No. 12-____

In the Supreme Court of the United States

MELISSA CRAWLEY, *Petitioner*

v.

STATE OF MINNESOTA, *Respondent*.

On Petition for a Writ of Certiorari to the Minnesota Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment allow a state to selectively criminalize defamation of the police, banning defamation expressing anti-police views while permitting knowing false statements expressing pro-police views?

The Minnesota Supreme Court upheld a Minnesota statute that selectively bans defamation expressing anti-police views; the Ninth Circuit struck down a similar California statute under the First Amendment as impermissible viewpoint discrimination.

LIST OF PARTIES

Petitioner is Melissa Crawley, an adult citizen and resident of Minnesota.

Respondent is the State of Minnesota.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES & REGULATIONS

OTHER AUTHORITIES

OPINION BELOW

The opinion of the Minnesota Supreme Court is reported at 819 N.W.2d 94. (App., *infra*, 1a-79a). The opinion of the Minnesota Court of Appeals (App., *infra*, 80a-108a) is reported at 789 N.W.2d 889. The order and memorandum of the Winona County district court (App., *infra*, 109a-114a) is unreported.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on September 6, 2012. (App., *infra*, 115a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). *See Mills v. Alabama*, 384 U.S. 214, 217-18 (1966); *accord R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution Provides, in relevant part: "Congress shall make no law ... abridging the freedom of speech [or] the right of the people to petition the Government for a redress of grievances."

Section 609.505, subdivision 2 of the Minnesota Statutes (App., *infra*, 4a-5a.) states in relevant part as follows:

> 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....

STATEMENT OF THE CASE

A. Petitioner's Conduct

Late on a July evening in a southern Minnesota town, Petitioner Melissa Crawley was involved in a altercation and was taken to the hospital. (App., *infra*, 4a, 81a) During her hospital recuperation, while still injured, Crawley signed a medical-release form allowing the police to receive a copy of her medical records. (App., *infra*, 81a-82a.) After Crawley signed the release, her nurse added the date to the release form. (App., *infra*, 124a-25a.) After the police received her medical records, Crawley was charged with assault and acquitted. (App., *infra*, 122a.)

After being acquitted of the assault that hospitalized her, Crawley told an officer that she believed the officer who visited her at the hospital had forged her signature on the release form. (App., *infra*, 125a-27a.) In response to her complaint, Petitioner was charged with falsely reporting police misconduct, Minn. Stat. § 609.505, subd. 2.

B. The Statute

Minn. Stat. § 609.505, subd. 2 defines the crime of falsely reporting police misconduct:

> Subd. 2. Reporting police misconduct.
>
> (a) Whoever informs, or causes information to be communicated to, a peace officer, whose responsibilities include investigating or reporting police misconduct, that a peace officer, as defined in section 626.84, subdivision 1, paragraph (c), has committed an act of police misconduct, knowing that the information is false, is guilty of a crime and may be sentenced as follows:
>
> (1) up to the maximum provided for a misdemeanor if the false information does not allege a criminal act; or
>
> (2) up to the maximum provided for a gross misdemeanor if the false information alleges a criminal act.

C. Trial Court Proceedings

Crawley—an indigent non-lawyer—thought that Subdivision 2 may violate the First Amendment. Crawley's intuitions proved correct. Through the Internet, Ms. Crawley found *Chaker v. Crogan*, a Ninth Circuit opinion that struck down California's false-reports-of-police-misconduct statute. 428 F.3d 1215, 1228 (9th Cir. 2005), *cert. denied* 547 U.S. 1128 (May 15, 2006).

Crawley printed out a copy of the *Chaker* opinion and gave it to her state-appointed public defender. He moved to dismiss based on *Chaker*

and its application of *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). (App., *infra*, 110a-15a.)

"I never heard of viewpoint discrimination, [*sic*]" stated the trial judge upon receiving Crawley's motion to dismiss. (App., *infra*, 118a.) The trial court denied the motion. (App., *infra*, 110a.)

During the trial, Crawley heard a nurse testify that the nurse had filled out a portion of Crawley's medical-release form, adding the date to the form. (App., *infra*, 124-25a.)

The jury found Crawley guilty. The trial judge sentenced her to 195 days in jail, 180 days stayed for two years with conditions. (App., *infra*, 82a.)

