NO. A09-1795

State of Minnesota
In Court of Appeals

State of Minnesota,

Respondent,

vs.

Melissa Jean Crawley,

Appellant.

BRIEF AND APPENDIX OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION

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Statement of *Amicus*[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The American Civil Liberties Union of Minnesota (ACLU-MN) is one of its statewide affiliates. Since its founding in 1952, the ACLU-MN has engaged in First Amendment litigation, both directly and as *amicus curiae*, in a wide variety of cases. Among the First Amendment rights the ACLU-MN has litigated are the right to freedom of expression and the right to petition the government for redress of grievances. The ACLU-MN has also represented victims of unconstitutional police misconduct, and has advised victims of police misconduct about their legal rights and the process for reporting that misconduct. Because these rights are at issue in this case, the proper resolution of this controversy is a matter of substantial concern to the ACLU-MN and its members.

Argument

I. MINN. STAT. § 609.505, Subd. 2 Violates the First Amendment's Prohibition on Viewpoint and Content Discrimination.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Minnesota's police misconduct false

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[1] Counsel certify that this brief was authored in whole by listed counsel and the *amicus curiae*. No person or entity made any monetary contribution to the preparation or submission of the brief. This brief is filed on behalf of the American Civil Liberties Union of Minnesota, which was granted leave to participate as *amicus* by this Court's January 28, 2010, Order.

reporting statute violates this cardinal rule by creating an unconstitutional viewpoint-based distinction and punishing only speech made against peace officers. The statute states:

> Whoever informs, or causes information to be communicated to, a peace officer, whose responsibilities include investigating or reporting police misconduct, that a peace officer . . . has committed an act of police misconduct, knowing that the information is false, is guilty of a crime. . . .

MINN. STAT. § 609.505, subd. 2 (2006). This is not simply an alternative way to punish falsely reporting a crime, which is punishable under Subdivision 1 of the same statute. *Id.*, subd. 1. Rather, the law singles out false reports of police misconduct (both criminal and non-criminal) and subjects them to harsher punishment than a general false report of a crime.

By singling out speech critical of police officers, Subdivision 2 engages in viewpoint discrimination. Viewpoint discrimination[2] violates the First Amendment even when it occurs within the class of otherwise proscribable false speech. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992). Viewpoint-based restrictions are subject to strict scrutiny, which Subdivision 2 cannot withstand. *Id.* at 395-96.

A. Subdivision 2 is an Unconstitutional Viewpoint-Based Regulation Because It Punishes Only Anti-Government Speech.

The district court's holding that the statute's proscription of only "knowingly false" speech "exempts [it] from Constitutional protection," *Appellant's Addendum ("Aplt's Add.")*

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[2] This Brief discusses the viewpoint discrimination in Subdivision 2, however courts examining the constitutionality of similar false-reporting statutes have also found content-based discrimination because such statutes apply only to speech directed at peace officers, but not at other public officials. *See Eakins v. Nevada*, 219 F. Supp. 2d 1113, 1118 (D. Nev. 2002); *Hamilton v. City of San Bernardino*, 107 F. Supp. 2d 1239, 1243 (C.D. Cal. 2000) ("*Hamilton I*"); *Ohio v. English*, 776 N.E.2d 1179, 1183 (Elyria Mun. Ct. Ohio 2002); *see also Appellant's Initial Br. 13-14.*

A-37, is erroneous. Contrary to the district court's conclusion, false speech is not entirely devoid of constitutional protection. The Supreme Court has explained:

> What [the categories of "unprotected speech"] mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

R.A.V., 505 U.S. at 383. Defamatory speech is therefore subject to constitutional review, even though it may be more freely regulated than "protected" categories of speech. Such regulation runs afoul of the Constitution, when it is based on the content of the message; indeed, it is "presumptively invalid." *Id.* at 382.

Consistent with the bedrock principle that the government should not attempt to control public debate and suppress disfavored ideas, laws which favor one viewpoint over another are repugnant to the Constitution. *See W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."). This prohibition comes from a fear of government control over the marketplace of ideas:

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message . . . contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions raise the specter

> that the Government may effectively drive certain ideas or viewpoints from the marketplace.

