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Hon. Presiding Judge Rushing
Hon. Judge Premo
Hon. Judge Duffey
California Court of Appeals for the Fifth District
2525 Capitol Street
Fresno, California, 93721

AMICUS LETTER

This Amicus letter is submitted by Raymond L. Henke, a lawyer duly licensed to practice law before the Court of the state of California (SB#90435). Mr. Henke is also a motorcyclist duly licensed to ride his motorcycle in the State of California. Mr. Henke is also a motorcyclist safety and bikers rights advocate who asks the Court to permit him to file this Amicus letter in order to raise concerns with regard to the constitutionality of this Court's opinion certified for publication in Department of the California Highway Patrol v. Superior Court (Richard Quigley).

I. This Court of Appeals Creates a Vague Enforcement Standard Authorizing the California Highway Patrol Officer to Consider the Fabrication of the Motorcyclist's Helmet In Determining Whether It Complies With The California Helmet Law, And Further Creates a Vague Enforcement Standard By Authorizing The CHP To Determine From the Fabrication of a Helmet Whether Riding With the Helmet Constitutes "An Immediate Safety Hazard."

The Court of Appeals decision is based on the conclusion that the CHP officer can determine from the fabrication of the helmet that it is "not a proper helmet" and find a helmet law violation on that basis alone. The Court further holds the California Highway Patrol officers are authorized to consider helmet fabrication in determining whether riding with the helmet constitutes "an immediate safety hazard" as an exception to the correctability statute. The former conclusion is irreconcilable with the California Court of Appeals decisions in Buhl v. Hannigan, 16 Cal. App. 4th 1620, 20 Cal. Rptr. 2d 740 (1993) and Bianco v. CHP, 24 Cal. App. 4th 1113, 29 Cal. Rptr 2d711 (1994), and contrary to the federal injunction issued in Easyriders v. Hannigan, 97 F. 3d 1485 (9th Cir. 1996). The later holding suffers from the same defect as required the foregoing California Court of Appeals holdings, because law enforcement officers are no more equipped by education, training or experience to determine the relative safety benefits of helmets from subjective assessments with regard to helmet fabrication than they are to judge whether a helmet complies with the federal helmet performance standards.

A. The Court's Decision Holding That Mr. Quigley's Helmet or Any Helmet Can Be Determined to be "Not a Proper Helmet" Based Upon Its Fabrication, Requires the Court

to Overrule The Court of Appeals Previous Decisions in Buhl and Bianco, And Undercut the Federal Injunction Issued in Easyriders. If this Is The Court's Intent, It Should Make it Explicit, And Provide Another Standard For Application of the Helmet Law That is Not Void for Vagueness.

At several points in the Court of Appeals opinion the Court uses the term "proper helmet" or "not a proper helmet" without definition, except that in applying the term to Mr. Quigley's "DOT" labeled headgear the Court disparages the helmet as fabric and as looking like a "baseball cap," plainly matters of appearance and fabrication. The court concludes that Mr. Quigley's helmet is "not proper helmet," despite that it is acknowledged in the opinion that the helmet bore a "DOT" label; it was never contended that the label was affixed by anyone other than the manufacturer; indeed, it is obvious from the manner in which the DOT label was affixed that it was affixed by the manufacturer. Furthermore, no contention was made that the helmet had been recalled for noncompliance with FMVSS 218, nor was there any evidence adduced or contention made that the helmet was determined to be noncompliant by NHTSA or an independent laboratory.

The Court of Appeals decision states:

> "Here, the officers did not issue "fix-it" tickets to Quigley, and therefore the standard citations that were issued imply a findings (sic) that in driving his motorcycle *without a proper safety helmet*, Quigley presented an immediate safety hazard to himself. As noted, the record reveals that Quigley was driving either without any helmet or *with a fabric baseball cap*. Such circumstances *unquestionably support each officer's implicit finding of a safety hazard and decision not to issue a "fix it" ticket*
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> "Given our analysis and conclusions that Quigley was *properly issued standard citations*, we conclude that the trial court erred in disregarding the citing officer's implied findings, which are *supported by the circumstances surrounding the infractions* and deeming Quigley's infractions to be correctable offenses." Id. p. 12.

The Court of Appeals use of the terms "proper safety helmet" consistently in the text of the opinion and "without a proper safety helmet" in the above language of the opinion, without definition, renders the opinion vague and by its failure to refer to FMVSS 218 suggests that the Court may intend another definition than that set forth in the national motorcycle and motor vehicle safety helmet performance standard. Indeed, the language of the opinion suggests that the term "proper helmet" refers to something which might be assessed on the basis of the appearance or fabrication of a helmet. However, the standards set forth in FMVSS 218 do not specify fabrication or preferred fabrication, indeed, as far as the standards are concerned a helmet can be fabricated out of anything. The federal standards, incorporated by reference in the California helmet law, set forth nothing but performance test procedures and minimum performance criteria for motorcycle and motor vehicle safety helmets. The states may chose to enact helmet laws or not, but if the states enact a helmet law, they are not permitted to vary from these national standards. However, if the Court of Appeals intends to create a different standard for "proper helmets," that can be assessed by appearance or fabrication, then the Court should explicitly set forth in the opinion what that standard is so it can be challenged in the Courts either or both on grounds of preemption or vagueness..

Upon constitutional challenges to the California helmet law "as written" to

incorporate FMVSS 218, in order to interpret the law to avoid the infirmity that the law would otherwise be void for vagueness, the California Courts of Appeals were required to make plain that the law contemplates that neither the consumer nor law enforcement shall look beyond the manufacturer's "DOT" label and consider the fabrication of the headgear. The first Court of Appeals decision to so hold was Buhl v. Hannigan, 16 Cal. App. 4th 1620, 20 Cal. Rptr. 2d 740 (1993). Indeed, the Buhl court held that to require the consumer or law enforcement officer to consider the fabrication of the helmet in determining whether it complies with the California helmet law was "absurd."

Again interpreting the California helmet law so as not to be void for vagueness, the Courts of Appeals in Bianco v. CHP, 24 Cal. App. 4th 1113, 29 Cal. Rptr 2d711 (1994) held that where the manufacturer affixes the "DOT" label prior to sale, this creates a rebuttable presumption that the helmet complies with FMVSS 218. If the headgear is labeled with the "DOT" symbol, the Court held that the presumption of compliance can only be rebutted if (1) the helmet has been recalled by the manufacturer for noncompliance with FMVSS 218, or if there has been determination by NHTSA or other qualified independent laboratory that the helmet does not comply with FMVSS 218; and (2) it is shown that the motorcyclist had actual knowledge that the manufacturer recalled the helmet or that there had been determination of the helmet's noncompliance by NHTSA or an independent laboratory. Bianco v. CHP, 24 Cal. App. 4th 1113, 29 Cal. Rptr 2d711 (1994) See also, Easyriders v. Hannigan, 97 F. 3d 1485 (9th Cir. 1996).

