

No. S275272

**IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA**

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LOS ANGELES POLICE PROTECTIVE LEAGUE,  
Plaintiff and Respondent,

v.

CITY OF LOS ANGELES and CHARLES BECK,  
Defendants and Petitioner.

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Petition for Review of a Decision of the Court of Appeal, Second  
Appellate District, Division 7, Court of Appeal No. B306321

Superior Court, County of Los Angeles  
Civil Case No. BC676283, Honorable Robert B. Broadbelt III;  
Affirmed on appeal

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**PETITION FOR REVIEW**

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## **Issues Presented**

Does Penal Code section 148.6, subdivision (a), particularly subdivision (a)(2), constitute improper viewpoint discrimination that violates the First Amendment?

Does Penal Code section 148.6, subdivision (a), particularly subdivision (a)(2), impose an impermissible burden on the ability to file, or on the City to accept, police misconduct complaints?

Is it error to compel the City to violate a federal judicial ruling that will necessarily subject it to liability in federal court for enforcing a statute that the Ninth Circuit has already ruled unconstitutional?

## **Introduction**

The City of Los Angeles (hereafter “the City”) is bound to follow the precedent of both this Court and the Ninth Circuit. But the Ninth Circuit has held that Penal Code Section 148.6, subdivision (a) (hereafter “Section 148.6(a)”) violates the First Amendment, whereas this Court has held it does not. Concluding that it was bound by this Court’s previous ruling, the Court of Appeal upheld a trial court injunction compelling the City to comply with Section 148.6(a)(2). This leaves the City in an impossible situation where it must violate Ninth Circuit

authority (and thus subject itself to federal liability) to comply with the Court of Appeal's decision. Guidance from this Court is urgently needed.

Section 148.6(a)(1) provides that making a knowingly false complaint against a peace officer is a misdemeanor, and Section 148.6(a)(2) bars a law enforcement agency from accepting a misconduct allegation unless it notifies the individual that filing a knowingly false complaint is a criminal misdemeanor and obtains a signature by the complainant acknowledging the warning.

The California Supreme Court and the Ninth Circuit have issued conflicting rulings regarding Section 148.6(a)'s constitutionality. First, in 2002, the California Supreme Court upheld Section 148.6(a) against a challenge that was much different from the City's current challenge. There, a defendant convicted of filing a false misconduct complaint argued that Section 148.6(a) was unconstitutional because it treated complaints against peace officers differently than complaints against other public employees. (See, *People v. Stanistreet* (2002) 29 Cal.4th 497, 501.) This Court held that allegations against police officers could be treated differently because of the distinct statutory scheme that applied, such as a mandatory investigation and preservation of complaints for at least five years. (*Id.*, at 503-04.)

Three years later, in *Chaker v. Crogan* (9th Cir. 2005) 428 F.3d 1215, 1229, the Ninth Circuit declared Section 148.6(a) unconstitutional under the First Amendment as an express content and viewpoint-based restriction on speech. The Ninth Circuit found that Section 148.6(a) specifically targets speech critical of peace officers – applying only to knowingly false misconduct complaints against peace officers but leaving untouched knowingly false statements favoring peace officers in misconduct investigations. That is, Section 148.6(a) criminalizes and threatens prosecution for knowingly false misconduct allegations while providing no consequence or threat to knowingly false statements that support the officer.

Subdivision (a)(2), which is the heart of this case, requires any law enforcement agency accepting a complaint against a peace officer to require the complainant to read and sign an advisory that threatens the complainant with possible criminal prosecution if the allegations are deemed false. In other words, any individual wishing to file a misconduct complaint against a peace officer must acknowledge that filing a false complaint is a potential criminal misdemeanor. Moreover, because subdivision (a)(2) requires an acknowledging signature for every misconduct complainant received, it bars anonymous complaints.

In 2017, the Los Angeles Police Protective League (“LAPPL”) initiated this action, asking the trial court to compel

the City to comply with Section 148.6(a)(2). The trial court, relying on *Stanistreet*, issued an injunction ordering the City to comply with Section 148.6(a)(2), which the Court of Appeal has now affirmed.

The Court of Appeal was not required to follow *Stanistreet* since *Stanistreet* did not address the relevant issue here – whether Section 148.6(a) imposes viewpoint discrimination because it only criminalizes misconduct allegations against peace officers but not statements favoring them. And yet, the Court of Appeals concluded that it was unable to follow *Chaker* because it is bound by *Stanistreet*. While the City faces an injunction requiring the enforcement of Section 148.6(a)(2), the City of San Bernardino, for example, is subject to a federal injunction barring the enforcement of Section 148.6(a). (See *La Fr. Hamilton v. City of San Bernardino* (C.D. 2004) 325 F. Supp. 2d 1087, 1095.) Once the City enforces Section 148.6(a)(2), it risks being subject to a similar federal injunction (as well as civil liability). Supreme Court review is, therefore, urgently needed.

From 2001 to 2013 a federal consent decree prevented the City from undertaking any action that could deter police misconduct complaints; thus blocking enforcement of Section 148.6(a)(2). After the Consent Decree expired, *Chaker* had issued and the LAPD did not enforce Section 148.6(a)(2). Four years later, the LAPPL sued to compel enforcement. The trial court

concluded it was bound by *Stanistreet* and granted LAPPL its requested injunction. The Court of Appeal affirmed, also concluding it was bound by *Stanistreet*.

On its face, Section 148.6(a) imposes viewpoint discrimination targeting knowingly false allegations of police misconduct and it should be held unconstitutional on those grounds. Even more problematic is the preemptive threats of prosecution required by Section 148.6(a)(2), which reduces the misconduct complaints received both by intimidating complainants who may already be hesitant to confront the police and by eliminating anonymous reports of misconduct. In addition, the injunction would require the City to violate *Chaker's* holding that Section 148.6(a) is unconstitutional, necessarily exposing the City to liability in federal court.

Because local and state agencies require Supreme Court review and guidance, the Court should grant review.

## **Factual and Procedural Background**

### **A. The Parties**

Plaintiff and Respondent LAPPL identifies itself as an employee organization recognized to represent all police personnel (i.e. peace officers) employed by the City of Los Angeles with regard to matters including working conditions. (Gov. Code § 3500, et seq.) (1 CT 124:2-6.)

The City of Los Angeles is a chartered city and Charles Beck is the City's former Chief of Police. (1 CT 124:7-11 and 145:4.)

**B. Penal Code Section 148.6(a) is designed to deter complaints of police misconduct.**

The Legislature adopted Penal Code Section 148.6(a) in 1995 in response to concerns that “less ethical citizens” were filing “maliciously [ ] false allegations of misconduct against officers” (*Stanistreet, supra*, 20 Cal.4th at 502-03.) Section 148.6(a)(1) makes it a misdemeanor to knowingly file a false misconduct allegation.

This appeal and this Petition focuses on subdivision (a)(2) of Section 148.6, which requires that before any “law enforcement agency” can accept “an allegation of misconduct against a peace officer” it “shall require the complainant to read and sign the following advisory, all in boldface type:

**YOU HAVE THE RIGHT TO MAKE A COMPLAINT AGAINST A POLICE OFFICER FOR ANY IMPROPER POLICE CONDUCT. CALIFORNIA LAW REQUIRES THIS AGENCY TO HAVE A PROCEDURE TO INVESTIGATE CIVILIANS' COMPLAINTS. YOU HAVE A RIGHT TO A WRITTEN DESCRIPTION OF THIS PROCEDURE. THIS AGENCY MAY FIND AFTER INVESTIGATION THAT THERE IS NOT ENOUGH EVIDENCE TO WARRANT ACTION ON**

**YOUR COMPLAINT; EVEN IF THAT IS THE CASE, YOU HAVE THE RIGHT TO MAKE THE COMPLAINT AND HAVE IT INVESTIGATED IF YOU BELIEVE AN OFFICER BEHAVED IMPROPERLY. CIVILIAN COMPLAINTS AND ANY REPORTS OR FINDINGS RELATING TO COMPLAINTS MUST BE RETAINED BY THIS AGENCY FOR AT LEAST FIVE YEARS.**

***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.***

**I have read and understood the above statement.**

**Complainant\_\_\_\_\_.”**

(Penal Code § 148.6, subd. (a)(2), emphasis added.)

From 2001 to 2013 the City was subject to a consent decree resulting from a lawsuit initiated by the U.S. Justice Department alleging a pattern and practice of civil rights violations by the City. (1 CT 145:10-16 and 257.) (Hereafter “Consent Decree”.) An important part of the Consent Decree required the City to “continue to provide for the receipt of the complaints” including “(a) in writing or verbally, in person, by mail, by telephone (or TDD), facsimile transmission, or by electronic mail; (b) anonymous complaints; . . . (d) distribution of complaint materials and self-addressed postage paid envelopes . . .”; [and]

“(g) continuation of a 24-hour toll-free telephone complaint hotline.” (1 CT 174.) The City also agreed not to require anyone lodging a misconduct complaint against the police to sign anything that would impede their ability to do so. (1 CT 174, ¶(h).)

By its express terms the Consent Decree barred the City from complying with Section 148.6(a)(2). (1 CT 174:18-23.) Notably, LAPPL accepted the City’s omission of the section 148.6(a)(2) advisory from 2001 until 2013. (See 1 CT 89:5-11.) The City of Oakland is currently subject to a similar consent decree, and it was partially on that basis that a trial court recently rejected an attempt to compel the City of Oakland to comply with Section 148.6(a)(2).<sup>1</sup>

**C. Federal and state courts have addressed criminal charges and convictions under Section 148.6(a)(1), reaching different conclusions.**

In 1996, the California Attorney General Daniel Lungren issued an opinion finding that Section 148.6(a)(2) only passed

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<sup>1</sup> That court ruled on two grounds: (1) that Section 148.6(a) could not be constitutionally enforced under *Chaker*; and (2) that the terms of Oakland’s consent decree conflicted with Section 148.6(a)(2). (See, *Morrow v. City of Oakland* (Super. Ct. Alameda County, 2020, No. RG20053166) 2020 Cal. Super LEXIS 71819, pp. \*3-\*4.) This unpublished decision is only cited as an example of current circumstances.

constitutional muster if “a law enforcement agency does not lose its power and jurisdiction to investigate allegations of police misconduct even though it fails to secure the signature of the complainant on the advisory form.” (79 Cal. Op. Att’y. Gen. 163, 167.)

In 2000 a federal district court found Section 148.6(a) facially unconstitutional for only addressing complaints against police officers but not complaints against other public employees. (*Hamilton v. City of San Bernardino* (Cal. C.D. 2000) 107 F. Supp. 2d 1239, 1247-48 [also holding that it was not narrowly tailored to meet its stated goals].)

The California Supreme Court issued its *Stanistreet* decision in 2002, following an appeal from a conviction under Section 148.6(a)(1) for filing a false misconduct complaint. *Stanistreet* upheld the constitutionality of Section 148.6(a) against the argument that it was an improper content-based restriction on speech for treating police misconduct complaints more harshly than complaints about other public employees, finding that Section 148.6(a) was a proper content-based restriction because the law imposed requirements specific to police misconduct complaints, such as mandatory investigations. (*Stanistreet, supra*, 29 Cal.4th at 512 and 508-09.) Regarding the Section 148.6(a)(2) advisory, *Stanistreet* stated only, without authority or discussion, that it was the equivalent of a perjury

warning and so its existence did not invalidate Section 148.6(a). (*Id.*, at 510.)

