

1 JAMES M. WAGSTAFFE (95535)  
wagstaffe@kerrwagstaffe.com  
2 MICHAEL VON LOEWENFELDT (178665)  
mvl@kerrwagstaffe.com  
3 MELISSA PERRY (305600)  
perry@kerrwagstaffe.com  
4 **KERR & WAGSTAFFE LLP**  
101 Mission Street, 18th Floor  
5 San Francisco, CA 94105-1727  
Telephone: (415) 371-8500  
6 Fax: (415) 371-0500

7 Attorneys for Petitioner/Plaintiff,  
COMMISSION ON JUDICIAL PERFORMANCE  
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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO**  
12 **UNLIMITED JURISDICTION**

13 COMMISSION ON JUDICIAL  
14 PERFORMANCE,

15 Petitioner/Plaintiff,

16 v.

17 ELAINE M. HOWLE, in her official capacity as  
18 CALIFORNIA STATE AUDITOR, and the  
19 CALIFORNIA STATE AUDITOR'S OFFICE,

20 Respondents/Defendants.  
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ELECTRONICALLY  
**FILED**

*Superior Court of California,  
County of San Francisco*

**06/29/2017**

**Clerk of the Court**

BY: JUDITH NUNEZ

Deputy Clerk

Case No. CPF-16-515308

**PETITIONER'S OPENING BRIEF ON  
PETITION FOR WRIT OF  
PROHIBITORY MANDATE, OR IN  
THE ALTERNATIVE, COMPLAINT  
FOR DECLARATIVE AND  
INJUNCTIVE RELIEF**

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1     **I.       INTRODUCTION**

2           The Commission on Judicial Performance (“CJP”) is a constitutionally created agency  
3 responsible for investigating complaints of judicial misconduct and judicial incapacity,  
4 disciplining judges, and maintaining public confidence in the judiciary’s integrity and  
5 independence. The CJP’s investigation of complaints is confidential. Confidentiality in the  
6 investigative phase is provided to complainants, witnesses, and judges, offering a safe forum to  
7 complain about judicial misconduct while protecting the judicial system from the harm caused  
8 by meritless accusations. This iron clad confidentiality has repeatedly been recognized as  
9 essential to the CJP’s function. The CJP’s decisions to impose discipline are subject to review by  
10 the California Supreme Court. If formal charges are filed, all papers and proceedings are open to  
11 the public.

12          On August 10, 2016, the Joint Legislative Audit Committee of the California Legislature  
13 authorized an audit of the CJP by the California State Auditor. The audit seeks to cover 19 topics  
14 and is estimated to take over 4,000 hours. Most of the audit covers topics clearly within the  
15 proper scope of legislative review of the judicial branch, such as staff qualifications, workload  
16 statistics, CJP processes, and financial information. Part of the audit, however, violates the  
17 California Constitution.

18          First, the State Auditor seeks to copy and review all of the CJP’s confidential files.  
19 Article VI section 18 of the California Constitution vests the CJP with the sole authority to  
20 determine the confidentiality of complaints and investigations. The CJP’s constitutional authority  
21 to make certain materials confidential overrides the State Auditor’s statutory authority to audit  
22 public entities, not the other way around.

23          Second, three of the eighteen audit topics impermissibly interfere with the CJP’s core  
24 constitutional function. By substituting itself for the CJP and the Supreme Court, the State  
25 Auditor’s attempt to audit whether the CJP made the right decision in specific cases violates the  
26 separation of powers doctrine.

27          The CJP met with the State Auditor to allow inquiry into the 15 of 18 topics that are  
28 appropriate for an audit and will not breach the CJP’s confidentiality. The State Auditor,

1 however, refused to commence the undisputed portions of the audit. Instead, the State Auditor  
2 insisted that it is entitled to review all CJP records and inquired about obtaining a full copy of the  
3 CJP's computerized case tracking database.

4 Faced with this demand that CJP turn over all of its confidential files and yield to  
5 whatever the State Auditor wants, the CJP filed this action. This Court should grant the CJP's  
6 petition for writ of mandate, and enter declaratory and injunctive relief (a) that Government  
7 Code section 8545.2 does not override the confidentiality established by Article VI section 18 of  
8 the California Constitution and CJP Rule 102, (b) that the State Auditor therefore has no right to  
9 review records made confidential by CJP Rule 102, and (c) that an audit of topics 2, 5, and 12 in  
10 the "Analysis of Audit Request" would violate the separation of powers doctrine.

