CITY AND COUNTY OF SAN FRANCISCO

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Via TrueFiling

Honorable Acting Presiding Justice William R. McGuiness
Honorable Associate Justices Martin J. Jenkins and Stuart Pollack
California Court of Appeal
First Appellate District, Division Three
350 McAllister Street
San Francisco, CA 94102-3600

Re: *Daugherty v. City & County of San Francisco*, Nos. A145863, A147385
Request for Publication (California Rules of Court 8.1105, 8.1120)

Dear Justices McGuiness, Jenkins, and Pollack:

I write on behalf of the City and County of San Francisco (the "City") and the League of California Cities (the "League"), to request that this Court publish its opinion in *Daugherty v. City & County of San Francisco*, Nos. A145863 and A147385 ("*Daugherty*"), filed on May 30, 2018.

The Court's opinion reversed a Superior Court order granting a writ of mandamus to nine San Francisco Police Department ("SFPD") officers, who faced discipline based on racist, sexist, homophobic, and anti-Semitic text messages they exchanged with each other and with former SFPD members and convicted felons Ian Furminger and Edmond Robles.

The Court held that the Superior Court misapplied the limitations period in the Public Safety Officers Procedural Bill of Rights Act, Cal. Gov. Code Sections 3300, *et seq*. ("POBRA"), by failing to select the appropriate date on which the period began, and by failing to toll the limitations period during the pendency of a federal criminal investigation. Those errors would have forced this choice on SFPD: cooperate with the investigation (and forfeit the right to discipline the nine officers, based on the trial court's misreading of POBRA) or proceed with disciplinary cases (and compromise the investigation by disclosing evidence). This Court reversed because POBRA is written to spare police departments that dilemma.

A. The *Daugherty* Opinion Meets the Standard for Publication.

Rule of Court 8.1105(c) provides that an opinion "should be certified for publication in the Official Reports" if it meets any one of nine enumerated standards. The *Daugherty* opinion meets at least four of those standards.

First, the opinion "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions[.]" (CRC 8.1105(c)(2).) There are not many published opinions applying POBRA's limitations period; the existing opinions involve different circumstances.

To decide *Daugherty*, the Court analyzed POBRA's rule that a police department must initiate disciplinary proceedings against officers within one year of "discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct[.]" (Gov. Code § 3304(d)(1).) The Court reversed the trial court's decision that an SFPD lieutenant was "authorized to initiate an investigation" when he discovered the nine officers' texts, because federal investigators expressly ordered him not to disclose any materials or information from the criminal probe.

The opinion merits publication because those facts—the federal criminal investigation, and the confidentiality orders by federal investigators (reinforced by orders of SFPD command staff, and extended through trial by a protective order)—are significantly different from those stated in any published opinion. As the *amicus curiae* briefs demonstrate, police departments often work with federal investigators to weed out corruption and criminal activity by officers. Yet no published decision before *Daugherty* provides guidance on the onset of the limitations period under such circumstances.

The facts of *Daugherty* also informed the Court's decision to apply the tolling provision of POBRA, Government Code Section 3304(d)(2)(A), because the texts were "the subject of a criminal investigation or criminal prosecution[.]" (*Id*.) The Court held that tolling applies where a criminal investigation is "led by an outside law enforcement agency" and that tolling continues when prosecutors "maintain[ ] the confidentiality restriction even after the indictments [have] issued." (Opinion p. 36.)

Second, the *Daugherty* opinion "[a]dvances a new … clarification .. of a provision" of POBRA. (CRC 8.1105(c)(4).) It clarifies that tolling is appropriate under POBRA all the way through a criminal trial, at least in cases where (as here) a protective order restricts dissemination of evidence and "the investigation was active and continued to evolve" long after indictment. (Opinion p. 35.)

Third, the *Daugherty* opinion "explains … an existing rule of law [.]" (CRC 8.1105(c)(3).) The Court explained that law enforcement agencies have latitude to designate a "person authorized to initiate an investigation" for purposes of Section 3304 (pp. 20-21); and that it would result in mischief to interpret Section 3304(d)(2)(A) as requiring a department to initiate a disciplinary investigation that would have risked compromising a federal corruption probe (pp. 34-35). Those clarifications validate the decision by many police departments, including those writing as *amici*, to structure their internal affairs departments with strict separation between criminal investigators and disciplinary investigators, as SFPD does.

Moreover, the opinion clarifies and explains the meaning of "subject of a criminal investigation" as used in Government Code Section 3304(d)(2)(A). The parties disagreed on the nexus between a criminal investigation and the "act, omission, or other misconduct" (here, the officers' texts) required to toll the limitations period. The Court resolved that dispute, clarifying that the "conduct involved in the criminal and administrative investigations" need not be precisely the same. It also explained that the existing case law (specifically, *Parra v. City and County of San Francisco* (2006) 144 Cal.App.4th 977; *Richardson v. City and County of San Francisco Police Com.* (2013) 214 Cal.App.4th 671; and *Lucio v. City of Los Angeles* (2008) 169 Cal.App.4th 793) supports a broader interpretation of the word "subject" than the one applied by the trial court. (Opinion pp. 30-36.)

Fourth, the *Daugherty* opinion "[i]nvolves a legal issue of continuing public interest"; in fact, it involves several. (CRC 8.1105(c)(9).) As noted above, the opinion provides much-needed guidance to cities and police departments. It reinforces the right and ability of local police to cooperate with federal criminal investigations, and to maintain the integrity of those investigations without sacrificing the ability to discipline officers for administrative misconduct.

The *Daugherty* opinion is especially pertinent in an era of increased public scrutiny of law enforcement, where the public seeks both accountability from its peace officers and an end to discriminatory police practices. Here, the SFPD sought to advance both of those objectives—by helping the federal government root out corrupt officers within its ranks, and then acting swiftly to take disciplinary action once federal prosecutors released the racist, homophobic, sexist, and anti-Semitic text messages. As the Court held: "There is no doubt that the public's interest in the integrity of SFPD was undermined by the offensive text messages. The attitudes reflected in these messages displayed unacceptable prejudice against members of the communities SFPD is sworn to protect." (Opinion p. 37.)

B. The City and the League Have an Interest in Publication.

The City is an Appellant in *Daugherty*. The City employs thousands of public safety employees and must comply with POBRA when initiating disciplinary investigations and proceedings. The City has a strong interest in the publication of the *Daugherty* opinion, to clarify its legal responsibilities.

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League filed an *amicus curiae* in support of Appellants in *Daugherty*, because its Legal Advocacy Committee (comprised of 24 city attorneys from all regions of California) identified this case as one with statewide significance, as well as concern to municipalities. Like San Francisco, the League's member cities employ thousands of public safety officers and must comply with POBRA when initiating disciplinary proceedings. The League has a strong interest in providing guidance to its members, and therefore in a clear delineation of the circumstances under which police departments may complete a criminal investigation before initiating administrative discipline.

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For the foregoing reasons, the City and the League respectfully request publication of the Court's May 30, 2018 opinion. Thank you for your consideration of this request.

Very truly yours,

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