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4
5 **UNITED STATES DISTRICT COURT**
6 **SOUTHERN DISTRICT OF CALIFORNIA**
7

8 DARREN DAVID CHAKER,
9 Petitioner,

11 vs.

13 ALAN CROGAN, SAN DIEGO COUNTY
14 PROBATION DEPARTMENT,
15 Respondent.

Case No. 00CV2137 (BTM) (CGA)

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

**DATE/TIME: TBA
LOCATION: EL CENTRO BRANCH**

18 COMES NOW, DARREN DAVID CHAKER, Petitioner, and files with
19 this Court his Motion for Summary Judgment as to claim one (1),
20 the unconstitutionality of Penal Code section 148.6, of his Writ
21 of Habeas Corpus filed pursuant to Rule 4 of the Rules Governing
22 28 U.S.C. § 2254.
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I. UNDISPUTED FACTS

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

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

IT IS AGAINST THE LAW TO MAKE A COMPLAINT THAT YOU KNOW TO BE FALSE. IF YOU MAKE A COMPLAINT AGAINST AN OFFICER KNOWING THAT IT IS FALSE, YOU CAN BE PROSECUTED ON A MISDEMEANOR CHARGE.

(Penal Code §148.6(a)(2).)

On February 22, 1999, Petitioner was found guilty of violating PC 148.6(a)(1) as a result of his second jury trial. Petitioner was sentenced to 1) three years of summary probation, 2) two days of custody with two days credit for time served, 3) fined about \$1,100 and, 4) 15 days¹ of public service.

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

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

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

2 Petitioner subsequently filed the instant Writ of Habeas
3 Corpus. The Office of the District Attorney, for the
4 Respondent, filed a motion to dismiss Petitioner's Writ when it
5 was initially filed and again subsequent to Petitioner's Third
6 Amended Writ. The Court denied the initial Motion to Dismiss
7 and recommended on October 19, 2002, to dismiss some of the
8 claims for procedural reasons when the second Motion to Dismiss
9 was brought. However, the instant issue raised herein is not
10 subject to dismissal nor was it challenged by the Respondent's
11 second motion to dismiss. Hence, irrespective of the Court's
12 decision to dismiss some of the claims in Petitioner's writ, the
13 claim challenging the constitutionality of the statute is left
14 standing.
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1 148.6 facially unconstitutional. (*People v. Stanistreet* (2001)
2 93 Cal. App. 4th 469 [113 Cal. Rptr. 2d 529], *opinion superseded*
3 *by grant of review*, (2002) 115 Cal. Rptr. 2d 852.) The federal
4 court in *Hamilton v. City of San Bernardino* (C.D. Cal. 2000) 107
5 F. Supp. 2d 1239, reached the same conclusion.

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

14 Additionally, **all three courts** to have reached the merits
15 have **struck down** Penal Code section 148.6's civil counterpart,
16 Civil Code section 47.5, which creates a special cause of action
17 for defamatory citizen complaints against peace officers.
18 (*Walker v. Kiouisis* (2001) 93 Cal. App. 4th 1432, 1457 [114 Cal.
19 Rptr. 2d 69]³; *Haddad v. Wall* (C.D. Cal. 2000) 107 F. Supp. 2d
20 1230, 1238; *Gritchen v. Collier* (C.D. Cal. 1999) 73 F. Supp. 2d
21 1148, 1153, *reversed on other grounds*, (9th Cir. 2001) 254 F.3d
22 807.)⁴

24
25 ³ No Petition for Review or Request for Depublication was filed in *Walker*,
and the opinion holding Civil Code §47.5 unconstitutional is now final.

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

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

15 Indeed, as explained more fully below, California law
16 already provides substantial protections for peace officers'
17 reputational interests far beyond what other public officials
18 enjoy, such as laws which ensure the confidentiality of peace
19 officer personnel records and require false complaints to be
20 removed from general personnel files. (Penal Code §§ 832.5(b),
21 832.7(a).) Moreover, as a matter of state law, complaints
22 determined to be frivolous, unfounded, or exonerated may not be
23 used for promotional or punitive purposes. (Penal Code
24 §832.5(c)(2).)

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

1 Respondent's only presumptive principal argument may be
2 that Penal Code section 148.6 is not really content-or
3 viewpoint-discriminatory at all, but simply "fills a gap" left
4 by previous decisional law interpreting Penal Code section
5 148.5. That argument would be patently incorrect, and rests on
6 a misunderstanding of what section 148.6 really does. Far from
7 treating citizen complaints against police officers the same as
8 those made against other public officials, section 148.6 creates
9 two tiers of citizen complaints. Citizen complaints about how
10 public officials **other than** peace officers, perform their jobs,
11 made with superiors or oversight agencies, remain absolutely
12 privileged. Those complaints are not subject to prosecution
13 under either section 148.6 or 148.5. By contrast, citizen
14 complaints against peace officers - whether made with police
15 chiefs, police commissions, or any other oversight body - are
16 subject to criminal defamation prosecution. There can be no
17 reasonable dispute, moreover, that with respect to citizen
18 complaints of non-criminal misconduct, California law treats
19 peace officers differently from all other public officials.
20 Respondent's potential argument - that reading section 148.6 *in*
21 *pari materia* with section 148.5 somehow remedies the content and
22 viewpoint discrimination - flies in the face of the plain
23 language of both statutes.