In upholding the California helmet law against constitutional challenge, and arriving at its necessary holding that it was not for the motorcyclist or law enforcement to consider helmet fabrication, rather limiting consumer and law enforcement officer inquiry solely to whether the headgear bears the "DOT" label, the Court of Appeals in Buhl, supra, reasoned:

> "Appellants contend the helmet law is void for vagueness under the federal and state constitutions in that it 'prescribes a standard which cannot be understood by persons of ordinary intelligence.' They assert that neither motorcyclists nor police officers can tell whether a particular helmet complies. (Para) Their first claim in this respect is that the law is too specific: The incorporated federal safety standards are so technical one must be a physicist or an engineer testing the product in a laboratory to ascertain whether a particular helmet complies. *But underlying this argument is the proposition that the statute requires the consumer or enforcement officer to decide if the helmet is properly fabricated, and such a reading of section 27803 is absurd. When sections 27802 and 27803 are harmonized, as they must be (citation omitted), it is clear the law requires only that the consumer wear a helmet bearing a certification of compliance.*"

Consistent with the Buhl decision that the fabrication of a helmet must not be a consideration either for the consumer or for law enforcement in the application of the California helmet law, Bianco v. CHP, supra, set forth the three pronged test which defined the law of California at the time Mr. Quigley was cited.

The Court of Appeals in Bianco held: "We conclude the statement in Buhl that consumer compliance with the state law only requires the consumer to wear a helmet bearing the DOT self-certaificant sticker does not apply when a helmet has been *shown* not to conform with federal standards and the consumer has *actual knowledge of this fact*." The Bianco Court set forth the information that could provide this knowledge, specifically a recall

by the manufacturer due to noncompliance, a determination of noncompliance by NHTSA or a determination of noncompliance by an independent laboratory.

It is uncontested in this case that the fabric helmet worn by Mr. Quigley at the time he was cited for allegedly violating the California helmet law, had affixed the "DOT" label. It was furthermore obvious from the manner in which the "DOT" labeling was affixed, and uncontested by the CHP that the label was originally affixed by the manufacturer prior to sale. The fabrication of the helmet and its appearance is disparaged in the CHP briefs and in this Court of Appeals opinion as a "baseball cap." Mr. Quigley never acknowledged that his helmet was a baseball cap, nor did the lower court so rule. It is not a baseball cap. It is a fabric helmet bearing the manufacturer's DOT label. And whether it may look like a baseball cap or a watermelon the California Courts of Appeals have consistently held that law enforcement may not consider the fabrication of a helmet in determining whether a motorcyclist complies with the California helmet law. Indeed, as noted above, in order to find that the California helmet law was not void for vagueness, the California Court of Appeals in Buhl held the proposition "absurd" "that the statute requires that the consumer or enforcement officer to decide if the helmet is properly fabricated ... it is clear the law requires only that the consumer wear a helmet bearing a certification of compliance."

Before reaching the application of the correctability statute, this Court first was required to conclude that the Mr. Quigley violated the California helmet law, and did so on the foundational basis of the CHP's determination, and this Court's determination, that Mr. Quigley's "DOT" labeled helmet was, on the basis of its fabrication "not a proper helmet." The Court found that Mr. Quigley had violated the helmet law on the subjective determination that the DOT labeled helmet "not proper," without a showing that the headgear had been recalled for noncompliance or determined by NHTSA or an independent laboratory to have failed the test set forth in FMVSS 218, and without any foundation that Mr. Quigley had actual knowledge that the helmet has been recalled or determined by NHTSA or an independent laboratory to have failed the test set forth in FMVSS 218. For the Court to make these findings in its opinion requires that the Court overturn the Buhl and Bianco decisions and set forth another interpretation of the California helmet law which will not render the statute void for vagueness as written.

Indeed, to justify the language of the Court of Appeals decision finding Mr. Quigley's helmet "not a proper helmet," based on its fabrication, the Court must overrule Buhl and Bianco *retroactively,* because clearly Buhl and Bianco were the law of California at the time that Mr. Quigley was cited. Mr. Quigley was entitled to rely on Buhl and Bianco on the dates he was cited. Furthermore, Mr. Quigley had the right to rely on, and the CHP was bound by the Easyriders federal injunction that the CHP comply with the Bianco three pronged test as set forth above. Under the federal injunction the CHP was prohibited to consider fabrication. The CHP was required to look no further than whether a DOT label was attached to the headgear. And given that a helmet citation in California contemplates an arrest, if the headgear worn by the motorcyclist bore a DOT label, the federal injunction, based upon the Forth and Fourteenth Amendments to the U.S. Constitution, prohibited the CHP from issuing a helmet citation without probable cause to believe that the motorcyclist knew that the helmet had been determined by NHTSA or an independent laboratory to be noncompliant with FMVSS 218. Easyriders v. Hannigan, supra.

All five of the alleged helmet violations before this Court of Appeals involve Mr. Quigley's use of the same DOT labeled headgear, as was found by the trial court in each case. In

issuing the 5 tickets to Mr. Quigley for riding with a DOT labeled helmet which had neither been recalled nor shown to be noncompliant with FMVSS 218 by NHTSA or an independent laboratory -- and obviously also without Mr. Quigley's actual knowledge of a nonexistent determination of noncompliance -- the CHP clearly violated the existing California law as set forth in Buhl and Bianco, and clearly violated the federal Court's injunction in Easyriders. Therefore, this Court clearly cannot find that the CHP properly issued any of the citations to Mr. Quigley on the basis of this Court's finding that Mr. Quigley's helmet was "not a proper helmet," without *retroactively* overruling not only Buhl and Bianco, and *retroactively* releasing CHP from the binding effect of the federal court injunction.

If it is this Court's intent to overturn Buhl and Bianco, and create a new standard based on law enforcement officer analysis of headgear fabrication, the Court should consider, in arriving at its new interpretation of the California helmet law, that the states cannot vary from the technical performance standards set forth in FMVSS 218. The supremacy clause prohibits it. Any different standard based on appearance or fabrication, even if legislated, would be void as preempted. Please consider also that in determining whether a helmet meets FMVSS 218 requires a laboratory with the essential equipment and adherence to the testing procedures set forth in the federal safety helmet performance standard.

If this Court intends to overrule Buhl and Bianco, then the Court must also consider that due process requires that the ordinarily intelligent motorcyclist be given fair notice of what it is that is prohibited, and that a clear enforcement standard also be provided to avoid arbitrary or discriminatory application of the law. Otherwise this Court's holding may well render the helmet statute void for vagueness.

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108 (1971).

If the Court of Appeals in this case is to rule that in determining whether a helmet is "a proper helmet" law enforcement may consider the fabrication of the headgear, then indeed, in addition to overruling Buhl and Bianco the Court must deal squarely with the fact that its decision will also undermine the Easyriders injunction grounded on 4th and 14th Amendments to the U.S. Constitution.

The United State Court of Appeals for the Ninth Circuit, in its Easyriders opinion observed:

> "Having reviewed the record, the district court concluded that 'the CHP has a clear *official policy* of allowing officers to stop motorcyclists and issue citations for substandard helmets based on the officer's *subjective opinion* of whether the helmet would, if tested, conform to federal safety standards.' In addition the district court found that '*the CHP has a clear official policy of allowing officers to cite for allegedly substandard helmets regardless of whether the officer has*

reason to believe that there has been a determination of noncompliance with [Standard 218] or that the motorcyclist has knowledge that the helmet has been determined not to comply with [Standard 218]."

It was indeed, based on this factual record and the 4th and 14th Amendment to the United States Constitution that the United States Court of Appeals in Easyriders upheld the aspect of the federal district court's injunction prohibiting the CHP from issuing helmet citations, inter alia, unless the officer has probable cause to believe that the motorcyclist has actual knowledge of a determination of nonconformity with FMVSS 218.

