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September 27, 2016

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

Re: *City of Eureka v. Superior Court*,
First District Court of Appeal Case No. A145701
Supreme Court Case No. S237292
Opposition to Request for Depublication (Cal. Rule of Court 8.1125(b))

Dear Chief Justice and Associate Justices:

The City Attorney of the City of Eureka (the "City") seeks depublication of the published opinion in *City of Eureka v. Superior Court* (*City of Eureka*) (2016) 1 Cal.App.5th 755. The City has not filed a petition for review. Neither Respondents Humboldt County Counsel nor H.M. - the minor involved in the case - filed a petition for review. No party other than the City has requested depublication of *City of Eureka*.

The City argues that *City of Eureka* will confuse the bar, the bench and was based on an incomplete record. Real Party in Interest Thadeus Greenson disagrees with the City and contends that *City of Eureka* satisfies well-accepted standards for certification of an opinion for publication set forth in rule 8.1105(c) of the California Rules of Court, which this court should look to in determining whether to depublish an opinion of the Court of Appeal.

The Incomplete Record is the City's Own Fault.

The City apparently argues that the incomplete record on appeal justifies depublication. However, it is well settled that the appealing party cannot challenge the precedential value of an appellate court's ruling due to an insufficient appellate record when the appealing party was responsible for providing the appellate court with an adequate appellate record in the first place.

If the City was unsatisfied with the appellate record, it was obligated to take steps to supplement the appellate record using standard procedural mechanisms for obtaining a settled statement. (*See Marks v. Superior Court* (2002) 27 Cal.4th 176, 192-194; California Rules of Court, Rules 8.137(b); and 8.346.)

The City, as appellant, had the responsibility of providing the Court of Appeal with the record on appeal. The City admits the record was incomplete, but took no action to obtain a settled statement, thereby forfeiting the right to lodge any complaints about the adequacy of the appellate record.

The Opinion Satisfies the Criteria for Publication.

California Rules of Court, Rule 8.1105(c) states in pertinent part:

> An opinion of a Court of Appeal or a superior court appellate division-whether it affirms or reverses a trial court order or judgment-should be certified for publication in the Official Reports if the opinion:
>
> (4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule…
>
> (6) Involves a legal issue of continuing public interest…

City of Eureka amply satisfies both of these criteria. First, the opinion clarifies the state of the law. *City of Eureka* is the first published opinion to apply this Court's opinion in *Long Beach Police Officers Assn. v. City of Long* Beach (2014) 59 Cal.4th 59, clarifying, in this particular factual and procedural context, that a police recording not created in conjunction with disciplinary proceedings is not automatically subject to *Pitchess* review.

Second**,** *City of Eureka* involves a legal issue of continuing public interest – i.e., the accessibility of video recordings potentially depicting police brutality. (*See Association for Los Angeles Deputy Sheriffs v. Los Angeles Times Communications LLC* (2015) 239 Cal.App.4th 808, 826 (recognizing "[t]he public has a strong interest in the qualifications and conduct of law enforcement officers"). Depublication should not be used to suppress information relating to a matter of public interest on the untenable arguments advanced by the City.

Nothing in the opinion supports the City's concern that the continued publication of the opinion "may confuse the bench and bar by creating the appearance that Welfare and

Institutions Code section 827 sidesteps the protections of *Pitchess*." The City's first block quote in its depublication request makes it clear that *City of Eureka* expressly disclaims any attempt to address that issue. The opinion unambiguously leaves that question open.

Leaving a question that is not necessary for disposition of a particular appeal open to be decided in future cases is not grounds for depublication. Rather, it is the epitome of judicial restraint. Had the Court of Appeal answered that question, its answer would have been pure *dictum*. Appellate courts routinely issue decisions that explicitly identify issues not decided by their holdings, and this functions as a useful signal to the bench and bar of open questions in need of litigation or resolution when the issues are squarely presented and dispositive of the actual controversy between the parties.

This case only held that a particular item was *not* automatically subject to the *Pitchess* process – expensive and time consuming for courts, attorneys and litigants. Why would an appellate court then go on to decide whether the video – not protected by *Pitchess* – would be discoverable via Welfare and Institutions Code § 827 if *Pitchess* had protected it? If the First District Court of Appeal had done so, *that* non-binding aspect of its holding would have been ripe for a depublication request.

When all is said and done, the opinion stands for the proposition that merely alleging that a document is subject to the *Pitches* process isn't enough to require *Pitches* review. Some evidence, some showing, that the document is subject to the *Pitches* process is reasonably required. The record contains no evidence whatsoever that the video at the center of this dispute is a record requiring *Pitches* review.

And, like the City's failure to provide a complete record on appeal, the City has only itself to blame for failing to prove its case.

Conclusion:

Former California Supreme Court Justice Joseph R. Grodin noted in his article about depublication that the Court should exercise restraint in depublishing Courts of Appeal opinions because, otherwise, depublication "gives rise to so much misunderstanding." (Joseph R. Grodin, The Depublication Practice of the California Supreme Court, 72 CAL. L. REV. 514, 528 (1984).) The City's depublication request offers no coherent basis for the Court to abandon that restraint with respect to the City. The opinion is well-grounded in procedural and substantive law, whereas City's depublication request appears to be motivated by nothing more than the City's desire to expand the *Pitches*

process to suppress public access to a video record that the City made no effort to demonstrate is subject to the Pitches process.

For all these reasons, the Court should deny the City's request to depublish the *City of Eureka* opinion.

Sincerely,

Paul Nicholas Boylan, Attorney for Real Party in Interest, Thadeus Greenson

PROOF OF SERVICE

I, Paul Nicholas Boylan, declare:

I am over 18 years of age. My place of business address is POB 719 Davis California, 95617. On December 22, 2015, I mailed a copy of the following document:

OPPOSITION TO REQUEST FOR DEPUBLICATION

to each of the following persons below:

☒ BY UNITED STATES MAIL: I placed the envelope for collection and mailing, following my ordinary business practices. I am readily familiar with the business practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Davis, California.

Dated: September 27, 2916

Paul Nicholas Boylan