In 2004, the same district court specifically disagreed with *Stanistreet* and rejected Section 148.6(a) as an improper content-based and viewpoint based restriction on speech. (*La Fr. Hamilton v. City of San Bernardino* (C.D. 2004) 325 F. Supp. 2d 1087, 1091-94.) That court found Section 148.6(a) unconstitutional and issued a permanent injunction barring the City of San Bernardino from enforcing it. (*Id.*, at 1095.)

In 2005, *Chaker v. Crogan, supra*, 428 F.3d at 1217 arose from a habeas corpus petition challenging Chaker's conviction under Section 148.6(a)(1). *Chaker* acknowledged *Stanistreet*, but then distinguished it. (See *id.*, at 1223, and n.9.) *Chaker* ruled Section 148.6(a) unconstitutional as improper viewpoint discrimination because it specifically targets false allegations against law enforcement officers while it allows any false statements in their favor that were obtained as part of the same misconduct investigation. (*Id.*, at 1229.)

*Cuadra v. City of South San Francisco* (N.D. Cal. Jan. 4, 2010) 2010 U.S. Dist. LEXIS 124 demonstrates the dilemma created by these conflicting cases. There, the district attorney filed criminal charges and Cuadra was arrested for violation of Section 148.6(a)(1). After those charges were dismissed Cuadra

filed a federal civil rights action. The federal court denied claims of qualified immunity by the officers who prepared the misdemeanor report because the Ninth Circuit in *Chaker* had held Section 148.6(a) was unconstitutional almost a year before the report recommending Cuadra's prosecution. (*Id.*, at \*28-29 ["there was no probable cause to arrest Cuadra for breaking a law that had already been held unconstitutional, which means a constitutional right was violated."].)<sup>2</sup>

In a further response to *Chaker*, the California regulations that govern prisoner complaint forms for prison guard misconduct have been amended to remove language from Section 148.6(a), including the advisory language that threatens criminal prosecution.<sup>3</sup>

**D. LAAPL sues to compel compliance with Section 148.6(a)(2).**

After the Consent Decree expired in 2013, the City left the Section 148.6(a)(2) advisory off the misconduct complaint form, both in compliance with *Chaker* and because the City was concerned about deterring meritorious misconduct complaints.

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<sup>2</sup> *Cuadra* was ultimately dismissed pursuant to settlement.

<sup>3</sup> See *Morris v. Barra* (S.D. Cal. January 31 2013) 2013 U.S. Dist. LEXIS 40557, \*19-21; and at (S.D. Cal. March 22, 2013) 2013 U.S. Dist. LEXIS 40568, \*14-15. These unpublished decisions are only cited as examples of current circumstances.

Four years later, LAPPL filed a petition for mandate to compel enforcement of Section 148.6(a)(2). (1 CT 18, et seq; and 86, et seq.)

After a bench trial, the trial court concluded it was compelled to follow *Stanistreet* and granted LAPPL's petition. The court issued a permanent injunction barring the City "from accepting an allegation of misconduct against a peace officer without requiring the complainant to read and sign the advisory set forth in Penal Code 148.6, subdivision (a)(2)." (4 CT 1111:16-19.) The City appealed.

The Court of Appeal recognized that *Chaker* and *Stanistreet* addressed distinct constitutional issues and also recognized that the trial court's injunction would subject the City to liability in federal court for civil rights violations. (See *LAPPL v. City of Los Angeles* (2022) 78 Cal.App.5th 1081, 1088.) Nevertheless, the Court of Appeal concluded that the scope and language of *Stanistreet* left it no alternative but to affirm the injunction. (*Ibid.*) The City has now filed this petition.

## Why Review Should be Granted

### 1. Review is Required to Secure the Uniformity of Decisions; i.e., to Address the Potential Conflict Between *Stanistreet* and *Chaker*.

Review is needed “to secure uniformity of decision” (Cal. Rules of Ct., Rule 8.500, subd. (b)(1).) (See, *Jankey v. Lee* (2012) 55 Cal. 4th 1038, 1043 [“We granted review to address the conflict between the Ninth Circuit's opinion . . . and the Court of Appeal’s decision”].)

In its 2002 *Stanistreet* decision, this Court upheld Section 148.6(a) against a constitutional challenge that it improperly focused on complaints against peace officers but excluded complaints against other public employee. (*Stanistreet, supra*, 29 Cal. 4th at 501.) About three years later, in *Chaker*, the Ninth Circuit held that Section 148.6(a) was an improper viewpoint restriction focusing only on statements critical of peace officers, leaving untouched statements in favor of peace officers that were also part of the same misconduct investigations. Neither this Court nor the Ninth Circuit have addressed the constitutionality of Section 148.6(a) in the subsequent 17 years.

While the Court of Appeal recognized that the constitutional challenges addressed in *Stanistreet* and *Chaker* were distinct, it still concluded that the language in *Stanistreet*

was sufficiently broad to effectively bar compliance with *Chaker*. Moreover, the now published Court of Appeal opinion is expected to encourage additional lawsuits in state court to compel local California law enforcement agencies to enforce Section 148.6(a)(2). Similarly, increased enforcement of Section 148.6(a), such as by the City, will presumably trigger additional federal actions to enforce *Chaker* and stop enforcement of Section 148.6(a).

Only this court can presently address these issues, clarify the interaction between *Stanistreet* and *Chaker*, and provide the guidance needed by the lower courts and local governments.

## **2. Review Is Required to Settle an Important Legal Issue of Statewide Importance.**

Review is appropriate “to settle an important question of law.” (Cal. Rules of Ct., Rule 8.500, subd. (b)(1).) As discussed below, separate from the current dispute over Sections 148.6(a)’s constitutionality, the potential required implementation of Section 148.6(a)(2)’s advisory has significant implications for the ability of the City to receive and respond to complaints of misconduct and therefore on its ability to properly manage its police force.

## Legal Discussion

- I. **The Supreme Court Should Revisit the Constitutionality of Penal Code Section 148.6(a) in Light of *Chaker* Because It Targets Speech Critical of Peace Officers.**
  - A. ***Stanistreet* did not resolve the distinct constitutional challenges addressed by *Chaker* and the City.**

While the Court of Appeal concluded that it was compelled to follow *Stanistreet*, *Stanistreet* should not control the issues raised in *Chaker* and this matter for at least three reasons.

First, *Stanistreet* never addressed the central issue raised in *Chaker* and by the City: that Section 148.6(a) impermissibly targets false complaints against police officers, whereas peace officers and other witnesses can make knowingly false statements in support of the police with impunity. *Stanistreet* never addressed the core defect in Section 148.6(a) addressed in *Chaker*: Section 148.6(a) treats false speech critical of the government differently than false speech in support of the government, and is thus a prohibited viewpoint-based regulation. (*Chaker*, *supra*, 428 F.3d. at 1228.) *Stanistreet* is not controlling on this issue, because a case cannot be authority for a proposition it never considered. (*People v. Jennings* (2010) 50 Cal.4th 616,

684.) Although this Court is not compelled to follow Ninth Circuit authority, in the absence of controlling precedent circuit court decisions on federal issues “are persuasive, and entitled to great weight.” (See *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 762, n.8.) The City urges this Court to follow *Chaker*.

Second, the Section 148.6(a)(2) advisory –which is the basis of the injunction here– was not at issue in *Stanistreet* and was only mentioned in passing and without analysis. (See *Stanistreet, supra*, 29 Cal.4th at 502 at n.2 and 510.) As a result, *Stanistreet* did not consider the significant degree to which Section 148.6(a)(2) restricts and discourages misconduct complaints, including by imposing a complete bar on anonymous misconduct complaints or the use of the City’s 800-line.

Third, the reasoning in *Stanistreet* should be reconsidered in light of *United States v. Alvarez* (2012) 567 U.S. 709. *Stanistreet* concluded that knowingly false misconduct complaints were bereft of any constitutional protection. (*Stanistreet, supra*, 29 Cal.4th at 506.) Rejecting that premise, *Alvarez* declared the Stolen Valor Act, which outlawed false statements of military service, unconstitutional. In *Alvarez*, the U.S. Supreme Court ruled that even knowingly false statements – in that case false claims of receiving military awards – enjoyed some First

Amendment protection and could not be criminalized.<sup>4</sup> *Alvarez* disavowed “any general exception to the First Amendment for false statements.” (*Alvarez, supra*, 567 U.S. at 718 and see 719-20 and Breyer, Concur at 736 [rejecting the idea that knowingly false statements could necessarily be criminalized].) When *Stanistreet* analyzed section 148.6 it did so from the premise that the speech in question – knowingly false misconduct reports – had no First Amendment protection. (*Stanistreet*, 29 Cal.4th 506.) *Stanistreet* also relied on defamation cases to justify criminalizing false speech, and *Alvarez* has specifically rejected that comparison. (*Id.*, at 505-06; *Alvarez* at 567 U.S. at 719-720.) In *Alvarez*, the United States Supreme Court held that knowingly false statements have First Amendment protection even absent concerns over content or viewpoint discrimination. (567 U.S. at 722 and 733.) Thus, the analytical underpinnings of *Stanistreet* have been altered and should be reconsidered.

Because *Stanistreet* is not controlling on the issues raised in this case, there is an urgent need for Supreme Court guidance.

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<sup>4</sup>The Stolen Valor Act did not include a “knowing” requirement, but *Alvarez*’s false statements were knowingly made and the U.S. Supreme Court held that limiting the statute to knowingly false statements would not salvage it. (*Alvarez, supra*, 567 U.S. at 723 (plur. opn. of Kennedy J., 733 (conc. opn. of Breyer J.), and see 739 (dis. opn. of Alito, J.).)

**B. As *Chaker* concluded, Penal Code Section 148.6(a) amounts to unconstitutional content and viewpoint discrimination.**

**1. On its face, Section 148.6(a) targets speech based on content and viewpoint.**

Section 148.6(a) expressly targets speech that is critical of peace officers because it criminalizes false misconduct complaints against officers. In contrast, there is no threat or consequence to a witness making knowingly false statements favoring police officers during those same misconduct investigations. (*Chaker, supra*, 428 F.3d at 1217; and see *La Fr. Hamilton, supra*, 325 F.Supp.2d at 1094-95 [“Section 148.6 discriminates based on viewpoint.”].)

“Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” (*Reed v. Town of Gilbert* (2015) 576 U.S. 155, 163.) “Government discrimination among viewpoints—or the regulation of speech based on the specific . . . opinion or perspective of the speaker—is a more blatant and egregious form of content discrimination. [Citation]” (*Id.* at 156 (cleaned up).) In *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, the court found a law criminalizing an untrue statement or rumor that is “derogatory” to a bank’s financial condition was a “content-based regulation of speech” because it “punishes only *derogatory* speech

about the financial condition of banks.” (*Summit Bank v. Rogers*, *supra*, 206 Cal.App.4th at 691, original emphasis.) Such a regulation “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” (*Ibid.*; citing *Davenport v. Washington Ed. Assn.* (2007) 551 U.S. 177, 188.)

*Stanistreet* acknowledged that Section 148.6(a) was a content-based regulation of speech and therefore analyzed the statute as such, albeit for the limited constitutional issues that were raised in those proceedings. (*Stanistreet*, *supra*, 29 Cal.4th at 507-08.) We address the content and viewpoint discrimination issues now.