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

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1 See *id.* at 325 (moving party's burden may be met by "'showing' -
2 that is, pointing out to the district court - that there is an
3 absence of evidence to support the nonmoving party's case").
4 Because Petitioner has made this showing, Respondent cannot
5 simply rely on his pleadings to argue the existence of a genuine
6 issue of fact; rather, he must identify specific facts in
7 dispute, and provide supporting evidence. See *Celotex*, 477 U.S.
8 at 324 (nonmovant must oppose summary judgment using evidence in
9 the form of "affidavits, depositions, answers to
10 interrogatories, and admissions on file"); *Taylor v. List*, 880
11 F.2d 1040 (9th Cir. 1989) (same); *Angel v. Seattle-First Nat'l*
12 *Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) (summary judgment
13 motion cannot be defeated by relying solely on conclusory
14 allegations unsupported by factual data); *Smith v. Mack Trucks*,
15 505 F.2d 1248, 1249 (9th Cir. 1974) (per curiam) (arguments and
16 statements of counsel "are not evidence and do not create issues
17 of material fact capable of defeating an otherwise valid motion
18 for summary judgment"). Because Respondent will not, and
19 cannot, introduce such evidence, Mr. Chaker is entitled to
20 summary judgment as to claim 1.
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II.

PENAL CODE SECTION 148.6 IS UNCONSTITUTIONAL

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

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

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

1 viewpoint based distinction created by Penal Code section 148.6.

2
3 **A. While California Law Generally Protects Citizen Complaints**
4 **Against Public Officials, Penal Code Section 148.6 Creates**
5 **an Exception for Citizen Complaints of "Peace Officer"**
6 **Misconduct.**

7 In order to assess the facial constitutionality of Penal
8 Code section 148.6, it is important to understand how California
9 law treats citizen complaints generally. California law
10 provides strong protection for citizens who speak up about the
11 misconduct of public officials in the performance of their
12 duties, by providing an "absolute privilege" from civil or
13 criminal defamation actions arising from such citizen
14 complaints. (*Imig v. Ferrar* (1977) 70 Cal. App. 3d 48 [138 Cal.
15 Rptr. 540]; *Pena v. Municipal Court* (1979) 96 Cal. App. 3d 77
16 [157 Cal. Rptr. 584]; *People v. Craig* (1993) 21 Cal. App. 4th
17 Supp. 1 [26 Cal. Rptr. 2d 184]; see also *Garrison, supra*, 379
18 U.S. at p. 67 [defining limitations on "state power to impose
19 criminal sanctions for criticism of the official conduct of
20 public officials."].) Subsequent to these decisions, however,
21 the Legislature enacted two laws creating an exception to the
22 general rule privileging citizen complaints of official
23 misconduct from defamation actions. These two laws selectively
24 withdraw the absolute privilege from one subcategory of citizen
25 complaints and one subcategory only - namely, those alleging
26 "peace officer" misconduct. (Penal Code §148.6(a)(1); Civil
27 Code § 47.5.)
28

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

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

9 It is now well established that this privilege extends
10 to transactions of administrative boards and quasi-
11 judicial proceedings.

12
13 [T]he California authorities have held that "a
14 communication to an official administrative agency,
15 which communication is designed to prompt action by
16 that agency, is as much a part of the 'official
17 proceeding' as a communication made after the
18 proceedings have commenced." [Citations.

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

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

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

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

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

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

1 Subsequent California appellate decisions recognized that
2 criminal libel prosecutions based on false citizen complaints
3 would be equally destructive to this "open channel of
4 communication."⁶ In *Pena v. Municipal Court, supra*, 96
5 Cal.App.3d 77, the Court held that: "The public policy
6 considerations expressed in *Imig* to bar a civil action on a
7 citizen's grievance are equally applicable to a criminal action
8 based on the contents of such complaint." (*Id.* at p. 82; *cf.*
9 *Garrison, supra*, 379 U.S. at p. 67 [holding that criminal libel
10 laws should be subjected to the civil libel rule articulated in
11 *New York Times v. Sullivan, supra*, 376 U.S. 254].) Allowing
12 "police officials to prosecute a citizen for filing a complaint
13 against an officer," *Pena* recognized, "would have the tendency
14 to 'chill' the willingness of citizens to file complaints . . .
15 ." (96 Cal. App. 3d at p. 82.) That is particularly true where
16 as in the instant case "the same entity against which the
17 complaint is made will be investigating the accusations." (*Id.*
18 at p. 83.) The *Pena* court thus held that a citizen complaint
19 of police misconduct, made to the chief of police, was protected
20 by this absolute privilege from criminal prosecution.

21 In *People v. Craig, supra*, 21 Cal. App. 4th Supp. 1, 5, the
22 Court likewise applied the *Imig* privilege to a criminal
23 prosecution, emphasizing that anything less than an absolute
24 privilege would create the chilling effect cited in *Pena*. As
25 *Craig* explained, "the importance of providing the community an
26

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

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

8
9 **2. Through Section 148.6, the State Has Created a Two-**
10 **Tiered System of Defamation Law - One Rule Applicable**
11 **to Citizen Complaints of "Peace Officer" Misconduct,**
12 **and Another Applicable to All Other Citizen Complaints**
of Official Misconduct.