The Court of Appeals here must deal squarely with the question whether it intends by its decision in this case to overrule Buhl and Bianco. Since the Easyriders decision is based on Buhl and Bianco, the Court must also deliberately decide whether it will rule that the Easyriders injunction shall no longer have force or effect in the State of California. If this Court intends to make such a wide reaching decision, contradicting all prior California case law and undermining the Easyriders federal injunction, to permit law enforcement officers now to write citations based on their subjective judgment from the fabrication of a helmet would or would not pass FMVSS 218 standards, then the Court should squarely state that it is overturning these decisions and provide a new standard that is not void for vagueness or otherwise violative of constitutional requisites.

The Court must also decide whether it intends to overrule the Buhl and Bianco decisions retroactively in order to apply its new standard to find that the helmet tickets issued to Mr. Quigley on the basis of fabrication alone, without NHTSA or independent laboratory determination of noncompliance and without Mr. Quigley's actual knowledge of a nonexistent determination of noncompliance were properly issued on the dates they were issued to Mr. Quigley.

B. The Court's Opinion Finding That the CHP Shall be Permitted to Determine From the Fabrication of a Helmet That Riding with The Helmet Will Result in an "Immediate Safety Hazard," Providing an Exception to the Correctability Statute, Invites Arbitrary Application of The Helmet Law and Correctability Statute Based Upon Assessments Which the Officers Are Not Appropriately Educated, Trained or Qualified to Make.

The Court's opinion that the helmet law falls within the purview of the correctability statute is appropriately grounded on the clear legislative intent and this Court's reasoning so eloquently set forth in the main body of the opinion. But the portion of this Court's opinion holding that the CHP shall be authorized to consider a helmet's fabrication in determining whether the "immediate safety hazard" exception to the correctability statute applies, exacerbates the vagueness sought to be cured by Buhl and Bianco, and specifically undercuts these prior California Appellate Court decisions' intent to provide clear standards not subject to arbitrary subjective law enforcement assessments with regard to helmet fabrication. It is at least as "absurd" – adopting the language of the Buhl court – to authorize law enforcement to consider the fabrication of a helmet in determining whether the helmet constitutes an "immediate safety hazard," as it is to permit law enforcement to consider fabrication in guessing whether the helmet complies with FMVSS 218.

Under the present law, in every helmet violation stop, before the officer can reach the question whether the correctability statute applies, and whether the "immediate safety hazard" applies, the officer must first have probable cause to believe that there has been a violation of the

helmet law, specifically, either that the helmet does not have a manufacturer affixed "DOT" label, or, if the helmet does have a DOT label, that the helmet has been recalled by the manufacturer, or determined by NHTSA or an independent laboratory not to comply with FMVSS 218 (in addition to the scienter requirement). Buhl and Bianco, supra. The Court must consider the landscape of recalled and adjudged noncompliant helmets which the CHP officer will be confronted with as he is authorized to decide, on the basis of the fabrication of each *noncompliant* helmet, whether riding with the *noncompliant* helmet constitutes an "immediate safety hazard." Some examples of such noncompliant helmets are described in the Easyriders decision, including helmets properly found to be noncompliant according to the federal scheme. Given the landscape of noncompliant helmets each with distinct fabrication qualities, the Court must consider whether it shall be the Court's intention to invest in the CHP officer the discretion to determine which noncompliant helmets constitute and which do not constitute "immediate safety hazards." Indeed, consider whether it shall be this Court's intention that the CHP officer will be permitted to assess whether a "determined noncompliant" metal helmet with 1/4 inch or 1/8 inch padding or no padding at all is more safe or less safe than a fabric helmet such as that worn by Mr. Quigley. Indeed, how shall the law enforcement officer assess the qualities of the padding, if the determined noncompliant helmet is equipped with padding? Is a plastic noncompliant helmet with padding more safe or less safe than a noncompliant metal helmet without padding or with 1/8 inch padding? Would either provide greater protection, or indeed, greater danger, than Mr. Quigley's helmet? Which is more likely to reduce the incidence of traumatic brain injury, sheering, or coup countercoup brain injuries? Is the "determined noncompliant" metal helmet with 1/4 inch padding or ½ inch padding or no padding at all more or less likely to result in skull fracture as its edges focus the energy of the impact upon at the edge of the helmet against the head, or indeed, more or less likely to cause cervical spinal cord injury than a determined noncompliant fabric helmet? On the other hand, to the extent that the CHP officer concludes as the product of his rank speculation that an adjudged noncompliant metal helmet without padding or 1/8 inch padding might be considered to be constructed at least to reduce the incidence of skull fracture, are we to defer to law enforcement to weigh that presumed safety benefit against the safety detriment that preventing skull fracture may actually increase the severity of brain injury given that the skull is designed to fracture to release internal bleeding to avoid intact skull brain damage due to pressure upon the brain structures resulting from hematoma?

The CHP is fond of the phrase "common sense." But "common sense is the sense that leads the common man to believe the world is flat." And it is also the "common sense," when applied to law enforcement and consumer consideration of the qualities of motorcycle headgear fabrication that our Court of Appeals has rightly held is "absurd." The CHP officer doesn't have the training in engineering or medicine to make these relative safety determinations; nor can the officers be trained to competently do so. To invest in the CHP authority to do what it is incompetent to do is to invite arbitrary enforcement of the law.

Clearly, according to the statutory scheme in which the helmet law clearly falls within the correctability statute, it is contemplated that when a rider is found to be wearing a helmet which does not have a DOT label, or is knowingly wearing a DOT labeled helmet has been determined by NHTSA or an independent laboratory to fail to comply with FMVSS 218, the officer then "shall"issue a correctable violation, unless he finds that an exception to the correctability statute applies. But this Court must not hold that law enforcement may make the determination that "immediate safety hazard" exception applies based upon the fabrication of the unlabeled or recalled or "determined noncompliant" helmet. If the "immediate safety hazard" exception applies to helmet law violations, the legislature must have intended that the officer's finding of

"immediate safety hazard" be based on factors other than the fabrication of the helmet, and specifically, factors within the officer's sphere of competency. The criteria, whatever they might be, within the sphere of expertise of the law enforcement officer, is for the Courts to determine, either in this case or in other cases, but it cannot be on the basis of the law enforcement officer's unqualified and arbitrary assessment of the safety qualities of the noncompliant helmet.

Unlike nonfunctioning turn signals or broken brake lights, which could certainly, within the limits of law enforcement training and education, be found to create an immediate safety hazard, because they plainly increase the risk of an accident, riding with a helmet that is not DOT labeled or which has been determined by NHTSA or and independent laboratory not to be in compliance with FMVSS 218, does not increase the likelihood of an accident. In the case where a motorcyclist is found to be riding with a recalled helmet or helmet determined by NHTSA or an independent laboratory not to be compliant with FMVSS 218, perhaps a determination of "immediate safety hazard" might be made based upon the unsafe manner in which the officer observed the motorcyclist riding, which the officer might well opine, within his sphere of expertise, in combination with wearing an determined noncompliant helmet, creates an "immediate safety hazard.". But again, it is clearly without the sphere of the expertise of the law enforcement officer to opine the relative safety qualities of helmets based upon their fabrication as the Court authorizes in it's opinion..

