COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ________

JOHN ST. CROIX, EXECUTIVE DIRECTOR, SAN FRANCISCO ETHICS COMMISSION; and SAN FRANCISCO ETHICS COMMISSION, Petitioners/Respondents, vs. SUPERIOR COURT OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO, Respondent/Appellant.	Case No. ______________ San Francisco County Superior Court No. CPF-13-513221 **EMERGENCY RELIEF REQUESTED**
ALLEN GROSSMAN, Real Party in Interest.	

PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION [CALIFORNIA GOVERNMENT CODE SECTION 6259(c)]

The Honorable Ernest H. Goldsmith

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208.

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with person or entity information if necessary.

Dated: November 22, 2013

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INTRODUCTION

Under the San Francisco Charter, the City Attorney is responsible for providing candid, confidential legal advice to the Mayor, the Board of Supervisors, and the City's various agencies and commissions. For over a century the City Attorney's Office has fulfilled these duties by advising its clients subject to the attorney-client privilege and attorney work product protection.

In 1999 the San Francisco voters enacted an ordinance that, among other things, purports to prevent the City Attorney's clients from asserting privilege with respect to certain issues. But it is beyond dispute that an ordinance cannot trump the provisions of a city charter, any more than a state statute can trump the California Constitution. If the voters wish to withdraw the attorney-client and attorney work product privileges from the City or its constituent agencies, they may only do so by amending the Charter.

Notwithstanding this, the Superior Court ordered the City to turn over written, privileged communications between the City Attorney's Office and one of its clients to a local resident. The only reason the Superior Court provided in its ruling was that the 1999 ordinance purports to eliminate the attorney-client and attorney work product privileges for those documents. Although the City's principal argument was that the 1999 ordinance is invalid because it conflicts with the Charter, the Superior Court ordered the City to disclose the documents without so much as considering this fundamental issue. The Superior Court insisted that the Charter argument was not before it, even though both sides agreed that it was, as reflected in the City's opposition brief, the other side's reply to the City's opposition and the dialogue at the hearing.

The Superior Court's refusal to consider the City's primary argument is inexplicable, and its decision to require the City to disclose privileged attorney-client communications is indefensible. The confidentiality of communications between attorney and client are to be jealously guarded, not blithely waived away. Under the expedited appeal process set forth by Government Code section 6259(c) for California Public Records Act matters, the Court should issue a writ ordering the Superior Court to set aside its ruling.

PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION

A. Relief Requested

1. By this verified petition, John St. Croix, Executive Director of the San Francisco Ethics Commission, in his official capacity, and the San Francisco Ethics Commission (referred to collectively as "the City"), defendants/respondents in *Grossman v. St. Croix, et al.*, San Francisco Superior Court Case No. CGC-13-513221 ("the Action"), seek a peremptory writ of prohibition and/or mandate or other extraordinary writ compelling the Superior Court of San Francisco County (Honorable Ernest H. Goldsmith) to set aside its ruling granting a petition for a writ of mandate in favor of Real Party in Interest Allen Grossman and instead to deny Grossman's petition for a writ of mandate and other requested relief.

B. Jurisdiction and Timeliness

2. This Court has jurisdiction over this matter under California Rule of Court 8.486. The City has a beneficial interest in the outcome of this case, which challenges the Superior Court's issuance of a writ of mandate against the City. On October 29, 2013, the Superior Court filed and served its order.

3. California Government Code section 6259(c) provides an expedited appeal process for California Public Records Act disputes:

> In an action filed on or after January 1, 1991, an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ. Upon entry of any order pursuant to this section, a party shall, in order to obtain review of the order, file a petition within 20 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the notice is served by mail, the period within which to file the petition shall be increased by five days.

Pursuant to section 6259(c), the City filed its petition 24 days after the Superior Court served its order by mail. (*See State Department of Public Health v. Superior Court* (2013) 219 Cal.App.4th 966, 972 n.5 [under section 6259(c), 25-day deadline for writ petition when notice of ruling served by mail].)

4. In enacting section 6259(c), the Legislature intended to replace "review by direct appeal with review by extraordinary writ" in order "to expedite the process and thereby to make the appellate remedy more effective." (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113.) And "[w]hen an extraordinary writ proceeding is the only avenue of appellate review, a reviewing court's discretion is quite restricted." (*Id.* at 113-14.) Thus, under 6259(c), "an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner." (*Id.* at 114.)

C. Authenticity of Exhibits

5. All exhibits that accompany this petition are true and correct copies of original documents on file with Respondent Superior Court and the transcript of the hearing on Grossman's petition for a writ of mandate. The exhibits are incorporated herein by reference as though fully set forth in this petition. The City is also filing a Request for Judicial Notice in connection with this petition, and the documents attached thereto are incorporated herein by reference as though fully set forth in this petition.

D. The Parties

6. Petitioners are the Executive Director of the San Francisco Ethics Commission John St. Croix in his official capacity, and the San Francisco Ethics Commission. Petitioners were the named defendants/respondents in the Action.

7. Respondent is the Superior Court of the State of California for the County of San Francisco.

8. Real Party in Interest is Allen Grossman, plaintiff/petitioner in the Action.

E. The Proceedings Below and Supporting Documents Filed Herewith

9. On September 18, 2013, Grossman filed a verified petition for writ of mandate ("Petition"). A true and correct copy of the Petition is attached as Exhibit A to the City's Exhibits. As set forth in the Petition, on October 3, 2012, Grossman submitted a public records request, pursuant to the California Public Records Act and the San Francisco Sunshine Ordinance, to Petitioner St. Croix for (1) all drafts and versions of the Ethics Commission's regulations for enforcement of Sunshine Ordinance violations, and (2) all documents relating to the preparation and review of those regulations, *including any communications with the City Attorney's*

Office. (*See* Exhibits in Support of Petition ["Exh."] A at 6 [emphasis added].) On October 12, 2012, the Ethics Commission provided Grossman with 127 documents, six of which were partially redacted. (*Id.* at 22-23, 50.) At that time, the Ethics Commission withheld additional documents responsive to Grossman's request, citing attorney-client privilege and attorney work-product as the bases for withholding. (*Id.* at 6, 22-23.)