D. Minnesota Court of Appeals

In a 2-1 decision, the Minnesota Court of Appeals reversed Crawley's conviction. The majority concluded that Minn. Stat. § 609.505, subd. 2 was facially unconstitutional under *R.A.V.* because subdivision 2 singles out a certain viewpoint for punishment: knowingly making false statements that assert or confirm an allegation of an officer's misconduct is criminal, while knowingly making false statements to absolve an officer of wrongdoing is not. (App., *infra*, 80a-81a.).

E. Minnesota Supreme Court

The Minnesota Supreme Court reversed the court of appeals by a 4-3 vote. (App., *infra*, 1a.) Part

I of the majority opinion concluded that subdivision 2, is a content-based regulation of speech. (App., *infra*, 11a-12a). Part II of the majority opinion construed subdivision 2 as applying only to defamatory speech. (App., *infra*, 13a-31a.) In Part III, the majority opinion concluded that subdivision 2 passes constitutional muster by satisfying two of the three *R.A.V.* exceptions to the traditional rule that prohibits the State from drawing distinctions based on content within an unprotected category of speech. (App., *infra*, 31a-45a.)

First, the majority concluded that subdivision 2 unambiguously punishes a substantial amount of protected speech. (App., *infra*, 18a-19a.) The majority interpreted this Court's precedent as mandating state courts to "construe" a clearly unconstitutional law to make that law constitutional. (App., *infra*, 20a-21a.) Applying this mandate, the majority held that after adding two additional elements to subdivision 2 (App., *infra*, 25a-28a), the statute now applies only to defamation. (App., *infra*, 25a.)

After narrowing the statute to cover only anti-police defamation, the Minnesota Supreme Court concluded that subdivision 2 was not unconstitutional under the second and third *R.A.V.* exceptions (App., *infra*, 37a-44a.) The majority recognized that *R.A.V.* applied because subdivision 2 criminalizes a content-based subclass of defamation that alleges an act of misconduct implicating a peace officer. (App., *infra*, 30a.) The

first *R.A.V.* exception permits content discrimination within a subclass of unprotected speech if the basis for the content discrimination "consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *R.A.V.*, 505 U.S. at 388. The second exception to *R.A.V.* states that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the … speech.'" *R.A.V.*, 505 U.S. at 389 (emphasis omitted) (quoting *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986)). The third *R.A.V.* exception allows distinguishing a subclass even without identifying "any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 390.

The majority also concluded that subdivision 2 is not unconstitutional because it satisfies the second and third *R.A.V.* exceptions. The second *R.A.V.* exception permits content-discriminatory regulation if those laws are associated with "secondary effects" that are justified without reference to the content of the targeted speech. *R.A.V.*, 505 U.S. at 389 (quoting *Renton*, 475 U.S. at 48). Traditionally, a secondary-effect analysis involved measures such as zoning ordinances. *E.g.*,

Renton, 475 U.S. at 48. But the majority concluded that "secondary effects" include the expenditure of public resources to conduct investigations of the accusations. (App., *infra*, 38a-41a.)

The majority concluded that subdivision 2 is not unconstitutional because it satisfies the third *R.A.V.* exception: a content-discriminatory law is permitted if there is "no realistic possibility that official suppression of ideas is afoot." The majority concluded that because subdivision 2, as construed, permitted a citizen to state that a police officer is "a scoundrel" there was no realistic possibility that official suppression of ideas was afoot. (App., *infra*, 43a-44a.)

The majority found "unpersuasive" the Ninth Circuit's application of *R.A.V.* in *Chaker v. Crogan*, 428 F.3d 1215 (9th Cir. 2005), *cert. denied*, 547 U.S. 1128 (May 15, 2006). (App., *infra*, 44a-45a.) *Chaker* invalidated a California statute prohibiting false reports of police misconduct.

The majority reversed and remanded the case for Crawley to be retried under the statute as modified by the two new elements.

The three dissenters concluded that subdivision 2 had an impermissible chilling effect on protected speech. (App., *infra*, 61a-68a.) Subdivision 2's prohibition on defaming the police in their official capacity is, the dissenters concluded, a modern-day equivalent of the Sedition Act of 1798, which criminalized the publication of "false, scandalous

and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame … or to bring them … into contempt or disrepute." (App., *infra*, 59a-60a, quoting Sedition Act of 1798, ch. 74, 1 Stat. 596.) Subdivision 2's chilling effect is especially pronounced because that law targets only speech critical of the government—core First Amendment Speech. *Snyder v. Phelps*, __ U.S. __, 131 S. Ct. 1207, 1215 (2011) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." (citation omitted)); *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) ("Criticism of the government is at the very center of the constitutionally protected area of free discussion."). False speech that exonerates or supports the police is not criminalized.

