SUPREME COURT OF THE STATE OF CALIFORNIA

JOHN ST. CROIX, EXECUTIVE DIRECTOR, SAN FRANCISCO ETHICS COMMISSION; and SAN FRANCISCO ETHICS COMMISSION Petitioner/Respondent, vs. SUPERIOR COURT OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO Respondents/Appellants.	Case No. S221082 First Appellate District, Division One, No. A140308 San Francisco County Superior Court No. CPF-13-513221
ALLEN GROSSMAN, Real Party in Interest.	

ANSWER TO PETITION FOR REVIEW

The Honorable Ernest H. Goldsmith

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INTRODUCTION

In its unanimous decision, the Court of Appeal relied on the well-settled legal principle that a city charter supersedes an inconsistent ordinance. The San Francisco Charter establishes the City Attorney as the lawyer for the City and County of San Francisco. And because a fundamental aspect of the lawyer-client relationship is the attorney-client privilege, only a charter amendment could abridge the privilege. The Court of Appeal therefore correctly held that the San Francisco Sunshine Ordinance cannot accomplish the same result by a mere ordinance. Not only is this ruling based on settled law, but its reach is narrow. There is only one other jurisdiction in California – the City of Vallejo – that has both a charter establishing a city attorney's office and a local ordinance that purports to abridge the attorney-client privilege.

Petitioner's request for review relies solely on his arguments that this case presents an "important question of law." (*See* Petition for Review ["Pet."] at 3-5.) The petition for review identifies four purportedly important questions raised by the court's opinion, yet none of these grounds presents a question worthy of this Court's review:

1. Petitioner claims that the Court of Appeal's decision would have an impact on other jurisdictions with "comparable" disclosure rules, but in fact, only one other city – out of the 540 local jurisdictions in California – has both a charter establishing a city attorney's office and a local ordinance that attempts to limit the attorney-client privilege;
2. Petitioner asserts that the Court of Appeal attempted to expand the scope of attorney-client privilege in California by prohibiting the waiver of privileged communications. But the

Court of Appeal's decision simply adopts state law regarding privilege, including potential waiver by clients;

3. Petitioner asserts that the decision would "undermine" a provision of the California Constitution that requires a broad construction of public records laws, *see* Cal. Const., art. 1, section 3(b)(2), but the Constitution also explicitly provides that this rule of construction does not affect any "statutory exception" to the right of public access, such as attorney-client privilege, *see* Cal. Const., art. 1, section 3(b)(5); and
4. Petitioner argues that the decision would also "undermine" a provision of the California Public Records Act that allows local jurisdictions to enact laws that require greater disclosure than state law, *see* Cal. Gov. Code section 6253(e), but the opinion does not prevent San Francisco voters from adopting such a law. Rather, it confirms that if the voters wish to eliminate a Charter-created privilege, they must do so by amending the Charter itself.

Consequently, the Court of Appeal's opinion does not raise any novel, important questions of law. This Court should deny review.

ARGUMENT

I. THE COURT OF APPEAL'S APPLICATION OF WELL-SETTLED LEGAL PRINCIPLES DOES NOT IMPLICATE ANY IMPORTANT QUESTIONS OF LAW JUSTIFYING REVIEW.

The following sections will address the four purported reasons Petitioner claims would justify further review by this Court.

A. The Court Of Appeal's Opinion Does Not Raise A Question Of Law That Would Affect Other Local Jurisdictions.

This case concerns the Court of Appeal's interpretation of two local laws. While important to San Francisco, it does not present a question of statewide importance that requires further review by this Court. (*See Southern Cal. Ch. of Assoc. Builders and Contractors, Inc., Joint Apprenticeship Comm. v. California Apprenticeship Council* (1992) 4 Cal.4th 422, 431 n.3 [the Supreme Court limits its review to issues of "statewide importance"].) Petitioner argues to the contrary by claiming that the Court of Appeal's opinion will have a statewide impact because other jurisdictions are similarly situated to San Francisco. (*See* Pet. at 4, 6-8.) This is an overstatement. Out of hundreds of local jurisdictions, Petitioner identifies only one other jurisdiction that has both a charter establishing an attorney-client relationship and a disclosure ordinance that purports to limit that relationship.