10. On September 18, 2013, Grossman filed his Petition and a Memorandum of Points and Authorities in Support of his Petition, a true and correct copy of which is attached as Exhibit C. Grossman's primary argument was that the City could not withhold those privileged documents because under Sunshine Ordinance section 67.24(b)(1)(iii), "[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning" state and local open meetings, public records, and ethics laws were subject to disclosure. (*Id.* at 14-15, Exh. C at 76-77.)

11. On October 9, 2013, the City filed its opposition, a true and correct copy of which is attached as Exhibit D. The City's opposition principally argued that the San Francisco Charter establishes that the attorney-client and attorney work product privileges apply to communications between the City Attorney's Office and City officials and departments, and that the Charter trumps the Sunshine Ordinance provision purporting to limit those protections. That argument was the subject of the first paragraph of the introduction to the City's brief, and appeared at pages five through nine of the discussion section. (Exh. D at 87, 91-95.) In support of its opposition, the City filed the Declaration of Andrew Shen, a true and correct copy of which is attached as Exhibit E; the declaration of John St. Croix, a true and correct copy of which is attached as Exhibit F; a

Request for Judicial Notice, a true and correct copy of which is attached as Exhibit G; and a Proof of Service, a true and correct copy of which is attached as Exhibit H.

12. The Declaration of Andrew Shen specified that the Ethics Commission had withheld 24 documents on the basis of attorney-client privilege and the attorney work product doctrine. (Exh. E at 104.) Of the 24 documents, 15 constituted requests from the Ethics Commission's staff to the City Attorney's Office for legal advice concerning the proposed regulations. (*Id.*) The nine remaining documents provided legal advice from the City Attorney's Office in response to those requests. (*Id.*) One of the nine documents is a May 6, 2010 memorandum to the Ethics Commission and the Ethics Commission's staff that analyzes the legal issues implicated by the proposed regulations. (*Id.*)

13. On October 15, 2013, Grossman filed his reply, a true and correct copy of which is attached as Exhibit I. In his reply, Grossman responded to the City's principal argument that the Charter prevailed over the Sunshine Ordinance. (Exh. I at 200-01.)

14. In his October 24, 2013 tentative ruling, Judge Goldsmith indicated that he would grant Grossman's petition for a writ of mandate. A true and correct copy of the tentative ruling is attached as Exhibit J. The tentative ruling stated that "Respondents have not met their burden that the withheld documents are exempt under the California Public Records Act and the San Francisco Sunshine Ordinance[]." (Exh. J at 203.) The tentative ruling further stated that under the Sunshine Ordinance, "public records regarding advice on compliance with, analysis of, and opinion concerning liability under, or any communication otherwise concerning the

CPRA or the Sunshine Ordinance are subject to disclosure," citing section 67.24(b)(1)(iii). (*Id.*)

15. The tentative ruling did not address the City's principal argument that the Charter establishes that attorney-client privilege and attorney work product applies to the City Attorney's communications with its clients, and that Sunshine Ordinance section 67.24(b)(1)(iii) is invalid because it is in conflict with the Charter.

16. The matter came on for hearing on October 25, 2013, and the transcript is attached as Exhibit M. Tracking the opposition brief, counsel for the City began by stating, "the crux of the City's argument in this case with respect to Mr. Grossman's petition is that the San Francisco charter establishes an attorney-client relationship between the City Attorney and all of the City's constituent officials and City departments." (Exh. M at 215 [Transcript at 2:15-19].) The City's counsel continued by arguing that "the Sunshine Ordinance provision cited by petitioner . . . conflicts with that charter obligation" and is "invalid." (*Id.* at 218 [Transcript at 5:7-9].) Despite this, Judge Goldsmith stated that he had not addressed the City's principal argument in his tentative ruling because "the fact that 67.24(b) conflicts with the City charter is just not before me" and was "not on my table." (*Id.* at 221, 229 [Transcript at 8:7-8, 16:18].) Further, Judge Goldsmith appeared to believe that the Sunshine Ordinance itself was a "charter amendment" rather than a mere ordinance – even though counsel for the City attempted to correct this misunderstanding. (*Id.* at 216-18 [Transcript at 3:20, 4:20-5:1].) At the conclusion of the hearing, Judge Goldsmith took the matter under submission. (*Id.* at 232 [Transcript at 19:6-20].)

17. On October 29, 2013, Judge Goldsmith filed his order granting Grossman's petition for a writ of mandate, attached as Exhibit K. Judge Goldsmith's order reiterated his tentative ruling with one addition, at lines 17-18, stating: "Respondents' request to strike SF Admin. Code §67.24(b)(1)(iii) is denied without prejudice, as the issue is not properly before this Court for the present motion." (Exh. K at 205.)

F. Basis for Relief By Writ

18. Government Code section 6259(c) provides an expedited appeal process for actions brought under the California Public Records Act: "an order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, . . . shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ." Section 6259(c) "expressly authorizes a writ as the sole and exclusive means to challenge the trial court's ruling" in California Public Records Act cases. (*MinCal Consumer Law Group v. Carlsbad Police Department* (2013) 214 Cal.App.4th 259, 263.) The legislative intent of this provision is to ensure that "the determination of the obligation to disclose records requested from a public agency be made expeditiously." (*Id.* at 265 [quotations and citation omitted].)