The dissenters observed that, after *United States v. Alvarez*, 567 U.S. __, 132 S. Ct. 2537 (2012) the fact that a law targets factually false speech does not mean the law is constitutional. (App., *infra*, 64a-65a.) *Accord N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964).

The dissenters concluded that subdivision 2 creates the real risk that legitimate, truthful criticism of public officials will be suppressed for fear of unwarranted prosecution. (App., *infra*, 62a-63a.) "[E]ven minor punishments can chill protected speech." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002); *see also Alexander v.*

United States, 509 U.S. 544, 565 (1993) (Kennedy, J., dissenting) ("There can be little doubt that regulation and punishment of certain classes of unprotected speech have implications for other speech that is close to the proscribed line, speech which is entitled to the protections of the First Amendment."). Both the plurality opinion and Justice Breyer's concurring opinion in *Alvarez* saw an unreasonable risk of chilling that was "not completely eliminated" by the statute's heightened scienter requirement because "a speaker might still be worried about being prosecuted for a careless false statement." *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring) (emphasis in original); *see also id.* at 2545 (plurality opinion) (explaining that the First Amendment scienter requirement in defamation and fraud cases should not be relied upon to restrict speech; instead, it "exists to allow more speech, not less").

SUMMARY OF ARGUMENT

This petition should be granted because the Minnesota Supreme Court's choice to uphold a statute that violates the First Amendment misapplied this Court's precedent, and deepened the pre-existing split of authority among various state and federal courts, including the Ninth Circuit. The Minnesota Supreme Court's decision chills speech based on viewpoint, it also burdens citizen's ability to petition for redress grievances that stem from police wrongdoing. This petition is a good vehicle to address this conflict because it arises from a facial challenge to subdivision 2 and because the three different lower courts that have ruled on the law's constitutionality have produced five different opinions—the trial court's ruling (App., *infra*, 109a-114a), two at the intermediate appellate court (App., *infra*, 80a-108a), and two at Minnesota's highest court. (App., *infra*, 1a-79a.)

Citizen speech will continue to be chilled unless and until lower courts and legislatures are reminded of this Court's instruction to it in *R.A.V.*: a state may not employ viewpoint-discriminatory laws towards a legitimate end.

REASONS FOR GRANTING THE PETITION

I. The Minnesota Supreme Court's decision conflicts with this Court's First Amendment jurisprudence.

The decision below conflicts with this Court's decisions in both *United States v. Alvarez* and *R.A.V. v. St. Paul.*

Although *Alverez* produced no majority opinion, both the plurality and the dissent agree that laws that viewpoint-discriminatory laws are either subject to strict scrutiny or invalid per se. *Alvarez*, 132 S. Ct. at 2543 (plurality opinion); *id.* at 2557 (Alito, J. dissenting) ("[T]he Act is strictly viewpoint neutral. The false statements proscribed by the Act are highly unlikely to be tied to any particular political or ideological message. In the rare cases where that is not so, the Act applies equally to all false statements, whether they tend to disparage or commend the Government, the military, or the system of military honors"); *see also Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest

grounds…." (citation omitted) (internal quotation marks omitted)).

Contrary to the holding of the Minnesota Supreme Court, *Alvarez* does not permit a state to engage in viewpoint discrimination. Even within "unprotected" categories of speech like defamation, a sovereign does not have plenary power to favor some views at the expense of others. *Alvarez* 132 S. Ct. at 2543-44; *id.* at 2557 (Alito J. dissenting) ("The false statements proscribed by the Act are highly unlikely to be tied to any particular political or ideological message. In the rare cases where that is not so, the Act applies equally to all false statements, whether they tend to disparage or commend the Government, the military, or the system of military honors."); *R.A.V.*, 505 U.S. at 383-83 (the various categories of unprotected speech are not "entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.").