The Court of Appeal's opinion relies on three undisputed facts: (1) San Francisco is a charter city; (2) the San Francisco Charter establishes the City Attorney's Office and details the office's duties; and (3) the voters adopted a Sunshine Ordinance that purports to waive attorney-client privilege for communications between the City Attorney's Office and its City clients. Only one of the jurisdictions that Petitioner cites as "comparable" to San Francisco actually satisfies all of these conditions. California has 482 cities and 58 counties. (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 293 [Cantil-Sakauye, C.J., conc. & dis. opn.].) And out of these 540 local jurisdictions in California, Petitioner identifies only one jurisdiction – the City of Vallejo – that satisfies the three conditions above. (*See* Vallejo Charter, Art. IV, § 401; Vallejo Mun. Code,

ch. 2.08, § 90(A).) The Court of Appeal's opinion thus raises no issue of "statewide" importance.

Petitioner identifies only two other local jurisdictions that have adopted a "Sunshine Ordinance" that sought to waive attorney-client privileged advice in the same manner as San Francisco: Contra Costa County and Milpitas. (Pet. at 7.) But neither jurisdiction has adopted a Charter. Both jurisdictions have instead respectively established a county counsel's office and city attorney's office through ordinances. (*See* Contra Costa County Ord. Code, ch. 24-12, § 24-12.002; Milpitas Mun. Code, ch. 3, § VI-3-1.00(B).) Thus, to the extent that their Sunshine Ordinances prevent the assertion of attorney-client privilege, there is no conflict between a Charter and a subordinate ordinance as is the case here. That leaves Vallejo as the only jurisdiction out of 540 that could be affected by the Court of Appeal's decision here. That is certainly not a "statewide" impact.

The other local jurisdictions cited by Petitioner are entirely irrelevant for the purposes of the Court of Appeal's holding. That Alameda, Benicia, Contra Costa County, Gilroy, Milpitas, and Oakland allow their governing bodies to choose to disclose attorney-client privileged advice that they receive in confidential closed sessions is unremarkable. (*See* Pet. at 7-8.) Public entity clients have the discretion to waive attorney-client privilege, just like private clients, and they are not obligated to assert the privilege if they do not desire to do so. (*See* Cal. Evid. Code § 954 [attorney-client privilege belongs to client].) The cited provisions of these jurisdictions' laws therefore do nothing other than affirm what state law provides

regarding waiver of attorney-client privilege.[1] And the "Sunshine" laws adopted by Riverside, San Bernardino County, and Santa Ana do not address attorney-client privilege at all.[2] Petitioner even goes so far as cite a *draft* legislative proposal in Dixon as support for his position – even though he admits that the voters already defeated such a measure in 2012. (*See* Pet. at 8 & 7 n.1.)

Because the Court of Appeal's decision would impact only one of California's 540 jurisdictions, this Court should deny review.

B. The Court of Appeal's Decision Does Not, As Petitioner Claims, "Expand" The Scope Of The Attorney-Client Privilege.

Petitioner claims that the Court of Appeal's opinion would "create an unprecedented expansion of the attorney-client privilege equal to a prohibition on disclosure of confidential communications by the *client*" and errs by conflating "the existence of an attorney-client relationship with a mandate that all advice from counsel remain entirely confidential." (*See* Pet. at 4, 11 [emphasis in original].) This is a mischaracterization of the opinion below. The court held that the San Francisco Charter incorporates state law regarding privilege. Because state law specifies that the client may waive the privilege, the Court's opinion does not prohibit waiver by City officials.