## **2. Section 148.6(a) does not satisfy the exceptions described in *R.A.V.***

In *R.A.V. v St, Paul* (1992) 505 U.S. 377, an ordinance banned certain actions, such as cross-burning, which amounted to “fighting words” on the basis of race, color, creed, religion or gender. (505 U.S. at 380.) While the court found such expressions were subject to government proscription as “fighting words”, *R.A.V.* held that the statute unconstitutional because it only restricted such “fighting words” based on certain motivations but not others; i.e., it wasn’t illegal to burn a cross to intimidate someone for any unlisted reason. (*Id.*, at 385-86.) The U.S.

Supreme Court held that while government may validly regulate “fighting words,” it could not target the content of the speech, such as words based on race, religion, and the like, noting that this went “beyond mere content discrimination, to actual viewpoint discrimination.” (*Id.*, at 391; and see 391-2 [“The First Amendment does not permit . . . special prohibitions on those speakers who express views on disfavored subjects.”].)

The City submits that Section 148.6(a) violates the First Amendment just as the ordinance in *R.A.V.* did. The *R.A.V.* ordinance did not just outlaw “fighting words,” it outlawed specifically fighting words that were focused on race, gender, etc., which the Court found to be a viewpoint regulation. Likewise, Section 148.6(a) does not just outlaw knowingly false statements made within a misconduct investigation, it targets false statements made *within a complaint of misconduct*, whereas false statements made in support of the officer are penalty and threat free. While *R.A.V.* described three exceptions where content discrimination might pass constitutional muster, these assumed that the restriction was not underinclusive, primarily focused on restricting conduct, or was not viewpoint specific, because they would then not raise “the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace. [Citations.]” (*R.A.V.*, *supra*, 505 U.S. at 387-88, and see 388-90.) Thus, a content discrimination could survive if it

satisfied one of those exceptions and/or satisfies strict scrutiny analysis. (See *id.*, at 387-390; *Ysursa v. Pocatello Educ. Ass’n.* (2009) 555 U.S. 353, 358 [confirming continued use of strict scrutiny, citing *R.A.V.*].) However, Section 148.6(a) fails here for the same reasons it fails strict scrutiny – because it is a viewpoint-based regulation that only burdens and threatens pure speech critical of police actions. (See *La Fr. Hamilton, supra*, 325 F.Supp.2d at 1093 [direct impact of the speech cannot be excused as “secondary’ effects.”].) (And see, City’s Opening Brief at pp. 31-34.) Because *Stanistreet* does not consider this viewpoint discrimination, its *R.A.V.* analysis, and the Court of Appeal’s reliance on it, is misplaced here.

## **II. Penal Code Section 148.6(a)(2) Imposes an Unconstitutional Burden on First Amendment Rights by Suppressing Citizen Misconduct Complaints**

Because the subject injunction only mandates the enforcement of Section 148.6(a)(2), this Court could correspondingly limit its constitutionality analysis, as opposed to Section 148.6(a) as a whole. Considered separately, Section 148.6(a)(2) is an unconstitutional burden on free speech.

Section 148.6(a)(2), impermissibly burdens free speech rights because it restricts the ability to lodge certain complaints,

including anonymous complaints, and it discourages people from reporting good faith complaints through threats and intimidation. While *Stanistreet* noted that Section 148.6(a) only criminalizes knowingly false allegations, in fact, Section 148.6(a), and particularly (a)(2), will inevitably restrict and even forbid good faith misconduct complaints.

**A. Section 148.6(a)(2) would bar all anonymous complaints of misconduct, thus directly blocking speech critical of peace officers.**

Section 148.6(a)(2) bars any attempt to report misconduct anonymously – a valuable tool for both citizens and law enforcement and a protected form of speech – because Section 148.6(a)(2) forces each reporting individual to identify themselves and sign the advisory. Anonymous speech—particularly when critical of the government—has long enjoyed First Amendment protection. (See *United States v. Glassdoor, Inc. (In re Grand Jury Subpoena)* (9th Cir. 2017) 875 F.3d 1179, 1185 [The decision to remain anonymous “is an aspect of the freedom of speech protected by the First Amendment.”]; *McIntyre v. Ohio Elections Comm’n* (1995) 514 U.S. 334, 341 [“the anonymity of an author is not ordinarily a sufficient reason to exclude her . . . from the protections of the First Amendment.”]; and see *Talley v. California* (1960) 362 U.S. 60, 64 [“persecuted groups and sects from time to time throughout history have been able to criticize

oppressive practices and laws *either anonymously or not at all*”, emphasis added; and see *Rosenblatt v. Baer* (1966) 383 U.S. 75, 85 [“Criticism of government is at the very center of the constitutionally protected area of free discussion.”].)

In addition to the general right to remain anonymous, in a context such as Section 148.6(a)(2), “anonymity may be an indispensable prerequisite to speech.” (*Huntley v. Public Utilities Comm.* (1968) 69 Cal.2d 67, 73 [annulling decision that would have required public disclosure of names and addresses of persons providing publicly available recorded messages].) “When the content of speech may lead to harassment or reprisal, fear or apprehension may deter expression in the first instance. History is replete with unpopular ideas which now form the foundation of modern society’s mores and laws, but which could only be asserted anonymously when first expressed.” (*Ibid.*)

Based on this concern, the Attorney General concluded that Section 148.6(a)(2) unconstitutionally prohibited anonymous complaints, and that if a complainant refused to sign the admonition, the law enforcement agency should still had the authority to investigate it. (See 79 Ops.Cal.Atty.Gen 163 (1996).) The opinion confirmed the established First Amendment protections for anonymous speech and complaints. (*Id.* at 167.) The opinion concluded that Section 148.6(a)(2)’s constitutionality depended on the continued ability to receive and investigate a

claim of police misconduct even if the complainant refused to, or failed to, comply with Section 148.6(a)(2). (*Id.* at 167-68.) In other words, the Attorney General concluded that Section 148.6(a)(2)'s ban on anonymous or unsigned complaints would be unconstitutional.

The City expressly invites anonymous misconduct complaints and the former Consent Decree specifically protected them. (1 CT 172:26.) Under the subject injunction, those individuals whose right to speak is already the most fragile – due to threats, intimidation, fear of retaliation, or other circumstances – would be silenced altogether.

Section 148.6(a)(2)'s signature requirement on the designated form will also bar receiving complaints by phone – including the City's 800 number – or U.S. Mail, each of which are currently accepted and promoted by the City.<sup>5</sup> Thus, given the realities of busy modern life, Section 148.8(a)(2) will result in a meaningful decrease in the number of valid and good-faith misconduct complaints that City residents will be able to register, further burdening important protected speech and decreasing the City's ability to manage its police force.

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<sup>5</sup> See the webpage for the Office of the Inspector General Los Angeles Police Commission, at <https://www.oig.lacity.org/how-to-file-a-complaint>.

The Court of Appeal declined to address the issue of anonymous complaints, and Section 148.6's bar on other means of submitting complaints, because it had not been argued below, citing the general rule that constitutional arguments must first be raised in the trial court. (*LAPPL, supra*, 78 Cal.App.5th at 1100-01.) However, as each of the cases cited by the Court of Appeal confirms, the existence of a "general rule" necessarily invokes the court's ability to exercise its discretion to consider the issue. (E.g., *Jackpot Harvesting Co., Inc. v. Superior Court* (2018) 26 Cal.App.5th 125, 154 [citing the general rule and then addressing the merits of the constitutional argument anyway].)

This issue of anonymous complaints presents a question of law and a facial challenge to the express terms of Section 148.6(a)(2) that this Court should exercise its discretion to address. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [can address legal issues based on the existing record for the first time on appeal]; *Mass v. Franchise Tax Bd.* (2019) 38 Cal.App.5th 959, 963 [a facial challenge to a statute is a question of law reviewed de novo].) Such a ruling would also be consistent with the urgent need by local governments for guidance regarding Section 148.6(a). In light of the express terms of Section 148.6(a)(2) barring all anonymous complaints and the legal importance of allowing such complaints to continue, the Court of Appeal's

assertion that a factual predicate is needed to elaborate on these legal issues is, in the City's view, incorrect.<sup>6</sup>

**B. By actively deterring citizens from lodging misconduct complaints, Section 148.6(a)(2) suppresses protected speech.**

Section 148.6(a)(2)'s admonition is a preemptive and explicit threat of criminal prosecution that the complainant is required to read and sign before any misconduct complaint is accepted. Subdivision (a)(2) is the means by which that threat is preemptively conveyed to everyone even contemplating a police misconduct complaint. That means any person desiring to file a claim of police misconduct is first threatened with possible prosecution if the police decide that the complaint falsely described the events. This will inevitably discourage residents from good faith reporting of misconduct.

“In many police misconduct situations, it inevitably will come down to the word of the citizen against the word of the police officer or officers,” in which case the investigators will decide who they believe. (*Stanistreet, supra*, 29 Cal.4th at 513-14 (conc. opn. of Werdegar, J.)) If the police decide events are different than as described by the complainant, then the

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<sup>6</sup> Alternatively, this court could remand this matter with instructions to address these issues in the trial court.

complainant could be subject to criminal prosecution. This will certainly discourage misconduct claims, as the concurring opinion in *Stanistreet* recognized. “If authorities for any reason disbelieve the citizen, the citizen (whether guilty or innocent) may then under section 148.6 face . . . criminal prosecution.... Prospective 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. Realistically, some complainants are likely to choose not to go forward – even when they have legitimate complaints.” (See *id.*, at 514.)

In the criminal trials for Section 148.6(a)(1) prosecutions, police testimony is pitted against the claimant’s insistence that his complaint was true, and it is up to a jury to decide who is telling the truth. The potential for resulting abuse is exemplified in *Grassilli v. Barr* (2006) 142 Cal.App.4th 1260. There, the plaintiff brought a claim under 42 U.S.C. Section 1983, resting in part on an attempted prosecution under Section 148.6(a)(1). An officer had filed a police report in which he concluded that a misconduct report filed by Grassilli against another officer was false and malicious. The officer recommended prosecution under Section 148.6 and the prosecutor agreed. (*Id.*, at 1268.) Even with three officers testifying against Grassilli, the trial court dismissed the charge since Grassilli produced substantial

evidence showing his report was truthful. (*Id.* at 1268 and 1283-84.) The judgment for Grassilli was affirmed on appeal with a reduction of costs and damages. (*Id.*, at 1295.) Most reporting individuals will not be that lucky and generally will have only their own word against the version of events reported by the officer(s). Or, worse, an individual may decide to accept a plea deal on a criminal charge under Section 148.6(a)(1) to avoid a misdemeanor conviction – up to 6 months in jail – despite their good faith belief in their complaint of misconduct. (Penal Code § 148.6, subd. (a)(1) and § 19.) There is no reason to conclude that the *Grassilli* case is unusual, but for his having collected sufficient evidence to refute the officers’ account. This scenario should make subdivision (a)(2)’s admonition a significant concern to anyone unwilling to risk criminal prosecution to defend their version of events.

