CANNATA O'TOOLE & OLSON

January 9, 2024

Submitted via TrueFiling
The Honorable Patricia Guerrero, Chief Justice of California,
and the Honorable Associate Justices of the California Supreme Court
350 McAllister Street
San Francisco, California 94102-4797

Re: Response of the First Amendment Coalition in Support of Request to Depublish *The Bakersfield Californian v. The Superior Court of Kern County* (Nov. 7, 2023) 96 Cal.App.5th 1228, Court of Appeal Case No. F086308 (Supreme Court Case No. S283323)

Dear Chief Justice Guerrero and Associate Justices:

Pursuant to California Rule of Court 8.1125(b)(1), the First Amendment Coalition ("FAC") submits this response in support of *The Bakersfield Californian*'s request that this Court depublish the opinion of the California Court of Appeal, Fifth Appellate District, in *The Bakersfield Californian v. The Superior Court of Kern County* (Nov. 7, 2023) 96 Cal.App.5th 1228, Case No. F086308. The opinion discusses California's reporter's shield law, Evid. Code § 1070; Cal. Const., art. I, § 2(b), and this Court's decisions applying it, e.g., *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 793. The Court of Appeal's decision misconstrues the burden of proof that a criminal defendant must meet to pierce the shield law and compel a journalist to disclose unpublished information.

Depublication is necessary to ensure "the orderly development of decisional law." (*Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 708.) The Court of Appeal's decision misconstrued the shield law and was inconsistent with other authority in multiple respects. It affirmed the trial court's decision to pierce the shield law based on a speculative and conclusory showing by the defendant, and it discussed the possibility of in camera review in a manner that flipped the burden of proof from the defendant seeking to pierce the shield law onto the journalist seeking to assert it. It also, in one passage, suggested that criminal defendants should seek information from journalists as a matter of course despite the shield law, stating that failing to do so could amount to ineffective assistance of counsel. Absent depublication, these errors will make the shield law less effective and encourage criminal defendants to seek information from journalists unnecessarily, especially in high-profile cases that draw serious investigative coverage. They may also, as a result, limit journalists' ability to investigate and report on criminal justice matters, and Californians' access to information about crimes and criminal prosecutions in this State.

To ensure that journalists cannot be compelled to disclose unpublished information by criminal defendants based on speculation, as this Court directed in *Delaney*, *supra*, 50 Cal.3d at p. 809, the *Californian*'s depublication request should be granted.

I. Interest of First Amendment Coalition

The First Amendment Coalition is a California-based nonprofit organization dedicated to advancing free speech, government transparency and public participation in civic affairs. Founded in 1988 as the California First Amendment Coalition ("CFAC"), FAC's activities include media and First Amendment litigation, educational programs, legislative oversight of bills in California with an impact on access to government and free speech, and public advocacy. FAC co-authored and sponsored Proposition 59, the Sunshine Amendment to the California State Constitution, enacted by voters in 2004. FAC's members are news organizations, law firms, libraries, civic organizations, academics, freelance journalists, bloggers, community activists, and ordinary persons.

Through its Subpoena Defense Initiative, FAC educates journalists and lawyers on journalists' legal protections against being compelled to disclose information obtained while newsgathering. FAC also assists subpoenaed journalists in obtaining qualified attorney representation.

II. Legal Standard

This Court has discretion in making publication decisions. However, depublication has been ordered when, among other things, "the opinion is wrong on a significant point" or its "analysis was too broad and could lead to unanticipated misuse as precedent." (Eisenberg, *Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2019) ¶ 11:180.1 [citing Hon. Joseph Grodin, *The Depublication Practice of the California Supreme Court* (Calif. L. Rev. July, 1984) 72 Calif.L.Rev. 514].) Both of these depublication criteria are satisfied here.