## 11 **II. STATUTORY AUTHORITY FOR THE COURT TO ACT**

12 A petition for writ of mandate is adjudicated in this Court by a motion in the law and  
13 motion department. (San Francisco Ct. R. 8.1(A)(3)(a).) A traditional writ of mandate lies "to  
14 compel the performance of an act which the law specially enjoins, as a duty resulting from an  
15 office, trust, or station ..." (Code Civ. Proc., § 1085, subd. (a).) "Two basic requirements are  
16 essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the  
17 part of the respondent; and (2) a clear present and beneficial right in the petitioner to the  
18 performance of that duty." (*Steelgard Inc. v. Jannsen* (1985) 171 Cal.App.3d 79, 83 [217  
19 Cal.Rptr. 152] [citation omitted].) An official's affirmative obligation to perform encompasses a  
20 corollary obligation not to perform the duty in violation of the law. Thus, the unlawful exercise  
21 of a ministerial duty can be restrained and courts label the writ restraining such unlawful  
22 performance "prohibitory mandate." (*Planned Parenthood Affiliates v. Van de Kamp* (1986) 181  
23 Cal.App.3d 245, 262-263 [226 Cal.Rptr. 361].) Prohibitory mandamus may be used either where  
24 an "official's conduct is in violation of a statutory ministerial duty," or "where the performance  
25 of a statutory ministerial duty would violate the Constitution." (*Id.* at p. 263.)

26 As the entity whose records are subject to the threatened audit, the CJP has a "special  
27 interest to be served or some particular right to be preserved or protected over and above the  
28 interest held in common with the public at large." (*Associated Builders & Contractors, Inc. v.*

1 *San Francisco Airports Comm'n* (1999) 21 Cal.4th 352, 361-362 [87 Cal.Rptr.2d 654, 981 P.2d  
2 499] [citation omitted].) The CJP thus has sufficient beneficial interest in prohibiting  
3 Respondents from accessing the CJP's confidential records and in prohibiting Respondents from  
4 interfering with the CJP's core functions. (*See Comm'n on Judicial Performance v. Superior*  
5 *Court* (2007) 156 Cal.App.4th 617 [67 Cal.Rptr.3d 434] [granting the CJP writ of mandate relief  
6 from an order directing the CJP to produce information that was confidential pursuant to CJP  
7 Rule 102].)

### 8 **III. FACTUAL BACKGROUND**

#### 9 **A. THE COMMISSION ON JUDICIAL PERFORMANCE: A CONSTITUTIONALLY 10 CREATED JUDICIAL BODY**

11 The CJP was created in 1960 by a legislatively referred constitutional amendment.  
12 (California Proposition 10, Commission on Judicial Qualifications (Nov. 8, 1960).) The CJP was  
13 established within the state's judicial branch, and was the nation's first permanent state judicial  
14 disciplinary commission. (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630,  
15 637 [34 Cal.Rptr.2d 641, 882 P.2d 358]; Cal. Const., art. VI, § 8.) The CJP's structure and  
16 authority have been revised by voters in five separate initiatives. (*Mandate & Legislative*  
17 *History*, State of California Commission on Judicial Performance  
18 <[https://cjp.ca.gov/mandate\\_legislative\\_history/](https://cjp.ca.gov/mandate_legislative_history/)> (as of June 7, 2017).) The CJP is vested with  
19 the authority to retire, remove, censure or to admonish a judge, and to disqualify a judge during  
20 the pendency of formal proceedings, subject to the review of the Supreme Court. (Cal. Const.,  
21 art. VI § 18, subd. (b), (d).)

22 The purposes of CJP disciplinary proceedings are to protect the public, to enforce  
23 rigorous standards of judicial conduct, and to maintain public confidence in the integrity and  
24 independence of the judicial system. (*Broadman v. Commission on Judicial Performance* (1998)  
25 18 Cal.4th 1079, 1111-1112 [77 Cal.Rptr.2d 408, 959 P.2d 715] [citing *Adams v. Commission on*  
26 *Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544]].) To  
27 accomplish these objectives, the CJP is constitutionally empowered to make rules for the  
28 investigation of judges and for formal proceedings against judges. (Cal. Const. art. VI, § 18,



