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

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## REPLY TO ANSWER BRIEF

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## Introduction

Nothing in the Answering Brief changes the fundamental flaw with Penal Code section 148.6, subdivision (a) ("Section 148.6(a)"), and particularly subdivision (a)(2) – it discriminates based on viewpoint and suppresses protected speech. Whether addressing the broader debate over the existence and extent of police misconduct, or the often disputed and uncertain circumstances of a specific alleged incident, Section 148.6(a) improperly takes sides on these disputed issues by burdening only speech critical of police conduct. This Court should reverse the injunction and the rulings below and instruct the lower courts to enter judgment for Petitioners and Defendants the City of Los Angeles and Charles Beck (collectively "the City").

Section 148.6(a)(2) requires an advisory on each police misconduct complaint form. The advisory threatens the complainant with criminal prosecution for any misconduct complaint which that same law enforcement agency finds knowingly false. Section 148.6(a)(1) gives teeth to that threat by criminalizing the submission of a knowingly false misconduct complaint against a peace officer. But because no such threats are extended to knowingly false statements, made as part of the same investigation, which defend or dispute police misconduct (or disparage misconduct complainants), Section 148.6(a) expressly takes sides in disputes over police misconduct. That is

unconstitutional viewpoint discrimination. Section 148.6(a)(2) also forbids the receipt of misconduct allegations unless the complainant signs the advisory, thereby barring anonymous complaints and effectively barring misconduct complaints from individuals too intimated to make them publicly.

Insofar as the Answering Brief by the Los Angeles Police Protective League ("LAPPL") repeats arguments made below and already addressed in the Opening Brief, those points will not be repeated here. LAPPL now argues, with little legal support, that disputes over factual issues don't involve viewpoints. So, LAPPL argues that there can be no viewpoint discrimination from Section 148.6(a) since it only addresses factual claims regarding alleged misconduct. Multiple courts have held, however, that factual disputes – such as whether or how alleged events took place – necessarily elicit different viewpoints from the disputants. Thus, when the government chills one side of a debate or discussion but leaves the other unrestricted, it engages in viewpoint discrimination.

LAPPL's attempt to salvage Section 148.6(a) by restricting it to criminalize only defamatory speech is equally misplaced. Adopting elements of defamation law would not address the preemptive threat of criminal prosecution in Section 148.6(a)(2) or the viewpoint discrimination of Section 148.6(a). In any case, the U.S. Supreme Court explained in *United States v. Alvarez*

(2012) 567 U.S. 709, that defamation law was designed to increase the total amount of speech by avoiding criminalization and limiting the scope of potential liability to actual harm caused by knowingly false statements. (*Id.*, at 719-720 (plur. opn. of Kennedy, J.).) Thus, defamation law should not be used to support the criminalization of speech.

LAPPL's argument addressing levels of scrutiny is largely dependent on its assertion that Section 148.6(a) does not discriminate by viewpoint. In any case, LAPPL fails to address alternative remedies that don't impact the First Amendment or to justify singling out misconduct complaints while failing to address knowingly false statements in defense of alleged misconduct made as part of the same investigation. LAPPL also ignores that the threat of criminal prosecution in Section 148.6(a)(2) improperly infringes on protected speech by discouraging misconduct reports.

LAPPL asserts that anonymous misconduct complaints are of little consequence and disputes whether blanket threats of criminal prosecution would deter misconduct reports. But one of LAPPL's primary arguments is that Section 148.6(a)(2) does not actually bar the receipt of anonymous misconduct complaints, which could then be investigated as the governing statutes otherwise require. While this was initially suggested by the Attorney General shortly after Section 148.6(a) was enacted, such

a clarification needs to come from this Court. Still, allowing anonymous complaints would not eliminate the viewpoint discrimination or the suppression caused by blanket threats of criminal prosecution.

Finally, LAPPL's arguments that the City will face no potential litigation or liability from enforcing Section 148.6(a)(2) are misplaced. Civil rights claims under 42 U.S.C. section 1983 apply to public entities enforcing unconstitutional state laws, including court injunctions compelling such enforcement. Under the Ninth Circuit holding in *Chaker v. Crogan* (9th Cir. 2005) 428 F.3d 1215, the City will certainly face adverse federal litigation from enforcing Section 148.6(a)(2), making it an abuse of discretion to order its enforcement. This Court should reverse the rulings below and order judgment for the City.

## Legal Discussion

### I. By Only Targeting Speech on One Side of a Disputed Issue, Section 148.6(a) Is Viewpoint-Discriminatory.

#### A. Section 148.6(a) Imposes Content and Viewpoint Discrimination.

The Answering Brief begins its legal discussion with the misguided argument that viewpoint is irrelevant to a factual

dispute. Thus, LAPPL argues that there can be no viewpoint discrimination involving factual disputes, and so a statute chilling the presentation of one set side of the dispute cannot be viewpoint-discriminatory. While Section 148.6(a) is expressly a content-based restriction on speech, it also constitutes specific government action favoring one side of an ongoing public debate over police misconduct, i.e. viewpoint discrimination. LAPPL's argument fails for multiple reasons.

First, several courts have observed that the terms of Section 148.6(a) chill one viewpoint (that critical of police) and not its opposite (defending the police), requiring a discussion of whether it constitutes impermissible viewpoint discrimination. (E.g., *Chaker*, *supra*, 428 F.3d at 1223-28; *La. Fr. Hamilton v. City of San Bernardino* (C.D.Cal. 2004) 325 F. Supp. 2d 1087, 1094-95; *Los Angeles Police Protective League v. City of Los Angeles* ("*LAPPL*") (2022) 78 Cal.App.5th 1081, 1093; and see *People v. Stanistreet* (2002) 29 Cal.4th 497, 513-14 (conc. opn. of Werdegar, J.) [recognizing only individuals critical of the police would be pressured to silence].) All of these cases recognized that Section 148.6(a) favors one side in disputes over alleged police misconduct and that this constitutes viewpoint discrimination.