19. Charter section 6.102 imposes many duties on the City Attorney that require the provision of candid and confidential legal advice to City officials, including:

- "[r]epresent[ing] the City and County in legal proceedings";
- in certain circumstances, "[r]epresent[ing] an officer or official of the City and County";
- if "a cause of action exists in favor of the City and County, commenc[ing] legal proceedings";

- "[u]pon request, provid[ing] advice or written opinion to any officer, department head or board, commission or other unit of government of the City and County";
- "[m]ak[ing] recommendations for or against the settlement or dismissal of legal proceedings to the Board of Supervisors prior to any such settlement or dismissal"; and
- through a Claims Bureau, "investigat[ing], evaluat[ing] and settl[ing] for the several boards, commissions and departments all claims for money or damages."

(Exh. G at 183-84 [Charter § 6.102(1)-(5), (9)].) In establishing the City Attorney's Office and its duties, the voters necessarily intended that the Office carry out those tasks subject to the attorney-client and attorney work product privileges.

20. The Charter also provides that the City Attorney shall be subject to the "duties prescribed by state laws" for the office. (Request for Judicial Notice ("RJN"), Exh. B [Charter § 6.100].) State law imposes duties on the City Attorney – like all attorneys in California – to maintain the confidentiality of attorney-client communications, and to protect attorney-client privileged communications. (*See* Cal. Bus. & Prof. Code § 6068(e)(1); Cal. Evid. Code § 955; Cal. Rule of Prof. Cond. 3-100.)

21. The Charter, by setting forth the City Attorney's specific duties, also establishes that City officials and departments must have a City Attorney's Office that can carry out those prescribed responsibilities. Any ordinance impeding the duties assigned to the City Attorney's Office would therefore conflict with the Charter. (*See Scott v. Common Council of the City of San Bernardino* (1996) 44 Cal.App.4th 684, 695-97.)

22. For charter cities such as San Francisco, the charter is the City's "constitution" and the "supreme law of the municipality." (*Michael Leslie Productions, Inc. v. City of Los Angeles* (2012) 207 Cal.App.4th 1011, 1021.) An ordinance cannot trump an inconsistent provision of the Charter any more than a statute could overrule an inconsistent provision of the Constitution. (*See Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1034.) Under Grossman's reasoning, city agencies would be prevented from receiving confidential written advice from the City Attorney on a wide array of issues. Grossman's argument, if accepted, could prompt further efforts, by *ordinance*, to prevent the City from invoking attorney-client privilege on every other subject on which the City Attorney provides legal advice pursuant to its Charter obligations.

23. The Superior Court's ruling has created uncertainty about the ability of the City Attorney's Office to provide confidential legal advice to its clients. Because the Office provides legal advice on a daily basis and needs to ensure that it is taking proper measures to protect the confidentiality of its advice, the City respectfully requests that the Court promptly adjudicate this matter. To prevent any irreparable harm resulting from the Superior Court's order, the City has also concurrently filed a motion for an immediate stay pursuant to Government Code section 6259(c).

G. Prayer

WHEREFORE, Petitioners pray that:

24. The City prays that this Court issue a peremptory writ of mandate and/or prohibition or other extraordinary writ directing the Superior Court to:

(1) set aside and vacate its order granting a writ of mandate, and to enter a new order denying Grossman's petition for a writ of mandate;

(2) order that the City recover its costs incurred; and

(3) grant other such relief as may be just and proper.

Dated: November 22, 2013

Respectfully submitted,

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City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
VINCE CHHABRIA
Chief of Appellate Litigation
ANDREW SHEN
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By: s/Andrew Shen
ANDREW SHEN

Attorneys for Petitioners JOHN ST. CROIX, in his official capacity as Executive Director of the San Francisco Ethics Commission and SAN FRANCISCO ETHICS COMMISSION

VERIFICATION

I, Andrew Shen, declare as follows:

I am an attorney admitted to practice in the State of California. I was appointed to represent petitioners herein.

In my capacity as attorney for petitioners, I am making this verification on their behalf.

I wrote and have read and considered the foregoing Petition for Writ of Mandate/Prohibition and the Memorandum of Points and Authorities are within my knowledge, except as to those matters which are alleged therein on information and behalf and as to those matters, I believe them to be true.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed this 22nd day of November 2013, at San Francisco, California.

s/Andrew Shen
ANDREW SHEN

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

A. The San Francisco Charter Establishes The City Attorney's Office And Its Primary Duties.

The voters structured San Francisco's government through the Charter. The first modern Charter, adopted in 1932, was a ballot measure approved by the voters, and every Charter amendment proposed since then has been decided by the voters at the ballot box. (*See* Cal. Const. art. XI, § 3(a) [requiring voter approval of Charter amendments]; *see generally* Francis V. Keesling, San Francisco Charter of 1931 (1933).)

It is much more difficult for voters to amend the Charter than to enact an ordinance. This is not surprising, since the Charter is the City's foundational governing document. To place a Charter amendment on the ballot, the proponents of the measure must gather the signatures of ten percent of all of San Francisco's registered voters, or approximately 50,000 signatures. (*See* Cal. Elec. Code § 9255(b)(3).) An initiative ordinance requires far fewer signatures: a number equal to five percent of the votes cast for Mayor in the last mayoral election, presently about 9,700 signatures. (*See* RJN, Exh. E [Charter § 14.101].)