In *Hamilton*, *supra*, 107 F. Supp. 2d 1239, the district court recognized that Section 148.6(a) provides officers with an improper weapon to threaten potential complainants. There, the plaintiff tried to lodge a misconduct complaint for excessive force after he was stopped by two officers, physically accosted, and then brought to the station and charged with not having a bicycle license. (*Id.* at 1240-41.) The watch commander gave him a complaint form with the Section 148.6(a)(2) language, verbally told him that he could be criminally charged for making a false

claim, and expressed skepticism about plaintiff's injuries. (*Id.*, a 1241.) Because of this intimidation and threats of prosecution, Hamilton never filed a misconduct complaint. (*Ibid.*) After additional harassment by the officers, he did file a section 1983 claim. The district court found that "Section 148.6 impermissibly discriminates on the basis of the content of the speech which it criminalizes and, therefore, facially violates the First Amendment and the Fourteenth Amendment's Equal Protection Clause." (*Id.*, at 1248; and see *La Fr. Hamilton v. City of San Bernardino* (C.D. Cal. 2004) 325 F. Supp. 2d 1087, 1095 [declaring Section 148.6 unconstitutional on its face and issuing a permanent injunction against its enforcement by that city].)

The City continues to seek to remove any impediment to reporting police misconduct by having as many open lines of communication as practical, so that such incidents can be better identified and resolved. This is consistent with the goal of the Consent Decree to protect the constitutional rights of its citizens. (See 1 CT 145:4-8 and 173:19-74:23.) It is also consistent with longstanding policy goals. (See *Imig v. Ferrar* (1977) 70 Cal.App.3d 48, 55 [it is a policy of the law "to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing"]; *People v. Craig* (1993) 21 Cal.App.4th Supp. 1, 5 ["the importance of providing the community an avenue to report

alleged misconduct by peace officers overrides concerns that this process may be abused by individuals to falsely report police misconduct”].)

**C. *Stanistreet’s* comparison of the Section 148.6 warnings to perjury warnings ignored the context in which Section 148.6(a)(2) operates.**

*Stanistreet* dismissed concerns about Section 148.6(a)(2) with a passing comment that the Section 148.6(a)(2) admonition requirement is “no more impermissible” than warning people of the threat of perjury. However, perjury warnings can amount to a threat that intimidates a witness from testifying. (See, e.g., *United States v. Vavages* (9th Cir. 1998) 151 F.3d 1185, 1189-90 [finding that a legally correct perjury warning becomes a constitutional violation if designed to “threaten and intimidate the witness into refusing to testify.”].) The relevant factors for witness intimidation include how the warnings are raised, the language used, and the basis for believing that the person might lie. (*Id.*, at 1190; *People v. Woods* (2006) 146 Cal.App.4th 106, at 120 [“Intimidation may take many forms, such as telling defense witnesses they will be prosecuted for perjury...”]; compare *United States v. Jackson* (5th Cir. 2006) 453 F.3d 302, 306 n.6 [no abuse where perjury warnings are channeled through witness’s counsel].)

In contrast to the above perjury cases, which can directly address the circumstances that potentially deterred each individual witnesses from testifying, Section 148.6(a)(2) inserts a preemptive blanket threat to everyone who is thinking about making submitted misconduct allegations. This makes it impossible to determine the specific circumstances of each good faith complainant who will be deterred without ever voicing his or her misconduct complaint. As a result, in order to assess and prevent the resulting harm, it is necessary to address the facial application of Section 148.6(a)(2) on potential misconduct complainants.

The specific context of the warning is crucial. A basic admonition against perjury is generally given customarily as part of some formal proceeding and counsel or a judge is often present. It is not necessarily adversarial. In stark contrast, individuals reporting police misconduct have already recently witnessed or experienced an inappropriate, and sometimes violent or threatening, encounter with police, and filing a misconduct report with that same police department can be a daunting task even without threats of prosecution.

Section 148.6(a)(2) requires each law enforcement agency to include an admonition, “in all boldface type,” warning each complainant of the threat of prosecution, and requiring the complainant to sign the admonition specifically to acknowledge

the threat. Thus, subdivision (a)(2) provides gratuitous threats to all of its recipients, who now have an additional reason to reconsider getting involving. As a practical matter, many complaints will boil down to the complainant's word against the officers, and the residents will be acutely aware of this reality and will be deterred by the threat. (*Stanistreet, supra*, 29 Cal.4th at 513-14 (Werdegar, J., concurring) [recognizing that the threats of Section 148.6 and subdivision (a)(2) will discourage honest complaints].) “Realistically, some complainants are likely to choose not to go forward--even when they have legitimate complaints.” (*Id.*, at 514; and see *La Fr. Hamilton*, 325 Fd.Supp.2d at 1094 [“There is a high likelihood that Section 148.6's warning will cause individuals to refrain from filing a complaint against law enforcement officers.”].)

As the concurring opinion in *Stanistreet* recognized, some people will choose not to file any misconduct complaint to avoid this threat – real or perceived – thus silencing voices that the government should hear.

**III. Section 148.6(a), and particularly (a)(2), fails strict or intermediate scrutiny.**

**A. As a viewpoint-based restriction Section 148.6(a), and particularly (a)(2), is subject to and fails strict scrutiny.**

Because it is expressly a content and viewpoint-based restriction on free speech, Section 148.6(a) fails strict scrutiny, whether looking at the whole statute or just focusing on subdivision (a)(2). This is true even accepting *Stanistreet's* conclusion that the State had a legitimate interest in curbing false police misconduct claims based on the possible effects on the officers being investigated and the expense of conducting mandatory investigations. (*Stanistreet, supra*, 29 Cal.4th at 509.) The record in this matter suggests that the burdens on individual officers are mostly abstract concerns, as the only witness called could not support specific examples of detriment to officers investigated on knowingly false claims. (See 4 CT 972:23-73:10, 974:9-75:12, 982:26-83:1, and 982:2-84:20 [no evidence of any officer being denied a promotional opportunity, a transfer, or overtime because of a demonstrably false complaint and lacked foundation to address what LAPD resources were used to investigate false reports].) In addition, any complaints that are found to be frivolous, unfounded, or exonerated are not maintained in the officer's personnel file. (Penal Code § 832.5,

subd. (c).) Nevertheless, for purposes of this discussion we can assume that reducing the number of knowingly false complaints is a worthy policy goal. (See *Stanistreet, supra*, 29 Cal.4th at 502-05.)

When a statute “is a content-based speech restriction, it can stand only if it satisfies strict scrutiny.” (*U.S. v. Playboy Entm’t Group* (2000) 529 U.S. 803, 813; see also *Brown v. Entm’t Merchs. Ass’n* (2011) 564 U.S. 786, 799 [a statutory restriction based on the content of protected speech “is invalid unless . . . it passes strict scrutiny.”].) As a sub-category, viewpoint discrimination based on a specific opinion or perspective “is a more blatant and egregious form of content discrimination.” (*Reed, supra*, 576 U.S. at 156.)

Moreover, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” (*Snyder v. Phelps* (2011) 131 S.Ct. 1207, 1215, cleaned up.) “Speech on matters of public concern is at the heart of the First Amendment’s protection.... [S]peech concerning public affairs is more than self-expression; it is the essence of self-government.” (*Id.*, cleaned up.) More specifically, “[t]he right to criticize the government and governmental officials is among the quintessential rights Americans enjoy under the First Amendment...” (*Stanistreet, supra*, 29 Cal.4th at 504.) “Thus, speech criticizing the government and governmental officials

receives the highest protection.” (*Id.*) “Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.” (*Rosenblatt v. Baer* (1966) 383 U.S. 75, 85.) Allegations of police misconduct clearly fall within this highly protected category of speech.

Under strict scrutiny, the proponent of a content or viewpoint-based restriction must “prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” (*Reed, supra*, 576 U.S. at 171, cleaned up.) “Content based regulations are presumptively invalid” and the burden needed to justify them is so substantial that the Supreme Court has cautioned that “[i]n the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint discriminatory.” (*Sorrell v. IMS Health Inc.* (2011) 564 U.S. 552, 571; and see *Playboy*, 529 U.S. at 817.)

Section 148.6(a) is fatally underinclusive because it unjustifiably criminalizes one viewpoint (knowingly false police misconduct allegations) but not the opposing viewpoint (knowingly false statements made during the misconduct investigation that support the police or deny misconduct). Nothing justifies this underinclusion. (See *ante* at 24-27.) “The notion that a regulation of speech may be impermissibly

underinclusive is firmly grounded in basic First Amendment principles.” (*City of Ladue v. Gilleo* (1994) 512 U.S. 43, 51 (emphasis in original); and see *Reed, supra*, 576 U.S. at 171-72.) Being underinclusive “is alone enough to defeat” a law on First Amendment grounds. (*Brown*, 564 U.S. at 801-02; *Planning & Conservation League, Inc. v. Lungren* (1995) 38 Cal.App.4th 497, 507, 509 [“In order to satisfy strict scrutiny, a law must be neither vague nor substantially over or underinclusive”].)

Section 148.6(a) is specifically designed to deter complaints critical of police officers. “[A] law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited.” (*Reed, supra*, 576 U.S. at 172; and see, e.g., *Brown, supra*, 564 U.S. at 802 [“Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”]; *City of Ladue*, 512 U.S. at 52 [noting underinclusiveness “diminish[es] the credibility of the government's rationale for restricting speech in the first place”]; *Fla. Star v. B.J.F.* (1989) 491 U.S. 524, 540 (holding underinclusiveness of a statute raises “serious doubts” about whether the statute actually serves the state's purported interest].)

These concerns are significantly amplified for Section 148.6(a)(2), which preemptively discourages potential misconduct complainants by threatening possible criminal prosecution if the LAPD deems the misconduct allegation to be false. Indeed, it appears that Section 148(a)(2) may functionally serve more as a deterrent to honest claims than false ones. Someone intent on providing a knowingly false report is already conscious of their intended wrongdoing, so the advisory in Section 148.6(a)(2) is less likely to provide that person with new information. However, the person bringing forth an honest report of misconduct does not expect to be threatened with possible criminal prosecution for merely reporting misconduct that the LAPD denies. This threat comes on top of whatever other trepidations the complainant might have about reporting misconduct to the law enforcement agency that committed the misconduct. While the statute on its face only sanctions knowingly false reports, since most cases will boil down to whether the officer or the complainant is believed, the practical perception is that any complainant who makes a report deemed false by the LAPD is at risk of prosecution. (See *ante* at 32-36.)

This concern over selective criminality is also supported by the sole witness in the record, Officer Gordon, who testified that: (1) witness interviews are an important part of the investigative process; (2) he expected each witness to tell him the truth

because it “would help [him] complete [his] investigation more thoroughly and save time,” and it would avoid wasting resources; and (3) when a witness lies, he or she undermines the integrity of the investigation. (4 CT 987:14-88:15.) Similarly, Officer Gordon confirmed that he expected an officer to tell the truth as part of an investigation, and if they did not, it would waste time and resources, and would undermine the integrity of the investigation. (4 CT 988:19-89:8.) But each of these concerns should weigh as heavily in favor of prosecuting false statements in favor of the police as those against the police.

*Chaker* pointed out that the facial defects of Section 148.6(a) can be “easily cured” by making all parties to an investigation of peace officer misconduct subject to the warnings and sanctions for making false statements. (*Chaker*, 428 F.3d at 1229; see also *Boos v. Berry* (1988) 485 U.S. 312, 329 [the existence of content-neutral alternatives “undercut[s] significantly” any defense of a content-based statute].) That is, if Section 148.6(a) provided that any false statements made during or as part of an investigation of a police complaint are a misdemeanor – not just statements that are contained in the *complaint* – then the First Amendment would be protected. Such a content neutral solution would more effectively reach the stated goals of Penal Code section 148.6(a) without offending the First Amendment with content-based restrictions. Regarding Section

148.6(a)(2), the solution is even easier – strike this subdivision and simply withdraw the global, preemptive threat of criminal prosecution to all those coming forward with reports of police misconduct. The existing lopsided restriction of free speech must be reversed.

