No. A158662

IN THE

CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT, DIVISION 1

OAKLAND POLICE OFFICERS' ASSOCIATION; OFFICER DOE 1; OFFICER DOE 2; OFFICER DOE 3; and OFFICER DOE 4,

Petitioners and Respondent,

v.

CITY OF OAKLAND,

Respondent and Appellant.

APPEAL FROM A JUDGMENT OF
THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
THE HONORABLE FRANK ROESCH, PRESIDING
LOWER COURT CASE NO.: RG19002328

BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES AND LOS ANGELES COUNTY POLICE CHIEFS' ASSOCIATION IN SUPPORT OF APPELLANT CITY OF OAKLAND

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I. INTRODUCTION

As the California Supreme Court explained in *Pasadena Police Officers Association v. City of Pasadena* ("*Pasadena POA*") (1990) 51 Cal.3d 564, 575, prompt, thorough and fair investigations into officer misconduct are ***essential*** to maintaining a police agency's efficiency and morale and to ensure the community's trust in its police:

> To keep the peace and enforce the law, a police department needs the confidence and cooperation of the community it serves. Even if not criminal in nature, acts of a police officer that tend to impair the public's trust in its police department can be harmful to the department's efficiency and morale. Thus, when allegations of officer misconduct are raised, it is essential that the department conduct a prompt, thorough, and fair investigation. Nothing can more swiftly destroy the community's confidence in its police force than its perception that concerns raised about an officer's honesty or integrity will go unheeded or will lead only to a superficial investigation.

(*Pasadena POA, supra,* 51 Cal.3d at 568.)

Justice Kennard's words are every bit as true today as they were when she first authored the *Pasadena POA* opinion, if not more so, in light of recent events, including weeks of demonstrations and civil unrest nationwide. Suffice it to say that the public's desire for police accountability appears to be at an all-time high. The ongoing efforts of police departments to hold themselves accountable should not be impeded by providing police officers under investigation with cumbersome discovery rights that are not contained in the statute that regulates the conduct of police disciplinary investigations.

Amici curiae the League of California Cities and Los Angeles County Police Chiefs' Association ask this Court to reverse the trial court's

ruling that Respondent-Appellant City of Oakland was obligated under the Public Safety Officers Procedural Bill of Rights Act ("POBR"), specifically Government Code section 3303, subdivision (g), to provide accused officers with reports and complaints from an ongoing internal affairs investigation into alleged civil rights violations prior to a second interrogation of the officers.

At issue in the present appeal is the proper interpretation of Government Code section 3303, subdivision (g), and specifically the timing of certain disclosures required by the statute. While the plain language of the statute specifically requires that an officer under investigation be provided "access" to a "tape recording" of an interrogation "prior to any further interrogation at a subsequent time," the statute is silent as to when the officer is entitled to receive notes made by a stenographer, or reports or complaints made by an investigator.

For nearly 30 years after the Supreme Court in *Pasadena POA* held that officers were ***not*** entitled to preinterrogation discovery, and that reports and complaints were not required to be disclosed until *after* interrogation, it was commonly understood by police agencies, police officers and police unions alike that reports and complaints would not be disclosed until after completion of the investigation, and typically at commencement of disciplinary proceedings, if any. That changed when the Fourth District Court of Appeal held for the first time in *Santa Ana Police Officers Assn. v. City of Santa Ana* ("*Santa Ana POA*") (2017) 13 Cal.App.5th 317, 328, that reports and complaints (in addition to recordings of any initial interrogations) needed to be disclosed prior to any further interrogation of an officer. However, the erroneous holding in that case is not binding upon this Court and should be disregarded.

As discussed below, the *Santa Ana POA* decision has had negative practical implications for the ability of police agencies throughout the state

to ensure the integrity of their officers by comprehensively, efficiently and fairly investigating allegations of misconduct. As a direct result of *Santa Ana POA*, in any case where a follow-up interview with an officer under investigation is desirable, agencies must now choose between compromising the investigation by either prematurely disclosing investigative materials to the subject officer prior to the follow up interview, thereby possibly tainting that follow up interview, or foregoing the follow up interview. Alternatively, in an effort to ensure the integrity of their internal investigations, some agencies have resorted to legal, but inefficient workarounds, such as having to open up all new, separate investigations for newly discovered instances of alleged misconduct that did not come to light until after the subject officer was initially interviewed.