1 subd. (i).) The CJP is expressly authorized by the California Constitution to “provide for the  
2 confidentiality of complaints to and investigations by the commission,” provided only that, when  
3 the CJP commences formal proceedings, the notice of charges, the answer, and all subsequent  
4 papers and proceedings are open to the public for all formal proceedings. (Cal. Const., art. VI,  
5 §§ 18, subd. (i)(1), (j).) This strict confidentiality serves several critical public policies:

6 Confidentiality encourages the filing of complaints and the willing  
7 participation of citizens and witnesses by providing protection against  
8 possible retaliation or recrimination. It protects judges from injury which  
9 might result from the publication of unexamined and unwarranted  
10 complaints by disgruntled litigants or their attorneys, or by political  
11 adversaries, and preserves confidence in the judiciary as an institution by  
12 avoiding premature announcement of groundless claims of judicial  
13 misconduct or disability. Confidentiality is essential to protecting the  
14 judge’s constitutional right to a private admonishment if the  
15 circumstances so warrant, and when removal or retirement is justified by  
16 the charges, judges are more likely to resign or retire voluntarily without  
17 the necessity of a formal proceeding if the publicity that would  
18 accompany such a proceeding can thereby be avoided. Leading writers  
19 have recognized that confidentiality of investigations and hearings by the  
20 Commission is essential to its success.

21 (*Comm’n on Judicial Performance v. Superior Court, supra*, 156 Cal.App.4th at p. 622.)

22 Prior to 1994, the California Constitution mandated that CJP investigations be  
23 confidential. Hearings were also confidential, subject to limited exceptions. (*Adams v. Comm’n*  
24 *on Judicial Performance, supra*, 8 Cal.4th at pp. 646-647.) That year, through Proposition 190,  
25 the California electorate amended the California Constitution to provide that **all** formal  
26 proceedings of the CJP are open to the public but to authorize the CJP to determine the  
27 confidentiality of complaints and investigations. (*Ibid.*) Article VI, section 18, subdivision (i)(1)  
28 of the California Constitution now provides that, “The commission shall make rules for the  
investigation of judges. The commission may provide the confidentiality of complaints to and  
investigations by the commission.” (Cal. Const., art. VI, § 18, subd. (i)(1).) Further, Proposition  
190 reaffirmed the CJP’s authority to “publicly **or privately** admonish a judge or former judge  
found to have engaged in an improper action or dereliction of duty.” (Cal. Const., art. VI, § 18,  
subd. (d)(3) [emphasis added].)

1 The California Constitution places no limits on the CJP's express power to provide for  
2 the confidentiality of complaints to and investigations by the CJP other than those set forth in  
3 article VI section 18.5. Article VI section 18.5 contains no provision allowing confidential  
4 information to be provided to the State Auditor's Office. Nor does any provision of the  
5 California Constitution empower the Legislative or Executive branches to place limits on, or to  
6 create additional exceptions to, the confidentiality established by the CJP.

7 Pursuant to the exclusive authority granted to the CJP by the California Constitution, the  
8 CJP adopted Rule 102, which provides, in relevant part, that "[e]xcept as provided in this rule, all  
9 papers filed with any proceedings before the commission shall be confidential." (CJP Rule 102.)  
10 Rule 102 delineates specific and limited exceptions where disclosure of confidential records is  
11 permissible. None of the exceptions applies here and nothing in Rule 102 authorizes disclosure  
12 of confidential records to the State Auditor.

13 **B. THE CALIFORNIA STATE AUDITOR: A LEGISLATIVELY CREATED BODY**

14 The California State Auditor is not a constitutional entity; rather, it was created by  
15 legislation. (Gov. Code, § 8543, subd. (a); Gov. Code, § 8543.2.) The duties of the State Auditor  
16 include annual examination of financial statements prepared by the state executive branch and  
17 statutorily mandated performance audits. (Gov. Code, § 8543.1.) In addition, at the request of the  
18 Joint Legislative Audit Committee ("JLAC"), the State Auditor is authorized to conduct audits of  
19 state and local governmental agencies and any other publicly created entities.<sup>1</sup> (Gov. Code, §  
20 8546.1, subd. (b).)

