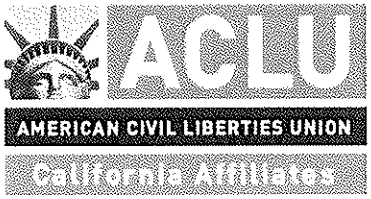

Via Federal Express

September 28, 2016

The Honorable Tani Cantil-Sakauye, Chief Justice
The Honorable Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102-4797

Re: *City of Eureka v. Superior Court of Humboldt County*, No. A145701
Letter in Opposition Request for Depublication

Dear Chief Justice Cantil-Sakauye and Associate Justices,

Pursuant to California Rule of Court 8.1125(b), please accept this letter opposing the Request for Depublication of *City of Eureka v. Superior Court of Humboldt County*, No. A145701, 1 Cal. App. 5th 755 (2016) ("*City of Eureka*"). The three California affiliates of the American Civil Liberties Union ("ACLU")—the ACLU Foundation of Southern California, the ACLU of Northern California, and the ACLU Foundation of San Diego/Imperial Counties—have a strong interest in the transparency concerns and public interests at stake in this case, and we submit this letter in the hope that it may assist the Court.

This opinion concerns a question at the forefront of public debate in California: what are the limits of public access to law enforcement records, particularly videos of contentious incidents? As the prevalence of police cameras has grown, so too has the public controversy regarding when and whether law enforcement agencies may refuse to release the footage to the public.[1] The video at issue in this case—which captured an officer allegedly assaulting a minor—is just one of an ever-increasing number of videos of critical incidents captured by police dash cameras or body-worn cameras. As one of the few appellate opinions to address public release of such videos, it is important that *City of Eureka* not be depublished.

Accordingly, for at least three reasons, we urge the Court to deny the City of Eureka's ("City's") Request for Depublication. *First*, this opinion lends welcome clarity on the question of whether video captured by a police dash camera or body-worn camera qualifies as a "confidential

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[1] *See, e.g.*, The Times Editorial Board, *Stop trying to keep police video out of public view*, LOS ANGELES TIMES (Aug. 18, 2016), *available at* http://www.latimes.com/opinion/editorials/la-ed-police-video-20160817-snap-story.html; The Editorial Board, *Stop the body-cam blackout, for the sake of police*, SACRAMENTO BEE (May 18, 2016), *available at* http://www.sacbee.com/opinion/editorials/article78468982.html; Tom Jackman, *When police shootings are caught on tape, agencies split on releasing video*, WASHINGTON POST (Feb. 22, 2016), *available at* https://www.washingtonpost.com/news/true-crime/wp/2016/02/22/police-agencies-still-trying-to-figure-out-how-when-to-release-videos/.

personnel record" protected from public disclosure requirements by California Penal Code sections 832.7-8, the so-called *Pitchess* statutes. Although some law enforcement agencies—notably the Fresno Police Department,[2] Oakland Police Department,[3] and San Diego District Attorney[4]—have released video of critical incidents, numerous others have advanced the *Pitchess* statutes as justification for keeping footage out of public view. This opinion represents the first appellate ruling on this central question and, as such, will provide much-needed guidance to departments across the state.

Second, the City's contention that the opinion could breed confusion about the interplay between Welfare and Institutions Code ("WIC") section 827 and the *Pitchess* statutes is far-fetched at best. While it is true that the court expressly declined to consider whether WIC section 827 would authorize disclosure of *Pitchess* material, it did so only after deciding that *Pitchess* protections did not apply to the material at issue. The mere refusal to address a point of law does not create obscurity on that point, particularly when—as the Request for Depublication itself notes—there exists clear statutory authority that applicable confidentiality requirements would prevail.

Moreover, the opinion itself makes clear that the appellate court was *required* to address the specter of the *Pitchess* statutes because the City first raised the issue:

> When such a petition is presented, ... the court must take into account any restrictions on disclosure found in other statutes, the general policies in favor of confidentiality and the nature of any privileges asserted, and compare these factors to the justification offered by the applicant in order to determine what information, if any, should be released to the petitioner. The juvenile court has both the sensitivity and expertise to make decisions about access to juvenile court records and is in the best position to consider *any other statutes or policies which may militate against access.* The City contends the *Pitchess* statutes militate against [] access...