While *Santa Ana POA* has presented problems for police agencies since its publication, a careful review of the Supreme Court's holding and analysis in *Pasadena POA* reveals that *Santa Ana POA* was incorrectly decided in that it is both unsupported by the statutory language of Government Code section 3303, subdivision (g), and also fails to consider the balancing of interests underlying the POBR.

For these reasons, amici curiae urge this Court to reverse the trial court's ruling against the City of Oakland by holding, consistent with the principles set forth in *Pasadena POA*, that reports and complaints are ***not*** required to be provided to an officer under investigation prior to a second interrogation of that officer and such reports and complaints only need to be disclosed upon completion of the investigation and commencement of disciplinary proceedings.

II. LEGAL ARGUMENT

The trial court's ruling should be reversed because it is contrary to the Supreme Court's analysis in *Pasadena POA*. As in the present case, *Pasadena POA* was concerned with the interpretation of Government Code

section 3303, subdivision (g) (then subdivision (f)[1]). (*Id.* at 568-569.)

Government Code section 3303, subdivision (g), contains just five sentences/provisions:

- "The complete interrogation of a public safety officer may be recorded."
- "If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time."
- "The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential."
- "No notes or reports that are deemed to be confidential may be entered in the officer's personnel file."
- "The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation."

The precise issue before the Supreme Court in *Pasadena POA* was whether subdivision (g) "manifests a legislative intent to grant preinterrogation discovery rights to a police officer who is the subject of an internal affairs investigation." (*Pasadena POA, supra*, 51 Cal.3d at 568-569.) In that case, an officer who was the subject of an investigation,

[1] At the time *Pasadena POA* was decided, present day subdivision (g) existed as subdivision (f). Then-subdivision (f) was renumbered to (g) without substantive change in 1994 when Section 3303 was amended to insert a new subdivision (f) (pertaining to the inadmissibility of statements made during an interrogation by an officer under duress, coercion or threat of punitive action). (See Stats.1994, c. 1259 (S.B.1860), § 1.)

Officer Diaz, demanded to see the investigator's notes from a witness interview that was conducted days earlier. Relying upon the third provision/sentence in subdivision (g) (entitling officers subject to interrogation to "reports or complaints made by investigators or other persons"), Officer Diaz maintained he did not have to submit to an administrative interrogation until the Department had given him access to the notes. After the investigator refused to turn over the notes, Officer Diaz and the Pasadena Police Officers Association sued to enjoin the Department from proceeding with his interrogation until it had disclosed the notes from the earlier witness interview. The trial court and Court of Appeal agreed with Officer Diaz and the POA and interpreted subdivision (g) to require preinterrogation disclosure of reports and complaints. (*Id*. at 570-571.)

On review, the Supreme Court carefully considered the statutory language of Government Code section 3303, subdivision (g), and the purpose underlying the POBR as a whole, and concluded the subdivision only required agencies to disclose reports and complaints to an officer being investigated ***after*** the officer's interrogation:

> In interpreting subdivision (f)[2] of section 3303, our role is limited to ascertaining legislative intent. Based on our review of the statutory language and the purpose underlying the Act, we conclude that the Legislature intended subdivision (f) to require law enforcement agencies to disclose reports and complaints to an officer under an internal affairs investigation only *after* the officer's interrogation. Because entitlement to *preinterrogation* discovery is neither apparent from the language of subdivision (f) nor fundamental to the fairness of an internal affairs investigation, and because such mandatory

[2] See Footnote 1, *supra*.

> discovery might jeopardize public confidence in the efficiency and integrity of its police force, we decline to engraft such a right onto the Act.

(*Id.* at 579. Italics in original.)

While the *Pasadena POA* decision did not address the specific issue of *when*, after an interrogation, law enforcement agencies were required to disclose reports and complaints, as discussed below, the same analysis that led the Supreme Court to conclude that officers are not entitled to preeinterrogation discovery should cause this Court to conclude that agencies are not required to disclose reports and complaints to an officer until ***after*** completion of the investigation, regardless of the number of segments in which the interrogation is conducted.