Second, LAPPL appears to assume that one can reliably determine the truth of a matter, so that identifying a knowingly false misconduct report is basically a matter of arithmetic, not

subject to varying views. LAPPL primarily cites *United States v. Alvarez* (9th Cir. 2010) 617 F.3d 1198, 1204, n.4, judgment aff'd, 567 U.S. 709 (2012), for the global proposition that viewpoint is irrelevant to any factual dispute. But the only factual issue in *Alvarez* was whether Alvarez received the military awards that he knowingly lied about. Thus, the discussion in *Alvarez* was limited to "the difficulty of identifying the potential viewpoint discrimination afoot in laws targeting false statements about simple, demonstrable facts." On that basis the panel declined to use a viewpoint based analysis under those circumstances. (*Ibid*.) Despite the limited and easily verifiable nature of that claim, the U.S. Supreme Court still struck as an improper content-based speech regulation the statute barring false claims of military honors. (*United States v. Alvarez* (2012) 567 U.S. 709, 715.)

The simplistic factual claim in *Alvarez* is wholly distinct from the often complicated and contentious question of whether a police officer committed misconduct. Under Section 148.6(a), anyone wanting to exercise their fundamental right to express a grievance to a law enforcement agency is threatened with criminal prosecution if their recollection of events is meaningfully different from the report set forth by the officers and their supporters. (See *Rosenblatt v. Baer* (1966) 383 U.S. 75, 85 ["Criticism of those responsible for government operations must

be free, lest criticism of government itself be penalized."].) Faced with conflicting witness accounts, an arbiter is tasked with determining what happened. It is difficult to see how that process does not involve weighing the different viewpoints and perspectives of the witnesses. Moreover, LAPPL's argument suggests that witnesses who testified to a different version of facts than was ultimately accepted by the trier of fact potentially face repercussions for providing false testimony, since LAPPL rejects the idea of differing viewpoints or perspectives in this context.

*Madsen v. Women's Health Ctr., Inc.* (1994) 512 U.S. 753, is even farther afield. It held that even though a content-neutral speech regulation happened to affect people with the same viewpoint, that alone was not proof of viewpoint discrimination. (*Id.* at 763.) This is virtually the opposite of the situation here, because Section 148.6(a) is expressly a content-based criminalization of speech that specifically targets only people who report police misconduct while giving a free pass to those who dispute or defend alleged misconduct. This is the accepted definition of viewpoint discrimination. (See *R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 391-92 [the government cannot "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."].)

Finally, LAPPL cites cases that addressed the right of public officers to file malicious prosecution counterclaims in response to frivolous lawsuits. Those plaintiffs claimed that allowing that cause of action burdened their ability to bring frivolous lawsuits and constituted viewpoint discrimination. (See *Gibson v. City of Kirkland* (W.D. Wash. Mar. 3, 2009) No. C08-0937-JCC, 2009 WL 564703, at *2.) *Gibson* distinguished both *R.A.V.* and *Chaker*, holding that the wholesale right to file lawsuits was not a viewpoint, unlike Section 148.6(a) in *Chaker* which "only criminalized false speech *critical* of peace officers, and not false speech *supportive* of peace officers [and therefore] impermissibly discriminated based on viewpoint." (*Id*., at *3, original emphasis.) A consensus of Washington district court judges agreed. (See *Laws v. City of Seattle* (W.D. Wash. Nov. 12, 2009) No. C09-033JLR, 2009 WL 3836122, at *3 [re cases cited].)

### B. LAPPL's Attempt to Invoke Defamation Law Should Be Rejected.

Tacitly conceding that Section 148.6(a) is facially unconstitutional, LAPPL proposes that it can be salvaged by constraining prosecution to knowingly and defamatory knowingly false complaints. While at one point the Answering Brief appears to argue that Section 148.6(a) is already consistent with defamation law, the only overlap is the act of making a knowingly false statement. But, to fit the limited defamation exception to

the First Amendment's speech protections, Section 148.6(a) would also need to require a showing of injury to a specific officer. (See Civ. Code §§ 45 and 46 [defamation requires injury to the subject].) LAPPL's attempt to salvage Section 148.6(a) by restricting it to defamatory claims fails for at least four reasons.

First, limiting prosecutions to defamatory misconduct claims would only impact actual prosecution under Section 148.6(a)(1) insofar as a prosecutor would need to prove actual harm to the subject officer. However, the most problematic aspects of Section 148.6(a) are its up-front chilling effects on the reporting of police misconduct. Making it slightly harder to prosecute someone later would not change that. (See OB at 36-43.) Moreover, adopting elements of defamation would have no effect on the unconstitutional impact of the advisory imposed by Section 148.6(a)(2) or the current injunction.

Second, restricting Section 148.6(a) to defamation claims would have no impact on the viewpoint discrimination because the statute still favors one side of the public discourse on police misconduct. (OB at 24-35.) This is analogous to *R.A.V.*, which confirmed that a government could proscribe cross-burning entirely, but that it would be unconstitutional to only ban cross-burning when done for specific reasons. (*R.A.V.*, *supra*, 505 U.S. at pp. 385-86.) Under LAPPL's proposal, knowingly false allegations of police misconduct would be subject to prosecution,

while knowingly false reports defending misconduct would still be unrestricted. Section 148.6(a)'s bar on receiving anonymous allegations would be unchanged.

Third, using defamation law to justify the criminal prosecution of speech would contradict the U.S. Supreme Court's holding in *Alvarez*. *Alvarez* explained that defamation law was intended to incentivize free speech – both by avoiding criminalization and limiting the scope of liability – and therefore should not be invoked to criminalize speech. (See *Alvarez*, *supra*, 567 U.S. at pp. 719-720 (plur. opn. of Kennedy, J.) ["A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it."].) The goal is to suppress as little speech as possible, which is why the U.S. Supreme Court is hesitant to approve the chilling of protected speech – as would result from threatening prosecutions for reporting of misconduct. (See *id.* at pp. 733 and 736 (conc. of Breyer, J.).)