Through the Charter process, the voters decided from the very start that San Francisco should have an elected City Attorney charged with representing the City and its officials in legal matters. (*See* Exh. G at 183-85 [Charter § 6.102].) For decades, the elected City Attorney has played this role without any suggestion that the City Attorney's advice to its clients is not privileged.

The Charter lists some of the City Attorney's primary duties. Many of these Charter-mandated duties require that the City Attorney's Office provide candid and confidential legal advice to its clients, in litigation and

non-litigation contexts. Under the Charter, the City Attorney is required to "[r]epresent the City and County in legal proceedings with respect to which it has an interest." (*Id.* at 183 [Charter § 6.102(1)].) In certain circumstances, the City Attorney must also represent individual City officers and officials in litigation. (*Id.* at 184 [Charter § 6.102(2)].) When "a cause of action exists in favor of the City and County," the City Attorney may also "commence legal proceedings." (*Id.* [Charter § 6.102(3)].) The City Attorney is also the legal advisor to the City as a whole, providing oral and written legal advice to the Mayor and Board of Supervisors as well as City officers, department heads, boards and commissions.[1] (*Id.* [Charter § 6.102(4)].) The City Attorney must "[m]ake recommendations for or against the settlement or dismissal of legal proceedings to the Board of Supervisors prior to any such settlement or dismissal." (*Id.* [Charter § 6.102(5)].) The City Attorney must also review and approve as to form "bonds, contracts and, prior to enactment, all ordinances" as well as "examine and approve title to all real property to be acquired by the City and County." (*Id.* [Charter § 6.102(6)].) The Charter also requires the City Attorney to establish a Claims Bureau "to investigate, evaluate and settle for the several boards, commissions and departments all claims for money or damages." (*Id.* [Charter § 6.102(9)].)

In addition to these Charter-imposed duties, the City Attorney is responsible for the City's other legal affairs, such as drafting proposed legislation (in addition to approving such legislation as to form), reviewing

[1] The voters have also specifically designated the City Attorney as the legal advisor for certain City bodies. (*See* RJN, Exhs. C-D, F-G [Charter §§ 8A.100 (Municipal Transportation Agency); 13.104.5 (Elections Commission and Department of Elections); 15.102 (Ethics Commission); B3.585 (Port Commission)].)

and drafting regulations, and advising City officials, boards, commissions and departments on all aspects of their operations. (*See* Exh. E at 103.) The City Attorney's role is substantively broad as well. The City Attorney advises and represents the City and its constituent bodies and officials on an array of subjects, including transportation, energy and telecommunications, public utilities, public health, environment and land use, contracts, construction, real estate and finance, law enforcement, health and safety code enforcement, child and family services, ethics and campaign finance, elections, labor and employment, taxation and litigation of all kinds. (*Id.*)

In its role as legal counsel to City departments and officials, the City Attorney provides written advice to City employees and officers, either through formal memoranda or more informal means such as e-mails. (*Id.*) The City Attorney's Office generally provides its advice confidentially. (*Id.*) Communicating with clients in confidence is important because it encourages clients to confide in the City Attorney and provide all information that may be critical to the City Attorney's ability to give thorough and accurate advice. (*Id.*)

B. The San Francisco Sunshine Ordinance, And The 1999 Amendments Concerning Attorney-Client Communications.

In 1993, the San Francisco Board of Supervisors enacted the first version of San Francisco's Sunshine Ordinance. (*See* RJN, Exh. A [S.F. Admin. Code §§ 67.1-67.2].) The Sunshine Ordinance establishes the City's obligations to provide public access to meetings of City officials and to respond to requests for public records concerning the City's business, in addition to the requirements set forth by state law. The 1993 version of the

Sunshine Ordinance did not address the confidentiality of attorney-client communications. (*See* Exh. G at 155, 176.)

In 1999, a group of San Francisco voters prepared and advocated for amendments to the Sunshine Ordinance. (*See id.* at 155.) Because the 1999 amendments were a ballot measure, the City Attorney's Office did not draft any of its provisions. (*See* Cal. Gov. Code § 54964 [prohibiting local agencies from using public resources to support a ballot measure campaign].) Nor did the Office approve the 1999 amendments as to form.[2] The proponents of the measure gathered signatures from registered San Francisco voters to place these amendments before the voters, and the measure appeared on the ballot for the November 2, 1999 municipal election. (*See* Exh. G at 155.) The voters approved it. Section 67.24(b)(1)(iii) of the Sunshine Ordinance now provides that "[a]dvice on compliance with, analysis of, an opinion concerning liability under, or any communication otherwise concerning" state and local public meeting, public records, and ethics laws are subject to disclosure. (*See id.* at 176.)

C. Grossman's Public Records Request To The Ethics Commission For Privileged Materials, And The Documents Withheld.

The San Francisco Ethics Commission ("Ethics Commission") is a five-member body that oversees the City's campaign finance, lobbying, conflicts of interest, and governmental ethics laws. (RJN, Exhs. F, H [Charter §§ 15.100, C3.699-10].) The Ethics Commission's Executive Director, John St. Croix, and his staff carry out the department's day-to-day work. (*See id.*, Exh. F [Charter § 15.101].)

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[2] Approval "as to form" means that the legislation is in the proper format and that the substance of the proposal is not patently unconstitutional or otherwise clearly illegal.

The Sunshine Ordinance designates the Ethics Commission as one of the bodies with authority to enforce that Ordinance. (*See* RJN, Exh. A [S.F. Admin. Code §§ 67.34, 67.35(d)].) However, the Sunshine Ordinance does not specify the procedures that govern the Ethics Commission's adjudication or enforcement of complaints alleging Sunshine Ordinance violations. After a multi-year process, at its September 14, 2012 meeting the Ethics Commission first considered the adoption of final regulations for its handling of complaints alleging violations of the Sunshine Ordinance.[3] (*See* Exh. F at 107.)