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

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

26
27 ⁷ Because both *Pena* and *Craig* held that Penal Code section 148.5 did not
28 reach citizen complaints of police misconduct, the courts did not reach the
question whether a law criminalizing such reports would violate First
Amendment rights. (*Pena, supra*, 96 Cal.App.3d at pp. 81, 83; *Craig, supra*,
21 Cal.App.4th Supp. at pp. 6-7.)

1 by other public officials.⁸ For this reason, Civil Code section
2 47.5 has been held unconstitutional. (*Walker v. Kioussis, supra,*
3 93 Cal. App. 4th at p. 1457, *Haddad v. Wall, supra,* 107 F. Supp.
4 2d at p. 1238.)

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

14 Because Civil Code section 47.5 and Penal Code section
15 148.6 selectively target the same subclass of citizen
16 complaints, they "serve the same purposes" and "should be
17 subject to the same constraints and limitations." (*Hamilton,*
18 *supra,* 107 F. Supp. 2d at p. 1243.) As the U.S. Supreme Court
19 explained in *Garrison:* "Where criticism of public officials is
20 concerned, we see no merit in the argument that criminal libel
21 statutes serve interests distinct from those secured by civil
22 libel laws, and therefore should not be subject to the same

23
24 ⁸ California Civil Code section 47.5 provides:

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

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

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

17 Petitioner acknowledges that Penal Code section 148.6 was
18 enacted in response to the decision in *Craig*, just as Civil Code
19 section 47.5 was enacted in response to the decision in *Imig*.
20 (*Walker, supra*, 93 Cal. App. 4th at p. 1440.) But Respondent
21 would be incorrect to argue that Penal Code section 148.6 simply
22 "fills a gap" left open by these cases. In reality section
23 148.6 **creates** a gap in the "absolute privilege" that otherwise
24 applies to citizen complaints of official misconduct lodged with
25 superiors or oversight agencies. Respondent would thus be quite
26 wrong to claim that reading sections 148.5 and 148.6 *in pari*
27 *materia* creates a "coherent legislative scheme" that treats
28 citizen complaints against all public officials the same.
Rather, citizens who want to complain about or criticize the

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

8 Proper application of the *pari materia* rule makes that
9 quite clear. As other courts have recognized, the statutes that
10 should be read together are Civil Code section 47.5 and section
11 148.6. Both laws single out peace officers for "special
12 protection," by providing civil and criminal sanctions against
13 knowingly false citizen complaints of "peace officer"
14 misconduct, sanctions that are not available with respect to
15 knowingly false complaints against other public officials.

16 While many states have laws like section 148.5, which
17 target false crime reports,⁹ Petitioners' research into the laws
18 of the other 49 states has uncovered only four that have
19 criminal laws specially targeting citizen complaints of peace
20 officer misconduct. At the time of section 148.6's enactment in
21 1995, no other state had such a law. Since then, the states of
22 Minnesota (1998), Nevada (1999), Wisconsin (2001), and Ohio

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

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

6
7 **B. Penal Code Section 148.6 Violates the Rule Against Content-**
8 **and-Viewpoint-Discrimination Within a Category of**
9 **Generally Proscribable Speech.**

10
11 **1. R.A.V. v. City of St. Paul Articulates the**
12 **Constitutional Rule Applicable to Content-and**
13 **Viewpoint-Based Distinctions Within a Category of**
14 **Generally Proscribable Speech Such as Defamation.**

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

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

1 'profound national commitment to the principle that debate on
2 public issues should be uninhibited, robust, and wide-open.'" *(Police Dept. v. Mosley* (1972) 408 U.S. 92, 96 [92 S. Ct. 2286,
3 33 L. Ed. 2d 212], citation omitted.)

4
5 This policy is at its zenith when it comes to citizens'
6 complaints of wrongdoing by public officials such as police
7 officers: "[T]he First Amendment protects a significant amount
8 of verbal criticism and challenge directed at police officers."
9 *(Houston v. Hill* (1987) 482 U.S. 451, 461 [107 S. Ct. 2502, 96
10 L. Ed. 2d 398].) As Judge Kozinski has written for the Ninth
11 Circuit: "[W]hile police, no less than anyone else, may resent
12 having obscene words and gestures directed at them, they may not
13 exercise the awesome power at their disposal to punish
14 individuals for conduct that is not merely lawful, but protected
15 by the First Amendment." *(Duran v. City of Douglas* (9th Cir.
16 1990) 904 F.2d 1372, 1378.)

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

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

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

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

26
27 ¹¹ The ordinance at issue in R.A.V. prohibited the "plac[ing] on public or
28 private property a symbol, object, appellation characterization, or graffiti,
including, but not limited to, a burning cross or Nazi swastika, which one
knows or has reasonable grounds to know arouses anger, alarm or resentment in
others on the basis of race, color, creed, religion, or gender"
(505 U.S. at p. 380 [quoting ordinance].)