21 The statutes creating the State Auditor purport to grant it access to, and the right to  
22 reproduce, any and all records of a state agency including confidential records. (Gov. Code, §  
23 8545.2, subd. (a).) This right of access purports to exist "[n]otwithstanding any other provision  
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25 <sup>1</sup> The State Auditor argues in its answer that JLAC is the proper Respondent here, not the  
26 State Auditor. JLAC, however, is not auditing the CJP. It is the State Auditor's conduct that this  
27 Petition seeks to enjoin, not JLAC's conduct. While the State Auditor takes requests from JLAC,  
28 it is a statutorily independent entity. "In order to be free of organizational impairments to  
independence, the office [of the State Auditor] shall be independent of the executive branch and  
legislative control." (Gov. Code, § 8543, subd. (a).)

1 of law.” (*Ibid.*) Documents created by or collected by the State Auditor during an audit and used  
2 to support the State Auditor’s report are public records subject to the California Public Records  
3 Act (“CPRA”) and must be retained for at least three years. (Gov. Code, § 8545.)

4       Once the State Auditor collects the files of another agency, it is the State Auditor, not the  
5 auditee, that handles public records requests for the State Auditor’s copies. Without citing  
6 authority, the State Auditor has asserted in discovery that, “[a]s a matter of law, Respondent is  
7 only permitted to release responsive records used in support of a published audit report *and not*  
8 *otherwise confidential*.” (Declaration of Michael von Loewenfeldt (“von Loewenfeldt Decl.”)  
9 Ex. A at Resp. No. 9 (emphasis in original).) Yet, no law provides absolute protection from the  
10 State Auditor’s decision to release responsive records the State Auditor deems non-confidential.  
11 Upon receipt of a CPRA request, the State Auditor decides which documents subject to the  
12 request are confidential. (*Ibid.*) Though the State Auditor might “contact[] the auditee’s legal  
13 counsel” to confer about the confidentiality of documents, the State Auditor is not required do so  
14 or agree with the auditee’s determination. (*Ibid.*)

15       Once the audit has concluded, the State Auditor publishes a report with findings and  
16 recommendations related to the audit and delivers the report to the Legislature and the public.  
17 (Gov. Code, § 8546.1, subd. (a).) The State Auditor is required by statute to “request that any  
18 state agency ... that is the subject of an audit or investigation ... provide updates on its progress  
19 in implementing the recommendations made by the California State Auditor, at intervals  
20 prescribed by the California State Auditor.” (Gov. Code, § 8546.2, subd. (a).) The statute also  
21 requires that the agency subject to the audit “shall” provide the State Auditor, “in the form  
22 prescribed by the California State Auditor, with updates on implementation of  
23 recommendations.” (Gov. Code, § 8546.2, subd. (b) .)

#### 24       **C.     THE AUDIT REQUEST AT ISSUE**

25       On August 10, 2016, the Joint Legislative Audit Committee of the California Legislature  
26 authorized an audit of the CJP. (Victoria Henley Declaration [“Henley Decl.”] Ex. A.) The stated  
27 goal of the audit is to “examine the policies and practices for handling and resolving complaints  
28 against judges by the Commission on Judicial Performance (commission).” (*Ibid.*) The analysis

1 of the audit prepared by the State Auditor lists 18 specific and one catch-all area of inquiry, and  
2 estimates that the audit will take 4,104 hours and cost approximately \$492,480 plus travel and  
3 administrative expenses and any potential costs related to an outside consultant. (*Ibid.*) The  
4 analysis states that the Auditor will use its existing budget authority “to the extent funding is  
5 available.” (*Ibid.*)

6 Prior to the commencement of the audit, the CJP contacted the Office of the State  
7 Auditor, expressing its concerns that the scope of the audit would require the CJP to violate its  
8 rules of confidentiality and that certain topics audited the discretionary exercise of the CJP’s core  
9 constitutional duties, thus violating the separation of powers doctrine. (Henley Decl. ¶ 3.)

10 At a meeting at the outset of the audit on October 17, 2016, the CJP made clear that it  
11 was not objecting to the other topics that were within the purview of a proper, traditional  
12 performance audit by Respondents. (Henley Decl. ¶ 4.) Such topics include evaluation of the  
13 CJP’s finances, workload statistics, and processes. (*Ibid.*) The CJP expressly invited the State  
14 Auditor to proceed with the audit on those other topics, and only objected to Topics 2, 5, and 12  
15 and any topics to the extent that they require review of the CJP’s confidential records. (*Ibid.*)  
16 Topic 2 seeks to determine whether the CJP is “taking an appropriate and reasonable course of  
17 action for the complaints it reviews and for determining the disposition of each complaint.”  
18 (Henley Decl. Ex. A.) Topic 5 seeks to evaluate how the CJP decides which witnesses and  
19 evidence to believe. (*Ibid.*) Topic 12 seeks to evaluate the outcomes of a selection of cases and  
20 the discipline imposed. (*Ibid.*) Each of these topics of the audit seeks to evaluate the decision-  
21 making of the CJP in specific cases and the discretionary and adjudicative exercise of its core  
22 function.