A. THE *SANTA ANA POA* DECISION LEADS TO COMPROMISED INVESTIGATIONS, WASTED TAXPAYER RESOURCES AND OTHER ABSURD OUTCOMES

In a perfect world, investigators would never have to re-interrogate officers being investigated for misconduct so that *Santa Ana POA*'s interpretation of Section 3303, subdivision (g), would never even come into play. However, the need or desire to conduct follow-up interrogations of subject officers is frequently unavoidable.

Even where investigators attempt to interview a subject officer "last," after all other known witnesses have been interviewed, the officer may identify new witnesses during his or her interrogation, and those new witnesses, once interviewed, may provide information leading to additional lines of questioning that investigators may wish to explore with the previously interrogated officer. Furthermore, in cases involving multiple subject officers, it is not even possible to interview all subject officers while having the benefit of information provided by all other subject

officers, making the need for further interrogation of some officers (particularly those interviewed prior to other subject officers) much more likely.

In any case where a second interview of an officer becomes necessary or desirable due to new information coming to light, as a direct result of the *Santa Ana POA* decision, agencies are now faced with having to choose between multiple bad options, all of which compromise the investigation: (1) taint the follow-up interviews by having to prematurely disclose reports and complaints as the "price" of conducting such follow-up interviews; or (2) forego the follow-up interviews entirely in order to avoid having to prematurely disclose reports and complaints while the investigation remains pending.

For example, the following scenario based demonstrates how the *Santa Ana POA* holding could frustrate an agency's ability to conduct a thorough investigation into officer misconduct: An officer is accused of illegally purchasing a controlled substance without a prescription, reselling it to another officer in the same department and also connecting the second officer to the original source of the controlled substance, thereby facilitating further illegal transactions. During the accused officer's interview, he claims he was unaware that the drugs required a prescription as he thought they were merely a nutritional supplement. He also identifies another witness who he believes could corroborate his ignorance defense. However, when interviewed, the newly identified witness does not support the accused officer's claims, which now raises questions about the accused officer's honesty during his initial interview. A follow up interview with the accused officer would allow the department to more fully evaluate whether the officer was dishonest during his interview.

In light of *Santa Ana POA*, the department may opt to forego a follow up interview to explore the dishonesty charge to avoid having to

make the premature disclosures required under that decision. Providing the premature discovery may undermine the follow-up interview and render it a waste of time to conduct it by allowing the accused officer to align his subsequent interview statements to be consistent with the witness's statements. As a result, the department may end up charging the accused officer with dishonesty during the investigation without the officer having an opportunity, prior to imposition of discipline, to explain the apparent inconsistencies. Alternatively, the department may opt to forego the dishonesty charge and impose lesser discipline than it believes would have been warranted had it been able to conduct a more complete investigation, re-interviewing the subject officer about his apparent dishonesty.

In an effort to avoid these adverse outcomes, motivated to ensure the integrity of their internal investigations, some agencies have resorted to costly and inefficient workarounds, such as opening up multiple investigations for different allegations of misconduct against different officers, all in connection with the same incident, or opening up new investigations against an officer already under investigation when additional allegations come to light, in order to avoid having to disclose all prior investigation materials simply to question the officer regarding the new allegation.

For example, if an agency has determined, after interviewing an officer, that the officer has run an illegal CLETS[3] search without a legitimate law enforcement purpose, the agency may wish to conduct a further investigation to determine whether the officer may have engaged in other illegal searches. Rather than incorporating the further investigation

[3] "CLETS" is an acronym for the California Law Enforcement Telecommunications System, a computer network that connects public safety agencies across the state to criminal histories, Department of Motor Vehicle records, and other databases.

into the original investigation, in order to avoid having to disclose everything obtained during the original investigation to date prior to questioning the officer about any other potentially suspect CLETS searches, the agency will likely open one or more new investigations into the additional searches. While agencies are fully within their rights to sever distinct allegations against an officer into separate investigations, they should not have to do so just to protect the integrity of the investigations. These workarounds, which would not be necessary but for *Santa Ana POA*'s problematic holding, undermine efficiency and come at great taxpayer expense. That is truly elevating form over substance.