This Court of Appeals suggests that riding "without a proper safety helmet" constitutes an "immediate safety hazard" *per se*. This is suggested by the following sentence of the opinion: "This would especially be the case where the officer stops a person for a helmet law infraction, *because driving without a proper safety helmet certainly poses an immediate safety hazard to the violator*," Opinion, p. 10.

The Court's use of the term "without a proper safety helmet" in the above quotation, at least until this Court squarely overrules Buhl and Bianco, must be read as an unlabeled helmet or recalled helmet or helmet "determined noncompliant" with FMVSS 218 by NHTSA or other competent testing laboratory.

But regardless of the definition of "not a proper safety helmet," it is clear that if it shall be this Court's holding, that *"driving without a proper safety helmet certainly poses an immediate safety hazard to the violator*," then the holding completely "swallows the rule" articulated in the main body of the Court's opinion that the helmet law falls within the correctability statute.

Indeed, if that is the Court's ruling, the Court completely undermines the legislative intent that helmet infractions fall within the correctability statute, established from the unambiguous legislative intent in the main body of the Court's opinion. The Court cannot hold on the one hand that helmet law infractions fall within the correctability statute, and on the other hand hold that helmet law infractions, necessarily grounded, inter alia, on the absence of a DOT label or recall for noncompliance or NHTSA or independent laboratory determination of noncompliance "certainly pose an immediate safety hazard" and therefore fall within the exception to the correctability statute. Indeed, given that the legislative intent is unambiguous that helmet infractions fall within the correctability statute, it necessarily must follow that the existence of the criteria for a helmet infraction, cannot constitute the basis for a finding that the immediate safety hazard exception applies. Again, otherwise clearly the exception would completely swallow the rule.

It is therefore inescapable, both by virtue of the unambiguous legislative intent set forth in the Court's opinion that helmet infractions fall within the correctability statute, and by virtue of the fact that it is certainly not within the sphere of expertise of the CHP officer to assess whether

the fabrication of any particular noncompliant helmet is safer or less safe than any other, that the Court must find that determinations of "immediate safety hazard" must be based on something other than either a determination of noncompliance or the helmet's fabrication.

In holding that the CHP officers properly issued citations in this case, the Court held: "Here, the officers did not issue "fix it" tickets to Quigley, and therefore the standard citations that were issued imply a findings that in driving his motorcycle without a proper safety helmet, Quigley presented an immediate safety hazard to himself. As noted, the record reveals that Quigley was driving either without a helmet or with a fabric baseball cap. Such circumstances unquestionably support each officer's implicit finding of a safety hazard and decision not to issue a "fix it" ticket."

The foregoing holding is again explicitly grounded on assumption that the officers found the existence of the "immediate safety hazard" exception based upon the fabrication of Mr. Quigley's "DOT" labeled helmet, and this Court's conclusion that "such circumstances," the only circumstance being the fabrication of the helmet, "unquestionably" supports the finding of an "immediate safety hazard."

This holding must be seen as plainly erroneous under the California statutory scheme and the prior California Court of Appeals decision in Buhl and Bianco. First the helmet worn by Mr. Quigley leading to citations before the Court bore a manufacturer's "DOT" label, and no contention was made by the CHP, nor is there any evidence in the record that the helmet was recalled by the manufacturer, or determined by NHTSA or an independent laboratory to be noncompliant with FMVSS 218, let alone that Mr. Quigley was aware that the helmet had been recalled or determined by NHTSA or an independent laboratory to be noncompliant with FMVSS 218. Furthermore, the holding is erroneous because even where a helmet has been recalled or "determined to be noncompliant" with FMVSS 218, law enforcement officers are clearly not equipped by training or education to conclude whether the fabrication of any particular noncompliant helmet, whether fabric, plastic or metal, with or without any particular type, width or construction of padding, is any safer than any other. And finally, the holding is erroneous because the conclusion that "improper helmets," (a term which must be interpreted consistent with the previous Court of Appeals decisions to mean unlabeled, recalled or "determined noncompliant" helmets) constitute "immediate safety hazards" per se, completely undermines the legislative intent that helmet infractions fall within the correctability statute.

It is sometimes said that "bad facts make for bad law." It is apparent from the Court's discussion that it considers that the fabrication of Mr. Quigley's DOT labeled helmet must be seen clearly to justify the conclusion that it is an "improper helmet." But if the Court were to consider the fabrication of most other recalled helmets and helmets determined not to comply with FMVSS 218, including metal helmets without padding, as one example, the Court might also conclude that they too, "obviously" cannot provide much protection or might indeed create additional danger of traumatic brain injury or cervical spine injury. Indeed, it is as likely as not, until the testing is done, that many or all of the "determined noncompliant" metal helmets may be significantly more dangerous than Mr. Quigley's helmet. But more fundamentally, it is a slippery slope if not the fall from the constitutional cliff, for the Court to conclude that any helmet bearing a manufacturer's DOT label, however fabricated, is clearly "an improper helmet" and on that basis draw the conclusion that wearing the helmet clearly violates the California helmet law or clearly constitutes and "immediate safety hazard." There is a need for clarity in the construction of the California helmet law if the statute shall not be rendered void for vagueness, and it has been determined by the California Courts of Appeals that it is essential to avoid constitutional infirmity that helmet

fabrication must not be a factor for the motorcyclist or law enforcement to consider. And by the same token, it must not be a factor for this Court to consider.

The interpretation of the helmet statute set forth in Buhl and Bianco, considered essential to avoid the conclusion that the statute was unconstitutional as written, is the construction this Court must adhere to in this case, unless it determines to overturn these previous Court of Appeals decisions and arrive at another construction of the California helmet law that it considers can pass constitutional muster.

The helmet tickets issued to Mr. Quigley were clearly issued improperly because his helmet bore the manufacturer's "DOT" label, the helmets have not been recalled by the manufacturer, and no government or independent testing laboratory has concluded that the helmets fail to comply with FMVSS 218. Furthermore, the language bandied about by the CHP that Mr. Quigley had actual knowledge that his helmet was an improper helmet because he'd received 30 tickets previously while riding with the same headgear is misleading and meaningless because that doesn't accurately describe the scienter element. In order to satisfy the criteria for this specific intent statute, as interpreted by Buhl, Bianco and Easyriders, the law enforcement officer must have probable cause to believe that the motorcyclist had actual knowledge that the helmet had been recalled by the manufacturer for noncompliance or found by NHTSA or an independent laboratory to be noncompliant with FMVSS 218; and there is no evidence or even the contention that any officer at any of the alleged 30 stops told Mr. Quigley that. Indeed, if an officer had, he would have had to do so untruthfully. Thirty illegally issued helmet tickets or one hundred, in the absence of any foundation that Mr. Quigley had the particular required specific intent, the helmet citations before the court can only be found to have also been issued illegally.

2. The CHP Has the Legitimate Procedure Available to It to Properly Issue a Citation or "Fix it" Ticket to Mr. Quigley if His Helmet Doesn't Comply with FMVSS 218, And Remedies Are Also Provided By the Law Against Manufacturers Which Improperly Label Noncompliant Helmets as "DOT" Certified. The Court Need Not Overturn Buhl and Bianco. The Court Need Only Require the CHP to Follow The Legal Procedures Provided By Law.