On October 3, 2012, Grossman submitted a public records request under the California Public Records Act and the Sunshine Ordinance for documents relating to the Ethics Commission's Sunshine Ordinance regulations. (*See* Exh. A at 6, 19-20.) His request sought all drafts of the regulations, a September 14, 2012 staff report regarding the regulations, and all documents relating to "the preparation, review, revision and distribution of all prior drafts and final versions of the Draft Regulation and Staff Report, including, without limitation, emails, memoranda, notes, letters or other correspondence or communications to or from" the City Attorney's Office. (*Id.*)

On October 12, 2012, the Ethics Commission responded to Grossman's request, producing 127 documents, six of which were partially redacted. (*Id.* at 22-23, 50.) As explained in its response, the Ethics Commission withheld other documents in their entirety based on attorney-

[3] The Ethics Commission concluded its review of the proposed regulations and adopted them at its November 26, 2012 meeting. (*See* Exh. F at 107.)

client privilege and work product, citing Evidence Code sections 952 and 954 and Code of Civil Procedure section 2018.030. (*Id.* at 22-23.)

On September 18, 2013, Grossman filed his petition for writ of mandate in the Superior Court. (*Id.* at 1-56.) In the course of litigating this matter, the City Attorney's Office specified that the Ethics Commission has withheld 24 documents subject to attorney-client privilege and attorney work product protection. (Exh. E at 104.)

D. The Superior Court's Ruling On Grossman's Petition For A Writ Of Mandate.

Superior Court Judge Ernest H. Goldsmith issued his tentative ruling on October 24, 2013. In it, Judge Goldsmith indicated that he would grant Grossman's petition for a writ of mandate. (Exh. J at 203.) The tentative ruling stated that "Respondents have not met their burden that the withheld documents are exempt under the California Public Records Act and the San Francisco Sunshine Ordinance[]." (*Id.*) The tentative ruling further stated that under the Sunshine Ordinance, "public records regarding advice on compliance with, analysis of, and opinion concerning liability under, or any communication other wise concerning the CPRA or the Sunshine Ordinance are subject to disclosure," citing section 67.24(b)(1)(iii). (*Id.*)

The tentative ruling did not address the City's principal argument that the Charter establishes that attorney-client privilege and attorney work product applies to the City Attorney's communications with its clients, and that section 67.24(b)(1)(iii) is invalid because it conflicts with the Charter. (*See id.*) This argument was the subject of the first paragraph of the introduction to the City's brief, and appeared in the discussion section at pages five through nine. (Exh. D at 87, 91-95.)

At the hearing, counsel for the City began by stating, "the crux of the City's argument in this case with respect to Mr. Grossman's petition is that the San Francisco charter establishes an attorney-client relationship between the City Attorney and all of the City's constituent officials and City departments." (Exh. M at 215 [Transcript at 2:15-19].) The City's counsel continued, "the Sunshine Ordinance provision cited by petitioner . . . conflicts with that charter obligation" and is "invalid." (*Id.* at 218 [Transcript at 5:7-9].) Despite this, Judge Goldsmith stated that he had not addressed the City's principal argument in his tentative ruling because "the fact that 67.24(b) conflicts with the City charter is just not before me" and was "not on my table." (*Id.* at 221, 229 [Transcript at 8:7-8, 16:18].) Further, Judge Goldsmith appeared to believe that the Sunshine Ordinance itself was a "charter amendment" rather than a mere ordinance – even though counsel for the City attempted to correct this misunderstanding. (*Id.* at 216-18 [Transcript at 3:20, 4:20-5:1].) At the conclusion of the hearing, Judge Goldsmith took the matter under submission. (*Id.* at 232 [Transcript at 19:6-20].)

On October 29, 2013, Judge Goldsmith issued his order granting Grossman's petition for a writ of mandate. Substantively, the order reiterated the tentative ruling with one addition, at lines 17-18, stating: "Respondents' request to strike SF Admin. Code §67.24(b)(1)(iii) is denied without prejudice, as the issue is not properly before this Court for the present motion." (Exh. K at 205.)[4]

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[4]The idea that the City requested the Court to "strike" a portion of the Sunshine Ordinance is not precisely accurate. The City, as respondent, argued that the Court should not grant the writ seeking to require production of privileged documents because the provision of the Ordinance purporting to abrogate the privilege is trumped by the Charter.

II. ARGUMENT

A. Through The San Francisco Charter, The Voters Established That The Attorney-Client Privilege And Attorney Work Product Applies To The City Attorney's Office's Communications With Its Clients.

For charter cities such as San Francisco, the charter is the "local constitution" and the "supreme law of the municipality." (*Michael Leslie Productions, Inc. v. City of Los Angeles* (2012) 207 Cal.App.4th 1011, 1021.) A charter city "may not act in conflict with its charter," and "[a]ny act that is violative of or not in compliance with the charter is void." (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 171.) Only the voters may adopt a charter for their city, and only the voters may make further amendments to a charter. (Cal. Const. art. XI, § 3(a).) San Francisco voters have exercised this charter power to establish the City Attorney's Office and its responsibilities to protect client confidences, including attorney-client privileged communications and attorney work product.