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (citations omitted). Thus, viewpoint discrimination is considered an egregious form of content discrimination. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Viewpoint discrimination which suppresses anti-government speech is especially suspect. In *United States v. Eichman* and *Texas v. Johnson*, for example, the Supreme Court struck down laws prohibiting burning the U.S. flag, holding that such laws outlawed only expression that was "likely to endanger the flag's symbolic role," while allowing speech that promoted that role. *Eichman*, 496 U.S. 310, 317 (1990) (citing *Johnson*, 491 U.S. 397, 416-17 (1989)). In *Schacht v. United States*, the Court held that a law that permitted wearing a military uniform in a theatrical production only "if the portrayal does not tend to discredit that armed force" was unconstitutional on the basis that it "leaves Americans free to praise the war in Vietnam but can send persons . . . to prison for opposing it." 398 U.S. 58, 60, 63 (1970). This runs contrary to the constitutional right every American enjoys "openly to criticize the Government." *Id.* Viewpoint discrimination is especially repugnant in the case of criminal laws such as these, because the cost of expressing a contrary viewpoint may be imprisonment.

In *R.A.V.*, the Court acknowledged the unconstitutionality of a law proscribing only anti-government speech. The "government may proscribe libel, but may not make the further content discrimination of proscribing *only* libel critical of the government." *R.A.V.*, 505 U.S. at 384. The Court noted that allowing free regulation within an unprotected area of speech would give the government free rein to prohibit certain kinds of anti-government

speech. By way of illustration, it "would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government." *Id.*

Subdivision 2 runs afoul of the Court's example in the most literal sense: here the State has outlawed, within the class of unprotected defamatory speech, only speech that is critical of the government. *See Chaker v. Crogan*, 428 F.3d 1215, 1226 (9th Cir. 2005); *Hamilton v. City of San Bernardino*, 325 F. Supp. 2d 1087, 1094-95 (C.D. Cal. 2004) ("*Hamilton II*"). This double standard punishes only false speech that is directed *against* a peace officer, while providing no corresponding punishment for false speech *in support of* a peace officer. To be viewpoint neutral, the law would not merely criminalize false reports of police misconduct, but any false statements related to a peace officer's execution of his or her duties in the investigation process.

The viewpoint-discriminatory effect of Subdivision 2—that it gives more defamation protection to peace officers than ordinary citizens—violates both the letter and the spirit of the First Amendment. In *New York Times Co. v. Sullivan*, the Supreme Court held speech promulgated against public officials to a *lower* standard than speech promulgated against private individuals. 376 U.S. 254, at 279-80 (1964). Public officials have voluntarily exposed themselves to public criticism. *Gertz v. Robert Welch*, 418 U.S. 323, 344-45 (1974). "[I]t is distressing and demoralizing for police officers to be subjected to false accusations of brutality, but that may be one of the crosses that a police officer must bear, in light of the power and deadly force that the state places in his hands." *Imig v. Ferrar*, 70 Cal. App. 3d 48,

56 (1977). This statute turns this principle on its head, granting public officials greater protections than private individuals who lodge complaints.

B. *R.A.V.*'s Three Exceptions Do Not Apply to This Case.

Because Subdivision 2 creates content distinctions in punishing "proscribable speech," it is subject to the analysis set forth in *R.A.V.*[3] *See Chaker*, 428 F.3d 1215; *Hamilton II*, 325 F. Supp. 2d 1087; *Eakins*, 219 F. Supp. 2d 1113; *Hamilton I*, 107 F. Supp. 2d 1239; *Ohio v. English*, 776 N.E.2d 1179 (Elyria Mun. Ct. Ohio 2002). *R.A.V.* identified the following three valid grounds for regulating proscribable speech such as defamation: (1) 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.*, 505 U.S. at 388; (2) where the "content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech so that the regulation is *justified* without reference to the content of the speech," *id.* at 389 (citation omitted); or (3) where the "nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 390. None of these exceptions apply here.

1. The first *R.A.V.* exception does not apply because the distinction is not related to the reason false speech is proscribable.

Content discrimination may be acceptable within a proscribable class of speech when "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *R.A.V.*, 505 U.S. at 388. Such regulation may only target speech encompassing a "particularly virulent form" of the proscribed speech. *See Virginia v.*

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[3] The ACLU-MN agrees with the arguments set forth by Appellant regarding the application of *R.A.V.* to this case, and this Brief rearticulates those arguments only to the extent necessary to help the Court.