III. The Opinion Endorses Piercing the Shield Law Based on Speculation, Contrary to *Delaney*

The shield law "safeguard[s] the free flow of information from the news media to the public, 'one of the most fundamental cornerstones assuring freedom in America.' [Citation.]." (*In re Willon* (1996) 47 Cal.App.4th 1080, 1091.) It prevents journalists from being "adjudged in contempt" for refusing to disclose "unpublished information obtained or prepared" in the newsgathering process, and the source of any information obtained in the newsgathering process, whether published or unpublished. (Cal. Const. Art. I, § 2(b); accord. Evid. Code § 1070(a) [similar]; see also *Miller v. Superior Court* (1999) 21 Cal.4th 883, 890 [shield law protects "(1) unpublished information, or (2) the source of information, whether published or unpublished.' "].) "Since contempt is generally the only effective remedy against a nonparty witness, [the shield law grants] such witnesses virtually absolute protection against compelled disclosure." (See *id.* at p. 891, internal citation and quotation marks omitted.) Enacted in its original form in 1935 and codified in Evidence Code section 1070 in 1965, the shield law was amended to protect unpublished information in 1974 and enshrined in Article I, section 2(b) of the California Constitution in 1978. (*In re Willon*, *supra*, 47 Cal.App.4th at p. 1090; *Playboy Enters., Inc. v. Superior Court* (1984) 154

Cal.App.3d 14, 27-28; *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 217.) "The Legislature's 1978 resolution proposing elevation of the protection to the level of a constitutional mandate, and the electorate's adoption of that proposition in 1980, clearly manifest the intent to afford newspersons the highest level of protection under state law." (*Playboy Enters., Inc.*, *supra*, 154 Cal.App.3d at pp. 27-28.)

The shield law is written in absolute terms. (See *Miller*, *supra*, 21 Cal.4th at p. 890.) However, it may be overcome "by a countervailing federal constitutional right" (*Id.* at pp. 887, 897.) Its "protection must be overcome in a criminal proceeding on a showing that nondisclosure would deprive the defendant of his federal constitutional right to a fair trial." (*Delaney*, *supra*, 50 Cal.3d at p. 805-06.) To invoke the shield law in response to a subpoena by a criminal defendant, "[t]he newsperson seeking immunity must prove all of the requirements of the shield law have been met. The burden then shifts to the criminal defendant seeking discovery to make the showing required to overcome the shield law." (*Id.* at p. 806 n. 20 [internal citation and quotation marks omitted].)

Here, a criminal defendant sought information from a journalist, so *Delaney* was controlling. And, the *Californian* easily met its initial burden to show that the information at issue – a journalist's interview questions and notes – was covered. (*The Bakersfield Californian*, *supra*, 96 Cal.App.5th at pp. 1244-45.) The parties and the Court of Appeal thus focused on the next step of the analysis: whether the criminal defendant had made the showing necessary to pierce the shield law. The Court of Appeal answered in the affirmative.

The Court of Appeal's decision misconstrued *Delaney* and weakened the shield law in cases where information is sought by criminal defendants. The criminal defendant's evidence and arguments in support of his subpoena here, as described by the Court of Appeal, were conclusory and speculative, and were therefore insufficient to justify piercing the shield law under *Delaney* as a matter of law. The Court of Appeal erred by holding otherwise.

In *Delaney*, this Court held that to overcome a prima facie showing of protection under the shield law, a criminal defendant must first show that there is at least "a reasonable possibility" that the information will "materially assist" his defense. (*Delaney*, *supra*, 50 Cal.3d at p. 808 [emphasis in original].) "The burden is on the criminal defendant to make the required showing." (*Id.* at p. 809.) "The showing need not be detailed or specific, *but it must rest on more than mere speculation*." (*Ibid*. [emphasis added]; accord. *People v. Parker* (2022) 13 Cal.5th 1, 34 [affirming decision not to order video tapes disclosed to criminal defendant where he had failed, among other things, "to demonstrate any specific, nonspeculative reason why the recordings would aid in his defense on appeal"].) The criminal defendant must then also show that, on balance, the information sought should be disclosed considering "the importance of protecting the unpublished information" and both sides' competing interests. (*Delaney*, *supra*, 50 Cal.3d at p. 810.) The factors considered are (1) whether the unpublished information is confidential or sensitive, (2) the interests sought to be protected by the shield law, (3) the importance of the information to the criminal defendant, and (4) whether there is an alternative source for the unpublished information. (*Id.* at pp. 810-13.)

