IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOHN ST. CROIX, EXECUTIVE DIRECTOR, SAN FRANCISCO ETHICS COMMISSION; and SAN FRANCISCO ETHICS COMMISSION,

Petitioners and Respondents,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent and Appellant.

ALLEN GROSSMAN,

Real Party in Interest.

After a decision by the Court of Appeal First Appellate District, Division One Case No. A140308, San Francisco Superior Court Case No. CPF13513221, The Honorable Ernest H. Goldsmith

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REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

Respondents John St. Croix and San Francisco Ethics Commission's Answer to the Petition for Review submitted by Real Party in Interest Allen Grossman (Grossman or Petitioner) confirms the significance of the issues raised, and the importance of action by this Court. For the reasons set out in his Petition and below, Grossman respectfully requests that review be granted here.

II. ARGUMENT

A. THE COURT SHOULD CORRECT THE IMPROPER EXPANSION OF THE ATTORNEY-CLIENT PRIVILEGE

Respondents' Answer to the Petition for Review exemplifies the legal error below which, if left uncorrected, would impermissibly expand the scope of the attorney-client privilege while limiting the protections of California's Public Records Act (Gov. Code § 6250 et seq.; hereafter the CPRA). Most importantly, the Answer glosses over the express and inherent errors in the Court of Appeal's construction of the interplay between the attorney-client relationship and a law requiring that municipal officials make certain communications with their attorneys publicly accessible. Those errors implicate not just the narrow issue submitted for decision, but California's broader jurisprudence concerning the attorney-client privilege, particularly as it applies in the public sector where the voters are the ultimate source of authority.

First, the decision below concludes that the San Francisco City Charter "incorporates" the attorney-client privilege. To the contrary, the Charter says nothing at all about the privilege. It merely creates an office of the City Attorney, who is designated to act as counsel to the City and its officials. (See S.F. Charter, § 6.102.) It is uncontroverted that the relationship between the City Attorney and city officials is such that communications between the two may give rise to the privilege. Absent more, requests for and the provision of confidential legal advice between the two are entitled to protection. That is not the same, however, as a conclusion that the attorney-client privilege is "incorporated" into the City Charter. Nothing in the record supports the conclusion that the voters of San Francisco intended to go beyond the straightforward designation of a municipal attorney, and nothing in the Court of Appeal's opinion supports its expansive reading of the Charter's silence regarding privilege. (See *Rando v. Harris* (2014) 228 Cal.App.4th 868, 881 [175 Cal.Rptr.3d 733] (noting that "voter intent is the paramount consideration in interpreting a charter provision").)

That initial error leads to a second: the establishment of an attorney-client relationship does not prohibit the city's voters from imposing other obligations on their officials that might limit the scope of the attorney-client privilege. In the circumstances here, the Sunshine Ordinance requires that certain communications on a narrow range of topics be conducted outside

the bounds of confidentiality (and thus, outside the privilege). By misreading the Charter as "incorporating" the attorney-client privilege, the Court of Appeal precluded the city's voters from imposing on their own officials any restriction that might place an even incidental limitation on those officials' absolute right to maintain the confidentiality of all communications with their attorneys. That error should be corrected.

Finally, the Court of Appeal's holding rests on an inappropriately expansive interpretation of the necessity of confidentiality to the attorney-client relationship. If not all advice from an attorney need be provided confidentially, the internal logic of the decision below cannot stand because the Charter and Sunshine Ordinance are not in conflict. The Sunshine Ordinance's requirement that certain communications between an attorney and client remain publicly accessible is entirely ordinary, and municipal lawyers are routinely called upon to render advice in publicly accessible settings. The desirability of public access to information concerning governmental dealings is enshrined in this state's constitution, and the voters of a municipality are entitled to preference such public access over the benefits of confidentiality in the attorney-client relationship. It is not the province of the courts to second-guess that balancing, especially in California, where the attorney-client privilege is entirely a legislative creation.

To leave the Court of Appeal's decision uncorrected would enshrine as binding precedent its dangerous over-reading of the attorney-client privilege. The immediate effect, as here, would be to restrict voter initiatives pursuant to the CPRA seeking to rebalance the competing values of attorney-client confidentiality and access to public records. But the Court of Appeal's conclusion conflating this Court's precedents commenting on the "fundamental" nature of confidentiality to the attorney-client relationship with a mandate that all communications with an attorney remain confidential would threaten a broad scope of laws limiting the attorney-client privilege. That error should be corrected.

B. THE PETITION RAISES A REVIEWABLE ISSUE OF SUBSTANTIAL SIGNIFICANCE

The direct and immediate impact of the Court of Appeal's decision is to negate a key provision of an initiative enacted by the voters of San Francisco—one of this state's largest municipalities. Respondents concede that the holding will also impact a virtually identical provision in Vallejo but quibble about distinctions that might be drawn in other jurisdictions with similar public records laws.