Besides contradicting *Alvarez*, the opinion below conflicts with this Court's express directive in *R.A.V.*: "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 384. (emphasis in original). Minnesota has done precisely what this Court forbade it from doing—proscribing a sub-class of defamation, limited only to defamation critical of the government. By criminalizing only a certain

class of anti-government speech and permitting a similarly situated class of pro-government speech, subdivision 2 discriminates between viewpoints and runs afoul of the First Amendment.

R.A.V. explained that the power to selectively regulate speech within a proscribable category of speech is the power to suppress speech on the basis of protected content or views. Government may, "consistent with the First Amendment" ban certain categories of speech "because of their constitutionally proscribable content." *R.A.V.*, 505 U.S. at 383 (original italics). But the power to prohibit obscenity or defamation outright does not entail the power to make content or viewpoint distinctions within these categories. In short, selective regulation itself may violate the First Amendment even though a total ban on a class of proscribable speech may not.

R.A.V. announced three exceptions to the general prohibition on content discrimination among subclasses of otherwise proscribable speech. 505 U.S. at 388. The first exception is when the basis for the content discrimination "consists entirely of the very reason the entire class of speech at issue is proscribable." Id. The second exception arises when the regulation targets secondary effects of the speech rather than the content of the speech. *Id.* at 288, 294. The third, catch-all exception, occurs when content-based regulation is such that "no significant danger of idea or viewpoint discrimination exists." *Id.* at 388, 395.

The facts of this case starkly illustrate the viewpoint-discrimination in subdivision 2: Crawley was convicted of falsely reporting police misconduct after she complained that she believed a police officer forged her signature on a medical-release form. Her conviction was based on the testimony of a nurse who saw Crawley sign the medical-release form that she had claimed was forged. The jury believed the nurse, concluded that Crawley was lying, and convicted her of falsely reporting police misconduct. But if the nurse had been lying to exonerate the police, the nurse could not have been charged under Subdivision 2 because it criminalizes only anti-police speech while permitting similar pro-police speech.

In his dissent, Justice David Stras explains,

> the State can prosecute an individual under subdivision 2 for holding a sign at a rally against police brutality falsely stating that "Officer A beat me when I was arrested," but the State cannot prosecute someone for holding a sign falsely stating that "Officer A has never beat a suspect." Subdivision 2 targets for punishment only those false statements of fact that are critical of the government; false factual statements seeking to absolve a police officer or impugn a complainant "would seemingly be useable *ad libitum*."

App. *infra*, 77a.) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)).

Under *R.A.V.*, there is no doubt that subdivision 2 is viewpoint discriminatory: it allows the use of defamation so long as the defamer does not accuse the police. All defamation is permitted, except defamation that makes the police look bad. A police officer is free to defame his accuser—by calling her a liar, for example. A different standard, however, applies to the accuser. Because her defamation impugns the police, it is forbidden.

Construed to protect police from official defamation, subdivision 2 cannot survive strict scrutiny because Minnesota already has a viewpoint-neutral law criminalizing defamation. Minn. Stat. § 609.765. Strict scrutiny asks whether subdivision 2's content discrimination is "reasonably necessary to achieve [the State's] compelling interests; it plainly is not." *R.A.V.*, 505 U.S. at 395. A statute "not limited to the [dis]favored topics ... would have precisely the same beneficial effect." *Id.* at 396. Minnesota has adequate content-neutral alternatives—perjury for example. Minn. Stat. § 609.48, subd. 4. Under Minnesota law, a perjury conviction carries a fine of up to $10,000 and five years in prison; a conviction under Subdivision 2 is no more than a gross misdemeanor. *Compare id., with* Minn. Stat. § 609.505, subd. 2. Special, police-specific criminal defamation laws have at best a highly dubious constitutional foundation; police officers, like

anyone else, have a viewpoint-neutral remedy if they are defamed. *Near v. Minnesota*, 283 U.S. 697, 718–19 (1931) ("Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment….").

A viewpoint-discriminatory law does not become constitutional simply because the viewpoint disfavored by the law can be expressed via other kinds of protected speech; the viewpoint discrimination itself invalidates such a law. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984))).

II. The Minnesota Supreme Court's disagreement with the Ninth Circuit expands the pre-existing, contradictory patchwork of authority among lower courts.