**B. While inapplicable to viewpoint discrimination, Section 148.6(a), and particularly (a)(2) would also fail intermediate scrutiny.**

Intermediate scrutiny is typically used for content-neutral restrictions on speech, and so would not normally apply here. (See e.g., *Turner Broad. Sys., Inc. v. FCC* (1994) 512 U.S. 622, 642 [“regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny”].) “Content-neutral restrictions are reviewed to determine whether they serve a significant government interest, are narrowly tailored to that interest and leave open alternative avenues of communication...” (*Showing Animals Respect & Kindness v. City of West Hollywood* (2008) 166 Cal.App.4th 815, 820.) Nevertheless, Section 148.6(a), and particularly (a)(2), would also fail such a review.

Because underinclusiveness remains a factor in applying an intermediate level of scrutiny, Section 148.6(a) also fails intermediate scrutiny for the same reasons discussed above – it only criminalizes one side in disputes over police misconduct and

it only threatens criminal prosecution for those who step forward with reports of misconduct. (See, *Showtime Entm 't, LLC v. Town of Mendon* (1st Cir. 2014) 769 F.3d 61, 78 [The town's approach is "tellingly underinclusive ... , revealing that Mendon's allegedly substantial interest is not actually furthered by its bylaws, a fact fatal to its claim under intermediate scrutiny."]; *Joelner v. Village of Washington Park* (7th Cir. 2007) 508 F.3d 427, 433 [holding ordinance violated First Amendment because it failed intermediate scrutiny where "[t]he Supreme Court has repeatedly recognized that an underinclusive regulatory scheme is not narrowly tailored"].) For all of the reasons discussed above, section 148.6 is fatally underinclusive and therefore also fails intermediate scrutiny.

#### **IV. The Ruling and the Current State of the Law Below Puts Local Governments in an Untenable Dilemma.**

The City is now caught between the Ninth Circuit *Chaker* ruling and the published opinion of the Court of Appeal in this case. To avoid being held in contempt of the injunction issued by the trial court the City will need to enforce Section 148.6(a)(2). (4 CT 1110-11.) However, the *Chaker* opinion declared Section 148.6(a) unconstitutional 17 years ago, so enforcing it would necessarily expose the City and its employees to federal lawsuits and the resulting financial liability for violating the

constitutional rights of any person it was enforced against. There is also the distinct possibility a federal district court could enjoin the City from enforcing Section 148.6(a)(2), thus resulting in conflicting state and federal injunctions. Even now, while the City is facing a state injunction mandating the enforcement of Section 148.6(a)(2), the City of San Bernardino is subject to a federal injunction barring enforcement of Section 148.6(a) as unconstitutional. (See, *La Fr. Hamilton, supra*, 325 F.Supp.2d at 1095.) The City of Oakland faced a lawsuit similar to this one, but it is still subject to a federal consent order that bars enforcement of Section 148.6(a). (See, *ante* at 14, n.1.) These contrary rulings are only going to become more common. The intervention of the Supreme Court is necessary to untangle this dilemma.

Moreover, the Court of Appeal's published opinion will undoubtedly encourage even more lawsuits in state court to enforce Section 148.6(a)(2) against various local and state agencies, despite the Ninth Circuit ruling. It can be safely concluded that efforts to enforce Section 148.6(a)(2) will trigger federal lawsuits and 42 U.S.C. § 1983 claims against municipalities and agencies across the state.

## Conclusion

The Supreme Court's prompt review and clarification of these issues is urgently needed. Local and state agencies are in a judicial bind between federal courts and the lower state courts which have concluded they are bound by a 20-year old California Supreme Court ruling that, at best, only tangentially addressed the issues driving the federal rulings. This court should grant review to provide guidance on these issues.

Dated: June 28, 2022

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## **Certificate of Compliance**

Counsel of Record hereby certifies that the enclosed brief is produced using 13-point proportionally spaced serif face, including footnotes; that it contains 8,355 words; and that its form and length complies pursuant to Rules 8.72(a) and 8.74(b) of the California Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: June 28, 2022

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**PROOF OF SERVICE**

**(By TrueFiling and U.S. Mail)**

I, the undersigned, declare that I am over the age of 18 years and not a party to the within action or proceeding. My business address is 200 No. Spring Street, 14th Floor, Los Angeles, California 90012.

I am familiar with the business practice at the Office of the City attorney for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the City Attorney is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On June 28, 2022, I electronically served the attached:

**PETITION FOR REVIEW**

by transmitting a true copy via this Court’s True Filing system.

On June 28, 2022, I served participants in this case who have not registered with the Court’s TrueFiling system or are unable to receive electronic correspondence, a true copy thereof enclosed in a sealed envelope in the internal mail collection service at the Office of the City Attorney, addressed as follows:

Frederick Bennett Stanley Mosk Courthouse 111 N. Hill Street Los Angeles, CA 90012	Hon. Robert B. Broadbelt Los Angeles Superior Court Stanley Mosk Courthouse, Dept 53 111 N. Hill Street Los Angeles, CA 90012
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Appellate Coordinator Office of the Attorney General 300 S. Spring Street, Ste 1702 Los Angeles, CA 90013-1230	
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 28th day of June, 2022, at Los Angeles, California.

/s/ Colleen Juarez  
COLLEEN JUAREZ

Filed 5/19/22

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

**COURT OF APPEAL – SECOND DIST.**

**FILED**

**May 19, 2022**

**DANIEL P. POTTER, Clerk**

**mgudiel Deputy Clerk**

LOS ANGELES POLICE  
PROTECTIVE LEAGUE,

Plaintiff and Respondent,

v.

CITY OF LOS ANGELES et al.,

Defendants and  
Appellants.

B306321

(Los Angeles County  
Super. Ct. No. BC676283)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert B. Broadbelt III, Judge. Affirmed.

Michael N. Feuer, City Attorney, Kathleen A. Kenealy, Chief Deputy City Attorney, Scott Marcus, Senior Assistant City Attorney, Blithe S. Bock, Managing Assistant City Attorney, and Michael M. Walsh, Deputy City Attorney, for Defendants and Appellants.

Rains Lucia Stern St. Phalle & Silver, Richard A. Levine, and Michael A. Morguess for Plaintiff and Respondent.

## INTRODUCTION

California requires law enforcement agencies to investigate complaints against peace officers. (See Pen. Code, § 832.5, subd. (a)(1).)<sup>1</sup> Section 148.6, subdivision (a)(1), makes it a crime to file a knowingly false allegation of misconduct against a peace officer. And section 148.6, subdivision (a)(2), requires law enforcement agencies, before accepting a complaint alleging misconduct by a peace officer, to require the complainant to sign an advisory informing the complainant that filing a knowingly false complaint may result in criminal prosecution.

In 2002 the California Supreme Court upheld section 148.6 against a challenge the statute was an impermissible content-based speech restriction under the First Amendment to the United States Constitution. (*People v. Stanistreet* (2002) 29 Cal.4th 497, cert. den. 538 U.S. 120 [123 S.Ct. 1944, 155 L.Ed.2d 861] (*Stanistreet*)). Three years later, a panel of the United States Court of Appeals for the Ninth Circuit reached a different conclusion. The Ninth Circuit ruled section 148.6 was an impermissible viewpoint-based speech restriction under the First Amendment because the statute criminalized false statements that accused a peace officer of misconduct, but not false statements, made by the officer or a witness during the investigation, that supported the officer. (*Chaker v. Crogan* (9th Cir. 2005) 428 F.3d 1215, cert. den. 547 U.S. 1128 [26 S.Ct. 2023, 164 L.Ed.2d 780] (*Chaker*)).

Until 2013 the City of Los Angeles and the United States were parties to a consent decree in the United States District Court that prevented the City from requiring complainants to

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

sign the advisory required by section 148.6. After the consent decree expired, the City continued to not require complainants to sign the advisory. The Los Angeles Police Protective League filed this action against the City and its Chief of Police, Charlie Beck, seeking an injunction requiring them to comply with section 148.6, subdivision (a)(2).<sup>2</sup> Following a court trial, the court entered judgment in favor of the Police Protective League. Concluding it was bound to follow *Stanistreet*, the trial court rejected the City's First Amendment challenge to section 148.6 and enjoined the City from accepting any complaint alleging misconduct by a peace officer unless the complainant has signed the advisory required by section 148.6.

The City appeals, asking us to hold, as the Ninth Circuit held in *Chaker*, section 148.6 is an impermissible viewpoint-based speech restriction. The City correctly points out that the arguments the California Supreme Court rejected in *Stanistreet* are not entirely identical to the arguments the Ninth Circuit accepted in *Chaker*. The City also argues the injunction requires the City to enforce a statute federal courts have found is unconstitutional. That's a real problem. But the Supreme Court's analysis in *Stanistreet* of why section 148.6 does not violate the First Amendment applies to the City's *Chaker*-based arguments here. Because the United States Supreme Court has not ruled section 148.6 or an analogous statute is unconstitutional, we must follow *Stanistreet*. Therefore, we do, and we affirm.

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<sup>2</sup> We refer to the City of Los Angeles and Beck collectively as the City.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *The Legislature Enacts Section 148.6*

The California Supreme Court in *Stanistreet* explained the circumstances that prompted the Legislature to enact section 148.6: After “the Rodney King incident in March 1991, law enforcement agencies throughout the state . . . “revised their citizen complaint procedures to promote greater accountability on the part of their line officers.”” (*Stanistreet, supra*, 29 Cal.4th at p. 502.) But, according to the Legislature, “a “glaringly negative side-effect [was] the willingness on the part of many of [California’s] less ethical citizens to maliciously file false allegations of misconduct against officers in an effort to punish them for simply doing their jobs.” [Citation.] Against this backdrop, the Legislature enacted section 148.6 in an attempt to curb a perceived rising tide of knowingly false citizens’ complaints of misconduct by officers performing their duties.” (*Id.* at pp. 502-503.)

Section 148.6, subdivision (a)(1), states: “Every person who files any allegation of misconduct against any peace officer, . . . knowing the allegation to be false, is guilty of a misdemeanor.” Section 148.6, subdivision (a)(2), states: “A law enforcement agency accepting an allegation of misconduct against a peace officer shall require the complainant to read and sign the following advisory, all in boldface type:

**“YOU HAVE THE RIGHT TO MAKE A COMPLAINT AGAINST A POLICE OFFICER FOR ANY IMPROPER POLICE CONDUCT. CALIFORNIA LAW REQUIRES THIS AGENCY TO HAVE A PROCEDURE TO INVESTIGATE CIVILIANS’**

COMPLAINTS. YOU HAVE A RIGHT TO A WRITTEN DESCRIPTION OF THIS PROCEDURE. THIS AGENCY MAY FIND AFTER INVESTIGATION THAT THERE IS NOT ENOUGH EVIDENCE TO WARRANT ACTION ON YOUR COMPLAINT; EVEN IF THAT IS THE CASE, YOU HAVE THE RIGHT TO MAKE THE COMPLAINT AND HAVE IT INVESTIGATED IF YOU BELIEVE AN OFFICER BEHAVED IMPROPERLY. CIVILIAN COMPLAINTS AND ANY REPORTS OR FINDINGS RELATING TO COMPLAINTS MUST BE RETAINED BY THIS AGENCY FOR AT LEAST FIVE YEARS.