Recognizing the requirements for the constitutional application of the California helmet law, as set forth in Buhl, Bianco, and the Easyriders injunction, does not mean that there is no state remedy. The CHP may ask NHTSA or an independent laboratory to make a determination of noncompliance on the DOT labeled helmet Mr. Quigley was wearing. Upon a determination of noncompliance the manufacturer is required to recall the helmet. NHTSA has in place procedures to publicize its findings of noncompliance. And the CHP can also notify the public or Mr. Quigley personally that the helmet has been determined to be noncompliant. That is the proper contemplated by the federal scheme. And it is the only procedure consistent with the prior holdings of the California Courts of Appeals deemed essential to conform the California helmet law to constitutional requisites, for the CHP properly to cite Mr. Quigley or any motorcyclist wearing any helmet of any fabrication bearing a DOT label which CHP suspects is noncompliant with FMVSS 218. That is also the only procedure which the CHP may properly employ to conform to the federal District Court's injunction upheld in the United States Court of Appeals' in Easyriders v. Hannigan, supra.

Once the determination of noncompliance is obtained, there a host of other consequences and penalties that are levied against the manufacturer. As noted by the United States Court of Appeals in Easyriders: "If the helmets are found not to be in compliance, the manufacturers are

required to notify owners of the helmets of the defect in the helmet and to stop selling noncomplying helmets with the DOT certification. See 49 U.S.C. SS 30112, 30115, 30116, 30118 (1994). Manufacturers that do not recall non-complying helmets are subject to substantial fines. 49 U.S.C. S 30165 (1994)."

These are the remedies available to the CHP, but which the CHP has declined to avail. Instead, across the board, as a matter of CHP policy, training and practice, it has elected to uniformly violate the Easyriders injunction, including in this case by issuing the citations before the Court. The CHP seeks to impose upon this Court to vary from the previous Court of Appeals decisions and make bad law here to permit it to issue citations in the future based solely on the CHP officer's incompetent "compliance assessments" based solely on the officer's subjective conclusions about the fabrication of a manufacturer DOT labeled helmet, without a competent determination of noncompliance according to the testing procedures specified in FMVSS 218. If the Court shall join in now authorizing the CHP to continue to violate the California law and federal injunction here, given the CHP's past history of illegal enforcement policies, abundantly discussed in the Easyriders decision in particular, it can only be predicted that the CHP officers will be emboldened further to arbitrarily issue illegal citations to every rider they arbitrarily and incompetently figure from their subjective analysis helmet fabrication, is not in compliance with FMVSS 218 or "not a proper safety helmet." And they will continue to do so illegally, further emboldened by this Court's holding, without regard to whether there has been a determination of noncompliance, and without probable cause to believe that the motorcyclist has actual knowledge of the existence of the nonexistent determination of noncompliance. This is CHP's official policy and pattern and practice of illegal conduct which the United States Court of Appeals found violated the 4th and 14th Amendment of the United States Constitution, justifying its injunction that the CHP cease issuing helmet citations without probable cause to believe that the that the motorcyclist has actual knowledge that his helmet has been determined to be noncompliant with FMVSS 218. Yet this is precisely what the Court of Appeals decision authorizes whenever the CHP officer arbitrarily and incompetently guesses that a helmet is "not a proper helmet."

3. The Court of Appeals Decision Permitting the CHP to Issue Helmet Citations Based on Subjective Assessments That a Helmet is "Not a Proper Helmet" Solely By Virtue of Their Qualities of Fabrication and Their Incompetent Assessments of the "Relative Safety" of Noncompliant Helmets Will Result in Havoc in the Courts, Will Result in Inconsistent Trial Court Decisions, Will Deprive Motorcyclists of Clear Direction as to How They Might Conform to the Law, Will Render The Helmet Statute Void for Vagueness, And Will Also Undermine The Legislative Purpose for the Inclusion of the Helmet Law Within the Correctability Statute.

The Court's decision will result in havoc in the lower courts, as the CHP will now rely on the language of this Court's opinion suggesting that it is no longer illegal for CHP officers to issue helmet tickets to motorcyclists based solely on the officer's arbitrary and incompetent subjective determination from the fabrication of the helmet that it is "not a proper helmet.". No longer will the lower Courts be permitted to apply the clear three pronged standard enunciated in Bianco, because it is plain from the opinion that this Court has chosen at least to disregard the Bianco three pronged test . No longer will the trial courts be guided by the "presumption of compliance" from the manufacturer's affixation of the DOT label. No longer will the trial courts be permitted the clearly defined rule that the presumption of compliance can be rebutted only by a showing that the helmet has been recalled for noncompliance or "determined noncompliant" by NHTSA or an

independent laboratory, and the that the defendant had actual knowledge of the recall or "determination of non compliance." Under this Court's decision each case arising in the lower Courts will now require the Court to determine first whether the fabrication of any particular helmet renders it noncompliant with FMVSS 218, on a case by case basis, obviously also a judicial task for which the trial courts are clearly unequipped, either with the testing equipment or the expertise to apply the technical performance standard. This reliance of arbitrary and incompetent CHP and judicial determinations based on fabrication will certainly also raise the certain specter of inconsistent rulings on every model of compliant and noncompliant helmet brought into more than one court. And in addition to creating havoc in the lower Courts, it will become manifest the constitutional infirmities of the statute previously sought to be cured by Buhl and Bianco, and the 4th Amendment infirmity sought to be cured by United States District Court and Court of Appeals in Easyriders.

Furthermore, whether the Court intended it or not, this Court's language that "driving without a proper safety helmet certainly poses an immediate safety hazard to the violator" will be interpreted by the CHP as its green light to ignore this Court's holding that the helmet statute falls within the correctability statute, and it can be predicted with certainty that the CHP will simply continue as it has in the past to issue citations rather than correctable violations as a matter of course.

The good legislative purpose for including the helmet law in the correctability statute will thus be avoided, in part because of the bad law created by this decision, and in part because of the CHP's certain future abuse of this Court's decision. If a motorcyclist is found to be wearing a helmet which the CHP officer arbitrarily and incompetently concludes is improperly fabricated, and issues a citation, this will do nothing to reduce the "safety hazard." According to CHP policy and practice, the citation is issued and the motorcyclist rides off.

If the motorcyclist considers that the citation was incorrectly issued, trusting in the manufacturer's DOT endorsement, in the absence of any competent determination that his helmet fails to comply with FMVSS 218, he might contest the citation or he might not. If he contests it, all he can hope for is that the Court's arbitrary and incompetent fabrication assessment will be different from the officer's arbitrary and incompetent assessment. Indeed, if the rider considers that the officer was wrong in his patently arbitrary and incompetent analysis of the fabrication qualities of the helmet, asserted contrary to the helmet manufacturer's DOT endorsement, the motorcyclist may well continue to ride with his DOT labeled helmet. Indeed, the purpose of the correctability statute is undermined, because the rider is denied further confirmation that his helmet has been determined noncompliant, and the state is denied the opportunity to assure that the rider obtains a compliant helmet, as required to "fix" the ticket.

Even if the Court shall ignore the three pronged standard set forth in Bianco, and find that Mr. Quigley's helmet was "improper" by virtue of its fabrication, in violation of Buhl, the Court must refrain from granting the writ herein based on the fiction of an "implied finding" that the CHP officers concluded from the fabrication of the helmet that it posed an "immediate safety hazard." Such a finding is well beyond the expertise of the CHP and no other circumstance, such as erratic riding, that might suggest an immediate safety hazard within the CHP officers sphere of competence, is apparent anywhere in the record or argued by CHP to have justified the citations.