A. The Minnesota Supreme Court's decision conflicts with the Ninth Circuit's decision in *Chaker v. Crogan*.

Besides being contrary to *Alvarez* and *R.A.V.*, the decision below reinforces the existing split of authority between the California Supreme Court in *People v. Stanistreet*, 58 P.3d 465 (Cal. 2002) and

the Ninth Circuit in *Chaker v. Crogan*, 428 F.3d 1215, as well as other federal or state district courts in Nevada, Ohio, and California. In light of this split of authority, review of the Minnesota Supreme Court's constitutional holding is warranted.

The fact that the highest courts of Minnesota and California are directly and openly at odds with a federal circuit on a matter of constitutional interpretation is enough for this petition to be granted. *See Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 155 n.2 (2000). But even before the Minnesota Supreme Court ruled in this case, there was a deep, pre-existing split of authority between state and federal courts on the question of whether the First Amendment permits states to enact laws that criminalize only anti-police lies but permit pro-police lies. Both sides of the issue had been explored at length by the Ninth Circuit, which struck down California's police-defamation law, and the California Supreme Court, which had upheld that same law. Moreover, other courts in California, Nevada, and Ohio have disagreed as to the constitutionality of police-defamation laws.

The Minnesota Supreme Court openly disagreed with the Ninth Circuit's application of *R.A.V.* in *Chaker*, 428 F.3d 1215 labeling that decision "unpersuasive." (App., *infra*, 44a.)

Chaker struck down California Penal Code section 148.6 for violating the First Amendment.

428 F.3d at 1217. That California law made it a misdemeanor to "file[] any allegation of misconduct against any peace officer … knowing the allegation to be false." Cal. Penal Code § 148.6(a)(1). The Ninth Circuit observed that the law was viewpoint-discriminatory because "knowingly false speech critical of peace officer conduct is subject to prosecution under section 148.6. Knowingly false speech supportive of peace officer conduct is not similarly subject to prosecution." *Id.* at 1228.

The Minnesota Supreme Court reached the opposite conclusion, expressly disagreeing with the Ninth Circuit. Minnesota deepened the pre-existing split between the Ninth Circuit and the California Supreme Court's decision in *People v. Stanistreet*, 58 P.3d 465 (Cal. 2002).

Although the Minnesota Supreme Court agreed with the California Supreme Court's outcome, the reasoning of the two courts differ. *Stanistreet* concluded that the first *R.A.V.* exception applied because police officers are especially vulnerable to knowingly false statements of fact about their conduct. *Id.* at 641. The Minnesota court did not agree that police officers are especially vulnerable to knowingly false statements of fact about their conduct. (App., *infra*, 37a.)

The Minnesota Supreme Court parted ways with other federal courts besides the Ninth Circuit. For example, *Hamilton v. City of San Bernardino*, 107 F. Supp. 2d 1239 (C.D. Cal. 2000) struck down

the same law upheld in *Stanistreet*. *Compare id.* at 1243-44 *with Stanistreet*, 58 P.3d at 467. *Hamilton* concluded that the California statute—even if limited to defamation—was content discriminatory and that none of the three *R.A.V.* exceptions saved the law. *Hamilton*, 107 F. Supp. 2d at 1244-47.

Another case conflicts with the Minnesota Supreme Court's reasoning. *Gritchen v. Collier* struck down the civil counterpart to the law invalidated in *Chaker*. 73 F. Supp. 2d 1148 (C.D. Cal. 1999) *rev'd on jurisdictional grounds* 254 F.3d 807 (9th Cir. 2001). *Gritchen* concluded that the civil police defamation law was content discriminatory and that none of the three *R.A.V.* exceptions applied. 73 F. Supp. 2d at 1152-53. *Gritchen*'s interpretation of *R.A.V.* contradicts the Minnesota Supreme Court's reading of *R.A.V. See also Haddad v. Wall*, 107 F. Supp. 2d 1230 (C.D. Cal. 2000) (agreeing with *Gritchen* and declaring California Civil Code § 47.5 unconstitutional).

The split goes deeper. The reasoning of the Minnesota Supreme Court below contradicts that of the United States District Court for the District of Nevada in *Eakins v. Nevada*, 219 F. Supp. 2d 1113 (D. Nev. 2002). *Eakins* involved a challenge to the constitutionality of Nevada Revised Statute 199.325,[1] which makes it a misdemeanor to

[1] *Eakins*, 219 F. Supp. 2d at 1116 ("A person who knowingly files a false or fraudulent written complaint or allegation of misconduct against a peace officer for

knowingly file false allegations of misconduct against a peace officer. *Eakins* concluded the law was content-discriminatory, *id.* at 1118, and that none of the three *R.A.V.* exceptions applied to save the statute. *Id.* at 1119-20. In striking down Nevada's law, the district court observed that adequate content-neutral alternatives exist. *Id.* at 1121.