Another example of the absurdity induced by *Santa Ana POA* involves a situation in which an attorney representing an officer says that he or she cannot schedule an interview earlier than 1:30 p.m. The investigator's regular workday ends at 5:00 p.m., and the investigator's employing agency has to pay the investigator overtime if they work beyond their regularly scheduled hours. The interview of the subject officer cannot be completed in 3.5 hours. Must the employer insist that the interview proceed earlier than 1:30 p.m. and that the officer retain a different attorney? Or, must the employer incur overtime costs so that the interview can be completed in one sitting? Alternatively, if the employer honors the attorney's schedule and elects to avoid incurring overtime costs, is it bound to conduct the interview in segments and provide the officer with discovery prior to the second segment of his or her interview? It simply does not make sense that whether an officer is entitled to discovery or not could turn on scheduling issues like that. For these reasons, as well as the fact *Santa Ana POA* was incorrectly decided, as discussed below, this Court should disregard *Santa Ana POA*.

B. UNDER THE PLAIN LANGUAGE OF GOVERNMENT CODE SECTION 3303, SUBDIVISION (G), AGENCIES

MUST ONLY PROVIDE "ACCESS TO THE TAPE," BUT NOT REPORTS OR COMPLAINTS, PRIOR TO ANY FURTHER INTERROGATION

As the Supreme Court observed in *Pasadena POA* the first step in ascertaining legislative intent is to look at the words of the statute and its provisions:

> Because subdivision (f) of section 3303 does not specify when an officer's entitlement to the reports and complaints arises, we must determine whether the Legislature intended such disclosure to occur before or after interrogation. To discern legislative intent, we look first to the words of the statute and its provisions, reading them as a whole, keeping in mind the statutory purpose and harmonizing "statutes or statutory sections relating to the same subject ... both internally and with each other, to the extent possible." (*Dyna–Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379, 1386–1387, 241 Cal.Rptr. 67, 743 P.2d 1323.)

(*Id*. at 574.)

Here, in looking at the plain language of the second and third provisions in Section 3303, subdivision (g), the only item to which an officer under investigation is expressly entitled "prior to" further interrogation is access to the tape recording, if any, of an earlier interrogation. Giving an officer access to the contents of his or her prior statement in the same case makes logical sense and it is not surprising that the Legislature made express provision for this. However, there is nothing in the text of the statute to indicate that officers are entitled to reports or complaints prior to a second interrogation. (Gov. Code § 3303, subd. (g).)

In concluding that subdivision (g) only provides officers the right to receive reports and complaints *after* interrogation, the Supreme Court

specifically noted that had the Legislature intended to require disclosure *before* interrogation, it would have specifically included the term "prior to" in the provision relating to disclosure of such reports and complaints, as it did elsewhere in Section 3303:

> [I]n other parts of section 3303 where the Legislature has required that certain acts be performed before interrogation, it manifested that intent by including the words "prior to" in the provision. (§ 3303, subds. (b) ["The public safety officer ... shall be informed *prior to* such interrogation of the rank, name and command of the officer in charge ..., the interrogating officers, and all other persons to be present during the interrogation"], (c) ["The public safety officer ... shall be informed of the nature of the investigation *prior to* any interrogation"] and (g) ["If *prior to* or during the interrogation ... it is deemed that he may be charged with a criminal offense, he shall be immediately informed of his constitutional rights"]; italics added.) **But the words "prior to" do not appear in that part of subdivision (f) requiring disclosure of reports and complaints. When the Legislature "has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded."** (*Phillips v. San Luis Obispo County Dept. of Animal Regulation* (1986) 183 Cal.App.3d 372, 379, 228 Cal.Rptr. 101; see also *People v. Drake* (1977) 19 Cal.3d 749, 755, 139 Cal.Rptr. 720, 566 P.2d 622.) Therefore, in this instance, the omission of the words "prior to" is another indicator of legislative intent to provide for production of reports and complaints after interrogation.