Black, 538 U.S. 343, 363 (2003). The language of the distinction itself must target the evils at the root of the proscribable class of speech—which, in the case of false speech, are reputational harm and interference "with the truth-seeking function of the marketplace of ideas." *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988). Thus, in *Virginia v. Black*, a cross-burning prohibition that targeted the intent to intimidate met this exception because cross-burning is a "particularly virulent form of intimidation," but in *R.A.V.*, a prohibition on only cross-burnings motivated by race, gender or religion did not fall into this exception because the statute targeted specific viewpoints. *Compare Black*, 538 U.S. at 363 *with R.A.V.*, 505 U.S. at 393-94.

Here, Subdivision 2 creates a prohibition based on the viewpoint of the speech, without reference to the underlying evils. Even if Respondent could demonstrate that police officers are somehow susceptible to greater harm than other persons, under *R.A.V.*, content-based distinctions cannot be based on the rationale that the restricted speech merely causes greater harm: "If that were the case, the ordinance in *R.A.V.* would have been constitutional since the history of racial, religious, and gender discrimination in the United States makes it more likely that fighting words can result in greater harm when they are based on race, religion, or gender." *Hamilton II*, 325 F. Supp. at 1091. Subdivision 2 instead prohibits only anti-government speech: "Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas." *R.A.V.*, 505 U.S. at 394.

2. The second *R.A.V.* exception does not apply because the distinction is justified by the direct effects of the speech.

The second *R.A.V.* exception applies only where the law justifiably targets secondary, not direct, effects of the proscribed speech. *See id.* at 389. The State bears the burden to

prove the existence of secondary effects. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437 (2002). While direct effects "focus on the direct impact of speech on its audience," secondary effects aim to regulate effects associated with the speech, where "the justifications for regulation have nothing to do with content." *Boos v. Barry*, 485 U.S. 312, 320-21 (1988). For example, the government may regulate adult theaters because of a desire to suppress neighborhood crime. *Id.* at 320. By contrast, a city may not regulate adult theaters out of concern for the "psychological damage" caused by viewing pornography because such damage is a direct effect. *Id.* at 321. Any attempt to regulate it on this basis would constitute a direct and unconstitutional regulation of speech.

While not expressly applying the secondary-effects exception, the trial court in this case concluded that Subdivision 2 "does not proscribe speech based solely on the subject the speech addresses. The subject—police misconduct—is not criminalized because the government disagrees with it," but according to the court "because of the repercussions a false report can have on an officer and the government, by way of investigation, prosecution, reputation, etc." *Aplt's Add. A-36.* These are the same reasons articulated by the state in *Hamilton v. San Bernadino*, where the court held that the secondary effects exception did not apply because "even if the legislature was partly motivated by the desire to curb the harmful effects of wasted investigative resources and damage to officers' reputation . . . these motives focus on the direct impact of the speech, not its 'secondary' effects." *Hamilton II*, 325 F. Supp. 2d at 1093.

In this case, "repercussions of a false report," whether they be psychological harm caused by damaged reputation or the expense of investigation and prosecution, fall squarely

into the direct effects category. Not only are these justifications based on the content of the reports of misconduct, they are directly caused by the effects of the reports on the listener. Accordingly, the distinction does not fall into the secondary-effects exception.

3. The third *R.A.V.* exception does not apply because it is realistically possible that the official suppression of ideas is afoot.

The final *R.A.V.* exception is also inapplicable. As the Court noted in *R.A.V.*, a law proscribing speech that is critical of the government is particularly suspect because it creates a "realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 383. Thus, the regulation is permissible only if there is "no realistic possibility" of government suppression. That the statute targets speech accusing government officers of misconduct necessarily raises a presumption of such suppression. *See Hamilton II*, 325 F. Supp. 2d at 1094. The effect of the law is to chill a broad range of speech—including protected speech—aimed at the government. The fact that the law does—and was intended to—reduce the number of complaints of government misconduct leads to a reasonable conclusion that the government enacted the law for the specific purpose of suppressing anti-government speech. *Aplt's Initial Br. 20-21.*

C. Subdivision 2 Cannot Withstand Strict Scrutiny.

A content- or viewpoint-based restriction must be "narrowly tailored to serve a compelling state interest." *Boos*, 485 U.S. at 334. The interests served by Subdivision 2—preventing reputational harm to peace officers and saving government resources—may be important, but they are not compelling by constitutional standards.