At several points in its opinion, the Court of Appeal notes that the attorney-client privilege incorporated into the San Francisco Charter is the same privilege established by the Evidence Code. For example, citing

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[1] For the same reason, Petitioner's citation of a draft proposal in the City of San Jose is inapposite. (*See* Pet. at 8.)

[2] *See* California Sunshine Ordinances, First Amendment Coalition, available at: http://firstamendmentcoalition.org/public-records-2/california-sunshine-ordinances/ (last visited September 25, 2014).

Evidence Code section 950, et seq., the court states: "The scope and availability of the attorney-client privilege are governed by statute." (Opinion ["Op."] at 4.) Elsewhere, the court holds that "the charter incorporates the state law attorney-client privilege for written communications" and that "the state law attorney-client privilege is a fundamental aspect" of "the relationship between the city attorney and the commission." (*Id.* at 7, 9.) And under state law, the client – as the "holder" of the privilege – is the one who can assert the "privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." (Cal. Evid. Code §§ 953(a), 954.)

That the Charter does not explicitly state "whether the client city officials and agencies must maintain advice received from the City Attorney in confidence," *see* Pet. at 13, does not reveal a flaw in the court's opinion. As the opinion provides, the attorney-client privilege incorporated into the Charter is the same privilege established by the Evidence Code. City clients could thus refuse to assert the privilege if they wished to do so. But here, as Petitioner acknowledges, Respondents asserted the attorney-client privilege, *see* Pet. at 5, thus creating the instant dispute.[3]

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[3] Petitioner also argues that the Court of Appeal erred in assuming that all attorney-client communications are confidential and privileged, citing the limited exceptions in the Brown Act for receiving confidential legal advice in connection with a public meeting. (*See* Pet. at 11-12.) But as the opinion explains, the Supreme Court rejected this argument in *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, holding that the Brown Act's limitations do not "limit the privilege as to *written* communications between public sector attorneys and their clients, such as the materials at issue here." (*See* Op. at 9 [emphasis in original].)

Petitioner further argues that the Court of Appeal incorrectly concluded that the attorney-client applied to "public records were never confidential in the first place" due to the voters' adoption of the San Francisco Sunshine Ordinance. (*See* Pet. at 13-14.) But as the Court of Appeal confirmed, "[b]ecause the charter incorporates the privilege, an

C. The California Constitution's Rule Of Construction For Public Records Laws Does Not Apply To The Attorney-Client Privilege.

Petitioner argues that California Constitution article 1, section 3(b)(2) precludes the court's interpretation of the San Francisco Charter, and that its opinion thus raises an important question of law. (*See* Pet. at 4, 10-11.) Section 3(b)(2) provides: "A statute, court rule, or other authority . . . shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." But as the Court of Appeal correctly concluded, section 3(b)(2) does not apply because this 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." (Op. at 8 n.7 [citing Cal. Const., art. 1, section 3(b)(5)].) As the court noted, the attorney-client privilege – as a statutory exception that limits access to public records[4] – is one of the privileges protected by section 3(b)(5). (*See id.*)

The Court of Appeal's decision on this issue is consistent with several California cases that similarly held that section 3(b)(5) limits the application of the rule of construction provided in section 3(b)(2). (*See, e.g., Sorenson v. Superior Court* (2013) 219 Cal.App.4th 409, 436 n.20; *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1278 n.3; *Sutter's Place v. Superior Court* (2008) 161 Cal.App.4th 1370, 1382; *Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 657; *Shapiro v. Bd. of*

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ordinance . . . cannot eliminate it" either by claiming that privileged communications are not confidential or attempting to "waive" the privilege. (*See* Op. at 10-11.) "[O]nly a Charter amendment can achieve that result." (*Id.* at 11.)

[4] The California Public Records Act does not require the disclosure of any records subject to privileges established by the Evidence Code, such as the attorney-client privilege. (*See* Cal. Gov. Code § 6254(k); Cal. Evid. Code §§ 952, 954.)