Fourth, restricting Section 148.6(a)(1) to defamatory statements would make it unnecessary and duplicative. California already has a statute that creates a cause of action for defamation of a peace officer based on filing a knowingly false misconduct complaint with malice: Civil Code section 47.5.[1]

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[1] The constitutionality of Civil Code section 47.5 as an improper restriction on free speech is disputed. See, *Walker v. Kiousis* (2001) 93 Cal.App.4th 1432, 1437 [§ 47.5 "impermissibly

Thus, the Legislature has already employed defamation law to enact a measured response to knowingly false and defamatory misconduct complaints that also compensates the officer for any resulting injury. Moreover, section 47.5 is not burdened with the global threat of prosecution required under Section 148.6(a)(2).

To support the incorporation of the elements of defamation into Section 148.6(a), LAPPL cites *State v. Crawley* (Minn. 2012) 819 N.W.2d 94, 97-98. *Crawley* upheld a Minnesota law somewhat broader than Section 148.6(a)(1); it criminalized all knowingly false statements critical of one officer that were made to any officer responsible for investigating misconduct. After narrowing the scope of the law to include only defamatory statements, *Crawley* upheld the statute on the grounds that criminalizing false misconduct reports – but not any knowingly false exculpatory statements – was not viewpoint discrimination and was an acceptable content-based restriction. (*Id.*, at pp. 114-15.) This out-of-state opinion is ultimately unpersuasive here.

First, and critically, the statute in *Crawley* had no mandatory advisory, as does Section 148.6(a)(2). Thus, any consideration of *Crawley* should be limited to Section 148.6(a)(1).

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regulates speech"]; and *Loshonkohl v. Kinder* (2003) 109 Cal.App.4th 510, 512 [§ 47.5 is constitutional]. *Stanistreet* recognized but did not resolve this dispute. (*Stanistreet*, *supra*, 29 Cal.4th at p. 512.)

Second, *Crawley* is a 4-3 decision reversing an appellate decision that struck the Minnesota law as improper viewpoint discrimination, because it "unevenly constrains one side of discussion on a highly charged, public issue." (*State v. Crawley* (Minn. 2012) 789 N.W.2d 899, 906 (Minn. Ct. App. 2010), rev'd, 819 N.W.2d 94.) The *Crawley* dissent also reached the conclusion that criminalizing false misconduct reports "discriminates based on the viewpoint of the speaker," noting that the ban "criminalizes speech on only one side of the issue of police misconduct: speech that is critical of the conduct of peace officers." (*Id*. at p. 128.) In other words, the intermediate appellate court and the dissenters in *Crawley* got it right.

The *Crawley* majority rejected those arguments by asserting defamation law as a sword that allowed the criminalization of false statements critical of police officers, a view since discredited by *Alvarez*. At the same time, the *Crawley* majority asserted that knowingly false reports that defended or excused police misconduct would not necessarily be defamatory, and so picking sides in this dispute would not constitute viewpoint discrimination. (*Crawley*, *supra*, 819 N.W.2d at p. 109.) The *Crawley* majority does not explain this conclusion, except to say that defamation is not protected speech. But, knowingly false statements supporting misconduct are at least fraudulent – they could be defamatory – and they are intended to

induce reliance, so the basis for *Crawley*'s conclusion is unclear. That the *Crawley* majority used defamation law as a means to justify viewpoint discrimination further undermines the decision's persuasive value.

### C. Section 148.6(a) Constitutes Content and Viewpoint Discrimination.

#### 1. LAPPL mischaracterizes Section 148.6(a).

LAPPL starts from the premise that Section 148.6(a) only effects knowingly false misconduct complaints, but that is wrong. Section 148.6(a) tips the balance against reporting and finding misconduct by applying different standards to those who report misconduct and those who deny it. Only those that report misconduct face criminal sanctions for making knowingly false allegations and threats of prosecution. (*Chaker*, *supra*, 428 F.3d at p. 1217; *La. Fr. Hamilton*, *supra*, 325 F.Supp.2d at p. 1094-95 ["Section 148.6 discriminates based on viewpoint."].) This is most blatant in Section 148.6(a)(2)'s mandatory advisory, because it threatens criminal prosecution for everyone who lodges a misconduct complaint that is meaningfully different than the report by the officers involved, a reality that will be apparent to individuals alleging misconduct. (See *Stanistreet*, *supra*, 29 Cal.4th at pp. 513-14 (conc. opn. of Werdegar, J.).) Thus, in addition to imposing content and viewpoint discrimination,

Section 148.6(a) is designed to impact all potential misconduct complainants by warning them to consider whether it's worth the potential risk of prosecution to report misconduct.

LAPPL improperly attempts to shift the focus away from the viewpoint discrimination against misconduct complainants by focusing exclusively on the impact false complaints have on the subject officer. However, the balance between the public need for "maintaining the efficiency and integrity of the police force" and an officer's interest in receiving fair treatment is already addressed by the Public Safety Officers Procedural Bill of Rights Act (POBRA) in a manner that does not infringe on First Amendment rights. (See *Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, 1029-30.) While the City recognizes the serious impact false reports have on police officers, dealing with meritless misconduct complaints is part of the cost of the First Amendment and a free society. This cost must also be considered "in light of the power and deadly force the state places in [a police officer's] hands." (*Pena v. Municipal Court for Tulare-Pixley Judicial Dist.* (1979) 96 Cal.App.3d 77, 82, cleaned up.) As exemplified by POBRA, the state must find means to protect police officers that do not violate free speech rights.

The Opening Brief cites *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, as an example of an improper "content-based regulation of speech" which "punishes only *derogatory* speech

about the financial condition of banks." (*Id.* at p. 691, original emphasis.) LAPPL offers a lopsided view of the opinion, focusing on the court's discussion of other failings of the subject statute and the available remedies, as if that was the main thrust of the opinion. However, *Summit Bank* stated that its "greatest concern" was the statute's "potential to inhibit persons from engaging in constitutionally protected speech about the financial soundness of our banking system by threatening those who express themselves with a less than optimistic view on this topic with criminal sanctions." (*Id.* at p. 692.) This is the same flaw which undermines Section 148.6(a) – its impact on suppressing and undermining valid misconduct complaints.