To interpret a city charter, courts should "construe the charter in the same manner as . . . a statute." (*Domar Electric,* 9 Cal.4th at 171.) The court's "sole objective is to ascertain and effectuate legislative intent." (*Id.* at 172.) To determine the voters' intent, courts should "look first to the language of the charter, giving effect to its plain meaning." (*Id.*) In examining the charter's language, "each sentence must be read not in isolation but in light of the statutory scheme." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

In creating the City Attorney's Office through the Charter, San Francisco voters intended that the City Attorney would be able to provide confidential legal advice to City departments and officials. The key language is in Charter sections 6.102 and 6.100. Section 6.102 lists the

duties of the City Attorney, and under section 6.100 the City Attorney must carry out those duties subject to the professional obligations that apply to all California attorneys. The duties that the voters imposed on the City Attorney's Office in section 6.102 necessarily evince an intent that the attorney-client privilege and attorney work product apply to the Office's legal advice. Further, in enacting Charter section 6.100, the voters provided that the City Attorney was subject to the duties "prescribed by state law" for that office. The applicable duties include the duty of the public lawyers to protect client confidences and privileged legal advice.

1. In establishing the City Attorney's specific duties, the voters necessarily intended that the City Attorney's advice to clients would be confidential and privileged.

In interpreting statutes, courts have recognized that "whatever is necessarily implied in a statute is as much part of it as that which is expressed." (*Johnston v. Baker* (1914) 167 Cal. 260, 264; *cf. Trimont Land Co. v. Truckee Sanitary Dist.* (1983) 145 Cal.App.3d 330, 349 [courts should not presume that lawmakers "intend[] to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication"].) Court have applied this rule of necessary implication to city charters. (*See Currieri v. City of Roseville* (1970) 4 Cal.App.3d 997, 1001 [interpreting charter as necessarily implying that certain probationary employees have right to notice and hearing prior to termination].) Because confidentiality is well-understood to apply to the attorney-client relationship and because it is fundamental to that relationship, the voters necessarily intended that the privilege apply to the City Attorney's advice.

In a similar context, the California Supreme Court held that statutes regarding the representation of clients in welfare benefits proceedings necessarily included basic confidentiality protections. In *Welfare Rights Org. v. Crisan* (1983) 33 Cal.3d 766, the Court considered whether Welfare and Institutions Code section 10950 created a confidentiality privilege for applicants where lay persons, rather than lawyers, represented them in their efforts to obtain welfare benefits. Section 10950 provides that applicants for welfare benefits may appear through an "authorized representative" who may be either an attorney or a layperson. (*Id.* at 770.) The Supreme Court held that in enacting section 10950 – even though it did not explicitly discuss any privileges – the Legislature necessarily intended to protect confidentiality: "Suffice it to say that the considerations which support the privilege are so generally accepted that the Legislature must have implied its existence as an integral part of the right to representation by lay persons." (*Id.* at 771.) Section 10950 necessarily implied "a guarantee of confidentiality in its extension of the right of representation." (*Id.* at 772.)

The same analysis applies more strongly here, because unlike lay persons' communications, attorneys' communications with clients pertaining to legal advice have been treated as confidential under the attorney-client privilege, which was recognized as far back as the reign of Elizabeth I. (*See* E. Imwinkelried, The New Wigmore: Evidentiary Privileges § 2.2 (Aspen Pub.); *see also Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 380 ["The attorney-client privilege has a venerable pedigree that can be traced back 400 years."].) "Protecting the confidentiality of communications between attorney and client is fundamental to our legal system," and the privilege that applies to those communication is a "hallmark of our jurisprudence." (*People v. SpeeDee Oil Change Systems,*

Inc. (1999) 20 Cal.4th 1135, 1146.) "The attorney-client privilege is based on grounds of public policy and is in furtherance of the proper and orderly functioning of our judicial system, which necessarily depends on the confidential relationship between the attorney and the client." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1207.) The attorney-client privilege allows clients to share all relevant facts with their counsel, and counsel to be equally frank in providing clients with legal advice. "[B]y encouraging complete disclosures, the attorney-client privilege enables the attorney to provide suitable legal representation." (*Id.*; *see also Hunt v. Blackburn* (1888) 128 U.S. 464, 470 ["The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."].)

In the proceeding below, Grossman argued that attorney-client privilege is unnecessary for public law offices, and cited California Government Code section 54956.9(b) (the Brown Act) as support for that proposition. (Exh. I at 195-96.) But section 54956.9 *explicitly* abrogates attorney-client privilege, and does so only for communications that take place in public meetings, with certain exceptions.[5] And except for this express abrogation, attorney-client communications remain privileged, by default. Therefore, section 54956.9(b) only supports the City's position

[5] Government Code section 54956.9(b) provides: "For purposes of this chapter, all expressions of the lawyer-client privilege other than those provided in this section are hereby abrogated. This section is the exclusive expression of the lawyer-client privilege for purposes of conducting closed-session meetings pursuant to this chapter."

that absent an express abrogation in the Charter, the privilege necessarily applies to the City Attorney's Charter-conferred duties.

Indeed, the California Supreme Court rejected an argument similar to Grossman's in *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363. There, a member of the public demanded disclosure of a memorandum provided by the city attorney to city council members in connection with a public meeting concerning approval of a parcel map. The petitioner contended that section 54956.9 abrogated the privilege not only as to public meetings but also for written communications pertaining to such meetings. The Court of Appeal had agreed with the petitioner, reasoning that absent pending litigation, for which there was an exception, the privilege wasn't necessary because "the public is not the adversary of the public agency and there is no need for secrecy between them." (*Id.* at 369.)