Contrary to the CHP's argument, furthermore, that the "persistent neglect" exception to the correctability statute applies here, unless the Court overrules Buhl and Bianco retroactively, the CHP's issuance of previous unlawful tickets to Mr. Quigley cannot possibly be held to support the exception because there is no evidence in the record and indeed no contention by the

CHP that Mr. Quigley had ever been informed that his helmet has been recalled or found by NHTSA or an independent laboratory to be noncompliant with FMVSS 218.

The Court must deny the writ of mandamus because the citations in truth were issued to Mr. Quigley by the CHP officers without consideration of the correctability statute, without any actual determination that any exception to the correctability statute applied, and in the absence of grounds for finding any exception to the correctability statute.

4. The Court's Decision Is Ambiguous as to Whether it Intends to Deny Motorcyclists Due Process and the Right to Trial on the Issue of the Existence or Non-Existence of an Exception to the Correctability Statute.

It is not clear from this Court's opinion whether it is holding that the criminal defendant, arrested and cited for violation of the California helmet law, shall henceforth be denied due process and the right to trial on the factual basis for the officer's finding of the existence of an exception to the correctability statute.

Under California law, a traffic citation is considered an "arrest." California Penal Code Section 853; People v. Parnell, 16 Cal. App. 4th 862, 875 (1993).

Assuming a case in which a helmet law citation or correctable violation might properly issue, that is, where the three pronged test of Bianco would permit it, this Court of Appeals opinion is unclear whether it intends to deny the criminal defendant the right to trial on the existence of an exception to the correctability statute.

The Court states: "...the Legislature indicated its preference for a flexible, fact-based, case-by-case approach to the enforcement of equipment regulations and the issuance of "fix-it" tickets instead of a rigid classification of correctable and non correctable violations."

The Court goes on to state: "Section 40303.5 unambiguously places *sole authority and responsibility* for making such determinations on the arresting officer, and the statute envisions that the officer will do so in deciding whether to take further enforcement action by issuing a citation."

The Court goes further to state: "The statute does not, however, require that the officer make written findings. Generally, absent evidence to the contrary, *we presume that "official duty has been regularly performed"* (Evid. Code, Section 664), and this presumption applies to law enforcement officers, except on the issue of the lawfulness of a warrantless arrest."

And the Court states elsewhere in the opinion: "*We reject this claim insofar as it suggests that either the trial court or this court has the authority to make factual findings concerning disqualifying circumstances*, especially factual findings based on the information not known to an officer at the time a citation was issued."

In the present case the Court also applies an inconsistent standard, on the one hand relying on its implied fiction that the law enforcement officers here considered and found the existence of an exception, and then finding, contrary to the findings of fact of the lower court, that the evidence supported the supposed implied finding. "Here, the officers did not issue 'fix-it' tickets to Quigley, and therefore the standard citations that were issued *imply findings* that in driving his motorcycle without a proper safety helmet, Quigley presented an immediate safety hazard to himself. *As noted, the record reveals that Quigley was driving either without a helmet or with a fabric baseball cap. Such circumstances unquestionably support each officer's implicit finding of a safety hazard and decision not to issue a 'fix it' ticket.*"

It is unclear under the Court's decision, whether motorcyclists who are issued citations be permitted the right to trial specifically to challenge the officer's "implied" factual basis for the exception to the correctability statute on which the officer issued the citation Under the Court's decision it is also unclear whether the trial court will be "authorized" to consider the evidence adduced by both sides in determining whether an exception applied and a citation was properly issued instead of a correctable violation.

The Court should make this plain in the decision so that motorcyclists will know whether they may challenge citations on the grounds that the law enforcement officer lacked factual grounds for finding an exception to the correctability statute. Furthermore, the lower Courts must be advised in clear language whether they shall be henceforth deprived of "authority" to render decisions based on the evidence that the officer's "implied" determination that one of the three exceptions to the correctability statute applies as grounds for proper issuance of the citation..

In answering these questions the Court should consider whether it's decision will comport with constitutional requisites of due process. The determination whether a helmet law violation shall result in a citation or correctable violation certainly results in a "taking" in the nature of a penalty enhancement. Correctable violations contemplate payment of a $10 fine; citations for violation of the helmet law involve an enhanced penalty, reflected in a $135 fine. The "taking" contemplated by the issuance of a citation rather than a correctable violation is $125, and the only contemplated basis under the law for the penalty enhancement is the officer's finding of the existence of one or another of the exceptions to the correctability statute. If the Court shall conclude that it considers it consistent with due process that the motorcyclist shall be denied the right to challenge the officer's finding of the existence of an exception to the correctability statute, or if the Court shall conclude that our trial courts and appellate courts lack the "authority" to consider such a challenge, then the Court should suggest the basis on which it concludes that this procedure comports with due process and the accused's right to trial.

5. The Court's Assumption That the Officers In The Four Cases Considered The Correctability Statute and Concluded that the Fabrication of Mr. Quigley's Helmet Gave Rise to an "Immediate Safety Hazard" is a Fiction Unsupported By the Record.

All of the officers testified in the lower court, leading to the trial court's determination that no exception to the correctability statute applied, and hence to the trial Court's order that Mr. Quigley follow the procedures to correct his ticket with the CHP. The officers' testimony was preserved in an official court recording which apparently the Attorney General did not ask to be transcribed or chose not to make a part of the record on this Petition for Writ of Mandamus.

The Attorney General's failure to provide this Court a complete record, including specifically the transcript of testimony of the officers as to their bases for issuing citations, has put this Court in the untenable position of rejecting the trial court's findings without the benefit of the evidentiary record which this Court solves by creating the fiction that the officers considered the exceptions to the correctability statute and that they found that one or more of the exceptions applied. The fiction is judicial fantasy in this case, as is made abundantly plain in the trial court's review of the evidence and factual findings set forth in Judge Barton's August 16, 2006 order, judicially noticed by this Court at footnote 2. Furthermore, this Court's assumption that the CHP will consider the exceptions to the correctability statute in the future is a fiction contrary to all facts and all judicial findings of fact pertaining to CHP policy and practice enforcing the helmet law, including the CHP's flagrant policy and practice of violating of the Easyriders injunction.

The CHP's written policies, it's officer training and it's practices to refuse to adhere to the law articulated by Buhl and Bianco has been the subject of judicial findings after evidentiary trial by the lower court herein, set forth in its August 16, 2006 order; and this despite that ten years earlier to the day, on August 16, 1996, the United States Court of Appeals upheld the federal district court's injunction based upon the identical factual findings that the CHP was illegally refusing to comply with the California helmet law as interpreted by Buhl and Bianco. The United States Court of Appeals upheld the federal district court's injunction prohibiting the CHP from illegally issuing helmet tickets without probable cause to believe either that the helmets were not DOT labeled by the manufacturer at the time of sale, or that the helmets were labeled and that the motorcyclists have "actual knowledge of a showing of a determination of non-conformity with federal standards." Ten years later, the CHP has not altered its policies or practices, continuing to issue illegal helmet tickets in violation of the California law as interpreted by Buhl and Bianco. Indeed, all factual findings with regard to the CHP's illegal policies and helmet law enforcement practices make a mockery of this Court's observation: "Generally, absent evidence to the contrary, *we presume that "official duty has been regularly performed"* (Evid. Code, Section 664)" There is no evidence before this Court that the CHP has ever once "regularly performed" its "official duty." There is only evidence that the CHP rejects its official duty when it comes to the enforcement of the California helmet law.