### 2. Section 148.6(a) fails *R.A.V.*'s standard for review.

In *R.A.V.*, the U.S. Supreme Court confirmed that the government cannot generally regulate even proscribable speech under terms that impose content or viewpoint discrimination. (*R.A.V.*, *supra*, 505 U.S. at pp. 391 and 391-92.) *R.A.V.* also described three exceptions to this general rule; three categories of content discrimination that do not raise "the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace. [Citations.]" (*Id.* at p. 387-88, and see 388-90.) First, "[w]hen 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.) Second, if the regulation addresses speech that "happens to be associated with particular 'secondary effects' of the speech, so that the regulation is justified without reference to the content of the ... speech." (*Id*. at p. 389.) Third, if "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.) None of these categories apply to Section 148.6(a). (See OB at pp. 25-35.)

As to the first category, LAPPL simply repeats the discussion in *Stanistreet* that misconduct complaints against police officers justify special restrictions because the agency is obligated to investigate the claim and retain the results for a prescribed period, wholly ignoring the viewpoint discrimination that disqualifies this category. Further, restrictions like Section 148.6(a), which generally discourage misconduct complaints, undermine the policy behind requiring an investigation and document retention – correcting misconduct. Finally, if a complaint is frivolous, then the investigation will say as much. How does that create any long-term injury to the officer? While there might be some short term concern during the investigation's pendency – although it would seem that a truly baseless complaint would require little investigation – this can be addressed by means that do not impact First Amendment rights

(e.g., additional resources for investigations, retroactive benefits if any were delayed pending investigation, etc.).

To fit into the second *R.A.V.* category, LAPPL attempts to reframe Section 148.6(a) as a regulation of conduct (i.e., filing a complaint) and not of speech. As discussed in the Opening Brief, but ignored by the Answering Brief, Section 148.6(a) is expressly based on speech content and only applies when the communication contains a misconduct claim. (OB at pp. 29-30.) Moreover, LAPPL fails to identify any "secondary effects" that can justify the regulation "without reference to the content of the ... speech" itself. (*R.A.V.*, *supra*, 505 U.S. at p. 389.) The adopted statutory scheme for how misconduct reports are handled is a direct part of the communication. (OB a 30-31.) LAPPL repeats a comment by the Court of Appeal that false misconduct complaints could adversely impact an officer's career, but knowingly false reports hiding, defending, or excusing misconduct would not. (See *LAPPL*, *supra*, 78 Cal.App.5th at p. 1096.) But neither the Court of Appeal nor LAPPL explain why that distinction is decisive or why the integrity of misconduct investigations is so easily disregarded. LAPPL's real complaint is that the statutes require law enforcement agencies to take all misconduct complaints seriously until they are shown to be baseless, but that also goes to the content of the

communication and is no basis for infringing on First Amendment rights.

Reporting police misconduct is an important form of constitutional free speech. (*La. Fr. Hamilton*, *supra*, 325 F.Supp.2d at p. 1092 [referring to the "protected status" of police misconduct complaints]; *Hernandez v. City of Phoenix* (9th Cir. 2022) 43 F.4th 966, 981 ["speech exposing police misconduct" "lies at the core of First Amendment protection"].) LAPPL argues without support that by establishing a process for processing misconduct complaints, i.e., mandating that they are investigated, California became entitled to limit the underlying constitutional right to report misconduct. There is no logic or legal support for the argument that a state can use its own legislation to justify a violation of First Amendment rights.

LAPPL's discussion of *R.A.V.*'s third category ignores: (1) *R.A.V.*'s statement that this category does not apply to viewpoint restrictions (OB at p. 32); (2) the impact of Section 148.6(a), and particularly (a)(2), to generally suppress misconduct reports (OB at pp. 34-35); and (3) in relying on *Crawley*, that the statute in *Crawley* did not have an equivalent to Section 148.6(a)(2), which preemptively threatens all individuals before they lodge a misconduct complaint.

## II. Penal Code Section 148.6(a)(2) Operates Independently to Improperly Suppress Misconduct Complaints.

### A. LAPPL's Overbreadth Argument is Incomplete.

LAPPL attempts to downplay the impact of Section 148.6(a)(2) by focusing on the standards for using overbreadth to strike a ban intended for constitutionally proscribable speech. This is an odd tack, in that the only speech that Section 148.6(a)(2) actually bans is anonymous or unsigned misconduct complaints (i.e. those fearful of retaliation or backlash), while the required advisory threatens all potential complainants with criminal prosecution if the police dispute the accuracy of the allegations. This ban is simply not limited to proscribable speech, and so is facially overbroad. In any case, the opinions cited by LAPPL do not support its position and, by contrast, confirm the overreach of Section 148.6(a)(2).

For example, *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234 holds that a statute that regulates proscribable speech is overly broad "if it prohibits a substantial amount of protected expression." (*Id*. at p. 244 [finding that ban included identifiable categories of protected speech and was therefore overbroad].) But in that context the court was contrasting "substantial" with a de minimis or speculative impact on protected speech. Similarly,

*Wisconsin v. Mitchell* (1993) 508 U.S. 476, 488 rejected an overbreadth argument that a "hate-crime" sentence enhancement would restrict biased speech for fear that it could possibly be used in relation to some unknown future crime, stating: "The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional 'overbreadth' cases." *New York v. Ferber* (1982) 458 U.S. 747, 773 upheld a child pornography ban because only "a tiny fraction of the materials within the statute's reach" might be potentially protected speech (e.g., medical textbooks), and the state courts would interpret "lewd exhibition" to reduce or eliminate even that degree of overbreadth. In *People v. Toledo* (2001) 26 Cal.4th 221, 234 this Court upheld the crime of attempted criminal threat because "in virtually all, if not all, of its applications, the crime of attempted criminal threat will apply only to speech that is not constitutionally protected." (*Id.* at 234.) This Court rejected an overbreadth argument because that statute only "theoretically might reach speech that is constitutionally protected" in some unarticulated manner and the court found the 'as applied' restriction constitutional. (*Ibid.*; see also *Virginia v. Hicks* (2003) 539 U.S. 113, 122 [defendant "has failed to demonstrate that any First Amendment activity" was actually barred].)