1 enough to render the ordinance presumptively invalid .

2 . . .

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

4 While the city could have enacted a ban on **all**
5 constitutionally proscribable "fighting words," it could not
6 **selectively** ban a particular class of fighting words based on
7 its content, message, or viewpoint. (*Id.* at pp. 391, 393-94.)
8 The *R.A.V.* Court recognized that there were "compelling
9 interests" supporting St. Paul's ordinance, but struck down the
10 measure because its content-based discrimination was not
11 "reasonably necessary" to serve these interests. (*Id.* at pp.
12 395-96.)

13
14 **2. Section 148.6 Constitutes Impermissible Content- and**
15 **Viewpoint-Based Discrimination By Selectively**
16 **Targeting Speech Critical Of Peace Officers.**

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

23 Assuming that Penal Code section 148.6 only covers speech
24

25
26 ¹² The lower court's content-discrimination analysis - like all the other
27 courts to have struck down Penal Code section 148.6 or its civil counterpart
28 - **assumes** that the statute incorporates the *New York Times* "actual malice"
test for proscribable defamation. (*New York Times, supra*, 376 U.S. at pp.
279-80; *Garrison, supra*, 379 U.S. at pp. 64, 69 [applying actual malice test
to criminal defamation statute]; *cf. R.A.V., supra*, 505 U.S. at pp. 380-81
[ordinance interpreted as limited to "fighting words" that may generally be
proscribed under the First Amendment].)

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

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

11 (107 F. Supp. 2d at p. 1244; see also *Walker, supra*, 93 Cal.
12 App. 4th at p. 1453.)

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

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

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

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

22 Rather than carving out an exception for *all*
23 defamatory statements made in an official
24 investigation of alleged police misconduct, section
25 47.5 makes actionable only a defamatory complaint
26 *against* a police officer. A defamatory statement *by*
27 the police officer, or another witness, about the
28 complainant or anyone else involved in the proceeding
is not actionable.

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

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

1 with "special interest" legislation intended to benefit a
2 particular group - that is how the legislative process works.
3 As demonstrated by the protections for the confidentiality of
4 personnel records, protections against unfounded complaints
5 being used for promotional purposes, and the Public Safety
6 Officers Procedural Bill of Rights, the peace officer lobby has
7 been very successful in protecting its interests through this
8 process. (See Gov. Code §3300 *et seq.*; Penal Code §§ 832.5(c),
9 832.7.) The First Amendment, however, limits government's
10 ability to grant special protections to certain groups where
11 speech is involved. (See *R.A.V.*, *supra*, 505 U.S. at p. 391
12 [First Amendment forbids "special prohibitions on those speakers
13 who express views on disfavored topics."].) The California
14 Legislature may well have been convinced that false citizen
15 complaints about peace officers pose a special harm, just as the
16 St. Paul City Council was convinced that fighting words
17 conveying a message of racial hatred are especially noxious. As
18 *R.A.V.* explained: "The politicians of St. Paul are entitled to
19 express that hostility [toward this message] - but not through
20 the means of imposing unique limitations upon speakers who
21 (however benightedly) disagree." (505 U.S. at p. 396.)

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

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

4
5 **3. Penal Code Section 148.5 Does Not Cure Section 148.6's**
6 **Facial Content - and - Viewpoint-Discrimination.**

7 Respondent could place great reliance on Penal Code section
8 148.5, arguing that this statute somehow cures the content- and
9 viewpoint- discrimination that is plain on the face of section
10 148.6. This argument, however, depends upon ignoring or
11 inviting this Court to rewrite the unambiguous language of
12 section 148.6. Respondent would be comparing apples and
13 oranges, because the two statutes are not directed at the same
14 type of expressive activity. Specifically: (1) section 148.6
15 (unlike section 148.5) applies to allegations of **non-criminal**
16 misconduct; (2) section 148.6 (unlike section 148.5) covers
17 citizen complaints made with the agencies responsible for
18 supervising the conduct of the public officials complained
19 against; and (3) section 148.6 (unlike section 148.5) requires
20 a stern, boldfaced warning that those complaining of peace
21 officer misconduct, but not misconduct by other public
22 officials, must sign.

23
24 **A. Penal Code Section 148.6, Unlike Penal Code**
25 **Section 148.5, Applies to Complaints of Non-**
26 **Criminal as Well as Criminal Misconduct.**

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

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

8 By its express terms, Penal Code section 148.6(a)(1)
9 applies to allegations of "misconduct against any peace
10 officer," not simply to allegations of criminal misconduct.
11 Any attempt by Respondent to equate Penal Code section 148.5 and
12 Penal Code section 148.6(a)(1) would be patently incorrect,
13 since section 148.5 allows prosecution only of false reports
14 "that a felony or misdemeanor has been committed." (Penal Code
15 § 148.5(a), (b), (c), & (d).) There is not a shred of evidence
16 anywhere in the legislative history that could be submitted by
17 Respondent to support the argument that section 148.6(a)(1) is
18 limited to complaints of **criminal** misconduct. To the contrary,
19 the legislative history at several points states that the
20 statute would apply to "any allegation of misconduct," without
21 any suggestion that allegations of non-criminal misconduct would
22 be excluded. The Enrolled Bill Report of the California Highway
23 Patrol states that the statute was designed to target "trivial
24 complaints against peace officers" as well as "fraudulent" ones.