(*Id.* at 576. Emphasis added)

Here, in the second sentence/provision in subdivision (g), the Legislature included the phrase "prior to any further interrogation at a subsequent time" in reference to access to a "tape recording" of an

interrogation. But the phrase does not appear in next sentence/provision in subdivision (g) requiring disclosure of reports and complaints. As the Supreme Court instructs, given that the Legislature employed the phrase "prior to any further interrogation at a subsequent time" in reference to access to the tape recording, but excluded it as to disclosure of reports or complaints, it should not be implied for reports and complaints. (*Pasadena POA, supra*, 51 Cal.3d at 576.)

The *Pasadena POA* decision was also based on the fact that, because notes of a stenographer memorialize the interrogation, they necessarily must be produced after an interrogation. (*Id*.) Therefore, to harmonize subdivision (g) as a whole, the provision should also be interpreted as requiring that reports and complaints be produced after interrogation. The Supreme Court also observed that "the Legislature placed the provision regarding disclosure of reports and complaints and the provision specifying entitlement to transcribed notes in the same sentence in subdivision (f)." Accordingly, the Supreme Court concluded, "This placement is an additional indication that the Legislature must have intended the discovery rights in each instance to be coextensive, entitling the officer to copies of reports and complaints and transcribed stenographer's notes after the interrogation." (*Id*.)

Based on the foregoing, had the Legislature intended to require agencies to disclose reports or complaints "prior to any further interrogation," similar to access to the tape recording, it would have used that phrase in reference to disclosure of reports or complaints. Alternatively, it would simply have included reports and complaints within the same sentence as tape recordings, such as by using the following language: "the public safety officer shall have access to the tape, and shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except

those which are deemed by the investigating agency to be confidential, if any further proceedings are contemplated or prior to any further interrogation at a subsequent time." The fact the Legislature did neither indicates legislative intent to treat access to the "tape recording" differently than disclosure of reports or complaints.

To borrow language from *Pasadena POA*, as a review of the statutory language has shown, there is nothing in the statute that can be interpreted as indicative of the Legislature's intent to grant an officer under administrative investigation the right to discovery of reports and complaints prior to any further interrogation. (*Id*. at 576-577.)

C. THE COMPETING INTERESTS UNDERLYING THE POBR DEMONSTRATE THAT THE LEGISLATURE DID NOT INTEND TO REQUIRE AGENCIES TO DISCLOSE REPORTS OR COMPLAINTS PRIOR TO A SECOND INTERROGATION

Consideration of the competing interests underlying the POBR lends further support to the conclusion that agencies are not required under Government Code section 3303, subdivision (g), to disclose reports or complaints prior to any further interrogation of an officer.

As explained in *Pasadena POA*, "[p]rotection of peace officers from abusive or arbitrary treatment in their employment is the essence of the Act. To accomplish this, the Legislature set out certain rights and procedures. Some of the rights that the Act affords peace officers resemble those available in a criminal investigation." (*Id*. at 577.) The Supreme Court went on to explain that the POBR's allowing certain actions, such as administrative searches of an officer's locker without a warrant or consent, which would not meet Fourth Amendment standards, demonstrated that the rights of officers needed to be balanced against the need to preserve public confidence in the integrity of its police force:

> This accommodation suggests a recognition by the Legislature that a law enforcement agency should retain greater latitude when it investigates suspected officer misconduct than would be constitutionally permissible in a criminal investigation. Limitations on the rights of those employed in law enforcement have long been considered "a necessary adjunct to the [employing] department's substantial interest in maintaining discipline, morale and uniformity." (*Kannisto v. City and County of San Francisco* (9th Cir.1976) 541 F.2d 841, 843.) That interest is increased when preservation of public confidence in the trustworthiness and integrity of its police force is at stake.

(*Id*.)

The *Pasadena POA* opinion also observed that the presence of subdivision (h) (then subdivision (g)), which requires that officers be given limited *Miranda* warnings prior to interrogation if it is deemed they may be subject to criminal charges, was "another indicator that the Legislature looked to criminal procedure as a model for the Act but then provided somewhat reduced protections," because officers had no absolute right to refuse to answer incriminating questions asked by their employer as long as their statements could not be used in a subsequent criminal proceeding. (*Id.* at 577-578, citing *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 827-828, and *Williams v. City of Los Angeles* (1988) 47 Cal.3d 195, 200, fn. 3.)