The California Supreme Court reversed, rejecting that argument. It held that the abrogation of the privilege contained section 54956.9 was expressly "for the purpose of the *open meeting* requirements of the Brown Act," whereas "written matter sent from attorney to governmental client is regulated by the *Public Records Act* and not this section." (*Id*. at 377 [emphases in original].) The Court declined to interpret the section as repealing the attorney-client privilege "by implication." (*Id*. at 378-79.) The Court also observed that while "[o]pen government is a constructive value in our democratic society," the attorney-client privilege is "vital to the effective administration of justice." (*Id.* at 380.) Moreover, it affirmed that local government "needs freedom to confer with its lawyers confidentially in order to obtain adequate advice, just as does a private citizen who seeks legal counsel, even though the scope of confidential meetings is limited by this state's public meeting requirements." (5 Cal. 4th

at 380; *see also Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 913 [similar considerations apply to attorney work product doctrine].) Thus, open meeting laws notwithstanding,

> [t]here is a public entitlement to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned. . . . Several California decisions recognize that the attorney-client privilege is as vital to public as to private clients.

(*Sacramento Newspaper Guild v. Sacramento County Bd. of Sup'rs* (1967) 255 Cal.App.2d 51, 54, mod. & affd. *Roberts*, 5 Cal.4th at 380.)

Thus, the attorney-client privilege and attorney work product protection are presumed to be an integral part of the City Attorney's functions as prescribed in the Charter. To take but one practical example, the Charter requires the City Attorney's Office to make recommendations to the Board of Supervisors about settlement or dismissal of pending litigation. (Exh. G at 184 [Charter § 6.102(5)].) This would be an impossible task if the City Attorney could not provide such recommendations in confidence. By providing the Board of Supervisors with its view of the strengths and weaknesses of the City's position, the best and worst facts revealed through discovery and its analysis of the relevant case law, the City Attorney would be providing the same information to the City's adversary, who could then use it against the City in the same or similar litigation. To read the Charter as not incorporating the privilege would require the Court to assume that the voters "intended that the only sound advice the [City Attorney] could give was, 'Don't talk to me.'" (*Welfare Rights Org.*, *supra*, 33 Cal.3d at 771 n.3.)

2. In the Charter, the voters additionally provided that the City Attorney's Office is subject to the duties of confidentiality imposed by state law.

Section 6.100 provides that the City Attorney is subject to the "duties prescribed by state laws." (*See* RJN, Exh. B.) The State Bar Act requires an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Cal. Bus. & Prof. Code § 6068(e)(1).) The Rules of Professional Conduct similarly prohibit an attorney from revealing confidential client information without the client's informed consent. (Cal. Rule of Prof. Cond. 3-100.) The confidential information subject to these duties includes all "matters communicated in confidence by the client" including, but not limited to, communications "protected by the attorney-client privilege" and "matters protected by the work product doctrine." (*See* Cal. Rule of Prof. Cond. 3-100, note 2; *see also* Cal. State Bar Formal Opn. 2003-161 ["The attorney's ethical duty of confidentiality under Business and Professions Code section 6068, subdivision (e) is broader than the attorney-client privilege."].) In addition, California Evidence Code section 955 provides that an attorney "who received or made a communication subject to the attorney-client privilege 'shall claim the privilege whenever he is present when the communication is sought to be disclosed.'" (*See, e.g., People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 713.)

It is well-established that public sector attorneys are subject to the provisions of the State Bar Act and "[a]ll members of the State Bar of California, including those who represent governmental entities, are governed by the Rules of Professional Conduct." (*See* Cal. State Bar Formal Opn. 2001-156.) These state law duties apply to all public lawyers in California. (*See, e.g., City and County of San Francisco v. Cobra*

Solutions, Inc. (2006) 38 Cal.4th 839, 846 [duty of confidentiality applies to San Francisco City Attorney]; *Santa Clara County Counsel Attys. Assoc. v. Woodside* (1994) 7 Cal.4th 525, 545-48 [applying Rules of Professional Conduct to county counsel]; *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 156-57 [California Attorney General is "bound by the rules that control the conduct of other attorneys in the state," such as duty of confidentiality]; *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 32-33 [analyzing county counsel's purported conflict of interest under the Rules of Professional Conduct].)

In enacting Charter section 6.100, the voters incorporated compliance with the State Bar Act, the Rules of Professional Conduct, and relevant provisions of the California Evidence Code into the City Attorney's Office's duties. By referencing these state law duties, the voters intended that the City Attorney's Office's communications to and from its clients would be privileged and confidential.

B. As An Ordinance, The Local Sunshine Law Cannot Limit The Confidentiality And Privilege Afforded By The Charter To Attorney-Client Communications.

For Charter cities, "a charter bears the same relationship to ordinances that the state Constitution does to statutes." (*Citizens for Responsible Behavior*, 1 Cal.App.4th at 1034.) As a statute cannot amend a constitution, "an ordinance cannot alter or limit the provisions of a city charter." (*Id.*) For this reason, the San Francisco Charter preempts any conflicting local ordinance. Consequently, the Charter's establishment of attorney-client privilege and attorney work product trumps section 67.24(b)(1)(iii) which invalidly purports to make such communications subject to public disclosure. Because the Charter imports attorney-client

and work product privileges, only a Charter amendment could eliminate the ability of the either the City Attorney or his City and County clients from invoking those privileges.

In providing its legal advice regarding the draft regulations at issue in this case, the City Attorney's Office was performing one of its Charter duties subject to the attorney-client privilege and work product protection. Through the deputies assigned to the Ethics Commission, the Office was "[u]pon request, provid[ing] advice or written opinion" to a City department. (Exh. G at 184 [Charter § 6.102(4)].) In seeking that advice, the Ethics Commission was exercising its right under the Charter to request such advice. Grossman's insistence that he is entitled to these communications, relying on section 67.24(b)(1)(iii), contravenes Charter sections 6.102 and 6.100 and the confidentiality that the voters intended to protect for communications requesting and providing legal advice.