First, Subdivision 2 is underinclusive, thereby undermining any claim that the interests at stake are compelling. *See Carey v. Brown*, 447 U.S. 455, 465 (1980). If curbing the

cost of investigation were compelling, the law would encompass all false speech in the investigatory process; if reputational harm interfered with government service to a degree that made it compelling, the law would encompass false speech about other public officials. Thus, by failing to include speech which would advance the stated purpose of the law, Subdivision 2 is not narrowly tailored to a compelling state interest.

Second, Subdivision 2's provisions are also overinclusive by chilling a substantial amount of protected speech. This, too, is evidence that the law does not meet strict scrutiny. *See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121-23 (1991). A narrowly tailored law is one that is "*necessary* to serve the asserted compelling interest." *R.A.V.*, 505 U.S. at 395 (citing *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion)). The existence of adequate content-neutral alternatives is evidence that the law is not narrowly tailored. *Id.* Here, Appellant has identified a content-neutral alternative in Minnesota's perjury laws. *Aplt's Initial Br. 24-25*; MINN. STAT. § 609.48 (2009) (providing a criminal penalty for making a false statement under oath). Employing the perjury laws in connection with *all* statements made in police misconduct investigations would serve the same interests. The Court should therefore hold that Minnesota Statute § 609.505, Subdivision 2 is unconstitutional.

II. MINN. STAT. § 609.505, Subd. 2 Chills the Essential First Amendment Rights of Engaging in Core Political Speech and Petitioning the Government for Redress of Grievances.

Subdivision 2 of the statute has dramatic, chilling effects on constitutionally valued speech. Because of the viewpoint discrimination in the statute, would-be complainants with legitimate complaints of police misconduct receive a clearly deterrent message. *See, e.g.*,

Rosenberger, 515 U.S. at 835 (holding that a viewpoint discriminatory policy created an impermissible chilling effect on speech). This chilling effect is also relevant to the *R.A.V.* analysis because it illustrates that there is a "realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. The speech burdened by Subdivision 2—legitimate grievances about the proper function of government—is at the core of protected speech, and the government's interference with such speech is highly suspect. In fact, the burden on highly protected speech is so great that it warrants the Court striking this statute down as facially overbroad.

A. The Statute Inhibits Speech by Creating a Chilling Effect on Complainants with Legitimate Grievances.

Citizens with legitimate complaints may be chilled by Subdivision 2. Assume a citizen has a complaint that the police used excessive force during his arrest. Like Ms. Crawley, this citizen approaches an investigator with a complaint, and, as in this case, the investigator informs the citizen that any knowingly false report of police misconduct is a crime. When faced with that proposition, the citizen considers the odds against him: the fear that because the same entity against which the accusations are made is investigating the complaint charges may be pressed against him in retaliation, and the fear that the police will deny his accusations and his complaint will not be believed either by the investigator or a jury. The citizen's fears of prosecution are only amplified by his familiarity with a history of tension between the police and the people in his community. Not wanting to risk prosecution, he abandons his complaint. This illustration demonstrates why Subdivision 2 creates a chilling effect. *See* Harvey Gee, *The First Amendment and Police Misconduct: Criminal Penalty for Filing Complaints Against Police Officers*, 27 HAMLINE L. REV. 225, 262 (2004) (noting that the chilling

effect of false-reporting statutes "is particularly troublesome in cases where the complaints are made based on weak evidence and when the same entity against which the complaint is made will be investigating the accusations").

1. Complainants' speech is chilled because the same entity against which the accusations are made is charged with investigating the complaint.