City of Eureka, 1 Cal. App. 5th at 762 (internal quotations and citations omitted) (emphasis in original). Taken in context, the court's statement that it "need not decide whether Welfare and Institutions Code section 827 would authorize disclosure of *Pitchess* material in a juvenile case file," *id.* at 763, is clearly made *pro forma* in satisfaction of its duty, rather than as an invitation for future litigation as the City suggests. It is also worth noting that, if the City genuinely found

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[2] *See* Matt Hamilton and Richard Winton, *Fresno police release dramatic body-camera footage of fatal shooting of unarmed 19-year old*, LOS ANGELES TIMES (July 14, 2016), *available at* http://www.latimes.com/local/lanow/la-me-ln-fresno-police-shooting-video-20160713-snap-story.html.

[3] *See* Henry K. Lee, *Oakland police release videos in two incidents that led to suspect deaths*, SF GATE (Sept. 11, 2015), *available at* http://www.sfgate.com/bayarea/article/Oakland-police-release-videos-in-two-incidents-6499438.php.

[4] *See* Pauline Repard, *San Diego district attorney reverses course and releases video of officer-involved shootings*, LOS ANGELES TIMES (May 8, 2016), *available at* http://www.latimes.com/local/california/la-me-0508-sd-shooting-videos-20160508-story.html.

the opinion's reference to WIC section 827 misleading, it could have requested that the Court of Appeal modify the opinion pursuant to Rules of Court 8.264(c) or 8.268 rather than attempt to have the entire opinion depublished.

Finally, contrary to the City's assertion, it is immaterial that the appellate court lacked the transcript of the superior court hearing. The sole issue on appeal was whether the video constituted a "confidential personnel record" protected under the *Pitchess* statutes, and this question of law was reviewed *de novo*. *See id.* If the City had believed the facts in the transcript to be relevant and was unable to obtain it, the appropriate step would have been to submit a settled statement under Rule 8.130. Instead, the City took the opposite position and argued before the Court of Appeal that the underlying facts were irrelevant:

> [T]he question on appeal is a matter of *statutory interpretation* and Respondent's lengthy argument regarding "substantial evidence" is entirely irrelevant to the matter at hand. The fact that the City did not provide this Court with the evidence is also irrelevant as the City's argument is that since *Pitchess* law applies and *Pitchess* procedures were not complied with, the evidence should never even have been reviewed in chambers by the Trial Court.

Petitioner's Reply Brief at 2, *City of Eureka*, No. A145701 (Jan. 4, 2016) (emphasis in original). The City should not be permitted to take the position before the Court of Appeal that the facts are irrelevant and no factual submissions are necessary, and then request depublication of an unfavorable decision on grounds that the court did not have all the facts.

Even in its instant request, the City can neither point to harm that resulted from the absence of the transcript nor identify a single fact within that transcript that was relevant to the Court of Appeal's result. To the extent that the opinion discussed any factual background, it was the undisputed manner and purpose for which the video was generated—independently and in advance of the ensuing administrative investigation—that the court found dispositive as a matter of law. *See City of Eureka*, 1 Cal. App. 5th at 765. Nothing in the transcript could alter that basic fact or undermine the conclusion that followed.

For the foregoing reasons, we respectfully urge the Court to reject the City of Eureka's Request for Depublication of *City of Eureka v. Superior Court of Humboldt County*, No. A145701, 1 Cal. App. 5th 755 (2016).

Respectfully submitted,

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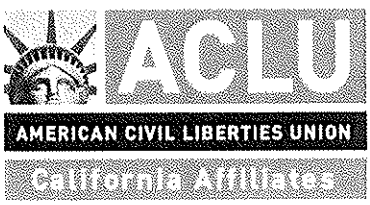

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