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

1 peace officer and believes she was treated rudely or
2 aggressively, the mere filing of citizen complaint against the
3 officer can result in criminal charges being lodged against her
4 under section 148.6 if she is not believed. On the other hand,
5 a knowingly false complaint of similar treatment made against a
6 firefighter, school administrator, or DMV employee is **not**
7 grounds for prosecution under section 148.5. Penal Code section
8 148.5 could never be applied against such a complaint of non-
9 criminal misconduct, because the statute is explicitly limited
10 to false complaints of felonies or misdemeanors.

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

27
28 The prior courts that ruled the statute is unconstitutional

1 were therefore correct to conclude that, after enactment of
2 section 148.6, citizen complaints of peace officer misconduct
3 are treated differently than citizen complaints against all
4 other public officials. Indeed, even the Appellate
5 Division in *Stanistreet* recognized that this section results in
6 non-criminal misconduct by peace officers being treated
7 differently from citizen complaints of non-criminal misconduct
8 by all others. (App. Div. slip op. at p. 6 [section 148.6
9 "covers non-criminal misconduct, which is not prosecutable under
10 either section [148.5 or 148.6] as to anyone except peace
11 officers."].) The *Hamilton* court likewise interpreted section
12 148.6 in accordance with its plain language to encompass "false
13 allegations of misconduct, whether civil or criminal." (107 F.
14 Supp. 2d at p. 1244.)¹³ The only other court to have construed
15 Penal Code section 148.6 has also interpreted its unambiguous
16 language to include complaints of noncriminal misconduct by
17 peace officers. (*San Diego Police Officers Ass'n, supra*, 76
18 Cal. App. 4th at p. 23 ["subdivision (a) [of Penal Code §148.6]
19 applies only to citizens' complaints of police misconduct during
20 the performance of an officers' duties that may or may not rise
21 to the level of criminal offense"].)

22 None of the cases Respondent could cite would support a
23 contention that "misconduct" should be construed to mean "felony
24 or misdemeanor." In *People v. Superior Court (Anderson)* (1984)
25 151 Cal. App. 3d 893, 895 [194 Cal. Rptr. 150], the court

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

1 interpreted a statute criminalizing "any threat or violence,"
2 giving the term "threat" its obvious, common-sense meaning in
3 context. The court interpreted the term to include "threats of
4 violence but not . . . threats of lawful conduct." Likewise,
5 the court in *In re Andre P.* (1991) 226 Cal. App. 3d 1164, 1174
6 [277 Cal. Rptr. 363], gave a common-sense interpretation to a
7 criminal law forbidding willfully resistance, delay, or
8 obstruction of police officers, construing it to exclude
9 protected speech. (*Id.* at p. 1174.)

10 What Respondent may ignore is the limitation that the terms
11 of the statute must be "reasonably susceptible" to the narrowing
12 construction. (*Welton v. City of Los Angeles* (1976) 18 Cal. 3d
13 497, 505[134 Cal. Rptr. 668]; see also *In re Andre P.*, *supra*,
14 226 Cal. App 3d at p. 1174 ["fair and reasonable
15 interpretation"].) By contrast, construing "misconduct" to mean
16 "felony or misdemeanor" would require a rewriting of the
17 statute. Petitioner's cases, moreover, do not allow a facial
18 **content-discrimination** problem to be cured by a narrowing
19 construction; these cases have instead to do with "overbreadth"
20 problems being cured in this manner. (See, e.g., *Welton*, *supra*,
21 18 Cal. 3d at pp. 505-07.) The facial distinction that this
22 statute draws between citizen complaints of "peace officer"
23 misconduct and those against all other public officials cannot
24 be cured by anything less than a manifest rewriting of the
25 statute.

26
27 In essence, Respondent would effectively ask this Court to
28 rewrite the statute, by replacing the word "misconduct" with "a

1 felony or misdemeanor." In *Metromedia, Inc. v. City of San*
2 *Diego* (1982) 32 Cal. 3d 180 [185 Cal. Rptr. 260], however, this
3 Court held that "rewrit[ing] the statute in accord with the
4 presumed legislative intent" is "a legislative and not a
5 judicial function." (*Id.* at p. 187, citation omitted; see also
6 *Eberle v. Municipal Court* (1976) 55 Cal. App. 3d 423, 433 [127
7 Cal. Rptr. 594] ["wholesale rewriting" of a statute by a
8 judicial authority would constitute a "flagrant breach of the
9 doctrine of separation of powers"].) "[A] statute '. . . is to
10 be interpreted by the language in which it is written, and
11 courts are no more at liberty to add provisions to what is
12 therein declared in definite language than they are to disregard
13 any of its express provisions.'" (*Wells Fargo Bank v. Superior*
14 *Court* (1991) 53 Cal.3d 1082, 1097 [282 Cal. Rptr. 841], citation
15 omitted.) The construction of section 148.6 that Petitioner urges
16 would do precisely what these cases forbid.