The chilling effect on allegations against the police is particularly strong because the complainant is aware of the connection between the investigator and the investigatee. Whether there is actual bias in the investigation, a complainant is likely to perceive the investigating authority as being allied with the officer against whom the claim is made. This perception may result in not only the conclusion that a complaint would be futile, but that the investigator may bring charges under Subdivision 2 in retaliation. *See, e.g., Brawner v. City of Richardson, Tex.*, 855 F.2d 187, 189 (5th Cir. 1988) (describing thorough investigatory and legal actions taken by police chief when an anonymous whistleblower publicly accused him of professional misconduct); *A.14-15*[4] (reporting on a whistleblower suit against the city of Minneapolis by a police sergeant alleging he was retaliated against after reporting police misconduct).

Even if the complainant believes the State will not ultimately prevail in a claim against him, the threat of prosecution alone creates an impermissibly strong chilling effect. *See Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) ("So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling

[4] References to *Amicus* ACLU-MN's appendix are written as *A._*.

effect on protected expression."). Contrary to the district court's conclusion in this case, *Aplt's Add. A-37*, the burden on the State to prove beyond a reasonable doubt that the false statement was made "knowingly" does not cure the constitutional defect. *See Eakins*, 219 F. Supp. 2d at 1117 ("[A]ny argument that the degree of proof required for a conviction under a speech chilling statute forbidden by the First Amendment somehow breathes life back into the statute, impermissibly exalts statute over Constitution.").

The fear of retaliation and futility is very real in Minnesota, where failure to investigate complaints and other police misconduct has been in the spotlight in recent years. In 2005, for instance, one former Minneapolis police officer authored a book on the Minneapolis Police Department's "code of silence," an "implicit rule that you never snitch on another officer." *App.164-66*; MICHAEL W. QUINN, WALKING WITH THE DEVIL: THE POLICE CODE OF SILENCE (2005). In the book, the former officer details instances of officers lying and failing to report each other's misconduct as part of an ingrained web to protect each other. *Id.*

Additionally, the Minneapolis Police Department Internal Affairs Unit, which is responsible for investigating claims of police misconduct, has been criticized as being "highly ineffective" by community members, with citizens believing that "it does little good to complain to the unit." *A.30-31.* Finally, in a recent report, the Civilian Review Board Authority ("CRA"), an alternative body with which one can register complaints against the Minneapolis Police Department, rated the Minneapolis Police Chief as being "unsatisfactory or in need of improvement on police accountability issues" because he failed to discipline 32 of 37 officers the CRA had recommended for discipline. *See A.3-4.*

When armed with the above knowledge, a truthful complainant may conclude that the police will not investigate his or her allegations or discipline the officers involved. Although some complainants will continue to pursue their claims, others will surely decide the risk of criminal prosecution under Subdivision 2 outweighs the desire to proceed with complaints.

Indeed, available data indicate that a large number of complainants eventually abandon initial allegations of police misconduct. According to the CRA, fully 30% of initial complaints received in 2008 were abandoned by the complainant before investigation. *A.122.* Upon review of an initial complaint, the CRA determines whether it believes the complaint "involve[s Minneapolis Police Department] policy violations that warrant an investigation." *A.116.* It then sends complaints warranting investigation to the complainant for signature. *A.116.* In 2008, of the 101 complaints sent for signature, 36 were either withdrawn or never returned. *A.120.* The CRA identified the complainant's "second thoughts about filing a signed complaint" as a primary reason the complaints were not returned. *A.122-23.* While no data are available as to how many complaints were abandoned in fear of wrongful prosecution, these statistics show that many citizens are reluctant to press their complaints. It is reasonable to conclude that Subdivision 2's strong disincentive to pursuing complaints is responsible for some abandonment of claims.

2. Complainants' speech is chilled by their fear that even legitimate complaints will not be believed.

Those filing complaints against the police are at a disadvantage when it comes to credibility. Whether a complainant is a witness to police misconduct or the victim of misconduct in the course of arrest, he may fear his word will not be believed above a law

enforcement officer's. For example, Malcolm Labon, a plaintiff in the *Zanders v. Swanson* lawsuit challenging the constitutionality of Subdivision 2, claimed that he was dissuaded from reporting an incident of police brutality he had witnessed for "fear of prosecution under the statute even if he ma[de] a truthful complaint." *Zanders v. Swanson*, Civ. No. 07-2171, 2008 WL 4117210, at *1 (D. Minn. Aug. 29, 2008) *Aplt's Add. A-38-39.* The knowledge that the police can falsely deny the misconduct with impunity under this statute further diminishes the complainant's faith in the process.