The Supreme Court flatly rejected the Pasadena Police Officers Association's assertion that peace officers were entitled to discover reports and complaints before submitting to interrogation because such discovery before charges were even filed was not essential to fundamental fairness and without precedent:

> Unlike other protections set forth in the Act, a right to preinterrogation discovery is not essential to the fundamental fairness of an internal affairs investigation. Indeed, the right to discovery before interrogation and before charges have been filed, as PPOA seeks here, is without precedent.

(*Id.* at 578.)

The Supreme Court also specifically pointed out that "during a criminal investigation a suspect has no right to discovery. In a criminal case, the right to discovery does not arise until charges have been filed and the suspect becomes an accused." (*Id.*) The Supreme Court then discussed at length how granting discovery before interrogation would undermine the investigation process, declining and it would decline to insert such a requirement into Government Code section 3303, subdivision (g), because it was not supported by the statutory text and would ultimately jeopardize public confidence in the efficiency and integrity of its police force:

> [G]ranting discovery before interrogation could frustrate the effectiveness of any investigation, whether criminal or administrative. Underlying every administrative inquiry into suspected officer misconduct is the obligation of the law enforcement agency to assure public confidence in the integrity of its officers. The purpose of the inquiry is to determine whether there is any truth to the allegations of misconduct made against an officer and, if so, whether to commence disciplinary proceedings. PPOA's interpretation of subdivision (f) of section 3303 would impair the reliability of such a determination and the effectiveness of the agency's efforts to police itself.
>
> Disclosure before interrogation might color the recollection of the person to be questioned or lead that person to conform his or her version of an event to that given by witnesses already

questioned. Presumably, a related concern led the Legislature to limit an officer's choice of a representative during interrogation to someone who is not a subject of the same investigation. (§ 3303, subd. (h).) That limitation seeks to ensure that participants in the same incident are not privy to evidence provided by other witnesses. Because in this case both Officer Ford and Officer Diaz were involved in the same investigation, under subdivision (h) neither could have designated the other as his representative. Furnishing Officer Diaz before his interrogation with the notes of the Ford interview would require the Department to disclose the same type of information that subdivision (h) seeks to shield from exposure.

Furthermore, to require disclosure of crucial information about an ongoing investigation to its subject before interrogation would be contrary to sound investigative practices. During an interrogation, investigators might want to use some of the information they have amassed to aid in eliciting truthful statements from the person they are questioning. Mandatory preinterrogation discovery would deprive investigators of this potentially effective tool and impair the reliability of the investigation. This is true in any interrogation, whether its purpose is to ferret out criminal culpability or, as in this case, to determine if a peace officer used a mailing list in contravention of a direct order by his superiors.

In interpreting subdivision (f) of section 3303, our role is limited to ascertaining legislative intent. Based on our review of the statutory language and the purpose underlying the Act, we conclude that the Legislature intended subdivision (f) to require law enforcement agencies to disclose reports and complaints to an officer under an internal affairs investigation only after the officer's interrogation. Because

> entitlement to preinterrogation discovery is neither apparent from the language of subdivision (f) nor fundamental to the fairness of an internal affairs investigation, and because such mandatory discovery might jeopardize public confidence in the efficiency and integrity of its police force, we decline to engraft such a right onto the Act.

(*Id*. at 578-579. Emphasis added.)

Turning to the present case, it is important to note that every single policy consideration underlying the Supreme Court's conclusion in *Pasadena POA* that officers are not entitled to discovery prior to interrogation applies equally to demonstrate that officers are not entitled to reports or complaints prior to a *second or further* interrogation. That is, a right to disclosure of reports and complaints prior to a second interview "is not essential to the fundamental fairness of an internal affairs investigation" and, prior to the *Santa Ana POA* case (discussed below), such right was without precedent. (*Pasadena POA, supra*, 51 Cal.3d at 578.)

Just as in a criminal case, where the right to discovery does not arise until charges have been filed and criminal suspects have no right to discovery prior to any interview, officers under investigation for misconduct should not be entitled to discovery prior to a first *or* subsequent interrogation. (*Id*.)