The difference in reasoning between the federal district court in *Eakins* and the Minnesota court is especially stark given that the Nevada law is narrower than the Minnesota law. The Nevada law is limited to the act of filing a complaint or allegation; the Minnesota law covers any communication at all, Minn. Stat. § 609.505, subd. 2 ("Whoever informs, or causes information to be communicated to…."), whether in a police station or in a saloon. *See Alvarez*, 132 S. Ct. at 2555 (Breyer J. concurring) ("And so the prohibition may be applied where it should not be applied, for example, to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like.").

These cases show a division among lower courts. On one hand, various federal courts—including the Ninth Circuit—have struck down laws that selectively criminalize lies containing anti-police content. On the other hand, state high courts in

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conduct in the course and scope of his employment is guilty of a misdemeanor.").

Minnesota and California refuse to strike down these laws. The only exception to this clear federal-state divide comes from a municipal court in Ohio. *State v. English*, 776 N.E.2d 1179, 1138 (Elyria Muni. Ct. 2002) (concluding that Ohio's police-defamation law violates *R.A.V.*). Only this Court can resolve this federal-state split regarding the application of the First Amendment to laws that criminalize falsely reporting police misconduct.

B. Lower courts continue to struggle with the regulations on knowingly false speech.

Even after *Alverez*, lower courts struggle with knowing by false speech—not only with respect to police-misconduct-reporting laws.

The circuits are divided as to whether the First Amendment protects false but non-fraudulent speech made to the government in connection with the sale or purchase of goods or services. The First Circuit holds that false speech in connection with selling goods to the government is not protected by the First Amendment. *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F. 2d 25, 28, 33-34 (1st Cir. 1970). The D.C. Circuit agrees. *Fed. Prescription Serv. v. Am. Pharm. Ass'n*, 663 F.2d 253, 263-64 (D.C. Cir. 1981). In contrast, the Seventh Circuit holds that this kind of false speech is protected. *Mercatus Group, LLC v. Lake Forest Hosp.*, 641 F.3d 834, 842-44 (7th Cir. 2011); *cf. Citizens United v. Fed. Election Comm'n*, 558 U.S.

310, 130 S. Ct. 876, 907 (2010) ("Factions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false." (citation omitted)).

Federal and state courts are divided as to whether knowingly false speech may be prohibited in election campaigns. Some courts treat these laws as unconstitutional. *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011) (holding that a law criminalizing knowingly false statements in election campaigns had to be reviewed to determine whether it passes strict scrutiny, and remanding for such review), *cert. denied*, No. 11-535, 2012 WL 2470100 (June 29, 2012); *State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691 (Wash. 1998) (striking down a law imposing civil liability for knowingly false statements in election campaigns). Some courts treat these restrictions as constitutional. *Weaver v. Bonner*, 309 F.2d 1312, 1319 (11th Cir. 2002); *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573 (6th Cir. 1991); *North Carolina State Bar v. Hunter*, 2010 WL 2163362, *10 (N.C. Ct. App. June 1); *In re Chmura*, 608 N.W.2d 31, 40 (Mich. 2000); *Mahan v. State of Nevada Judicial Ethics & Election Practices Comm'n*, 2000 WL 33937547, *4 (D. Nev. Mar. 23); *State v. Davis*, 499 N.E.2d 1255, 1259 (Ohio Ct. App. 1985); *Snortland v. Crawford*, 306 N.W.2d 614, 623 (N.D. 1981); *Commonwealth v. Wadszinski*, 422 A.2d 124, 129-30 (Pa. 1980); *Vanasco v. Schwartz*, 401 F. Supp. 87, 91-93

(S.D.N.Y. 1975). Wisconsin's high court is evenly divided on whether knowing falsehoods may be prohibited in political campaigns. *Compare In re Gableman*, 784 N.W.2d 631, 644-45 (Wis. 2010) (Prosser, J.), *with In re Gableman*, 784 N.W.2d 605, 618, 624 (Wis. 2010) (Abrahamson, C.J.).