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

28 Whether or not these constitute a majority of citizen

1 complaints , they clearly fall within the scope of section
2 148.6(a). It is equally clear that similar complaints made
3 against other public officials would not fall within the scope
4 of section 148.5, section 148.6, or any other law. The
5 differential treatment accorded to citizen complaints of non-
6 criminal misconduct by peace officers, as contrasted with other
7 public officials, demonstrates its content-discriminatory
8 character.¹⁴

9
10 **B. Section 148.6 Targets Citizen Complaints of**
11 **"peace officer" Misconduct, While Leaving**
12 **Untouched Complaints Made to The Authorities**
13 **Charged With Monitoring Other Public Officials.**

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

18
19 ¹⁴ As set forth in the text above, Penal Code section 148.6 cuts a wider
20 swath than Petitioner contends in one respect, namely insofar as it applies
21 to citizen complaints involving both criminal and non-criminal misconduct by
22 peace officers. In another respect, however, section 148.6 may be narrower
23 than Petitioner suggests. In *San Diego Police Officer Ass'n v. San Diego*
24 *Police Dep't* (1999) 76 Cal. App. 4th 19 [90 Cal. Rptr. 2d 6], the Court of
25 Appeal construed subdivision (a) to apply "only to citizens' complaints of
26 police misconduct during the performance of an officer's duties . . ."
27 (*Id.* at p. 23.)

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

1 in section 148.5." Section 148.6(a) allows criminal
2 prosecutions based on complaints made with authorities
3 responsible for monitoring police misconduct - including police
4 chiefs, police commissions, and citizen review boards. Section
5 148.5, on the other hand, is limited to false crime reports made
6 to those whose responsibility is to enforce the criminal law
7 (i.e., prosecutors, law enforcement agencies, and grand juries).
8 It does not target citizen complaints about the job performance
9 of public officials made to their superiors or watchdog
10 agencies, and therefore does not breach the "absolute privilege"
11 for such statements.

12 Some examples are helpful in illuminating this distinction.
13 Even after enactment of Penal Code section 148.6, parents who
14 make citizen complaints of misconduct by teachers with a
15 principal or local school board are protected from libel
16 actions, either criminal or civil. (See *Frisk v. Merrihew*
17 (1974) 42 Cal. App. 3d 319, 324 [116 Cal. Rptr. 781]; *Martin v.*
18 *Kearney* (1975) 51 Cal. App. 3d 309, 311 [124 Cal. Rptr. 281].)
19 Such citizen complaints are not subject to prosecution under
20 section 148.5 - even putting aside its limitation to **criminal**
21 misconduct - since that statute applies only to statements made
22 to district attorney offices, law enforcement agencies, and
23 grand juries. Nor, of course, would such citizen complaints be
24 subject to prosecution under section 148.6, which is *explicitly*
25 *limited* to complaints of "peace officer" misconduct.
26

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

1 to prosecution under either section 148.5 or section 148.6.
2 Such a statement would not fall within the scope of section
3 148.5, since it is not made to a district attorney office, law
4 enforcement agency, or grand jury; nor, of course, would it be
5 covered by section 148.6(a)(1).

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

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

27
28 **C. The Stern, Boldfaced Warning Required by Section**

1 148.6(a)(2) Applies Only to Citizen Complaints of
2 Peace Officer Misconduct, not to Complaints of
3 Misconduct by Other Public Officials.

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

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

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

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

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

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

23
24
25 **4. While Defendants Believe That Section 148.6(a)(1)**
26 **Applies Even If the (a)(2) Warning Is Not Signed, the**
Statute Discriminates Based on Content and Viewpoint

27
28 ¹⁵ As explained below, if there is any question posed by this Court,
Petitioner believes that section 148.6(a)(1) allows for prosecution of
complainants whether or not they sign the warning. Regardless, it does not
alter the content-discriminatory character of the statute.

1 **BE PROSECUTED ON A MISDEMEANOR CHARGE."**

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

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

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

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

13
14 **B. Section 148.6 is Unconstitutional, Whether or Not**
15 **Citizen Complainants Who do Not Sign the (a)(2)**
16 **Admonition May be Prosecuted.**

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

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

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

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

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

1 possibility of a criminal prosecution for filing a false
2 complaint - even without the admonition required by (a)(2) -
3 tends to "'chill' the willingness of citizens to file
4 complaints, particularly on weak evidence and when the same
5 entity against which the complaint is made will be investigating
6 the accusations." (96 Cal. App. 3d at p. 83.) This chilling
7 effect is only exacerbated by the (a)(2) warning, regardless of
8 whether the government actually follows through by initiating a
9 prosecution. And because this statute discriminates based on
10 content by specifically targeting citizen complaints against
11 "peace officer[s]," even the "realistic possibility" of such a
12 chilling effect is sufficient to render it presumptively
13 invalid. (*R.A.V.*, *supra*, 505 U.S. at p. 390.)
14

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

18 Respondent may go as far to argue that, even if section
19 148.6 discriminates on the basis of the content and viewpoint of
20 speech, that such discrimination is constitutionally acceptable
21 under all three of the exceptions delineated in *R.A.V.* Any
22 potential argument by Respondent in this regard would have been
23 rejected not only by the court below, but also by the district
24 courts in *Hamilton*, *Gritchen*, *Haddad* and by the Court of Appeal
25 in *Walker*. This Court should likewise reject these arguments.
26