The criminal defendant's showing in this case, as described by the Court of Appeal,

failed to meet his burden. He served the *Californian* with two subpoenas in 2023, which sought identical records. (*The Bakersfield Californian*, *supra*, 96 Cal.App.5th at pp. 1244-46.) The *Californian* moved to quash each subpoena soon after receipt, and the trial court granted the *Californian*'s motion as to the first but denied it as to the second. (*Ibid.*)

According to the Court of Appeal, the criminal defendant's filing in support of the first subpoena simply "alleged the subpoenaed records were 'necessary and material' to [his] defense, but no further explanation was provided." (*Id.* at p. 1245.) That is conclusory and speculative under any reasonable definition of the terms. Perhaps recognizing this, "[c]iting a fear of ' "revealing possible defense strategies and work product to the prosecution," ' [the criminal defendant's] counsel requested an in camera hearing 'to present [the defense's] theories regarding the relevancy and entitlement to the subpoenaed records.' " (*Ibid.*) The trial court declined to hold an *in camera* hearing and granted the *Californian*'s motion to quash the first subpoena, on the grounds that he had not met his threshold burden. (*Ibid.*)

The criminal defendant's filing in support of his second subpoena made the same arguments as his filing in support of his first subpoena. (See Jan. 8, 2024 Depublication Request of The Bakersfield Californian, at p. 3 [citing 1 PA 253-270].) According to the Court of Appeal, however, as to the second subpoena,

> Roberts attempted to meet his threshold burden by alleging (1) he "has been falsely accused by [Parra] of committing this crime," and (2) Parra "is the person who shot [the victim]." Roberts further accused Parra of perjuring himself at the preliminary hearing and continually "trying to cover up his own involvement and lying to try to escape culpability."

(*The Bakersfield Californian*, *supra*, 96 Cal.App.5th at pp. 1245-46.) He asserted that "the number of times" that his co-defendant, the journalist's interviewee, had "changed his story" was "highly relevant and material" to his defense. (*Id.* at p. 1246.) The Court of Appeal tried to make sense of this line of argument by restating it differently, without success:

> In other words, since the People's ability to prove the charges and allegations against Roberts "will revolve around [Parra's] credibility," it is reasonably possible that Parra's unpublished statements to the reporter will materially assist the defense in impeaching his credibility.

(*Ibid.*) He also offered to present additional theories of relevancy *in camera* a second time, again claiming that they could not be disclosed to the public without revealing "defense strategies and work product." (*Ibid.*) As to the second subpoena, the trial court again declined to order *in camera* review, but this time denied the *Californian*'s motion to quash and ordered it to comply, holding that the defendant had made the showing that *Delaney* required. (*Ibid.*) The Court of Appeal did not state the basis for the trial court's holding with precision, instead stating that "remarks by the court," which are not stated in the decision, "suggested the finding of a reasonable possibility that the material sought will support the defense theory of Parra being the true killer and/or provide additional impeachment evidence." (*Ibid.*)

The trial court's denial of the *Californian*'s motion to quash the second subpoena was mistaken, as was the Court of Appeal's affirmance. The same logic that justified quashing the first subpoena also justified quashing the second one. The criminal defendant's 'allegations' that a co-defendant had made false accusations about him, that his co-defendant had shot the victim, that his co-defendant had repeatedly changed his story, and that his co-defendant had credibility problems did not explain how or why the information at issue – a *Californian* reporter's unpublished interview questions and notes – would assist the defense in a non-speculative manner, as *Delaney* requires. Nor did the criminal defendant adequately address whether the information sought was available from other sources, such as law enforcement officers or the *Californian*'s own published material.