Furthermore, requiring disclosure of reports and complaints prior to a second, follow-up interrogation could just as easily "frustrate the effectiveness of any investigation," impair the reliability of the determination of whether there is any truth to allegations of misconduct against an officer, and diminish the effectiveness of an agency's efforts to police itself. (*Id*. at 578-579.)

Disclosure of reports and complaints before a second interrogation might color the recollection of the person to be questioned or lead the

person to conform his or her version of an event to that given by witnesses already questioned. (*Id.* at 579.)

Additionally, to require disclosure of crucial information about an ongoing investigation to its subject before a second interrogation would contradict sound investigative practices. Investigators would be deprived of the ability to use some of that information as an aid in eliciting truthful statements from the person they are questioning and would impair the reliability of the investigation. (*Id.*)

Because entitlement to disclosure of reports or complaints prior to a second or further interrogation is neither apparent from the language of subdivision (g) nor fundamental to the fairness of an internal affairs investigation, and because such mandatory disclosure might jeopardize public confidence in the efficiency and integrity of its police force, this Court should decline to engraft such a right onto the POBR. (*Id.*)

D. CONSISTENT WITH A CRIMINAL DEFENDANT'S RIGHT TO DISCOVERY ONLY ONCE HE OR SHE HAS BEEN FORMALLY CHARGED, OFFICERS ARE NOT ENTITLED TO DISCLOSURE OF REPORTS OR COMPLAINTS UNTIL COMPLETION OF AN INVESTIGATION.

While *Pasadena POA* holds that officers under investigation are entitled to disclosure of reports and complaints *after* interrogation, it does not explain *when* after the interrogation such disclosure must be made. Just as the *Pasadena POA* court observed that suspects during a criminal investigation have no right to discovery, and the right to discovery in a criminal case does not arise until charges have been filed, this Court should similarly hold that officers are not entitled to disclosure of reports and complaints until the investigation is completed.

Completion of the investigation and commencement of disciplinary

proceedings against an officer is a reasonable and logical point for disclosing reports and complaints and other investigation materials to an officer. It is at that point when the materials actually become relevant to the officer and disclosure of the materials becomes necessary to protect the officer's due process rights. (See *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215.) As a practical matter, if an investigation ultimately finds no wrongdoing by an officer and, as a result, the agency does not formally charge the officer with misconduct, the officer has no legitimate need to obtain the investigation materials since any such materials should not be included in an officer's personnel file (or any other file used for personnel purposes) and an agency can deem such materials confidential. (Gov. Code § 3303, subd. (g).) Accordingly, officers are not entitled to disclosure of reports or complaints until completion of the investigation.

E. THIS COURT SHOULD DISREGARD THE POORLY REASONED *SANTA ANA POA* CASE AS INCONSISTENT WITH *PASADENA POA*

The Court of Appeal in *Santa Ana POA* seemingly analyzed the *Pasadena POA* decision but concluded that since discovery rights to reports and complaints were purportedly "coextensive with discovery rights to tape recordings," and because tape recordings must be produced prior to any further interrogation, it follows that reports and complaints must also be produced prior to any further interrogation. (*Santa Ana POA, supra,* 13 Cal.App.5th at 328.) Even though the *Santa Ana POA* court purported to base its conclusion on *Pasadena POA*, its holding was, in fact, directly contrary to the Supreme Court's analysis in that case.

First, nowhere in the *Pasadena POA* decision did the Supreme Court ever say that discovery rights to "reports and complaints" were "coextensive" with discovery rights to "*tape recordings.*" Rather, the *Pasadena POA* court found indicia of a legislative intent to treat discovery

rights to reports and complaints to be coextensive with discovery rights to "*transcribed notes*" (***not*** tape recordings) based upon the Legislature's placing the provision regarding entitlement to "transcribed notes" (not tape recordings) *in the same sentence* as the provision regarding disclosure of reports and complaints. (*Pasadena POA, supra,* 51 Cal.3d at 576.) Without that "same sentence" link between reports and complaints on the one hand, and *tape recordings* on the other, there was no basis for the *Santa Ana POA* court's holding that reports and complaints also must be produced prior to any further interrogation.