The Ninth Circuit Court of Appeals opinion in Easyriders states: "Having reviewed the record, the district court concluded that 'the CHP has a *clear official policy* of allowing officers to stop motorcyclists and issue citations for substandard helmets based on the officer's *subjective opinion* of whether the helmet would, if tested, conform to federal safety standards.' In addition the district court found that '*the CHP has a clear official policy of allowing officers to cite for allegedly substandard helmets regardless of whether the officer has reason to believe that there has been a determination of noncompliance with [Standard 218] or that the motorcyclist has knowledge that the helmet has been determined not to comply with [Standard 218].*'"

It was on this factual basis of clearly illegal CHP policies and practices in violation of this Court's interpretation of the California law in Buhl and Bianco, and in violation of the 4th and 14th Amendments of the United States Constitution, that the United States Court of Appeals affirmed its injunction prohibiting the CHP from issuing further citations, inter alia, without probable cause to believe that the motorcyclist is aware of a showing of determination that the helmet is noncompliant with FMVSS 218. That United States Court of Appeals decision was filed on August 16, 1996. Ten years later, on August 16, 2006, the honorable Judge Barton filed his opinion after evidentiary trial citing the identical unchanged policies, and pattern and practice of CHP illegal enforcement, now not only in violation of the Buhl and Bianco Court of Appeals decisions, but also clearly in violation of the Easyriders injunction.

Indeed, for evidence of the fact that the CHP has maintained that policy of illegally issuing helmet tickets based on subjective conclusions about helmet fabrication, without regard to the fact that the helmet contains a manufacturer's DOT label, and despite that the officers have no reason to believe that there has been a determination of non-compliance, or that the motorcyclist has actual knowledge of a determination of non-compliance, the Court need look no further than the citations issued by the CHP in this case. Mr. Quigley was wearing a helmet which bore the manufacturer's DOT label at the time of his arrests. From the manner in which the DOT label was affixed, it was obvious that it was affixed by the manufacturer. The helmet has never been determined to be non-compliant with FMVSS 218 either by NHTSA or an independent laboratory, and at no time did the CHP or the prosecutors claim that it had. Furthermore, there was no evidence that Mr. Quigley had any actual knowledge of any non-

existent determination of non-compliance. It is patent that the tickets were issued solely on the CHP officers subjective conclusions with regard to qualities of the helmet's fabrication in violation of Buhl and Bianco and also clearly illegally, in violation of the Easyriders injunction.

This is furthermore not an isolated case. This practice of illegally issuing helmet citations is precisely what the Federal District Court and United States Court of Appeals ten years earlier found was the CHP's policy and practice before it issued its injunction. Ten years later, the CHP policy manuals remain unchanged since before the Easyriders decision, and the CHP practices remain the same, making plain that the CHP has capriciously continued with its illegal policies and practices not only in violation of Buhl and Bianco but flagrantly in violation of the federal court injunction.

These are not just contentions based on the undisputed facts of these cases, these are also the factual findings of the lower court, forming the foundation for its August 16, 2006 order holding the helmet law void for vagueness "as applied" by the California Highway Patrol.

In that opinion, judicially noticed by this Court, the honorable Judge Barton summarized the evidence:

> "Throughout the litigation of these cases, the prosecution did not provide any evidence that the California Highway Patrol had adopted any regulations whatsoever, pursuant to section 27802, other than the requirements imposed by FMVSS 218 -- performance standards, not model specifications -- which according to the Buhl doctrine, cannot be applied to consumers.
>
> "By contrast, the defendant provided ample evidence that the CHP had, for the purposes of their in-house training, and training of their allied agencies, equated compliance with FMVSS 218 with "DOT approved," and stated that in order to comply with the helmet law, motorcyclists must wear a "DOT approved" helmet (or at least an approved helmet). However, FMVSS 218 clearly provides nothing by way of authority to approve helmets. The Federal government, in fact, has stated in its interpretive letters, that the government does not approve helmets, that FMVSS 218 does not approve helmets, and that the phrase "DOT approved" has no meaning in fact or in law. (NHTSA counsel letters.)
>
> "Additionally, CHP training instilled the belief in vehicle code enforcement officers throughout the State that they *could tell by looking* whether a given helmet was *approved* for use in California -- the presence of a certification of compliance (the "DOT" symbol) the only requirement noted by the Buhl court, notwithstanding.
>
> "*The requirement of Buhl that the headgear bear a certification of compliance was neither accepted by the citing officers nor the prosecution as evidence of compliance, nor did the prosecution offer any evidence that the rebuttable presumption created by the presence of the DOT label on the defendant's headgear had been rebutted by a manufacturer's recall, a determination of noncompliance by NHTSA or evidence that the headgear had been tested by an independent testing laboratory, and failed, as required by Bianco.*
>
> "*The evidence of how the statute was implemented was substantiated by the testimony of the citing officers and confirmed by the prosecution's theories of the case(s) throughout the proceedings.*"

The Court held that it was proved to the Court's satisfaction "*that issuance of the eight*

citations for wearing headgear bearing a certification of compliance with federal standards, violated the injunction issued by the Federal Court in Easyriders, thereby violating the defendant's Forth Amendment rights as described in Easyriders."

In its "Order After Hearing, the Court held, "*Although the [helmet] statutes have been found to be constitutional by the Buhl, Bianco and Easyriders courts, the law in question is not being applied in the manner contemplated by those courts. For certain, the helmet law is not being applied by the CHP and their allied agencies as contemplated by the Easyriders injunction.*"

Given the findings of fact after evidentiary trial, set forth by the federal district court in its opinion and accepted by the United States Court of Appeals in Easyriders, supra, as fully sufficient ground to issue its injunction against the CHP ten years earlier; and now in the lower court's identical findings of the CHP's continuing, unchanged illegal policies, training and practices to ignore the California Court of Appeals decisions in Buhl and Bianco, and one step more illegal, now in violation of the Easyriders injunction; on what possible basis does this Court "infer," contrary to the trial court's findings in this case, that the CHP officers who cited Mr. Quigley considered the exceptions to the correctability statute at all. During this time CHP didn't consider that the correctability statute applied to helmet law violations. Indeed the CHP's regulations, policies and training make plain that the officers were to consider nothing of the kind

The Court's opinion suggests that this fiction of an "implied finding" that an exception applies shall be inferred solely from the fact that the CHP officer issues a citation. The Court goes further to relieve the officer of any obligation even to set forth the basis for his fictional finding of an exception, and then suggests further that the appellate court and trial court do not have the "authority" to question the fictitious finding. All despite the fact that this "implied finding" flies directly in the face of everything that every court which has heard the evidence has concluded about the arbitrariness and unlawfulness of the CHP's policies and practices when it comes to the enforcement of the helmet statute.

The Court must not infer that the CHP considered the correctability statute at all in this case, because to do so would make a mockery of truth as the foundation for justice, and denigrate the trial court's findings of fact after trial based on the officers testimony and its consideration of the evidence of the CHP policies, training, and practices, without any evidence before this Court upon which to contradict it.

Conclusion.