23 The State Auditor, however, insisted that it have immediate access to all CJP records.  
24 (Henley Decl. ¶ 5.) It inquired how to obtain a copy of the CJP’s entire computerized case  
25 tracking database going back to the 1980s, despite the audit’s time frame of 5 years. (*Ibid.*) The  
26 State Auditor also claimed that typically the auditee has to pay for the audit. (*Ibid.*)<sup>2</sup> The State

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27  
28 <sup>2</sup> Respondents now admit in their Answer that “the Auditor has no authority to charge the  
Commission for the cost of conducting the audit and has no intention of doing so.” (von

Auditor did not respond to further attempts to resolve these issues, and chose *not* to commence its audit of the undisputed topics. (*Ibid.*) The CJP filed this action, having no other recourse to protect its confidential records or the exercise of its core function.

**D. THE STATE AUDITOR’S CURRENT AUDIT IS UNPRECEDENTED**

As far as the CJP can determine, this audit is unique in its attempt to second-guess discretionary, adjudicatory decision-making by the judicial branch. In their Answer, Respondents assert that “[t]he Auditor regularly audits State agencies established by the Constitution” including “the Supreme Court, the State Bar, the Judicial Council, the Administrative Office of the Courts, various Superior Courts, the Secretary of State, the State Controller, the Public Utilities Commission, and the University of California” and none of these audits “intruded on the ‘core function’ of those agencies.” (Answer at ¶ 2.) As a threshold matter, Respondents’ assertion regarding past audits does not authorize the State Auditor’s attempted audit of the CJP or bear in any way on the legal analysis of the clear separation of powers issue. Even so, it appears that this audit, unlike prior audits of judicial branch entities, is unprecedented.

The CJP requested in discovery a list of all similar audits (across several criteria found in Topics 2, 5, or 12) that the State Auditor claimed to have performed. (von Loewenfeldt Decl. Ex. A at Resp. Nos. 1-7.) In response, the State Auditor provided a list of past audits, but only some were audits of judicial branch entities.<sup>3</sup> None of Respondents’ previous audits of the judicial branch that were provided are analogous to the disputed portions of the audit at issue. For example, Respondents offer two audits of the State Bar that purportedly evaluated areas similar to Topics 2, 5, or 12. (*Id.* at Nos. 1, 3, 4, 5, 7.) Neither audit substantively evaluated discretionary decision-making of the State Bar; instead, the audits evaluated protocols and processes the State

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Loewenfeldt Decl. Ex. B at ¶ 6.) Given the State Auditor’s concession, the CJP should prevail on its fifth cause of action, and is entitled to a declaration that the State Auditor is not permitted to charge the CJP for the costs of the audit and that the CJP has no legal obligation to pay such costs if charged by the State Auditor.

<sup>3</sup> Any prior audits of, for example, the executive branch, would require a completely different analysis as there is no separation of powers issue with which to contend.

1 Bar follows to ensure the State Bar is in compliance with various rules, workload statistics, and  
2 financial decisions. (von Loewenfeldt Decl. Exs. C-D.)

3 Respondents also identify audits which evaluate reporting procedures, administrative  
4 policies and procedures, and qualifications of staff in Superior Courts. (von Loewenfeldt Decl.  
5 Ex. A at Resp. Nos. 1, 3, 4, 5, 7.) None of these audits make evaluations of discretionary  
6 decision-making similar to those presented in Topics 2, 5, and 12 of the audit at issue. (von  
7 Loewenfeldt Decl. Exs. E-F.)<sup>4</sup>

8 Topics 2, 5, and 12 essentially amount to auditing whether the CJP made “the right”  
9 decision with respect to particular complaints. This would be akin to auditing this Court’s law  
10 and motion department by reviewing briefs and judging how this Court should have ruled on  
11 motions. There is no precedent for the State Auditor to audit a judicial entity in that fashion.