The Court of Appeal's decision repeatedly suggests, including in a section that the Court of Appeal states is intended to offer "guidance to all concerned in this matter, and for trial courts and litigants in future cases," *The Bakersfield Californian*, *supra*, 96 Cal.App.5th at pp. 83, 88, that any ambiguity in the defendant's showing could and should have been cured *by the Californian*, which it suggests should have voluntarily submitted its reporter's unpublished materials to the Court for *in camera* review. That incorrectly reverses the parties' burdens of proof at this step of the *Delaney* analysis. (*Delaney*, *supra*, 50 Cal.3d at p. 806 n. 20.) It is also inconsistent with case law on *in camera* review. It encourages journalists to seek *in camera* review regularly in shield law disputes, regardless of who bears the burden of proof, while other cases make clear that *in camera* review should be viewed as a disfavored last resort. (See *Am. Civil Liberties Union of N. Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 87 [holding, in a Public Records Act case, that "a trial court's prerogative to inspect documents in camera is not a substitute for the government's burden of proof, and should not be resorted to lightly" and that in camera review cannot replace the "obligation to justify its withholding in publicly available and debatable documents, and it should be invoked only when the issue at hand, could not be otherwise resolved"]; *Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 873 [holding that that parties are "not entitled to an *in camera* hearing" "just for the asking," and vacating a trial court order setting an *in camera* hearing based on a conclusory request by the People, who had the burden of proof].) Also, here, where the criminal defendant had the burden of proof, the Court of Appeal wrongly transferred that burden to the *Californian* by suggesting it should have advocated for *in camera* review to respond to the criminal defendant's conclusory and speculative showing of need for access to the *Californian*'s unpublished information.

The Court of Appeal's holding that the criminal defendant's speculative showing in this case was enough to pierce the shield law could confuse lower courts and improperly encourage similarly aggressive information-gathering efforts by other criminal defendants. Moreover, this risk is magnified by language elsewhere in the opinion. When discussing how to strike the appropriate balance between the interest of the criminal defendant in access and the reporter's interests protected by the shield law, the Court of Appeal wrote:

> In a scenario like this one, where one defendant is facing LWOP based on the accusations of a codefendant, discovery efforts in response to the codefendant's jailhouse interview with a reporter are highly likely. *Such efforts may even be required by the defendant's right to effective assistance of counsel.* The Newspaper's argument necessarily posits that a different outcome here would dissuade competent defense attorneys from making

> similar discovery efforts in future cases, which we do not find persuasive.

(*The Bakersfield Californian*, *supra*, 96 Cal.App.5th at p. 1271 [emphasis added].)

Although criminal defense counsel have ethical and constitutional obligations to represent their clients zealously, the courts must be the ultimate guardian of the shield law and strike the proper balance between the rights of defendants and the press. By effectively downgrading the rights of the press to a mere speed bump in criminal cases, the Court of Appeal's decision upsets the balance that this Court crafted in *Delaney*.

The Court of Appeal's opinion is in tension with the policy objectives advanced by the shield law, which supports depublication. By protecting journalists against subpoenas for unpublished information in most cases, the shield law protects journalists' efficacy and independence. If journalists could be subpoenaed freely, they would suffer regular "administrative and judicial intrusion[s] into the newsgathering and editorial process," obtaining information would become harder because journalists would appear more like "an investigative arm of the judicial system or a research tool of government or of a private party," journalists would be discouraged from compiling and preserving unpublished material, and journalists' and news organizations' already-strained "time and resources" would need to meet an additional burden. (See *Shoen v. Shoen* (9th Cir. 1993) 5 F.3d 1289, 1294-96 [explaining, in the context of the First Amendment, the policy reasons why even nonconfidential information obtained by journalists in the newsgathering process requires protection, and quoting *United States v. LaRouche Campaign* (1st Cir. 1988) 841 F.2d 1176, 1182 and Morse & Zucker, *The Journalist's Privilege in Testimonial Privileges* (Stone & Liebman eds., 1983) 474-75].)

The Ninth Circuit elaborated in *Shoen*, a case involving the federal reporter's privilege, that there is "a 'lurking and subtle threat' to the vitality of a free press if disclosure of nonconfidential information 'becomes routine and casually, if not cavalierly, compelled.' " (*Shoen*, *supra*, 5 F.3d at pp. 1294-96.)