Second, by limiting its entire analysis of the issue to just two sentences, and ultimately relying on nothing more than the imagined link between reports and complaints and tape recordings, the *Santa Ana POA* court wholly ignored the numerous other considerations behind the Supreme Court's conclusion in *Pasadena POA* that officers were ***not*** entitled to preinterrogation discovery (i.e., lack of "prior to" language, similarities between the POBR and discovery rights in criminal cases, whether the disclosure is essential to fundamental fairness of an investigation, and whether the disclosure would frustrate the effectiveness of an investigation and public confidence in the efficiency and integrity of the police force). As previously discussed, just as those very considerations all weighed ***against*** the right to preinterrogation discovery, they also weigh against requiring disclosure of reports and complaints prior to a second or further interrogation of an officer being investigated for misconduct.

Furthermore, a requirement that agencies provide officers with reports prior to a subsequent interrogation of that officer makes no practical sense. If investigators intend to conduct a subsequent interrogation of a subject officer, they are necessarily not finished with the investigation, and any report would almost certainly be only an incomplete draft. It makes no sense and there is no legitimate reason for an agency to provide a copy of

the report to an officer at that stage of the investigation. It also makes no sense to make disclosure of a report prior to a further interrogation entirely dependent upon whether an investigator prepared a draft report prior to seeking a follow-up interrogation. An agency should not be penalized for having proactive investigators by requiring agencies to disclose preliminary draft reports in order to conduct a further interrogation of an officer suspected of misconduct. Finally, as already discussed, the requirement that reports and complaints be disclosed prior to any further interrogation of an officer has resulted in compromised investigations and wasted taxpayer resources, all of which undermines public confidence in the efficiency and integrity of its police force.

Because this Court is not bound by the *Santa Ana POA* decision, and because that decision is not only poorly reasoned but also directly contrary to the Supreme Court's *Pasadena POA* analysis, this Court should disregard *Santa Ana POA* as unpersuasive. (See *Apple Valley Unified School Dist. v. Vaurinek, Trine, Day & Co., LLP* (2002) 98 Cal.App.4th 934, 947; *Wooden v. Raveling* (1998) 61 Cal.App.4th 1035, 1042.)

F. THE LEGISLATIVE HISTORY OF SECTION 3303 IS SILENT ON THE TIMING OF DISCLOSURES OF REPORTS AND COMPLAINTS

Amici curiae have obtained and reviewed the legislative history of Government Code section 3303 for anything that might aid in determining the legislative intent behind subdivision (g). While the legislative history appears silent on the timing of disclosures of reports and complaints, amici curiae have included the legislative history materials with its concurrently filed Request for Judicial Notice in the event the Court wishes to review them.

III. CONCLUSION

For the foregoing reasons, amici curiae League of California Cities

and Los Angeles County Police Chiefs' Association respectfully request that the Court reverse the trial court's judgment and hold that agencies are not required to disclose to officers under investigation reports or complaints prior to any further interrogation of such officers. Instead, the Court should hold that reports and complaints only need to be disclosed upon completion of the investigation and commencement of disciplinary proceedings.

Dated: July 20, 2020 LIEBERT CASSIDY WHITMORE

By: */s/ Alex Y. Wong*
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204, subd. (c)(1))

I, Alex Y. Wong, of Liebert Cassidy Whitmore, attorneys for amici curiae League of California Cities and Los Angeles County Police Chiefs' Association, do hereby certify in accordance with California Rules of Court, rule 8.204, subdivision (c)(1), that the foregoing brief, according to the Microsoft Word computer program used to prepare the brief, consists of 6,101 words, including footnotes.

Dated: July 20, 2020 LIEBERT CASSIDY WHITMORE

By: */s/ Alex Y. Wong*
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **6033 West Century Boulevard, 5th Floor, Los Angeles, California 90045.**

On **July 20, 2020**, I served the foregoing document(s) described as **BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES AND LOS ANGELES COUNTY POLICE CHIEFS' ASSOCIATION IN SUPPORT OF APPELLANT CITY OF OAKLAND** in the manner checked below on all interested parties in this action addressed as follows:

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/s/ Beverly T. Prater
Beverly T. Prater