The complainant's apprehension is even stronger when the misconduct occurred during the course of arrest. When the uncorroborated allegations of a criminal complainant are pitted against an officer's denial, the complainant may conclude that he will not be believed, even when he is, or believes himself to be, telling the truth. *See* Gee, *supra*, at 262; *see also* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 9 (2009) (noting that "victims of police misconduct often make problematic witnesses; and that juries frequently believe and sympathize with defendant officers"). This is especially true where the misconduct complained of is police brutality, since brutality is most likely to occur where it is unwitnessed and will be uncorroborated. Susan Bandes, *Tracing the Pattern of No Pattern: Stories of Police Brutality*, 34 LOY. L.A. L. REV. 665, 669 (2001) ("Questions of credibility are of paramount importance in resolving brutality claims, since most brutality takes place in secret: in interrogation rooms or back alleys. . . . The officer is assumed to be a disinterested civil servant, whereas the complainant is presumed to have a motive to lie.").

The fear of not being believed is well supported by statistics from the City of Minneapolis.[5] For example, of the two-hundred preliminary allegations of police misconduct received by the Minneapolis Police Department[6] in 2008, ninety-six, or 48% percent, were dismissed without full investigation after being found to have no basis.[7] *A.60.* Further, 44% of the cases in 2007[8] proceeding to full investigation were ultimately either not sustained or determined to be unfounded.[9] *See A.65.* While the State's concern for limiting baseless complaints may be one reason for Subdivision 2's enactment, the dismissal of "unfounded" complaints is at the heart of a complainant's reluctance to come forward, especially when the result of a complaint being deemed "unfounded" is not inaction, but prosecution.

3. Complainants' speech is further chilled by Subdivision 2 in light of the history of tension between the police in many Minnesota communities and the people whom they serve.

Minnesota has a "long history of strained relations between the police and minority residents." Gee, *supra*, at 246 (citing *A.151-52*); *see A.176* ("[T]he Minneapolis Police

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[5] Statistics from many Minnesota Police Departments, including the Winona Police Department, are not easily available. Because Minneapolis is the largest city in the state and it makes data easily accessible, much of the data presented here are from Minneapolis.

[6] The Minneapolis Police Department receives only a portion of police misconduct complaints. Citizens making complaints in Minneapolis can choose to file them with the Civilian Police Review Authority ("CRA") instead. CRA Frequently Asked Questions, http://www.ci.minneapolis.mn.us/cra/CRAFAQs.asp.

[7] A finding of "no basis for complaint" means there "is no articulated policy violation with the facts presented." This finding is available only for preliminary cases that are not investigated beyond the initial phase. *A.57.*

[8] Data from 2007 provide a more complete picture than the data available from 2008, as many cases were still pending at the time of the Internal Affairs Report. *A.65.*

[9] A finding of "not sustained" means "there is insufficient evidence to either prove or disprove the complaint," and a finding of "unfounded" means the complaint was found to be false. *A.57.*

Department has a history of trouble with brutality. . . . [Q]uestionable behavior has been part of the department's culture for years."). In recent years, numerous incidences of police misconduct have occurred in Minnesota. In 2009, the Metro Gang Strike Force came under fire and was eventually disbanded after allegations of severe misconduct came to light. *See A.92-97.* Minneapolis police also came under scrutiny after Minneapolis police officers wrongfully punched and kicked one resident following a traffic stop. *See A.176-77.* In the first two weeks of March 2010 alone, two Minnesota police chiefs lost their jobs due to citizen criticism or alleged misconduct. *See A.26-28; A.170.* The impact of police misconduct is heightened by the government's failure to prosecute officers who falsify police reports and provide false testimony during criminal prosecutions. *See A.37-38. Amicus* has included in the Appendix just a sampling of newspaper articles detailing other serious reports of police misconduct throughout the state.

Despite efforts to repair the relationship between the police and the community, substantial tension remains. In 2003, a committee known as the Police Community Relations Council (PCRC) was created with the hopes of improving the relationship between the Minneapolis police and the people of Minneapolis. *A.1-2.* Under a mediation agreement, the group tackled a number of key recommendations for improving the relationship; unfortunately, the group met only about half of its goals before disbanding. *App 1-2; see also City of Minneapolis Police Department website,* http://www.ci.minneapolis.mn.us/police/about/mcu/ (last visited Mar. 11, 2010) (providing meeting information and progress reports, ending in December 2008).