“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.

“I have read and understood the above statement.

“Complainant \_\_\_\_\_.”

*B. A Consent Decree Prevents the City from Requiring Complainants To Sign the Advisory*

In 2000 the United States filed a lawsuit against the City of Los Angeles alleging the City had failed to implement appropriate management practices, resulting in a pattern or practice of unconstitutional conduct that violated title 42 United States Code former section 14141.<sup>3</sup> The following year the

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<sup>3</sup> At the time, that section provided: “It shall be unlawful for any governmental authority . . . to engage in a pattern or practice

United States and the City of Los Angeles entered into a consent decree that resolved the lawsuit. Under the decree, the City of Los Angeles and the Los Angeles Police Department agreed to receive complaints against peace officers “in writing or verbally, in person, by mail, by telephone . . . , [by] facsimile transmission, or by electronic mail . . . .” The City of Los Angeles also agreed to receive anonymous complaints and to “prohibit officers from asking or requiring a potential complainant to sign any form that in any manner limits . . . the ability of a civilian to file a police complaint with the [Department] or any other entity.” The consent decree ended in 2013.

C. *The Trial Court Orders the City To Comply with Section 148.6, Subdivision (a)(2)*

In 2017 the Police Protective League—an employee organization<sup>4</sup> that represents peace officers employed by the City—filed this action, seeking a declaration section 148.6, subdivision (a)(2), was “legally valid [and] enforceable.” The Police Protective League also sought an order “enjoining the

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of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” (See 42 U.S.C. former § 14141, eff. Sept. 13, 1994.) Congress has since renumbered that law as title 34 United States Code section 12601.

<sup>4</sup> “Employee organization means . . . [a]ny organization that includes employees of a public agency and that has as one of its primary purposes representing those employees in their relations with that public agency” or “[a]ny organization that seeks to represent employees of a public agency in their relations with that public agency.” (Gov. Code, § 3501.)

[City] from accepting an allegation of misconduct against” peace officers represented by the Police Protective League “without the complainant being required to read and sign” the required advisory.

The parties stipulated at trial that, after the consent decree ended in 2013, the City declined to require complainants filing allegations of police misconduct to sign the advisory required by section 148.6. The Police Protective League called one witness, Officer Steve Gordon, the director of the Police Protective League, who testified that serious complaints against officers may result in the Los Angeles Police Department removing the officers from an assignment pending an investigation. Therefore, Officer Gordon stated, gang members try to “get rid of an officer” by “continually mak[ing] complaints.” Gordon testified that false complaints against an officer “could” adversely affect the officer’s opportunity for promotion, but that he was not aware whether the police department had ever denied an officer a promotion because of a false complaint. He also testified that, if a complaint against an officer were adjudicated false, it would not affect the officer’s ability to transfer to a different unit or division.

In its trial brief the City argued the court should not issue an injunction requiring the City to comply with section 148.6 because the statute violates the First Amendment. Citing *Chaker, supra*, 428 F.3d 1215, the City argued the statute was an impermissible content- and viewpoint-based speech restriction because it criminalized knowingly false complaints against police officers, but not “false statements by police officers or witnesses in the same context.”

The trial court ruled section 148.6, subdivision (a)(2), was not unconstitutional under the First Amendment. The court

ruled the California Supreme Court held in *Stanistreet, supra*, 29 Cal.4th 497 that “section 148.6 falls within all the categories of permissible ‘content discrimination’ identified by the [United States] Supreme Court . . . .” Recognizing “a split of authority between the California Supreme Court and the Ninth Circuit,” the trial court concluded it was bound by the California Supreme Court’s decision in *Stanistreet*. The trial court declared section 148.6, subdivision (a)(2), is valid and enforceable and enjoined the City “from accepting an allegation of misconduct against a peace officer without requiring the complainant to read and sign the advisory set forth in Penal Code [section] 148.6, subdivision (a)(2).”<sup>5</sup> The City timely appealed.

## DISCUSSION

### A. *The City Has Standing*

Relying on *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 (*Lockyer*), the Police Protective League argues the City does not have standing to appeal or to raise its constitutional arguments. In *Lockyer* a city clerk refused to enforce then-existing provisions of California’s marriage statutes that limited “the granting of a marriage license and marriage certificate only to a couple comprised of a man and a woman,” after the mayor of the city determined the marriage statutes violated the California Constitution. (*Id.* at pp. 1067, 1070.)

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<sup>5</sup> The trial court stayed the injunction “until either (1) the time to file an appeal has expired and no timely notice of appeal has been filed or (2) a timely notice of appeal is filed and the Court of Appeal issues a remittitur or the appeal is dismissed.” Thus, the injunction is currently stayed.

Ruling the clerk could not refuse to enforce the statutes, the California Supreme Court stated that, “under California law, the determination whether a statute is unconstitutional and need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution.” (*Id.* at p. 1093.) Therefore, the Supreme Court held, “a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official’s view that it is unconstitutional.” (*Id.* at p. 1082.) According to the Police Protective League, because the City has a ministerial duty to comply with section 148.6, subdivision (a)(2), the City may not refuse to comply because it believes the statute is unconstitutional.

This argument does not implicate the City’s standing to appeal. “Under Code of Civil Procedure section 902, ‘[a]ny party aggrieved’ may appeal a judgment.” (*Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 263.) “An aggrieved person, for this purpose, is one whose rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision.” (*In re. K.C.* (2011) 52 Cal.4th 231, 236; see *County of Riverside v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 20, 27.) An aggrieved party includes “the party against whom an appealable order or judgment,” including an injunction, “has been entered.” (*Ely v. Frisbie* (1861) 17 Cal. 250, 251; see *County of Riverside*, at p. 27.) The City is a party against whom an appealable judgment that includes an injunction has been entered. And the City’s interests are not remote—the judgment

enjoins the City from continuing to engage in a prior course of conduct (accepting unsigned complaints alleging misconduct by a peace officer). That is all that is required for standing to appeal. (See *K.C.*, at p. 237 [“standing to appeal is construed liberally, and doubts are resolved in its favor”].)<sup>6</sup>

The Police Protective League’s argument, more properly framed, is that under *Lockyer* the City’s assertion that section 148.6 is unconstitutional is not a valid defense to the Police Protective League’s request for an injunction ordering it to comply with the statute.<sup>7</sup> The Police Protective League, however, forfeited this argument by not raising it in the trial court. (See *Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 920, fn. 3; *Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 357.) In addition, as the City argues, the California Supreme

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<sup>6</sup> The Police Protective League similarly asserts that the constitutionality of section 148.6 is a “nonjusticiable” issue. This, too, is incorrect. “California courts decide only justiciable controversies and do not resolve lawsuits that are not based on an actual controversy.” (*Bichai v. Dignity Health* (2021) 61 Cal.App.5th 869, 879.) For example, “unripeness and mootness describe situations where there is no justiciable controversy.” (*Ibid.*) “Where there is no justiciable controversy the proper remedy is not to render judgment for one side or the other, but to dismiss.” (*Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 752.) The Police Protective League effectively admitted there was a justiciable controversy when it filed a lawsuit seeking a judicial declaration and injunction. It also asks us to affirm the judgment, not to vacate the judgment or order the trial court to dismiss the action.

<sup>7</sup> The Court in *Lockyer* did not refer to the issue as one of “standing.”

Court in *Lockyer* held only that officials may not refuse to enforce a statute “in the absence of a judicial determination of unconstitutionality.” (*Lockyer, supra*, 33 Cal.4th at pp. 1067, 1069, 1082.) Here, there is a judicial determination of unconstitutionality—the Ninth Circuit in *Chaker* held section 148.6 violates the First Amendment. As has at least one other federal court. (See *Hamilton v. City of San Bernardino* (C.D.Cal. 2000) 325 F.Supp.2d 1087, 1095.)<sup>8</sup>

B. *Section 148.6 Is Not an Impermissible Content- or Viewpoint-based Speech Restriction*

1. *Applicable First Amendment Principles*

Under the First Amendment to the United States Constitution, “governments have “no power to restrict expression because of its message, its ideas, its subject matter, or its content.”” (*National Institute of Family and Life Advocates v. Becerra* (2018) \_\_\_ U.S. \_\_\_, \_\_\_ [138 S.Ct. 2361, 2371, 201 L.Ed.2d 835]; see *Reed. v. Town of Gilbert* (2005) 576 U.S. 155, 163 [135 S.Ct. 2218, 192 L.Ed.2d 236].) “Content-based regulations ‘target speech based on its communicative content.’ [Citation.] As a general matter, such laws ‘are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” (*National Institute*, at p. \_\_\_

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<sup>8</sup> We assume without deciding that the decisions in *Chaker* and *Hamilton*, holding section 148.6 violates the United States Constitution, are “judicial determinations of unconstitutionality” that allow the City to assert the statute’s unconstitutionality as a defense in this action.

[138 S.Ct., at p. 2371]; see *Reed*, at p. 163.) Viewpoint discrimination, where the “[g]overnment discriminat[es] among viewpoints[,] is a ‘more blatant’ and ‘egregious form of content discrimination . . . .’” (*Reed*, at p. 168; accord, *McCullen v. Coakley* (2014) 573 U.S. 464, 482-483 [134 S.Ct. 2518, 189 L.Ed.2d 502].)<sup>9</sup>

## 2. Stanistreet

In *Stanistreet* a jury convicted the defendant of violating section 148.6. (*Stanistreet*, *supra*, 29 Cal.4th at p. 501.) The Court of Appeal reversed the judgment, holding section 148.6 was unconstitutional under the First Amendment “because it proscribes knowingly false accusations of misconduct against peace officers only and not against others,” thereby “selectively prohibit[ing] expression because of its content. (*Ibid.*) The California Supreme Court reversed. The Supreme Court acknowledged the statute was a content-based speech restriction because it criminalized false allegations of misconduct against peace officers (only), and not (for example) firefighters, paramedics, teachers, and elected officials. (*Id.* pp. 503-504, 508.) But the California Supreme Court held the statute fell within each of the “three categories of content discrimination that . . . are permissible” under the United States Supreme Court’s decision in *R.A.V. v. City of St. Paul, Minn.* (1992) 505 U.S. 377

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<sup>9</sup> The California “state Constitution’s free speech provision is ‘at least as broad’ as [citation] and in some ways is broader than [citations] the comparable provision of the federal Constitution’s First Amendment.” (*Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329, 341; see Cal. Const., art. I, § 2.) The City does not challenge section 148.6 under the California Constitution.

[112 S.Ct. 2538, 120 L.Ed.2d 305] (*R.A.V.*). (See *Stanistreet*, at p. 506.)

In *R.A.V.* the United States Supreme Court identified three permissible types of content-based restrictions that do not “pose [the] threat” that “the Government may effectively drive certain ideas or viewpoints from the marketplace . . . .” (*R.A.V.*, *supra*, 505 U.S. at p. 387.) The first is where “the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.” (*Id.* at p. 388.) The second is where the speech is “associated with particular ‘secondary effects’ of the speech, so that the regulation is *‘justified* without reference to the content of the . . . speech . . . .” (*Id.* at p. 389.) And the third is where “the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.” (*Id.* at p. 390.) As we will discuss in more detail, the California Supreme Court in *Stanistreet* held all three exceptions applied to section 148.6, subdivision (a)(2), because of the state’s requirement, unique to peace officers, that agencies must investigate and retain a record of all complaints of misconduct. (*Stanistreet*, *supra*, 29 Cal.4th at pp. 508-510.)