In stark contrast, there is nothing speculative about Section 148.6(a)(2)'s complete ban on receiving any anonymous

"allegation of misconduct" – regardless of its merit or importance. That concern was sufficiently substantial that the initial Attorney General evaluation concluded that Section 148.6(a) was unconstitutional unless anonymous complaints could still be received and investigated despite the plain statutory language. (See 79 Ops. Cal. Atty. Gen. 163, 167 (1996) ("Cal. A.G.").) (See also OB at pp. 36-37 [describing additional examples].) That express ban is in addition to the general suppression of misconduct complaints by blanket and express threats of criminal prosecution should the law enforcement agency dispute the complaint's accuracy. (See OB at 40-43.) This categorical ban on protected speech shows the substantial overbreadth of Section 148.6(a)(2).

### B. On Its Face, Section 148.6(a)(2) Improperly Bars Anonymous Misconduct Complaints.

LAPPL primarily responds to Section 148.6(a)(2)'s express bar of anonymous complaints with two arguments: (1) anonymous speech does not enjoy unlimited protection, and (2) anonymous misconduct complaints are not actually banned by Section 148.6(a)(2). The first argument does not support LAPPL's attempt to limit the receipt of misconduct complaints and the second requires clarification from this Court.

### 1. Section 148.6(a)(2) infringes on the fundamental right to criticize public officers and the public interest in identifying misconduct.

LAPPL does not generally dispute the importance of anonymous speech, particularly when exercising one of "the quintessential rights Americans enjoy under the First Amendment to the United States Constitution" – "[t]he right to criticize the government and governmental officials." (*Stanistreet*, *supra*, 29 Cal.4th at 504 [noting this "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."], cleaned up; and see U.S. Constit., 1st Amend. [right to petition].) Thus, this Court has long recognized that the right to lodge police misconduct complaints is founded in constitutional rights. As a result, the statutes that establish a process for responding to such complaints, and that recognize the high priority misconduct complaints should receive, are implementing that constitutional prerogative. (See OB at pp. 36-38.) Instead, LAPPL attempts to distinguish the cases supporting the importance of allowing anonymous speech by arguing that none of them address knowingly false speech. But, Section 148.6(a)(2)'s exclusion of anonymous allegations makes no distinction between false and accurate misconduct complaints. They are all barred.

Nor does LAPPL challenge that some valid and important reports of misconduct will be made anonymously or not at all "because of a fear of official retaliation, concern about social ostracism, or merely a desire to preserve his or her privacy." (Cal. A.G, 79 Cal. Op. Att'y Gen. 163 (1996); and see *Pena*, *supra*, 96 Cal.App.3d at p. 83 [recognizing that the threat of retaliation has "the tendency to 'chill' the willingness of citizens to file complaints, particularly on weak evidence and when the same entity against which the complaint is made will be investigating the accusations."].) (And see OB pp. 36-39.) Both the constitutional right to expression and the legislative mandate to investigate all misconduct complaints confirm the importance of police misconduct complaints, in particular those in which the circumstances intimidate witnesses from publicly coming forward.

To argue against the right to speak anonymously, LAPPL cites cases that limit that right in markedly different contexts than reporting police misconduct to law enforcement agencies. For example, the disclosure of signatories on a petition to challenge a state law by referendum was upheld as a means of "preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability." (*John Doe No. 1 v. Reed* (2010) 561 U.S. 186, 197.) Similarly, a disclosure requirement for the

corporate funding of election television spots was upheld as means of informing both the electorate and shareholders of corporate activity "to make informed decisions and give proper weight to different speakers and messages." (*Citizens United v. Fed. Election Comm'n* (2010) 558 U.S. 310, 371.) Other cases addressed the authorship of anonymous internet postings with disclosure under a protective order allowed for commercial speech that was allegedly part of a smear campaign against a competitor. (*In re Anonymous Online Speakers* (9th Cir. 2011) 661 F.3d 1168, 1177.) Conversely, disclosure was barred for the anonymous critiques of city officials because the officials were unable to establish that the comments were even actionable. (*Ghanam v. Does* (2014) 303 Mich. App. 522, 550.)

All of those cases started with the premise that anonymous speech is protected, and only allowed the identification of the speaker in limited circumstances in light of a compelling interest (e.g., electoral integrity, having used the speech for tortious conduct, etc.) None of the cases established negative consequences for disclosing the speaker's identity, such as potential harassment, but reserved the possibility of an 'as applied' analysis if that was apparent. (See *Reed*, *supra*, 561 U.S. at 201-02.) The instant matter is plainly distinguishable because the perceived negative consequences of disclosure here are at

their zenith and will effectively bar misconduct complaints from ever being submitted. (See OB at pp. 36-39.)

### 2. LAPPL argues that Section 148.6(a)(2) does not bar anonymous complaints.

Curiously, LAPPL argues that the requirement that a complainant read and sign the advisory is, in effect, optional, and that a law enforcement agency can still accept and investigate misconduct allegations if the complainant refuses to sign the advisory. (AB at 48-51.) For this argument LAPPL adopts the reasoning of the former Attorney General and the corresponding discussion in the Court of Appeal's concurring opinion. (See Cal. A.G., 79 Ops. Cal. Atty. Gen. 163 (1996); and *Los Angeles Police Protective League (LAPPL) v. City of Los Angeles* (2022) 78 Cal.App.5th 1081, 1102-03 (P.J. Perluss, concur.) ["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."].)