#### 12 **IV. ARGUMENT**

##### 13 **A. THE CJP DOES NOT OBJECT TO THE MAJORITY OF TOPICS IN THE AUDIT**

14 This Petition seeks to enforce the CJP’s constitutional right to designate materials  
15 confidential and prevent anyone, including the State Auditor, from reviewing them, which is  
16 essential to the CJP’s constitutional function, as well as to enforce basic separation of powers  
17 principles. Critically, CJP is *not* seeking to prevent an audit of those matters that the State  
18 Auditor properly has the right to audit.

19 The vast majority of topics in the audit, such as examining the CJP’s financial records,  
20 workload statistics, staff qualifications, and protocols, are appropriate areas of inquiry. For  
21 example, Topic 13 seeks to examine, for the most recent five-year period, “the commission’s  
22 budget, expenditures, and fund balances” and to “determine whether the commission’s budget  
23 for administration and staffing, as well as the average cost of an inquiry or investigation, are

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24  
25 <sup>4</sup> In response to Petitioner’s Form Interrogatory No. 15.0, Respondents list other audits of  
26 judicial branch entities. (von Loewenfeldt Decl. Ex. B at Resp. No. 15.0.) Respondents did not  
27 include these audits in their responses to Petitioner’s Special Interrogatories seeking specific  
28 audits that evaluated the discretionary decision-making similar to those in Topics 2, 5, and 12 of  
the audit at issue. This only confirms that the audit at issue is unprecedented compared to prior  
audits of judicial branch entities.

1 consistent with best practices of other comparable organizations.” (Henley Decl. Ex. A.) Topic  
2 11 evaluates the CJP’s process for investigating legal error and the standards the CJP uses to do  
3 so. (*Ibid.*) If, as it has done with other agencies, the State Auditor wishes to audit the number of  
4 confidential complaints the CJP receives, how long it takes to resolve complaints, the type of  
5 resolution reached, and similar statistical analysis that does not depend on review of the  
6 confidential material or a substantive second-guessing of the judicial function, the CJP has no  
7 objection to that. (Henley Decl. ¶ 6.) The commission is willing to provide necessary statistics  
8 for purposes of statistical analysis. (*Ibid.*) These and other topics are within the scope of the  
9 Legislature’s legitimate interest as the entity authorizing the CJP’s budget and do not interfere  
10 with the core functions of the CJP. (Henley Decl. ¶ 7.) The CJP has no objection to these proper  
11 audits, and has repeatedly invited the State Auditor to begin conducting them. (*Ibid.*)

12 **B. THE STATE AUDITOR HAS NO LEGAL AUTHORITY TO REVIEW AND COPY**  
13 **CONFIDENTIAL RECORDS OF CJP PROCEEDINGS**

14 The first issue this Court needs to resolve is whether the State Auditor’s statutory right to  
15 review confidential agency records under Government Code section 8545.2 overrides the CJP’s  
16 confidentiality rules promulgated under Article VI section 18 of the California Constitution and  
17 Rule 102. The State Auditor, like all agents of California, has a mandatory duty not to violate the  
18 California Constitution. (*Leger v. Stockton Unified Sch. Dist.* (1988) 202 Cal.App.3d 1448, 1454  
19 [249 Cal.Rptr. 688] [“[A]ll branches of government are required to comply with constitutional  
20 directives or prohibitions.” [citations omitted]].) Whether the State Auditor has a duty not to  
21 violate the constitutionally authorized Rule 102 or, alternatively, whether the CJP has a duty to  
22 provide the confidential records to the State Auditor despite that rule, is a proper subject of this  
23 writ of mandate and request for declaratory and injunctive relief. (*See Planned Parenthood*  
24 *Affiliates v. Van de Kamp*, *supra*, 181 Cal.App.3d at p. 263.)

25 This question turns on the fundamental hierarchy between the Constitution and state  
26 statutes. “The California Constitution is ‘the supreme law of our state’..., subject only to the  
27 supremacy of the United States Constitution.” (*California Logistics, Inc. v. State of California*  
28 (2008) 161 Cal.App.4th 242, 250 [73 Cal.Rptr.3d 825] [citation omitted].) “Wherever statutes

1 conflict with constitutional provisions, the latter must prevail.” (*Delaney v. Superior Court*  
2 (1990) 50 Cal.3d 785, 800, fn. 11 [268 Cal.Rptr. 753, 789 P.2d 934] [quoting *People v. Navarro*  
3 (1972) 7 Cal.3d 248, 260 [102 Cal.Rptr. 137, 497 P.2d 481]]; *Citizens Assn. of Sunset Beach v.*  
4 *Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1189 [147  
5 Cal.Rptr.3d 696] [“Constitutions trump conflicting statutes.”].)