The Court of Appeals decision insofar as it finds that the helmet law falls within the correctability statute is well reasoned and eloquently substantiated by its discussion of the legislative intent. However, the Court's use of language in the opinion suggesting that it is appropriate for the California Highway Patrol officer to conclude that a DOT labeled helmet is an "improper helmet," and issue helmet citations, based solely upon the law enforcement officer's subjective assessment with regard to the fabrication of a helmet can only be seen as clear and unambiguous rejection of the holding of the Court of Appeals in Buhl. The Court's holding that the citations were properly issued despite that there was no evidence that Mr. Quigley's helmet was determined by NHTSA or an independent laboratory to be noncompliant with FMVSS 218, or that Mr. Quigley was aware of any such nonexistent determination, unambiguously flies in the face of the Court of Appeals decision in Bianco. The Court's language finding that the CHP's issuance of the citations was proper also suggests complete disrespect for the federal court

injunction in effect at the time of these citations, prohibiting CHP from issuing helmet citations without probable cause to believe, inter alia, that the motorcyclist was aware of a NHTSA or independent laboratory determination of noncompliance.

The Court of Appeals decision that Mr. Quigley violated the helmet law, despite that Buhl and Bianco were the law of this State at the time that he was cited riding with DOT labeled headgear, without knowledge of any nonexistent determination of noncompliance, requires that the Court retroactively overrule Buhl and Bianco and retroactively overturn the federal court injunction. Mr. Quigley had the right to rely upon the helmet law as it was interpreted by controlling the Court of Appeals decisions at the time of his arrests, and rely upon the federal injunction, which prohibited the CHP from making these illegal arrests. We submit that the retroactive revision of the California helmet law to uphold the citations before the Court clearly violates Mr. Quigley's due process rights, and cannot cure the CHP's violation of his right against illegal arrest without probable cause as guaranteed by the United States Constitution and Easyriders.

If this Court intends, as it suggests by the language of its opinion, to overrule Buhl and Bianco, and undermine the federal court injunction, then the Court should do so explicitly. The Buhl and Bianco decisions were found necessary by the Courts of Appeals in order to interpret the California helmet law to avoid the constitutional infirmity that otherwise the helmet law would be void for vagueness. If it is this Courts determination to overturn Buhl and Bianco, then the Court must, to comport with due process, set forth a "fabrication standard" in terms more clear and specific than "proper helmet" to provide the motorcyclist clear notice of what it is that he must do to comply with the law. And the Court must also set forth clear standards for application of the law to avoid arbitrary CHP enforcement practices. If the Court chooses only to reject the Buhl and Bianco standards, without providing clear standards to replace them, then the Court will with certainty render the helmet law void for vagueness as written.

If this Court shall maintain its holding that the use of an "improper helmet" "certainly" constitutes an "immediate safety hazard," then the main body of the Court's opinion is an exercise in futility, as the exception automatically negates the rule in every case in which the rule would apply. If the Court adopts a "relative safety" rule under which the law enforcement officer is to determine from the qualities of a particular noncompliant helmet whether it is "too unsafe," the Court again invites arbitrary enforcement, indeed such a rule could only be applied arbitrarily given the CHP officer's complete lack of any of the education in engineering or medicine essential to make that kind of determination. The only way that it can be reconciled that the helmet law falls within the correctability statute, as it must, consistent with the unambiguous legislative intent, is to recognize that determinations of "immediate safety hazard" must be made on the basis of findings within the sphere of the CHP officer's expertise. We have suggested that such a determination might be made upon the officer's conclusion that the rider was operating the motorcycle in an unsafe manner. The Court might arrive at a different criterion. But the standard cannot be that the helmet is "improper" or noncompliant with FMVSS 218; nor may it be based upon the fabrication of the helmet or another standard outside the law enforcement officer's expertise.

If this Court of Appeals decision shall be published in its present form it will indeed cause havoc in the trial courts where the judges will no longer be permitted to rely on the rebuttable presumption of compliance from the DOT label or the guidance of the of the Bianco three pronged test setting forth with specificity the grounds by which the presumption can be

rebutted. Now the trial courts will be required to inspect the helmets and draw their own incompetent conclusions with regard to whether each helmet's fabrication renders it vaguely "improper." This will certainly lead to inconsistent judgments in the trial courts, and may indeed lead to findings that helmets not in compliance with FMVSS 218 are compliant, misleading the motorcyclist to continue to use his noncompliant helmet, or indeed to rulings that helmets compliant with FMVSS 218 are noncompliant.

If an officer issues a citation rather than a correctable violation on the basis that the helmet's fabrication creates an "immediate safety hazard" the trial court will now also be put in the additional untenable position of judging the "relative safety" of the presumed noncompliant helmet. If CHP officers issues a helmet citation telling the rider he doesn't qualify for a correctable ticket because he looks like a repeat offender, the Courts may consider that they compelled to deny the motorcyclist the right to introduce his clean driving record in rebuttal as it appears mandated by this Court's holding that the trial court is not "authorized" to question the CHP officer's finding of an exception to the correctability statute.

In the present case, the Court should deny the writ on the basis that there is no evidence that any of the exceptions to the correctability statute apply. The Court should acknowledge that arbitrary subjective and unqualified law enforcement officer assessments about the qualities of fabrication of a noncompliant helmet may not be used to justify a finding of "immediate safety hazard" and that there is no other competent evidence that Mr. Quigley posed an immediate safety hazard. The Court should conclude further that there is no evidence before the Court that Mr. Quigley was guilty of "persistent neglect" since all previous citations referred to by the CHP in its briefs were clearly illegally issued citations for riding with a DOT labeled helmet which had never been determined of noncompliant with FMVSS 218.

The only scofflaw here is the CHP, refusing to comply with Buhl and Bianco, and flagrantly violating the Easyriders injunction. This is the unambiguous conclusion of the federal courts in Easyriders following evidentiary trial and the unambiguous conclusion of the lower court after evidentiary trial. The Court must reject the CHP's efforts to legalize their pattern and practice of illegally enforcing the California helmet statute. The Court must not join the CHP in the abandonment of due process of law.

Respectfully submitted,

June 5/07

Raymond L. Henke

DECLARATION OF SERVICE BY MAIL

Case name: Californi Highway Patrol v. Superior Court of the State of California, County of Santa Cruz, et al.

Court of Appeals of the State of California, Sixth Appellte District

Case No.: H029406 (Santa Cruz County Superior Court Nos.: 4SM21812; 4WM023363; 4SM023894; 4SM028271 and 4SM044470)

I declare:

I am an attorney at law duly licensed to practice before the Courts of the State of California. I am over the age of 18 and not a party to this matter. I am familiar with the business practice at the Law Office of Raymond L. Henke for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Henke Law Office is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 4, 2007, I served the attached AMICUS LETTER by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Law Office of Raymond L. Henke, 836 Hilldale Avenue, West Hollywood CA, 90069, addressed as follows:

SEE ATTACHMENT OF PARTIES BEING SERVED.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was issued on May 4, 2007 at West Hollywood, Los Angeles County, California.

Raymond L. Henke, Declarant

ATTACHMENT - DECLARATION OF SERVICE BY U.S. MAIL

California Highway Patrol v. Superior Court of the State of California, County of Santa Cruz, et al.

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Case No.: H029406 (Santa Cruz County Superior Court Nos.: 4SM21812; 4WM023363; 4SM023894; 4SM028271 and 4SM044470)

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