### 3. Chaker

Three years after the California Supreme Court decided *Stanistreet*, the United States Court of Appeals for the Ninth Circuit held in *Chaker*, *supra*, 428 F.3d 1215 that section 148.6 violated the First Amendment. In *Chaker* a jury convicted the defendant in California state court of violating section 148.6. (*Id.* at p. 1217.) The defendant filed a petition for writ of habeas corpus in the United States District Court, alleging section 148.6 violated the First Amendment. The district court denied the

petition, but the Ninth Circuit reversed. (*Id.* at p. 1218.) The Ninth Circuit held section 148.6 was an impermissible viewpoint-based speech restriction because “[o]nly knowingly false speech *critical* of peace officer conduct during the course of a complaint investigation [was] subject to prosecution under section 148.6,” while “[k]nowingly false speech supportive of peace officer conduct [was] not similarly subject to prosecution.” (*Id.* at p. 1228.) The Ninth Circuit in *Chaker* also rejected as a valid basis for the restriction the “state’s asserted interest in saving valuable public resources and maintaining the integrity of the complaint process.” (*Id.* at p. 1227.)<sup>10</sup>

4. *The City’s Constitutional Challenge Is Inconsistent with the Supreme Court’s Analysis in Stanistreet*

Relying on *Chaker*, the City argues section 148.6 “is a flagrant content and viewpoint-based restriction on speech, applying only to knowingly false statements against a police officer but not to knowingly false statements in favor of police officers . . . .” The City also argues the Supreme Court’s decision in *Stanistreet* has “nothing to do” with the City’s argument because “*Stanistreet* never considered whether Section 148.6’s conflicting treatment of false complaints and false commendations was an acceptable regulation of speech.”

We read *Stanistreet* differently. True, the Supreme Court in *Stanistreet* did not reject the exact argument the City now makes for why section 148.6 is an impermissible content- and

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<sup>10</sup> The court in *Chaker* discussed *R.A.V.*, but did not analyze the three exceptions to content-based speech restrictions the California Supreme Court in *Stanistreet* applied to section 148.6.

viewpoint-based speech restriction. But the California Supreme Court in *Stanistreet* held all “three categories of content discrimination [the United States Supreme Court identified in *R.A.V.*] that do not threaten to drive ideas or viewpoints from the marketplace and hence are permissible . . . apply here.” (*Stanistreet, supra*, 29 Cal.4th at p. 508.) And the California Supreme Court’s analysis of why the three *R.A.V.* exceptions apply to section 148.6 applies to the City’s arguments.

Regarding the first *R.A.V.* exception—where “the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable” (*R.A.V., supra*, 505 U.S. at p. 388)—the California Supreme Court held: “The reason the entire class of speech at issue—knowingly false statements of fact—is proscribable has ‘special force’ [citation] when applied to false accusations against peace officers.” (*Stanistreet, supra*, 29 Cal.4th at p. 508.) The California Supreme Court explained that, when “a person makes a complaint against a peace officer,” 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” and that therefore “the potential harm of a knowingly false statement is greater . . . than in other situations.” (*Ibid.*) This reasoning applies whether section 148.6 is viewed as a restriction based on whom the complainant accuses of misconduct (e.g., police officer or firefighter) or as a restriction based on whether a person is accusing an officer of misconduct or commending the officer for his or her service. When a person commends an officer, an agency is not legally obligated to investigate or retain the commendation. Section 832.5 requires agencies to investigate only “complaints by members of the public” and to retain the

“complaints and any reports or findings relating to these complaints . . . .” (§ 832.5, subd. (a)(1), (2).)

As for the second *R.A.V.* exception—where the category of proscribed speech is “associated with particular ‘secondary effects’ of the speech” (*R.A.V.*, *supra*, 505 U.S. at p. 389)—the California Supreme Court in *Stanistreet* held “knowingly false accusations of misconduct against a peace officer have substantial secondary effects—they trigger mandatory investigation and record retention requirements” that do not apply to other persons. (*Stanistreet*, *supra*, 29 Cal.4th at p. 641.) In addition, “[p]ublic resources are required to investigate these complaints, resources that could otherwise be used for other matters; the complaints may adversely affect the accused peace officer’s career, at least until the investigation is complete; and the complaints may be discoverable in criminal proceedings.” (*Ibid.*) And again, (false) commendations of officers do not trigger mandatory investigation and retention requirements that demand use of public resources.<sup>11</sup> It is hard to see, and the City does not explain, how false statements commending an officer or

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<sup>11</sup> Quoting *Chaker*, *supra*, 428 F.3d at page 1226, the City argues “a peace officer or witness who lies during an investigation is equally to blame for wasting public resources by interfering with the expeditious resolution of an investigation.” A peace officer or a witness who makes false statements during an investigation is certainly blameworthy. But once a complaint is filed, an agency must complete an investigation of the misconduct allegations; the marginal cost and additional “waste” of public resources caused by investigating false statements made after the complaint are more difficult to quantify. In contrast, a person who chooses to file a knowingly false complaint necessarily wastes public resources by triggering the investigation.

defending an officer against alleged misconduct could adversely affect anyone's career. While complaints against an officer remain in the officer's personnel file and may be discoverable in future criminal proceedings where the officer is a witness, false statements defending the officer and accusations by an officer or against a complainant are less likely to surface.

On the final *R.A.V.* exception—where “the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot” (*R.A.V.*, *supra*, 505 U.S. at p. 390)—the California Supreme Court in *Stanistreet* held there was “no realistic possibility of official suppression of ideas.” (*Stanistreet*, *supra*, 29 Cal.4th at p. 473.) The California Supreme Court stated the Legislature did not suppress “all complaints of police misconduct, only knowingly false ones . . . .” (*Ibid.*) According to the California Supreme Court, the Legislature did not render complaints critical of peace officers a “disfavored subject” because such complaints were, “in other respects, favored.” The Legislature actually “elevate[d] the status” of complaints against peace officers by “requir[ing] their investigation and retention of records” and, in doing so, sought only to strike a balance by penalizing “those who invoke that status with knowingly false complaints.” (*Ibid.*)

The Supreme Court's analysis in *Stanistreet* again applies whether section 148.6 is considered a restriction based on whom the complainant accuses of misconduct or a restriction based on whether the speaker complains about or commends a peace officer. Because the Legislature elevated the status of misconduct complaints against peace officers by imposing mandatory investigation and retention requirements—an elevation it did not extend to other comments about peace

officers—there is no realistic possibility the Legislature intended to suppress the viewpoint of speakers critical of such officers. Therefore, section 148.6 does not “raise[ ] the specter that the Government [was attempting to] drive certain ideas or viewpoints from the marketplace . . . .” (*Stanistreet*, *supra*, 29 Cal.4th at p. 508, citing *R.A.V.*, *supra*, 505 U.S. at p. 388.)

The City does not meaningfully explain why the California Supreme Court’s analysis in *Stanistreet* of the third exception in *R.A.V.* would not apply to the City’s viewpoint-based argument. Instead, the City urges us to adopt the reasoning of *Chaker* and of the two concurring justices in *Stanistreet* who would have held the third exception in *R.A.V.* did not apply to section 148.6. The concurring opinion in *Stanistreet* concluded there was a realistic possibility that criminalizing even false complaints against peace officers would suppress legitimate ones. (See *Stanistreet*, *supra*, 29 Cal.4th at pp. 513-514 (conc. opn. of Werdegar, J).) But our role is not to second guess a majority opinion of the California Supreme Court, however persuasive the reasoning of concurring or dissenting opinions may be. (See *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 868 [“an appellate court may not properly disregard Supreme Court authority in favor of a [different] ruling that it prefers”]; *In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 795 [“A principle stated in a California Supreme Court opinion is not the opinion of the court unless it is agreed to by at least four of the justices.”].)

The City argues that, because “*Stanistreet* and *Chaker* considered very different content-based distinctions,” and “[b]ecause an opinion has no authority regarding an issue it did not address,” we can follow the Ninth Circuit’s holding in *Chaker* rather than the California Supreme Court’s holding in

*Stanistreet*. We cannot. Even statements by the California Supreme Court that do “not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made . . . after careful consideration, or in the course of an elaborate review of the authorities . . .” (*Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1472-1473.) Although the specific arguments the California Supreme Court rejected in *Stanistreet* are somewhat different from those the City advances here, the Supreme Court’s reasoning in *Stanistreet* applies. That’s enough to control our decision here. (See *Pogosyan v. Appellate Division of Superior Court* (2018) 26 Cal.App.5th 1028, 1037 [“we must examine the questions actually presented” to the Supreme Court and how the Supreme Court’s “reasoning led to the statements at issue to determine the extent to which we must—or should—follow them”]; see also *Masellis v. Law Office of Leslie F. Jensen* (2020) 50 Cal.App.5th 1077, 1093 [following the “Supreme Court’s dicta” where the appellant did not identify “a compelling reason for rejecting [the] Supreme Court’s statements”].)<sup>12</sup>

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<sup>12</sup> The City’s insistence that the California Supreme Court “considered” a different content-based distinction than the one the City makes here is incorrect. In *Stanistreet* the respondents devoted an entire section of their brief in the Supreme Court to a viewpoint discrimination challenge to section 148.6 that was essentially identical to the City’s argument. (See *People v. Stanistreet*, No. S102722, Answer Brief on the Merits, filed May 24, 2002, at p. 17.)\* For example, the respondent in *Stanistreet* argued in its brief: “The statute and the required statutory advisory make it clear that only knowingly false statements ‘AGAINST AN OFFICER’ can be criminally punished. [Citation.] However, there is no threat of criminal punishment for knowingly false statements that the officer might make about

The City also argues *Stanistreet* has “questionable legitimacy in the wake of” the United States Supreme Court’s decision in *U.S. v. Alvarez* (2012) 567 U.S. 709 [132 S.Ct. 2537, 183 L.Ed.2d 574]. In *Alvarez* six justices of the United States Supreme Court held the Stolen Valor Act of 2005—which made it a crime for a person to falsely represent he or she was awarded the Congressional Medal of Honor—violated the First Amendment. (See *id.* at p. 715; *id.* at p. 730 (conc. opn. of Breyer, J.)) A plurality of the United States Supreme Court stated there is no “general exception to the First Amendment for false statements.” (*Id.* at p. 718.) In *Stanistreet* the California Supreme Court stated that “knowingly false statements of fact are constitutionally unprotected.” (*Stanistreet, supra*, 29 Cal.4th at pp. 505-506.) Seizing on the difference in High Court language, the City argues *Alvarez* overruled the “legal pillar upon which the *Stanistreet* holding rested.” The City, however, reads far too much into the California Supreme Court’s statement in *Stanistreet*. Despite stating that false speech was “unprotected,” the California Supreme Court recognized that “constitutional protection is not withheld from all such” false statements even assuming they, “by themselves, have no constitutional value.” (*Id.* at p. 637.) More importantly, the California Supreme Court

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the citizen in response to the complaint.” (*Id.* at p. 18, capitalization in original.)