The impact on San Francisco and Vallejo is sufficient for this Court to grant review. (See, e.g., *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853 [118 Cal.Rptr.2d 746] (reviewing a Los Angeles County ordinance affecting a gun show held only in the City of

Pomona); *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165 [105 Cal.Rptr.2d 214] (reviewing an initiative ballot measure from the Sierra Madre city council); *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644 [209 Cal.Rptr. 682] (reviewing a Berkeley city rent control ordinance that affected approximately 23,000 units).) That the above-cited authority resolves local issues further demonstrates that the Answer is wrong to suggest that this Court can or should only review matters that apply to the entire state. (Answer, p. 3.)

Review is particularly appropriate here in light of the constitutional significance afforded the right of access to public records. That other jurisdictions' laws requiring some disclosure of public officials' attorney-client communications may be framed in slightly different ways does not mitigate the risks posed should the error below become precedent.

C. THE CONSTITUTION'S RULES OF CONSTRUCTION APPLY TO THE ATTORNEY-CLIENT PRIVILEGE

The Answer suggests that the Constitution's rules of construction, which support disclosure, do not apply to the attorney-client privilege. (Answer, pp. 7-8.) In support, Respondents cite Article I, section 3(b)(5) which provides that the rule of construction "does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision."

Section 3(b)(5) has no bearing on this petition. Grossman does not seek to repeal or nullify any statute, including Evidence Code section 952. To the contrary, Respondents seek to invalidate a key provision of the Sunshine Ordinance, while Grossman advocates a position that would allow that law to stand in parallel with the charter provisions at issue. Section 3(b)(5) is not triggered, leaving the Constitution's rules of construction in full effect.

D. THE ANSWER'S INTERPRETATION OF THE CHARTER WOULD VIOLATE THE HOME-RULE PRINCIPLE

California's Constitution limits charter cities' ability to depart from statewide law. It does so via the "home-rule principle," which confirms that charter cities "shall be subject to general laws" except with regard to "municipal affairs." (Cal. Const., art. XI, § 5, subd. (a).) As implemented, the home-rule principle further limits charter cities' ability to regulate municipal affairs where a state statute targets a statewide concern and is reasonably related to resolution of that concern. (*State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 556 [143 Cal.Rptr.3d 529].)

The CPRA provides that "[e]xcept as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for . . . greater access to records than prescribed by the minimum standards set forth in this chapter." (Gov. Code § 6253, subd. (e).) The term "state or

local agency" is broadly defined to include public groups of every size from charter cities to individual commissions or agencies. (Gov. Code § 6252, subd. (a).) The CPRA further establishes that access to public records is "a fundamental and necessary right of every person in this state." (Gov. Code § 6253.) The CPRA thus establishes both that access to public records is a statewide concern within the meaning of the home-rule principle and that "a state or local agency" may "allow for . . . greater access," in any legal manner. (Gov. Code § 6253, subd. (e).)

Despite this, the Answer suggests that San Francisco's charter limits the methods available for city agencies to expand access. Indeed, the Answer argues that "the voters can require the City to waive attorney-client privilege for certain categories of advice by adopting a Charter amendment" but not an ordinance. (Answer, p. 8.) Not only is the San Francisco Charter silent on the Sunshine Ordinance's disclosure mandate (see discussion *supra*), a charter provision containing a clear and explicit restriction on the right to expand access contained in the CPRA would be invalidated by the Constitution's home-rule principle.

III. CONCLUSION

Petitioner's issue, which is squarely presented, raises an important legal question that is appropriate for the Court's review. Grossman respectfully requests that his petition for review be granted.

DATED: October 6, 2014

Respectfully submitted,

KERR & WAGSTAFFE LLP

By 

Frank Busch

Attorney for Real Party in Interest
ALLEN GROSSMAN

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rules of Court, rules 8.204(c)(1) and 8.504(d)(1), I certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 1,924 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct.

DATED: October 6, 2014

KERR & WAGSTAFFE LLP

By _____
FRANK BUSCH

Attorney for Real Party in Interest
ALLEN GROSSMAN

PROOF OF SERVICE

I, Caroline Dwyer, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 101 Mission Street, 18th Floor, San Francisco, California 94105.

On October 6, 2014, I served the following document(s):

REPLY IN SUPPORT OF PETITION FOR REVIEW

on the parties listed below as follows:

Dennis J. Herrera City Attorney Andrew Shen Joshua S. White Deputy City Attorneys 1 Dr. Carlton B. Goodlett Pl. City Hall, Room 234 San Francisco, CA 94102	California Court of Appeal 1st Appellate District, Division 1 350 McAllister Street San Francisco, CA 94102
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By first class mail by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 6, 2014 at San Francisco, California.

C. Dwyer

Caroline Dwyer