6 Here, Article VI section 18, subdivision (i)(1) of the California Constitution provides that  
7 the *CJP*, not the Legislature, determines which of the CJP’s records are confidential. The CJP  
8 did so, enacting Rule 102 which renders the records confidential and contains no exception for  
9 the State Auditor, though other exceptions are provided. (CJP Rule 102, subd. (e)-(p).)  
10 Government Code section 8545.2 cannot override the constitutional grant of power in Article VI  
11 section 18 or its exercise in Rule 102. (*People v. Superior Court (Mudge)* (1997) 54 Cal.App.4th  
12 407, 412-413 [62 Cal.Rptr.2d 721], *as modified* (May 9, 1997) [“[A]ny legislative regulation  
13 must not ‘substantially impair’ an express provision of the California Constitution.”].)  
14 Government Code section 8545.2 is therefore unconstitutional as applied to the CJP’s  
15 confidential records.

16 While this specific conflict has not arisen before, the courts have rejected other attempts  
17 to breach the CJP’s confidentiality. In *Mosk v. Superior Court* (1979) 25 Cal.3d 474 [25 Cal.3d  
18 474, 601 P.2d 1030], the Supreme Court held that a Rule of Court allowing investigative  
19 hearings to be open to the public was unconstitutional because it conflicted with the then-  
20 applicable constitutional provision for confidentiality of investigations. (*Id.* at p. 499.) In  
21 *Comm’n on Judicial Performance v. Superior Court, supra*, 156 Cal.App.4th 617, the Court held  
22 that the discovery statutes and *Pitchess* procedure cannot be used to obtain confidential CJP  
23 records because CJP Rule 102 did not provide any such exception. (*Id.* at pp. 622-625.) The  
24 court noted that “the superior court judge presiding over the proceedings in which the  
25 Commission’s confidential records are requested has no more right to see the Commission’s  
26 records than does any other member of the public.” (*Id.* at p. 625.)

27 The CJP’s constitutional right to control the confidentiality of its documents is consistent  
28 with the law in other states. As the United States Supreme Court noted in *Landmark Commc’ns*,



1 *Inc. v. Virginia* (1978) 435 U.S. 829, 834-835 [98 S.Ct. 1535, 56 L.Ed.2d 1], as of 1987 the  
2 overwhelming majority of states, the District of Columbia, and Puerto Rico, have established by  
3 constitution, statute, or court rule, some type of judicial inquiry and disciplinary procedures, and  
4 all of these jurisdictions, except Puerto Rico, provide for the confidentiality of judicial  
5 disciplinary proceedings. Currently, all 50 states have disciplinary procedures with varying  
6 degrees of confidentiality. (CYNTHIA GRAY, *How Judicial Conduct Commissions Work*, 28 JUST.  
7 SYS. J. 405, 405 (2007)). Indeed, courts have held that the constitutional or statutory authority of  
8 similar entities to the CJP to make their records confidential preserves the agencies' independent  
9 function and cannot be overridden by other branches of government. (See *Garner v. Cherberg*  
10 (1988) 111 Wash.2d 811, 812-814 [765 P.2d 1284] [cited with approval in *Comm'n on Judicial*  
11 *Performance, supra*, 156 Cal.App.4th at p. 625] [holding that the legislative committee could not  
12 use a subpoena to force disclosure of records of Commission on Judicial Conduct that would  
13 cause violation of Commission rules of confidentiality]; *Forbes v. Earle* (Fla. 1974) 298 So.2d 1,  
14 2-5; *Stern v. Morgenthau* (1984) 62 N.Y.2d 331, 333-336 [465 N.E.2d 349].)

15 Using the exclusive power vested in the CJP by the California Constitution, the CJP  
16 enacted Rule 102. That rule contains no exception for access by the State Auditor. The  
17 Legislature has no constitutional power to create such an exception itself, and Government Code  
18 section 8545.2 thus cannot constitutionally apply to confidential records of the CJP. The Court  
19 should therefore find that the State Auditor's demand for access to records made confidential by  
20 Rule 102 is unlawful, grant the writ of mandate, and enjoin the State Auditor from seeking any  
21 such confidential records from the CJP.