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

1
2 Another potentially flawed argument Respondent could contend
3 is that the distinction drawn by section 148.6 is justifiable
4 because it "consists entirely of the very reason the entire
5 class of speech is proscribable." quoting Boos v. Barry, 485
6 U.S. 312, 321, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988)

7
8 **III.**

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

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

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

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

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

26
27 ¹⁷ The California Supreme Court's opinion in *In re. M.S.* (1995)10 Cal. 4th
28 698 [42 Cal. Rptr. 2d 355], further illuminates the speech/conduct
distinction underlying *Steven S.* In *M.S.*, this Court upheld a statute
prohibiting "unlawful conduct" rather than expression, specifically
interference with the "exercise of constitutional or statutory rights by
means of force or threat of force." (*Id.* at pp. 714, 722.)

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

12 As the Supreme Court has explained:

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

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

21 This prohibition against content, message, and viewpoint
22 based discrimination applies even to government attempts to
23 regulate so-called "unprotected" speech. Id. at 505 U.S. at 386
24 n.5. Though government may proscribe certain classes of speech,
25 such as defamation and libel, it may not discriminate within
26 that class based on content, subject matter, or viewpoint. For
27 example, in Police Dept. v. Mosley and Carey v. Brown, the
28

1 Supreme Court struck down laws that permitted labor-related
2 picketing, while prohibiting picketing on all other subjects.¹⁸
3 In both cases, the Court was careful to emphasize that its
4 holding imposed no bar to more general prohibitions against
5 picketing. See Mosley, 408 U.S. at 98 ("This is not to say that
6 all picketing must always be allowed."); Carey, 447 U.S. at 470
7 ("even peaceful picketing may be prohibited when it interferes
8 with the operation of vital government facilities, or when it is
9 directed toward an illegal purpose")(citations omitted). What
10 the government could **not** constitutionally do was to "select
11 which issues are worth discussing or debating in public
12 facilities." Mosley, 408 U.S. at 96 (emphasis added). The
13 government may **not** attempt to "pick and choose among the views
14 it is willing to have discussed" Id. at 98 (quoting Cox v.
15 Louisiana, 379 U.S. 559, 581, 85 S. Ct. 476, 13 L. Ed. 2d 487
16 (1965)(Black, J., concurring)).

20 The Mosley Court thus struck down a ban on non-labor-
21 related picketing near schools. Although the City of Chicago
22 could have banned all forms of disruptive picketing irrespective
23

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

1 of content without violation the Constitution, Mosley holds that
2 "selective exclusions ... must be carefully scrutinized." Id.
3 at 98-99. In particular, such selective bans "must be tailored
4 to serve a substantial governmental interest." Id. at 99. By
5 allowing labor-related picketing but prohibiting other
6 picketing, the City of Chicago had engaged in impermissible
7 content-based discrimination:
8

9
10
11 Far from being tailored to a substantial
12 governmental interest, the discrimination among
13 pickets is based on the content of their
14 expression. Therefore, under the Equal
15 Protection Clause, it may not stand.

16
17 408 U.S. at 102; see also Carey, 447 U.S. at 461-62 (relying on
18 Mosley to strike down Illinois law differentiating between labor
19 and nonlabor picketing).

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

1 statute).

2 Writing for the R.A.V. Court, Justice Scalia properly
3 recognized that government could, "consistent with the First
4 Amendment," regulate certain categories of speech – such as
5 defamation, obscenity, and fighting words – "*because of their*
6 *constitutionally proscribable content.*" Id. at 383 (emphasis in
7 text). The government may not, however, engage in "content
8 discrimination unrelated to the[] distinctively proscribable
9 conduct." Id. at 384. Thus, for example, "government may
10 proscribe libel, but may not make the further content
11 discrimination of proscribing *only* libel critical of the
12 government." Id. (emphasis in text). By the same token,
13 government may proscribe obscenity, but may not "enact an
14 ordinance prohibiting only those legally obscene works that
15 contain criticism of the city government" Id. at 384.
16 While the Constitution permits general rules prohibiting
17 obscenity or libel, "selective limitations upon speech," even
18 within these categories, are subject to strict scrutiny. Id. at
19 392 (emphasis added). The Court explained: "The First Amendment
20 does not permit St. Paul to impose special prohibitions on those
21 speakers who express views on disfavored subjects." Id. at 391.