In the proceedings below, Grossman virtually ignored the City's argument that Sunshine Ordinance section 67.24(b)(1)(iii) is void because it conflicts with the Charter, dedicating one paragraph to the issue at the very end of his reply brief. In that paragraph, Grossman argued that: (i) the California Public Records Act authorizes local governments to provide for even more generous disclosure of public records than state law contemplates; and therefore (ii) section 67.24(b)(1)(iii) may permissibly conflict with the City Charter. (*See* Exh. I at 200.) This is a non-sequitur. Although it is true that local governments are *authorized* to adopt public records laws that are more generous with respect to disclosure than the Public Records Act itself, that does not mean cities are authorized to contradict their charters by mere ordinance. If a city charter prevents a city

from accomplishing something authorized by state law, the answer is to amend the charter, not to enact an ordinance that violates the charter.

C. The Disputed Provision Of The Sunshine Ordinance Would Impermissibly Interfere With The City Attorney's Charter-Mandated Duties.

The confidentiality of attorney-client communications is not the only right conferred by the Charter upon the City Attorney's clients. The Charter, by setting forth the City Attorney's duties, necessarily assumes that City officials and departments will have a City Attorney's Office that can effectively carry out those prescribed responsibilities. Any ordinance impeding the duties assigned to the City Attorney's Office would therefore conflict with the Charter. The provision of the Sunshine Ordinance invoked by Grossman is invalid for this independent reason as well.

In *Scott v. Common Council of the City of San Bernardino* (1996) 44 Cal.App.4th 684, the Court of Appeal considered whether a budget resolution adopted by the San Bernardino city council impermissibly violated the city charter by eliminating funding for the only two investigator positions in its city attorney's office. San Bernardino's charter established a city attorney's office and prescribed a duty on the part of the office to conduct investigations. (*Id.* at 686.) The petitioner argued that the proposed removal of that personnel would prevent the city attorney's office from carrying out its charter-mandated duty to perform investigations. (*Id.* at 687.) The Court of Appeal agreed and held that the city council could not impair the city attorney's charter duties through a budget ordinance. (*Id.* at 695-97.) Only the voters could change the city attorney's duties by amending the city's charter.

The same analysis applies here, because the abrogation of the privilege significantly impedes the City Attorney's functions. If a proposed ethics ordinance presents significant legal issues, the City Attorney's Office will provide its advice regarding the legal risks in a confidential memorandum. The City Attorney's Office could not do this absent the privilege, because the memorandum would give a roadmap to a prospective plaintiff to challenge the legality of the ethics legislation. If Grossman's argument were correct, the City Attorney's Office could not provide the 11-member Board of Supervisors with a legal memorandum addressing the potential legal issues and risks presented by a proposed ordinance – thus interfering with its Charter-mandated duty to provide such advice. (*See* Exh. G at 184 [Charter § 6.102(4)].) In such a circumstance, the City Attorney could not provide candid or thorough legal advice, possibly frustrating the efforts of the Board of Supervisors to address an ethics issue facing the City and to explore alternate vehicles to achieve its policy objectives.

Similarly, if Grossman's position were correct, the City Attorney could not effectively defend City boards and officials in litigation about ethics, open meeting or public records matters, since the City Attorney's communications with the officials or bodies whose conduct was claimed to violate those laws would be open to the City's opponents in the litigation. Nor could the City Attorney effectively carry out his duty to advise City officials and boards about those laws since the possibility of receiving advice that a city actor's course of conduct entailed some legal risk – advice that an adversary would be entitled to review –would discourage officials from ever seeking such advice in the first instance. Of course, the City Attorney could refrain from ever putting such advice in writing, but this

would be unworkable, since advice about ethics, public records, and open meetings laws can be complicated and fact-dependent.

Lastly, if voters could withdraw the privilege by ordinance in regard to the matters mentioned above, why could they not do the same for any subject on which the City Attorney advises City officials? If, for example, a group of residents disagreed with the City Attorney's defense of cases against City police officers, Grossman's argument would seem to allow them to legislate that the City Attorney must turn over its work product and advice on such litigation to the City's adversaries. But police officers are entitled to an effective defense – something that cannot happen without the attorney-client privilege. And overall, under the Charter, the City Attorney's clients are entitled to confidentiality. The idea that this confidentiality could be totally obliterated by ordinance makes no sense.

III. CONCLUSION

In the Charter, the voters established the City Attorney as an elected office, enumerated the primary duties of the Office, and in listing those duties, necessarily intended that attorney-client privilege and attorney work product applied to the Office's communications with its clients. While the voters later adopted amendments to the Sunshine Ordinance, including section 67.24(b)(1)(iii), such an initiative ordinance must yield to the

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Charter. The Superior Court failed to heed this legal truism and its order granting the petition for a writ of mandate should therefore be reversed.

Dated: November 22, 2013

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 8,304 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 22, 2013.

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PROOF OF SERVICE

I, Pamela Cheeseborough, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, 1 Dr. Carlton B. Goodlett Place, City Hall, Room 234, San Francisco, CA 94102.

On November 22, 2013, I served the following document(s):

PETITION FOR PEREMPTORY WRIT OF MANDATE AND/OR PROHIBITION [CALIFORNIA GOVERNMENT CODE SECTION 6259(c)]

on the following persons at the locations specified:

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[original and three copies]
[via hand delivery]

California Supreme Court
[Submitted Electronically Through the Court Of Appeal E-Submission]

in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed November 22, 2013, at San Francisco, California.

s/Pamela Cheeseborough
Pamela Cheeseborough