Several states and municipalities have enacted laws of the type struck down in *Chaker* and upheld here—Nevada,[2] California,[3] Indiana,[4] Ohio,[5] and Wisconsin.[6] Tulsa, Oklahoma has a similar ordinance.[7] Half of these states' laws have been declared unconstitutional under *R.A.V.* (California, Nevada, and Ohio); the other half's laws are still in effect (Wisconsin, Indiana, and Minnesota).

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[2] Nev. Rev. Stats. § 199.325. After that law was declared unconstitutional in *Eakins*, Nevada replaced it with a content- and viewpoint-neutral law. Nev. Rev. Stat. Ann. § 207.280 (2005).

[3] Cal. Pen. Code § 148.6 (criminalizing false reports of police misconduct); California Civil Code § 47.5 (creating a civil cause of action for peace officers against those who defame them).

[4] Ind. Code Ann. § 35-44.1-2-3(d)(5) (effective June 30, 2003).

[5] Ohio R.C. Ann. § 2921.15(B) (2006) (effective Mar. 22, 2001).

[6] Wis. Stat. Ann. § 946.66 (2006) (effective May 12, 1998).

[7] *See* Tulsa, Okl., Mun. Code. tit. 27 § 1908(b).

III. The Question Presented Is An Important One.

A. Laws like subdivision 2 chill speech critical of the government.

Minnesota's error is too common. Western thought contains some support for the theory that the government should be able to selectively punish lies depending on their content:

> Again, truth should be highly valued…if anyone at all is to have the privilege of lying, the rulers of the State should be the persons; and they, in their dealings either with enemies or with their own citizens, may be allowed to lie for the public good. But nobody else should meddle with anything of the kind; and although the rulers have this privilege, for a private man to lie to them in return is to be deemed a [serious,] heinous fault….
>
> If, then, the ruler catches anybody beside himself lying in the State [the ruler] will punish him for introducing a practice which is equally subversive and destructive of ship or State.

Plato, *Republic*, bk. III, 389 (B. Jowett trans., Barnes & Noble Books 2004, at 78).

The First Amendment, however, stands in sharp contrast to Plato's vision of the ideal republic. "Congress shall make no law … abridging the

freedom of speech." U.S. Const. amend I. Subject to certain well-defined exceptions, these words are absolute. *Alvarez*, __ U.S. __, 132 S. Ct. 2537, 2544 (2012) (plurality opinion) (listing exceptions). "In The Republic and in The Laws, Plato offered a vision of a unified society[;] [t]he vision is a brilliant one, but it is not our own." *Bowen v. Gilliard*, 483 U.S. 587, 632 (1987) (Brennan J. dissenting).

The constitutional infirmity of subdivision 2 stems not primarily from its regulation of lying, but from the fact that the regulation is triggered only if the speech is critical of the government. Subdivision 2 punishes precisely the type of speech that is at the core of the First Amendment: statements critical of government officials—in this case, peace officers. This Court has repeatedly emphasized that the protection of anti-government speech in general—and anti-police speech in particular—is at the heart of the First Amendment. *City of Houston v. Hill*, 482 U.S. 451, 461 (1987). "Criticism of government is at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). The "right to receive information and ideas, *regardless of their social worth* is fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citation omitted).

Subdivision 2 casts a broad chill because the statutory definition of police officer is broad. A "peace officer" is defined in Minn. Stat. § 626.84,

subd. (c), and includes not only state-certified police officers but also

> …the Minnesota State Patrol, agents of the Division of Alcohol and Gambling Enforcement, state conservation officers, Metropolitan Transit police officers, Department of Corrections Fugitive Apprehension Unit officers, and Department of Commerce Insurance Fraud Unit officers, and the statewide coordinator of the Violent Crime Coordinating Council….

"Misconduct" is overbroad too. Misconduct includes any act or omission that may result in disciplinary action by the agency or appointing authority. Minn. R. 6700.2000, subp. 3. In Minnesota's largest city—Minneapolis—any member of the Department who violates the code of conduct is subject to discipline. Mpls Police Policy & Procedure Manual § 5-101.02. That code requires police officers to "[b]e courteous, respectful, polite and professional." *Id.* § 5-104.01. Accordingly, in jurisdictions like Minneapolis, a person can be convicted of violating Subdivision 2 if that person complains that an officer was rude and a jury later concludes the person was lying.