These tensions between police and civilians all contribute to a chilling effect on legitimate complaints. Especially in cases where the complainant's word is stacked against the word of a law enforcement officer, the complainant may become convinced that the odds are against him, even if the truth is on his side. This is particularly true when the complaint arises during the complainant's arrest, and the complainant fears the police, the county attorney, and a jury will perceive that he has some motive to lie. With these factors in mind, a truthful complainant may see Subdivision 2 and the resulting threat of prosecution as an insurmountable barrier to reporting police wrongdoing.

B. The Speech Inhibited by Subdivision 2 Is Highly Protected and Necessary to the Proper Function of Government.

The speech inhibited by Section 609.505, subdivision 2—truthful complaints of police misconduct—is at the core of two First Amendment freedoms: the right to free speech regarding political affairs, and the right to petition the government for redress of grievances. Because these fundamental freedoms "have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth," this Court should protect them with "ceaseless vigilance." *Smith v. California*, 361 U.S. 147, 155 (1959).

Free debate on public issues and criticism of public figures are essential components of the First Amendment right to free speech. *See Sullivan*, 376 U.S. at 270. Political speech is central to the free exchange of ideas: "Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). Because peace officers are public officials, criticism of peace officers, including allegations of misconduct, is speech "at the very center of the constitutionally

protected area of free discussion." *Eakins*, 219 F. Supp.2d at 1119; *see also Gomes v. Fried*, 136 Cal. App. 3d 924, 933 (1982) (detailing decisions in which even a low-level police officer was found to be a "public official" under the *Sullivan* framework). In fact, the concern of infringement of core political speech is "particularly acute in the context of allegations of police misconduct." *State v. Allard*, 813 A.2d 506, 510 (N.H. 2002).

Another fundamental cornerstone of our liberty is the First Amendment's guarantee of "the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST., amend. 1. This right is "implicit in the very idea of government, republican in form." *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (citing *United States v. Cruikshank*, 92 U.S. 542 (1876)). Justice Brennan has noted:

> The right to petition is among the most precious of liberties guaranteed by the Bill of Rights, and except in the most extreme circumstances citizens cannot be punished for exercising this right without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions. As with the freedoms of speech and the press, exercise of the right to petition may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials, and the occasionally erroneous statement is inevitable. The First Amendment requires that we extend substantial 'breathing space' to such expression, because a rule imposing liability whenever a statement was accidentally or negligently incorrect would intolerably chill would-be critics of official conduct from voicing their criticism.

Id. at 486-87 (Justice Brennan, concurring) (citations omitted). Like the right to debate political affairs freely, the right to appeal directly to the government regarding grievances is a foundation of the democratic system of government.

Subdivision 2 inhibits both of these core First Amendment values. Its very purpose is to censure speech critical of public officials performing their official functions. While the speech directly prohibited by the statute is unprotected under the First Amendment, the

speech that the statute effectively chills is at the very core of the democratic principles the First Amendment is designed to protect—the ability for citizens to speak publicly and freely about matters of political concern and to directly petition the government for redress of grievances regarding governmental misconduct.

The dangers of interfering with this type of speech are not abstract. When the reporting of police misconduct is blocked, it interferes with the function of government. If and when misconduct—and the failure to punish or prevent misconduct—occurs, the people of Minnesota have a right for curative action to be taken. The fact that Subdivision 2 provides no recourse when a police officer lies during the investigatory process serves to hide and perpetuate misconduct, robbing the public of its right to the effective and ethical function of government.

While the right to be free of defamatory comments is important to police officers, the right to lodge complaints about governmental wrongdoing cannot be sacrificed in its name. Prioritizing the government's convenience above citizen's constitutional rights is the opposite of what the First Amendment demands. Voices critical of the established order must not be silenced while voices supporting it are allowed to speak freely. "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *Barnette*, 319 U.S. at 642.

