Bozek* (1983) 459 U.S. 1095.) On remand, this Court explained that its judgment was based on both, with the article 1, section, 3 of the California Constitution "furnish[ing] an independent ground to support the decision." (*City of Long Beach, supra*, 33 Cal.3d at 728; *see generally Michigan v. Long* (1983) 463 U.S. 1032, 1042 (recognizing that constitutional judgments of a state's highest court may "rest on adequate and independent state grounds").) *City of Long Beach* remained the law ever since.

The Petition Clause thus furnishes an adequate and independent state-law basis for non-enforcement of Section 148.6, and this Court may resolve the constitutionality of Section 148.6 on that ground alone, without deciding whether it also violates either the federal or California free speech clauses. (*Cf. Pruneyard Shopping Ctr.*, *supra,* 23 Cal.3d at p. 910 (recognizing that even where the federal First Amendment does not encompass a particular right to petition, that right may exist under California's Constitution because no Supreme Court precedent prevents "California's [Constitution] providing greater protection than the First Amendment now seems to provide"); *see also Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 502,

487 (extending the California Constitution's article I protection to speech unprotected by the First Amendment and rejecting any "attempt to make article I's free speech clause similar to the First Amendment's" because "article I's right to freedom of speech, unlike the First Amendment's, is unbounded in range").)

Although this argument was not heard below, this Court may resolve the constitutionality of Section 148.6 on this basis,[10] order additional briefing and argument from the parties,[11] or remand to the Court of Appeal to consider it in the first instance.[12]

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[10] This Court need "not remand this question to the Court of Appeal for its initial determination, but exercise [its] discretion to decide the issue in this proceeding." (*Santa Clara Cnty. Loc. Transportation Auth. v. Guardino* (1995) 11 Cal.4th 220, 231 n.4, as modified on denial of reh'g (Dec. 14, 1995) *see also Snukal v. Flightways Mfg., Inc.*, (2000) 23 Cal.4th 754, 773 ("at times this court has decided additional issues" beyond those raised in the appeal).)

[11] This Court may "on reasonable notice, order oral argument on" this issue by "giv[ing] the parties reasonable notice and opportunity to brief and argue it." (Cal. R. Ct. 8.516(a)(2) & (b)(2).)

[12] Alternatively, this Court could "remand[] to [the lower] court for consideration of the additional contentions raised on appeal." (*In re Manuel G.* (1997) 16 Cal.4th 805, 825.)

IV. CONCLUSION

For the foregoing reasons, Section 148.6 violates the federal First Amendment and the California Constitution. Accordingly, the Court should hold that Section 148.6 is unconstitutional, vacate the judgment below, and order that Section 1486 may not be enforced.

Dated: March 6, 2023 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court and in reliance on the word count of the computer program to prepare this Proposed Amicus Curiae Brief, counsel certifies that the text of this brief (including footnotes) was produced using 13-point type and contains 11,286 words. This includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File Amicus Curiae Brief required under Rule 8.520(f)(1-3), this certificate, and the signature blocks.

Dated: March 6, 2023

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 3 Embarcadero Center, 20th Floor, San Francisco, California 94111-4004. I am employed in the office of a member of the bar of this court at whose direction the service was made. On March 6, 2023, I served the attached document by electronically transmitting a true copy via this Court's TrueFiling system to the recipients listed on the below service list. Also on this date, I mailed the above document to the recipients listed on the below service list.

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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on March 6, 2023 at San Francisco, California

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