B. The risk of chilling speech is gravest when the chilled speech is a petition to the government for redress of grievances.

Subdivision 2 offends the First Amendment by chilling not only by proscribing speech *about* the

government—it also targets certain speech *to* the government. The law doubly upsets the delicate balance between citizens who complain and their government, which receives those complaints. Subdivision 2 burdens the people's right to petition the government for redress of grievances—a right more ancient than the freedom of speech. *See* 1 Wm. & Mary, sess. 2, ch. 2 § 1 (1689) ("That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal."). The petition right is even older for the nobility than for commoners. *See Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2499 (2011) ("The right to petition traces its origins to Magna Carta, which confirmed the right of barons to petition the King. The Magna Carta itself was King John's answer to a petition from the barons." (citation omitted).) Though similar, "the Speech Clause and Petition Clause are not co-extensive." *Id.*, 131 S. Ct. at 2504 (2011) (Scalia, J. concurring in part and dissenting in part).

The right "to petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967)). Various circuit courts, too, recognize the importance of avoiding chilling of the petition right. *E.g., Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 651 (7th Cir. 1983) (declaring that the fraud exception "cannot be used to chill [the] constitutional right" to "petition without fear of

sanctions"); *Stern v. U.S. Gypsum, Inc.*, 547 F.2d 1329, 1345 (7th Cir. 1977) (concluding "that the real if peripheral chill of the right to petition which [the] knowing falsity rule could engender is significant enough for the First Amendment values to play a part in construing federal legislation"). The petition clause protects communication between citizens and police. *Forro Precision, Inc. v. IBM Corp.*, 673 F.2d 1045, 1060 (9th Cir. 1982) (citation omitted).

Laws like subdivision 2 drape a pall over the First Amendment's petition right. Granting Crawley's petition will re-affirm this Court's commitment to protecting the right to petition for redress of grievances against the chilling effect that flows from a fear that a later jury might conclude a petition was false.

IV. This Petition is A Good Vehicle for Answering The Question Presented.

This case is a good vehicle for answering the question presented because it comes to the Court on direct appeal without the awkward posture and the legal deference that encumbers a habeas corpus appeal. And this petition presents a facial challenge without any factual disputes.

Not only is this petition a good vehicle by which to examine subdivision 2, a petition from a direct appeal is effectively the *only* such vehicle. Subdivision 2 cannot be challenged via habeas corpus nor declaratory judgment. Because the

crime defined by subdivision 2 is a misdemeanor, a habeas petition will never be a realistic avenue for challenging subdivision 2 because the convicted person will be out of custody long before exhausting his state-court remedies. *See* 28 U.S.C. § 2254(b)(1)(A). Further, this issue cannot be raised by a declaratory judgment because the Eighth Circuit has decided that those whose speech is chilled by the statute lack standing to challenge the law via declaratory judgment. *Zanders v. Swanson*, 573 F.3d 591 (8th Cir. 2009).

The varied spectrum of opinions in this case shows the need to clarify this legal issue for lower courts. The trial judge concluded the statute was constitutional, believing (pre-*Alvarez*) that knowingly false speech is wholly unprotected by the Constitution. (App., *infra*, 114a.) A majority of the Minnesota Court of Appeals panel concluded that the statute was unconstitutional under a straightforward application of *R.A.V.* (App., *infra*, 102a.) The dissenting judge concluded that the first and second *R.A.V.* exceptions justified the law. (App., *infra*, 104a-105a.) A four-justice majority of Minnesota Supreme Court held that the second and third (but not the first) *R.A.V.* exceptions justified the law. (App. *infra*, 38a-44a.) The three dissenting justices concluded that subdivision 2 was invalid without resorting to *R.A.V.*'s three exceptions because it discriminated on the basis of the speaker's viewpoint. (App., *infra*, 73a.) Without this Court's intervention, lower courts will continue to

examine these kinds of laws through this unhelpful kaleidoscope of reasoning.

CONCLUSION

Alvarez left unanswered how courts are to analyze the constitutionality of prohibitions on false statements of fact where those prohibitions risk chilling core First Amendment speech. This petition presents the opportunity to answer that question by defining the legal test for whether and how states may criminalize knowingly false speech about the government. Granting this petition can resolve the entrenched split of authority regarding the application of *R.A.V.* to laws that proscribe knowingly false anti-government speech that currently divides state and federal courts.

Respectfully submitted,

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