> [T]he compelled disclosure of nonconfidential information harms the press' ability to gather information by: "damaging confidential sources' trust in the press' capacity to keep secrets and, in a broader sense, by converting the press in the public's mind into an investigative arm of prosecutors and the courts. It is their independent status that often enables reporters to gain access, without a pledge of confidentiality, to meetings or places where a policeman or a politician would not be welcome. If perceived as an adjunct of the police or of the courts, journalists might well be shunned by persons who might otherwise give them information without a promise of confidentiality, barred from meetings which they would otherwise be free to attend and to describe, or even physically harassed if, for example, observed taking notes or photographs at a public rally."

(*Id.* at p. 1295 [quoting Morse & Zucker, *supra*, 474-75].) When interpreted correctly, the shield law acts as a bulwark against the sort of "routine[]" and "casual[]" compelled disclosure that worried the Ninth Circuit in *Shoen*. The Court of Appeal's opinion in this case, however, weakens that bulwark, especially for reporters who wish to cover crime and criminal proceedings.

The Court of Appeal's decision will have the greatest impact, and thus the greatest chilling effect, on journalists who cover crime and criminal court proceedings. That makes the decision particularly problematic as a matter of policy, because this Court, and others, have repeatedly acknowledged the importance of this kind of coverage. The information that journalists provide to their readers and the public about criminal prosecutions informs millions of Californians' decisions at the ballot box. As the Court of Appeal has explained, "In our society, the power resides with the People; public supervision of governmental administration through informed voting is the cornerstone of democracy." (*McClatchy Newspapers, Inc. v. Superior Court* (1987) 189 Cal.App.3d 961, 974-75.)

> Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

(*Id.* at p. 975 [quoting *Cox Broad. Corp. v. Cohn* (1975) 420 U.S. 469, 491-92]; see also *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 564-75 [acknowledging the history of public criminal trials, that "[t]o work effectively, it is important that society's criminal process 'satisfy the appearance of justice' . . . by allowing people to observe it," and that citizens principally observe criminal trials through the media].) The public's "interest in overseeing the conduct of the prosecutor, the police, and the judiciary, is strong indeed," *McClatchy Newspapers, Inc.*, *supra*, 189 Cal.App.3d at p. 975, as, by extension, is its interest in incentivizing, rather than dramatically increasing the burden and cost to journalists of, covering these matters.[1]

IV. Conclusion

For the foregoing reasons, this depublication request should be granted. The opinion of the California Court of Appeal, Fifth Appellate District, in *The Bakersfield Californian v. The Superior Court of Kern County* (Nov. 7, 2023) 96 Cal.App.5th 1228, Case No. F086308 should be depublished in its entirety.

[1] Allowing journalists who cover crimes and criminal proceedings to be transformed into defense witnesses based on a speculative showing like the criminal defendant's showing in this case could obstruct coverage of criminal proceedings in other ways, as well. For example, prosecutors or criminal defendants might seek to exclude journalists from the proceedings until after they have testified, preventing them from continuing to cover the case. (See Evid. Code § 777(a) ["Subject to subdivisions (b) and (c), the court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses."]; see also Pen. Code §§ 867, 868 [providing that exclusion of witnesses is mandatory at preliminary hearings].)

Respectfully submitted,

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PROOF OF SERVICE

I, Danielle Ott, declare that I am employed in the County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within entitled cause, and my business address is Cannata, O'Toole, & Olson LLP, 100 Pine Street, Suite 350, San Francisco, CA 94111.

On January 9, 2024, I served the foregoing document described as:

Response of the First Amendment Coalition in Support of Request to Depublish *The Bakersfield Californian v. The Superior Court of Kern County* (Nov. 7, 2023) 96 Cal.App.5th 1228, Court of Appeal Case No. F086308 (Supreme Court Case No. S283323)

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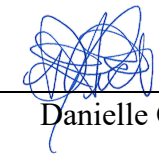
Executed on January 9, 2024 at San Francisco, California.



Danielle Ott