Directors of Centre City Development Corp. (2005) 134 Cal.App.4th 170, 181 n.14.) Because the court's opinion does not diverge from these authorities, the decision does not raise an important question of law that demands Supreme Court review.

D. San Francisco Voters Could Preclude The City From Asserting Attorney-Client Privilege Through A Charter Amendment.

Petitioner claims that the decision raises an important question of law because it conflicts with California Government Code section 6253(e). Section 6253(e) provides: "a state or local agency may adopt requirements for itself that allow for . . . greater access to records than prescribed" by the California Public Records Act. But Petitioner overstates that impact of the court's holding by claiming that its decision "*prohibits* the voters from directing their officials" to waive privilege for certain types of advice. (*See* Pet. at 13 [emphasis added].) The court's opinion simply does not prevent the voters from addressing this issue. Rather, because a Charter supersedes an ordinance, the voters can require the City to waive attorney-client privilege for certain categories of advice by adopting a Charter amendment – instead of an initiative ordinance like the San Francisco Sunshine Ordinance. (*See* Op. at 11.) The proponents of the Sunshine Ordinance used the wrong legislative vehicle to prevent the City from asserting attorney-client privilege. But the court's opinion does not preclude the voters from adopting a Charter amendment with this same objective in the future.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Review.

Dated: September 26, 2014

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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 2,270 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 September 26, 2014.

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APPENDIX

LOCAL LAWS
[Pursuant To Cal. Rule of Court 8.504(e)(1)(C)]

Contra Costa County Ord. Code, ch. 24-12, § 24-12.002

24-12.002 Appointment—Duties.

The office of county counsel is established. The board of supervisors shall appoint the county counsel and fix his salary; and his tenure and duties shall be as provided by state law and by the board.

(Ord. 69-39 § 1, 1969: prior code § 2197).

Milpitas Municipal Code, ch. 3, § VI-3-1.00(B)

VI-3-1.00 Establishment of Departments of City.

Pursuant to the provision of Section VI-1-2.08 of the Milpitas Municipal Code, the work of the City government shall be distributed among the following departments of the City:

A. City Manager;
B. City Attorney;
C. Finance;
D. Human Resources and Recreation Services;
E. Information Services;
F. Planning and Neighborhood Services;
G. Public Works and Engineering;
H. Police;
I. Fire; and
J. Building and Safety.

(Ord. No. 197.12, § 2, 6/5/12; Ord. No. 197.11, § 2, 6-16-09; Ord. 197.10 (1), 6/19/07: Ord. 197.9, 6/6/06: Ord. 197.7, 7/3/01: Ord. 197.6, 9/5/95: Ord. 197.5, 3/21/95: Ord. 197.4, 5/4/94: Ord. 197.3 (A), 8/5/86: Ord. 197.2, 3/16/79; Ord. 197.1 (part), 9/5/78)

City of Vallejo Charter, Art. IV, § 401

Section 401 City Attorney.

There shall be a City Attorney, appointed by the Council, who shall serve as legal advisor to the Council, the City Manager, and all City departments, offices and agencies, shall represent the City in legal proceedings, and shall perform other duties as directed by the Council. He/She shall have been at the time of his/her appointment admitted to practice and engaged in the practice of law in the State of California. The Council may appoint, or empower the City Attorney, at his/her request to employ, without regard to civil service provisions, special legal counsel, appraisers, engineers, and other technical and expert services necessary for the handling of any pending or proposed litigation, proceeding, or other legal matter.

(Amendment adopted by the electors of the city, 11/7/00.)

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 September 26, 2014, I served the following document(s):

ANSWER TO PETITION FOR REVIEW

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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.

☒ **BY PERSONAL SERVICE**: I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. **A declaration from the messenger who made the delivery ☐ is attached** or **☐ will be filed separately with the court.**

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed September 26, 2014, at San Francisco, California.

Pamela Cheeseborough