The distinction drawn is whether the "shall" in Section 148.6(a)(2) is "mandatory" – meaning that failure to comply strips the agency of the corresponding authority to act – or "directory" – meaning that the entity is instructed to follow the requirement, but the failure to do so does not alter its ability to proceed with a misconduct investigation. (*Cal. A.G.*, *supra*; *LAPPL*, *supra*.) If

the instructions in Section 148.6(a)(2) are directory, the law enforcement agency can pursue misconduct investigations even without a signed advisory. This result is consistent with the procedural nature of Section 148.6(a)(2)'s required advisory and the lack of any expressed consequence for failing to comply. (*People v. Gray* (2014) 58 Cal.4th 901, 909; and see *City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 924 ["In California, it is not uncommon for obligatory statutory provisions to be accorded only directory effect."].) In addition, a statute should be interpreted in a manner that reduces questions about its constitutionality, and in this case in a manner that preserves a resident's right to express his grievances and the ability of law enforcement agencies to investigate officer misconduct. (See *Young v. Haines* (1986) 41 Cal.3d 883, 898.)

If this Court rejects this interpretation, then the discussions above and in the Opening Brief regarding the harm of banning anonymous complaints remain unchanged. Even accepting this interpretation, unless the Court concludes that the signed advisory is de facto optional, this does not resolve the problem of excluding or limiting anonymous complaints. If the Court accepts this interpretation, then the existing injunction needs to be reversed so that the City can accept misconduct complaints without a signed advisory.

However, accepting this interpretation only partially addresses the constitutional infirmaries. First, this does not alter the viewpoint discrimination imposed by Section 148.6(a). Second, insofar as the Section 148.6(a)(2) advisory is presented at all, even if it is not ultimately signed, it still discourages valid complaints by threatening criminal prosecution to anyone attempting to report misconduct. Finally, since the ability to report misconduct anonymously will not be apparent to potential complainants, even this issue will not be resolved unless the agency can convey that signing the advisory is requested but not mandatory.

### C. LAPPL Disregards the Improper Suppression of Misconduct Complaints Via Threats of Prosecution.

Aside from the bar on anonymous complaints, the primary injury from Section 148.6(a)(2) is the resulting chilling effect on reporting police misconduct as a result of the blanket threat of criminal prosecution if the agency should disagree with the contents of the complaint. (See OB pp. 40-43.) LAPPL largely ignores this issue and complains that the City cannot produce the statistics on who would decline to report misconduct in response to this threat. Such evidence would be impractical, if not impossible, to create, even if the advisory was in use. More importantly, that is unnecessary because the chilling effect of the

blanket threat of prosecution is apparent on the face of Section 148.6(a)(2).

The chilling effect of this threatened prosecution has already been recognized on multiple occasions, including in the concurring opinion in *Stanistreet*. "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." (*Stanistreet*, *supra*, 29 Cal.4th at 514 (conc. opn. of Werdegar, J.); accord, *La. Fr. Hamilton*, *supra*, 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."]; and *Pena*, *supra*, 96 Cal.App.3d at 83 [threatened prosecution "would have the tendency to 'chill' the willingness of citizens to file complaints, particularly on weak evidence and when the same entity against which the complaint is made will be investigating the accusations."]; cited by *Chaker*, *supra*, 428 F.3d at 1222.) These holdings were all discussed in the Opening Brief, but ignored in the Answering Brief.

LAPPL repeats the unsupported statement in *Stanistreet* that Section 148.6(a)(2) is no more than a typical perjury warning. (But see OB pp. 43-44.) LAPPL disregards the context

that makes Section 148.6(a)(2) problematic, and instead describes a police station as a "typically casual setting" while noting that individuals might also fill out the form from home. However, LAPPL ignores the most important context: The person reporting has recently experienced some event of police misconduct and is reporting it to that same law enforcement agency. A potentially daunting task that becomes worse with the degree of misconduct, which is then also burdened with a threat of criminal prosecution if the agency disputes the claim. (OB at pp. 44-45.) LAPPL appears to accept that some complainants will be too intimidated to finish the report, particularly if they are unaware that they can report anonymously, but this is a significant imposition on First Amendment rights.

LAPPL does briefly discuss two cases cited in the Opening Brief, but misstates their import. In *Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1284, Grassilli won a Section 1983 action after multiple police officers retaliated against him for filing a misconduct complaint. (*Id.* at pp. 1265-66.) While the retaliation claim centered on a series of harassing traffic stops, despite LAPPL's assertion it also included a baseless attempt to prosecute Grassilli under Section 148.6(a)(1) that was dismissed for insufficient evidence. (*Id.* at pp. 1283-84.) This remains a documented example of the type of retaliation that discourages civilians from reporting police misconduct.

Following an evidentiary hearing on the constitutionality of Section 148.6(a), the U.S. District Court also concluded that "[t]here is a high likelihood that Section 148.6's warning will cause individuals to refrain from filing a complaint against law enforcement officers." (*La. Fr Hamilton v. City of San Bernardino* (C.D. Cal. 2004) 325 F. Supp.2d 1087, 1094.) Hamilton alleged that this threat was the reason he declined to file a misconduct complaint, choosing instead civil rights litigation which included claims regarding Section 148.6(a). (*Hamilton v. City of San Bernardino* (C.D.Cal. 2000) 107 F.Supp.2d 1239, 1241.) While this provides another example of Section 148.6(a)(2)'s chilling effect, the legal conclusions are more significant. LAPPL's speculation that Hamilton's claims might have been false is of no moment.

These holdings follow common sense, particularly given recent events impacting public perception of law enforcement. "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 law enforcement authorities will conduct an investigation to determine who is telling the truth." *Stanistreet*, *supra*, 29 Cal.4th at 513-14 (conc. opn. of Werdegar, J.).) While it is unlikely that an accurate count of the persons who declined to step forward could be assembled, it is inevitable that in some instances potential complainants will be intimated

by the threat and decline rather than risk criminal prosecution. (See *id*. at 514.) This improper chilling effect on a fundamental First Amendment right – declaring misconduct by public employees – can only be prevented by striking Section 148.6(a)(2).