\* We take judicial notice of the respondent’s answer brief in *Stanistreet* “for the purpose of determining the procedural posture of [the] case before the” California Supreme Court. (*Davis v. Southern California Edison Co.* (2015) 236 Cal.App.4th 619, 632, fn. 11; see Evid. Code, §§ 452, subd. (d), 459; *People v. Sanchez* (1995) 12 Cal.4th 1, 85, fn. 10 [taking judicial notice of a brief filed in a different appeal], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390.)

assumed a content-based restriction on even unprotected speech would violate the First Amendment unless one of the exceptions the United States Supreme Court enumerated in *R.A.V.* applied. (See *id.* at p. 638.)<sup>13</sup>

Finally, the City contends that, because the Ninth Circuit in *Chaker* and at least one district court have held section 148.6 violates the First Amendment,<sup>14</sup> the City “faces real consequences if it enforces section 148.6 by including the admonition.” That may be—the City does seem caught between the Scylla of *Chaker* and the Charybdis of *Stanistreet*. But as a California intermediate appellate court, we must, when considering federal questions, “follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the same question differently.” (*Winns v. Postmates Inc.* (2021))

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<sup>13</sup> Other language in *Alvarez* supports the California Supreme Court’s holding in *Stanistreet* that section 148.6 does not violate the First Amendment. The plurality in *Alvarez* identified several “examples of regulations on false speech” it did not intend to undermine, including the prohibition in title 18 United States Code section 1001 “on false statements made to Government officials, in communications concerning official matters . . . .” (*United States v. Alvarez, supra*, 567 U.S. at p. 720.)

<sup>14</sup> At least one state supreme court, however, has upheld a statute similar to section 148.6 against a challenge essentially identical to the City’s, disagreeing with the Ninth Circuit’s decision in *Chaker*. (See *State v. Crawley* (Minn. 2012) 819 N.W. 2d 94, 109, 114 [“Because speech that is supportive of peace officer conduct does not fall within the unprotected category of defamation, the statute does not discriminate on the basis of viewpoint.”], cert. den. 568 U.S. 1212 [133 S.Ct. 1493, 185 L.Ed.2d 548].)

66 Cal.App.5th 803, 811; see *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 619.) Unless and until the California Supreme Court reconsiders its decision in *Stanistreet* (or the United States Supreme Court considers the constitutionality of section 148.6 or an analogous statute), we may not decide section 148.6 constitutes an impermissible restriction on content-based or viewpoint-based speech.

Which leaves the City in a practical quandary: The City must either disobey a state court injunction or enforce a statute federal courts have held is unconstitutional and cannot be enforced. The City currently has a temporary reprieve from this dilemma because the trial court stayed the injunction until this court issues its remittitur, which will not occur until the Supreme Court rules on a petition for review, if one is filed (or after the time to file such a petition expires). In the absence of intervention by the California Supreme Court (or the United States Supreme Court), the stay will expire, and the injunction will take effect.

C. *The Advisory and Signature Requirements of Section 148.6 Do Not Chill Protected Speech*

The City also argues section 148.6, subdivision (a)(2), violates the First Amendment by placing an impermissible burden on speech. According to the City, the requirement that complainants sign an advisory containing “a preemptive and explicit threat of criminal prosecution” for the filing of false complaints also deters people from filing good faith complaints.

The California Supreme Court in *Stanistreet* rejected this argument. The Supreme Court specifically considered whether the requirement in section 148.6, subdivision (a)(2), that

complainants read and sign an admonition explaining the “criminal sanction for knowingly false complaints” demonstrated that “official suppression of ideas [was] indeed afoot.” (*Stanistreet, supra*, 29 Cal.4th at p. 510.) The Supreme Court held it did not: “That admonition merely advises complainants of the law and impresses on them the significance of the formal complaint. Warning people of the consequences of a knowingly false complaint is no more impermissible than advising people they are signing a document or testifying under penalty of perjury. The explanation and admonition do not invalidate the statute.” (*Ibid.*) Absent a contrary ruling by the United States Supreme Court, we may not second guess the California Supreme Court on this (or any) issue.

D. *The City Forfeited Its Argument Section 148.6 Violates the First Amendment by Prohibiting Anonymous Complaints*

Finally, the City contends for the first time, on appeal, section 148.6, subdivision (a)(2), violates the First Amendment because, by requiring complainants to sign the admonition, it prohibits persons from anonymously reporting government misconduct. This is one argument the California Supreme Court in *Stanistreet* did not consider.

“[T]he First Amendment right of freedom of speech includes the right to remain anonymous,” at least for some types of speech. (*Huntley v. Public Utilities Commission* (1968) 69 Cal.2d 67, 73.) “[J]udicial recognition of the constitutional right to publish anonymously is a long-standing tradition . . . .” “Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices . . . either

anonymously or not at all.”” (*John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1310.) The United States Supreme Court has recognized the right to speak anonymously, for example, when distributing handbills and pamphlets (see, e.g., *Watchtower Bible Tract Society of New York, Inc. v. Village of Stratton* (2002) 536 U.S. 150, 166-167 [122 S.Ct. 2080, 153 L.Ed.2d 205]; *McIntyre v. Ohio Elections Com.* (1995) 514 U.S. 334, 357 [115 S.Ct. 1511, 131 L.Ed.2d 426]; *Talley v. California* (1960) 362 U.S. 60, 64-65 [80 S.Ct. 536, 4 L.Ed.2d 559]) and when circulating ballot-initiative petitions (see *Buckley v. American Constitutional Law Foundation, Inc.* (1999) 525 U.S. 182, 199-200 [119 S.Ct. 636, 112 L.Ed.2d 599].)

There may be some merit to the City’s anonymity argument. The City, however, forfeited the argument by not making it in the trial court. (See *Jackpot Harvesting Co., Inc. v. Superior Court* (2018) 26 Cal.App.5th 125, 154 [“As a general rule, ‘constitutional issues not raised in earlier civil proceedings are waived on appeal.’”]; *In re M.H.* (2016) 1 Cal.App.5th 699, 713 [by failing to raise the constitutional challenge in the trial court, appellant forfeited the argument a statute violated the First Amendment]; *Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, 585 [constitutional issues not raised in the trial court are forfeited on appeal].) Indeed, applying the forfeiture rule here is particularly appropriate given that “there is no absolute right to anonymity” and that a court must balance the right against the government’s interest in requiring disclosure of identifying information. (*Huntley v. Public Utilities Commission, supra*, 69 Cal.2d at p. 75.) In this case neither side presented evidence of the state’s interests in requiring complainants to sign the advisory required by section

148.6, subdivision (a)(2), so that the trial court could balance those interests against citizens' right to file complaints of police misconduct anonymously. (See *In re N.R.* (2017) 15 Cal.App.5th 590, 598 [where an argument "involves an issue of fact rather than a pure question of law," it is "forfeited by appellant's failure to raise it below"]; *Blankenship v. Allstate Ins. Co.* (2010) 186 Cal.App.4th 87, 105 ["arguments raised for the first time on appeal" that "involve questions of fact" are forfeited]; *Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson* (2005) 131 Cal.App.4th 1466, 1488 [an argument is forfeited "if it was not raised below and requires consideration of new factual questions"].)

## DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

WISE, J. \*

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\* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PERLUSS, P. J., Concurring

I fully agree with, and have signed, the court's opinion adhering to the Supreme Court's decision in *People v. Stanistreet* (2002) 29 Cal.4th 497, holding Penal Code section 148.6 (section 148.6) is not an unconstitutional restraint on speech. I add this grace note to briefly emphasize several issues our opinion does not address because the City focused its defense of the Police Protective League's lawsuit on the rights of individuals seeking to complain about police misconduct, not the City's own rights and responsibilities.

First, Los Angeles is a charter city. (See Gov. Code, § 34101.) As the Supreme Court explained in *State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547 (*City of Vista*), "Charter cities are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs. Article XI, section 5, subdivision (a) of the California Constitution provides: 'It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.'" (*Id.* at p. 555; italics omitted.) Known as the home rule doctrine, the broad authority of charter cities was originally "enacted upon the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact

direct legislation which would carry out and satisfy its wants and needs.’ [Citation.] The provision represents an ‘affirmative constitutional grant to charter cities of “all powers appropriate for a municipality to possess . . .” and [includes] the important corollary that “so far as ‘municipal affairs’ are concerned,” charter cities are “supreme and beyond the reach of legislative enactment.”’” (*Id.* at pp. 555-556; see *Johnson v. Bradley* (1992) 4 Cal.4th 389, 394-398; *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 12 (*California Fed. Savings*).)

Article XI, section 5, subdivision (b), of the California Constitution sets out a nonexclusive list of four core categories that are, by definition, “municipal affairs.” First on that list is “the constitution, regulation, and government of the city police force.” (See *Johnson v. Bradley, supra*, 4 Cal.4th at p. 398.) Thus, if the City authorizes its police department to accept complaints of misconduct without a signed advisory, it may not be within the authority of the Legislature to prohibit it from doing so. (See generally *City of Huntington Beach v. Becerra* (2020) 44 Cal.App.5th 243, 254, 259 [“[h]ome rule authority under article XI, section 5 of the California Constitution does not mean charter cities can never be subject to state laws that concern or regulate municipal affairs”; the Supreme Court’s analytical framework articulated in *City of Vista* and *California Fed. Savings* “appl[ies] to a state law that is claimed to intrude on a charter city’s right under article XI, section 5(b) to create, regulate, and govern a police force”].)

Second, although section 148.6 provides a law enforcement agency “shall” require a complainant to read and sign the advisory, “shall” can be construed as mandatory or directory.

(*People v. Ledesma* (1997) 16 Cal.4th 90, 95.) “When, as here, a statute sets forth a procedural requirement but does not set forth any penalty for noncompliance, a party may reasonably question whether the statute is merely directory, not mandatory. “[T]he “mandatory” or “directory” designation does not refer to whether a particular statutory requirement is obligatory or permissive, but instead denotes “whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates.”” (*People v. Gray* (2014) 58 Cal.4th 901, 909; see *Cal-Air Conditioning, Inc. v. Auburn Union School Dist.* (1993) 21 Cal.App.4th 655, 673 [“provisions defining time and mode in which public officials shall discharge their duties and which are obviously designed merely to secure order, uniformity, system and dispatch in the public bureaucracy are generally held to be directory”].) Even if section 148.6 applies to the City’s regulation of its police department despite the home rule doctrine, it is not clear—and we do not decide—that the City violates the statute by accepting a complaint of police misconduct without a signed advisory.<sup>15</sup>

Third, the import of a prohibition against “accepting an allegation of misconduct against a peace officer” without the signed advisory—the language of section 148.6 repeated in the injunction issued by the superior court—is, at best, unsettled. In an opinion issued in 1996 shortly after the enactment of

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<sup>15</sup> Presumably, an appellate court decision that section 148.6 could not apply to the City under the home rule doctrine or that it was directory, not mandatory, would provide a basis for the City to seek to dissolve the injunction we affirm today.

section 148.6, Attorney General Daniel Lungen concluded, “A law enforcement agency may investigate an allegation of police misconduct even though the prescribed information advisory form has not been signed by the person filing the allegation.” (79 Ops.Cal.Atty.Gen. 163 (1996).) The Attorney General explained, “The plain wording and legislative history of section 148.6, along with the governing principles of statutory construction, including the duty to uphold the statute’s constitutional validity, all support the conclusion that a law enforcement agency does not lose its power and jurisdiction to investigate allegations of police misconduct even though it fails to secure the signature of the complainant on the advisory form.” (*Id.* at p. 167.) What, if anything, the City and its police department may do after receiving, but not “accepting,” an unsigned or anonymous complaint is yet another issue we do not decide.

PERLUSS, P. J.

STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

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Supreme Court of California

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Office of the Los Angeles City Attorney

Law Firm