C. By Inhibiting Core Protected Speech, Subdivision 2 Is Overbroad.

In light of the substantial burden Subdivision 2 places on the expression of highly valued, core First Amendment speech, the Court may conclude that it is unconstitutionally

overbroad.[10] A law may not ban substantially more speech than is necessary to achieve its legitimate objectives. *See New York v. Ferber*, 458 U.S. 747, 772 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Even if a defendant's conduct falls within the legitimate sweep of the law, the defendant may challenge a statute on its face under the overbreadth doctrine. *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998). Thus, the Court may strike down a substantially overbroad statute, "not because [the defendant's] own rights are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612.

A statute is facially overbroad if it prohibits or deters constitutionally protected activity in addition to activity that may be prohibited without offending constitutional rights. *Broadrick*, 413 U.S. 612; *Machholz*, 574 N.W.2d at 419. In order to be overturned, a statute must be "substantially overbroad," *i.e.* it inhibits a substantial amount of protected speech, and it cannot be subject to a limiting construction. *Ferber*, 458 U.S. at 772; *Broadrick*, 413 U.S. 601 at 613; *Machholz*, 574 N.W.2d at 419. The substantial overbreadth requirement does not mean that the statute must directly prohibit protected speech; it is enough that the chilling effect indirectly burdens a substantial amount of protected speech. *See Eakins*, 219

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[10] While the facial challenge brought in the district court focused on the statute's unconstitutionality under the prohibition on viewpoint- and content-based discrimination in regulations of speech, the Court may, in its discretion, consider new constitutional issues when "the interests of justice require [doing so], the parties have had sufficient time to brief such issues, and when such issues are implied in the lower court." *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Minn. 1982). Here, each of these factors is met: full consideration of the constitutional implications of this statute is necessary to carrying out justice; the State has sufficient time to respond to the arguments offered by the *amicus*; and the issue of overbreadth was implied in the lower court by its consideration of the facial validity of the statute under the First Amendment.

F. Supp. 2d at 1115 (entertaining an overbreadth challenge to false reporting statute based on allegations of chilling effect alone); *see also United Mine Workers of America, Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("The First Amendment would . . . be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such."); *American Booksellers v. Webb*, 919 F.2d 1493, 1499 (11th Cir. 1990) ("[W]hen overly broad statutory language seems to sweep protected First Amendment expression directly into the scope of a regulation affecting speech, *or indirectly places an undue burden on such protected activity*, free expression can be chilled even in the absence of the statute's specific application to protected speech." (emphasis added)).

The Supreme Court has repeatedly recognized that it is the very danger of chilling effects on protected speech that necessitates finding overly broad laws facially unconstitutional:

> [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U.S. 415, 433 (1963) (citations omitted). Thus, the very reason for the overbreadth doctrine in the First Amendment context is to prevent an overbroad statute from chilling protected speech.

> We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions. Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves

> but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.

Virginia v. Hicks, 539 U.S. 113, 119 (2003) (citations omitted).

Subdivision 2 places citizens with complaints of police misconduct in a tenuous position. The complainant cannot help but be aware of the realistic possibility that even a legitimate complaint will result in a criminal prosecution when he decides whether to proceed with filing. Just as it is nearly impossible to prove any negative, it is impossible to quantify exactly how much speech has been chilled. But it does not take a leap of logic to determine that this statute potentially deters a large number of people from lodging their legitimate complaints. In light of the essential nature of the speech suppressed, Subdivision 2 creates an impermissibly substantial burden on constitutionally protected speech in light of the speech that would be within its legitimate reach. For this reason, the statute must be struck down.

Conclusion

For all of the foregoing reasons, the American Civil Liberties Union of Minnesota, *amicus curiae,* urges this Court to rule that MINN. STAT. § 609.505, subd. 2 is facially unconstitutional under the First Amendment of the United States Constitution.

Dated: March 18, 2010.

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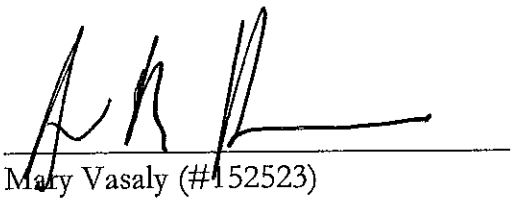
By 

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Dated: March 18, 2010.

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