## III. As Both Content and Viewpoint Restrictions, Section 148.6(a) and separately Section 148.6(a)(2) Fails Heightened Scrutiny

LAPPL's primary argument regarding strict or intermediate scrutiny is that Section 148.6(a) does not impose viewpoint discrimination. As such, it makes little effort to justify the viewpoint discrimination imposed or to respond to many of the arguments in the Opening Brief. LAPPL's discussion also makes the baseless assumption that only knowingly false complaints are impacted by Section 148.6(a), and so offers no justification for the suppression of other misconduct complaints. (See OB at pp. 36-43.) LAPPL ignores the existence of alternative approaches to address the concerns of falsely accused officers while not infringing on First Amendment rights, and so fails strict scrutiny on those grounds alone. (OB at pp. 47-48.)

The two examples LAPPL cites from the Court of Appeal do not support its argument. First, LAPPL claims that *Alvarez* supports its position though its endorsement of a federal statute

that criminalized "false statements made to Government officials, in communications involving official matters…" (See *LAPPL*, 78 Cal.App,5th at 1098, n.13.) But that federal statute globally barred all false statements made in official matters, and so has no viewpoint bias. In sharp contrast, Section 148.6(a) selectively suppresses misconduct complaints while allowing knowingly false reports that defend, support, or conceal misconduct without restriction – a clear example of viewpoint discrimination. Second, the Court of Appeal dismissed *Chaker*'s concern for knowingly false statements made as part of a misconduct investigation, noting that it would be difficult to quantify the additional public expense from such false statements. (*Id*., at 1096, n.11.) Unlike *Chaker*, the Court of Appeal failed to address the injury to investigation integrity. (See *Chaker*, *supra*, 428 F.3d at 1226.) It is the latter concern that more directly addresses viewpoint discrimination and the suppression of speech on one side of the dispute.

Accepting the goal of reducing the impact of knowingly false misconduct complaints, that does not justify viewpoint discrimination. This is particularly true here, where the blanket threats compelled though Section 148.6(a)(2) will discourage misconduct complaints more broadly. This confirms that the impact is facially overly broad. (OB at pp. 36-45.) To avoid such discrimination, the Legislature could impose the same warnings

and penalties to everyone giving statements as part of a misconduct investigation, beginning with the complainant who is the first such witness. Alternatively, and perhaps preferably, the Legislature could address these concerns without imposing on free speech at all, such as by amending or expanding POBRA or providing sufficient resources for more prompt investigations.

## IV. It Was an Abuse of Discretion to Compel the City into Federal Litigation.

Aside from whether Section 148.6(a), or Section 148.6(a)(2), is unconstitutional on its face, and even if the Court finds they are not, there remains the separate issue of whether it was an abuse of discretion to compel the City to violate the holding in *Chaker* and mandate its exposure to federal litigation. LAPPL's response appears divided between ancillary issues and asserting that the City will have available defenses when dragged into federal court. Neither adequately responds to the issue or alters the conclusion that the trial court abused its discretion.

### A. The City Will Likely Face Federal Litigation if Compelled to Enforce Section 148.6(a).

As the controlling case in the Ninth Circuit, *Chaker* unequivocally ruled in 2005 that Section 148.6(a) is unconstitutional and that its enforcement violated constitutional

rights. (*Chaker*, *supra*, 428 F.3d at p. 1229.) Indeed, at least one district court denied qualified immunity for attempting to enforce Section 148.6(a). (See *Cuadra v. City of South San Francisco* (N.D. Cal. Jan. 4, 2010) 2010 U.S. Dist. LEXIS 124, *28-29.) The City will undoubtedly face repeated federal litigation if it attempts to enforce Section 148.6(a). So, it was an abuse of discretion to compel enforcement.

A plaintiff bringing a claim under 42 U.S.C. section 1983 must show a "violation of a right secured by the Constitution and laws of the United States:" and that the deprivation "was committed by a person acting under color of state law." (*West v. Atkins* (1988) 487 U.S. 42, 48.) For purposes of a section 1983 claim, showing that the defendant's conduct is a "state-action" – i.e, exercising power "possessed by virtue of state law" or "clothed with the authority of state law" – also satisfies the "color of state law" requirement. (*Id.*, at 49.) "Thus, generally, a public employee acts under color of state law while acting in his official capacity or exercising his responsibilities pursuant to state law." (*Id.*, at 50.) Consistent with its purpose, "coverage of § 1983 must be broadly construed." (*Dennis v. Higgins* (1991) 498 U.S. 439, 443, cleaned up.) 42 U.S.C. section 1983 was adopted "to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether

that action be executive, legislative, or judicial." (*Mitchum v. Foster* (1972) 407 U.S. 225, 242, cleaned up.) Thus, section 1983 expressly authorizes federal injunctions against state court proceedings, including state court injunctions. (*Id.*, at 242-243.) The City will therefore be subject to federal civil rights litigation and the resulting damages awarded.

A law enforcement officer enforcing Section 148.6(a) is a state actor enforcing a state law. LAPPL's assertion that the trial court's injunction will somehow become a shield that extends into federal court to nullify *Chaker* is simply wrong. Enforcing Section 148.6(a) will expose the City to federal liability, through litigation against its employees. As noted above, enforcing the trial court's injunction is actionable in its own right. "The enforcement of a state court judgment constitutes state action under 42 U.S.C. § 1983." (*Periera v. Chapman* (C.D. Cal. 1988) 92 B.R. 903, 906 [held: police enforcement of state court judgment constitutes state action under section 1983]; citing *Sotomura v. County of Hawaii* (D.Haw.1975) 402 F.Supp. 95, 103 [allowing suit alleging that state court judgment infringed on constitutional property rights].)