22 Applying this principle, the R.A.V. Court concluded that
23 the St. Paul ordinance violated the First Amendment, because it
24 prohibited one content-based subcategory of proscribable speech
25

1 - in that case, "fighting words" conveying racial, gender, or
2 ethnic intolerance. While the city could have enacted a ban on
3 all constitutionally proscribable "fighting words," including
4 but not limited to burning crosses on someone's front yard, it
5 could not selectively ban a particular class of fighting words:
6

7 [T]he ordinance applies only to "fighting words" that
8 insult, or provoke violence, "on the basis of race,
9 color, creed, religion, or gender." ... Those who wish
10 to use "fighting words" in connection with other ideas
11 - to express hostility, for example, on the basis of
12 political affiliation, union membership, or
13 homosexuality - are not covered

14 St. Paul has not singled out an especially offensive
15 mode of expression - it has not, for example, selected
16 for prohibition only those fighting words that
17 communicate ideas in a threatening (as opposed to a
18 merely obnoxious) manner. Rather, it has proscribed
19 fighting words of whatever manner that communicate
20 messages of racial, gender, or religious intolerance.
21 Selectivity of this sort creates the possibility that
22 the city is seeking to handicap the expression of
23 particular ideas. That possibility alone would be
24 enough to render the ordinance presumptively invalid
25

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

IV.

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

4 Laws drawing content-based distinctions - even within a
5 category of generally proscribable speech - are subject to
6 strict scrutiny, and can pass constitutional muster *only if* they
7 are "narrowly tailored" to serve "compelling interests." 505
8 U.S. at 395-96; see also Gritchen, 73 F. Supp. 2d at 1153. There
9 is no compelling, substantial, or even legitimate justification
10 that can support the distinction between citizen complaints
11 against police officers and all other citizen complaints.
12

13 To the contrary, Penal Code §148.6 hinders the weighty
14 interest in promoting an "open channel" of communication between
15 the People and their government - an interest that is of
16 particular importance in the area of law enforcement. Imig, 70
17 Cal. App. 3d at 56. As the federal district court said in
18 striking down Penal Code §148.6's civil counterpart, this law
19 "may in fact hinder the policies underlying [California Civil
20 Code] §47, by blocking the 'open channel' of communication
21 between citizens and their government, at least as to one group
22 of public officials." Gritchen, 73 F. Supp. 2d at 1153. As the
23 court also recognized: "No showing has been made that there is a
24 serious problem of false complaints against police." 73 F.
25 Supp. 2d at 1153. Respondent, presumptively, cannot make any
26 showing in this case either, with respect to Penal Code §148.6.
27
28

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

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

25
26
27 Even if there were some conceivable compelling interest
28 supporting the selective targeting of complaints against peace

1 officers, the burden is on the **government** to show that the
2 statute is narrowly tailored to serve the proffered interests.
3 See, e.g., Boos v. Barry, 485 U.S. 312, 321, 108 S. Ct. 1157, 99
4 L. Ed. 2d 333 (1988); Carey, 447 U.S. at 461-62. Assuming
5 *arguendo* that there is some cognizable interest in providing
6 special "protection" to police officers, over and above those
7 enjoyed by all other public officials, Penal Code §148.6 is not
8 narrowly tailored - or even rationally related - to serve that
9 interest. As the Gritchen court observed:
10
11

12
13 Even if the state interest behind the content
14 discrimination in § 47.5 were compelling, the
15 provision is not narrowly tailored to fit that
16 interest. Significant protections from false
17 complaints are already afforded to police officers by
18 their internal oversight agencies, in addition to the
19 possibility of perjury charges for false complainants.
20 See Plaintiff's Reply, pp. 24-25.¹⁹ If these
21 protections are insufficient, California may
22 strengthen existing safeguards or provide procedures
23 to ensure police officers' careers are not put in
24 jeopardy until after a complaint's truth is verified.

25 73 F. Supp. 2d at 1153.

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

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

16
17
18
19 As documented in the expert evidence submitted in Gritchen,
20 the means by which to make sure that officers' reputations are
21 protected, **without** invading free speech, include the following:

22 § Civilian oversight agencies only consider complaints that
23 have been sustained after a thorough investigation.

24
25 § [M]ost agencies do not publicize the names or allegations
26 against officers unless they have been sustained, or proven
27 to have been true.

28 § Police officers who wish to challenge "sustained" findings

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

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

7 § California law allows police officers to have citizen
8 complaints found to be frivolous or unfounded removed from
9 their files. (citing Penal Code §832.5(c)).
10
11

12 The existence of other means by which to protect peace
13 officers' reputational interests -- means that do not impede
14 First Amendment rights -- undercuts any conceivable claim that
15 Penal Code §148.6 survives the strict scrutiny that Supreme
16 Court precedent requires. Respondent would be wrong to suggest
17 that Gritchen in any way sanctions Section 148.6. To the
18 contrary, Gritchen makes crystal clear that the distinction
19 between police officers and other public officials, drawn by
20 Penal Code §148.6 and Civil Code §47.5 alike, cannot pass
21 constitutional muster. Penal Code §148.6 cannot survive any
22 level of constitutional scrutiny, much less the heightened
23 scrutiny mandated by the Supreme Court in R.A.V., Carey, and
24 Mosley, and the federal district court in Gritchen.
25
26
27
28

V.

CONCLUSION

1 For the reasons set forth above, Mr. Chaker respectfully
2 requests that this Court grant his Motion for Summary Judgment
3 with respect to claim 1, grant Mr. Chaker's Petition for Writ of
4 Habeas Corpus, and vacate Mr.Chaker's judgment of conviction.
5

6
7 Dated this day 30 day of October, 2002
8

9
10 Darren D. Chaker
11 Petitioner
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