In fact, the circumstances here are far more compelling than in *Periera* or *Sotomura*, because here the trial court's ruling is nothing more than an extension of Section 148.6(a)(2). The injunction contains no other operative terms or requirements

other than to impose the statutory language. (See 4 CT 111; and see Answering Brief at 49, n.7.) As a result, having the City comply with the trial court's order is equivalent to enforcing Section 148.6(a)(2) – which even LAPPL concedes is a state action. The implied assertion by LAPPL that an unconstitutional law can be cloaked with invulnerability by a state court order that simply compels compliance with that law is wrong.

LAPPL mistakenly raises the issue of direct City liability under *Monell v. Dept. of Social Services* (1978) 436 U.S. 658, based on a municipal policy. The effect of a state statute by itself does not support such a claim regardless of the ruling of the trial court here. (*Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit* (1993) 507 U.S. 163, 166 [a municipality "cannot be held liable unless a municipal policy or custom caused the constitutional injury."].) However, an individual state actor, such as a peace officer or other municipal employee, can be liable under 42 U.S.C. section 1983 regardless of individual intent or what flavor of state law was being asserted to infringe on federal constitutional rights. (*Nieves v. Bartlett* (2019) 204 L.Ed.2d 1, 139 S.Ct. 1715, 1725.) The City will ultimately be on the hook for litigation expenses and indemnifying the liability imposed on the City employees that will get sued.

### B. LAPPL's Arguments Are Unpersuasive.

None of LAPPL's arguments change the threat of federal litigation. LAPPL first argues that state courts are equally empowered to interpret federal law as any federal court, but for the U.S. Supreme Court, citing a concurring opinion by Justice Thomas. (*Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., conc.).) However, to support that assertion, Justice Thomas cited an earlier concurring opinion by Justice Rehnquist, which itself noted that any federal decision on federal law would "of course, be viewed as highly persuasive" in state court. (*Steffel v. Thompson* (1974) 415 U.S. 452, 482, n.3 (Rehnquist, J., concurring); see also *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 762, fn.8 [a Ninth Circuit opinion on a question of federal law is "persuasive, and entitled to great weight."].) There are no counter authorities that a state court ruling on federal law should be given similar preferential weight in federal court, so the courts agree that the weight of authority on federal law is not equally balanced.

In any case, the issue here is not whether the trial court had the power to issue its order, but whether that was an abuse of discretion. Similarly, LAPPL's statement that the City agrees *Chaker* is not controlling is, at best, only half true. The City was bound to follow *Chaker*, as it would be with any Ninth Circuit ruling about the constitutionality of its operations. Conversely,

the City also recognizes that this Court is not bound by a Ninth Circuit ruling in reaching its own legal conclusions, while also accepting that federal rulings on federal law are entitled to great weight and that the City will still be held to account in federal court under *Chaker*.

LAPPL's brief detour into legislative intent is irrelevant, as legislative intent is not at issue here. In any case, the 2016 amendment made to Section 148.6(a) was part of a linguistic change made to several statutes together changing "citizens' complaints" to "civilians' complaints" in each statute, without any suggestion the issues raised in *Chaker* were otherwise considered.

The cases cited by LAPPL do not provide any assurance against federal litigation against the City. Importantly, none of those cases address a 42 U.S.C. section 1983 claim or its express authorization to pursue local entities in litigation and overturn state court injunctions that infringe on federal constitutional rights. Instead, LAPPL cites to cases which address the general obligation to comply with injunctions in factual settings distinct from those here. (See *Walker v. City of Birmingham* (1967) 388 U.S. 307, 320-321 [party must appeal injunction it believed was issued in error and cannot simply ignore it]; *Pasadena City Bd. of Ed. v. Spangler* (1976) 427 U.S. 424, 438 [party cannot assume comments made by the court altered the terms of an existing

injunction until the injunction is actually amended]; and see *Levitoff v. Espy* (9th Cir. 1996) 74 F.3d 1246, 1996 WL 14215, *2, unpub. [plaintiffs had no basis to complain about impact of previous consent decree when they failed to attend fairness hearings and other proceedings that determined the its terms].)[2]

LAPPL primary relies on *GTE Sylvania, Inc. v. Consumers Union of U. S., Inc.* (1980) 445 U.S. 375, in which consumer advocacy groups sought product records from the Consumer Product Safety Commission (CPSC) through the Freedom of Information Act (FOIA). The CPSC agreed that there was no exception to bar production, but the product manufacturers obtained a federal injunction barring the CPSC from producing the records. The consumer groups filed a separate federal lawsuit to compel production of those same records. The U.S. Supreme Court held that FOIA was not intended to require the CPSC to commit contempt of a federal injunction, and therefore the CPSC did not act improperly in withholding the documents from production. (*Id.*, at 387.) In *GTE*, there were no state court

[2] LAPPL actually cited the earlier unpublished district court decision, which held that the employer was bound by the consent order and noted that Congress has specifically barred such collateral attacks on employment consent decrees. (See *Levitoff v. Espy* (N.D. Cal. Dec. 14, 1993) No. C 92-4108 BAC, 1993 WL 557674, at *3, aff'd in part, rev'd in part, 74 F.3d 1246 (9th Cir. 1996).

proceedings, no mention of 42 U.S.C. section 1983, and the validity and constitutionality of the first injunction was never questioned.

## Conclusion

The Legislature cannot unduly burden the First Amendment as a shortcut to address other concerns, particularly when there are alternatives to address those concerns. In any case, it was an abuse of discretion to remove the City's ability to navigate conflicting federal and state court decisions in establishing policy by compelling it to violate a long-standing Ninth Circuit opinion and necessarily expose it to federal litigation.

Dated: February 3, 2023

HYDEE FELDSTEIN SOTO, City Attorney
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By: */s Michael M. Walsh*
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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 8,351 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: February 3, 2023

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**Proof of Service**

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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.

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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 3RD day of February 2023, at Los Angeles, California.

/s/ *Colleen Juarez*
COLLEEN JUAREZ

**STATE OF CALIFORNIA**
Supreme Court of California

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**STATE OF CALIFORNIA**
Supreme Court of California

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Lower Court Case Number: **B306321**

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