22 **C. THE CJP'S ABILITY TO KEEP ITS DOCUMENTS CONFIDENTIAL IS PARAMOUNT**

23 There are significant risks to allowing the State Auditor to access and copy the CJP's  
24 confidential records. As discussed above, the CJP's need for confidentiality protects judges,  
25 complainants, and witnesses, and the CJP's ability to function independently. With the State  
26 Auditor's access, the CJP loses control over its confidential records. The CJP will simply have to  
27 "trust" that no confidential information (whether in CJP documents or State Auditor documents  
28 summarizing CJP documents) will be publicly disclosed.

Moreover, the CPRA appears to open the door for the CJP's confidential documents to be released. The State Auditor's statute is unclear on this point. On one hand, Government Code section 8545.1 prohibits the State Auditor from divulging records or information "the disclosure of which is restricted by law from release to the public." On the other, Government Code section 8545 provides that the State Auditor must retain "any papers or memoranda used to support a completed audit" for three years and that all such documents are public records. This internal inconsistency in the State Auditor's own statute highlights the CJP's concerns about the State Auditor's obligations pursuant to the CPRA.

Further, the State Auditor cites no authority – and there is none – requiring the State Auditor to follow the CJP's determination that a document is to be withheld as confidential. The State Auditor's assertion that it typically confers with the auditee's legal counsel provides cold comfort to the CJP. The State Auditor, not the CJP, controls release of documents to the public, and the CJP will have no legal recourse to prevent the State Auditor from doing so.

Also notable is the real world impact the CJP's commitment to confidentiality has on the its own ability to function effectively. For example, it is common for complainants and witnesses to inquire about confidentiality before giving the CJP information pertaining to a case. (Henley ¶ 8.) Witnesses frequently give statements to the CJP after they have been informed that their statements are confidential unless the matter goes to formal proceedings and if their statements are discoverable under the rules. (*Ibid.*) Further, based on judges' communications with the CJP during proceedings, their consent or stipulation to private discipline is typically made with the expectation that such discipline will remain confidential, subject to the rules. (*Ibid.*) The State Auditor's proposed audit will eviscerate the CJP's guarantees of confidentiality and will prevent the CJP from performing its core functions.

Finally, as discussed above, the majority of the proposed audit may proceed without the State Auditor's access to the CJP's confidential records. Indeed, the CJP has no objection to the State Auditor accessing the CJP's non-confidential documents, and only seeks to protect a discrete population of information from release. The State Auditor's access to the CJP's confidential records will eviscerate the robust procedures that encourage complainants and

1 witnesses to “inform the Commission of judicial transgression,” persuade judges to “step down  
2 in silence,” and protect “the confidential deliberative process of the Commission” from political  
3 pressures. (*Garner v. Chernberg, supra*, 111 Wash.2d at pp. 820-821.)

4 **D. A FEW OTHER ASPECTS OF THE AUDIT ALSO VIOLATE THE SEPARATION OF**  
5 **POWERS DOCTRINE**

6 The State Auditor’s attempt to override the CJP’s control over its confidential records  
7 violates the California Constitution’s delegation of that power to the CJP. That is not, however,  
8 the only separation of powers issue raised by the audit. Three of the specific audit topics also  
9 trigger a separation of powers violation because they interfere with the CJP’s core function.

10 **1. California’s Constitutional Separation of Powers Doctrine Protects**  
11 **Each Branch from Other Branches Infringing on its Core Functions**

12 The California Constitution divides power among three branches of state government: the  
13 Legislature, the executive branch, and the courts. (*Perez v. Richard Roe I* (2006) 146  
14 Cal.App.4th 171, 176 [52 Cal.Rptr.3d 762], *as modified* (Jan. 26, 2007).) Although there is a  
15 certain overlap and interdependence among the three branches, each is constitutionally vested  
16 with “core” or “essential” functions that the others may not perform. (*Ibid.*) Protection of those  
17 core functions is guarded by the separation of powers doctrine and is embodied in a  
18 constitutional provision, which states that one branch of state government may not exercise the  
19 powers belonging to another branch. (*Id.* at pp. 176-177; Cal. Const., art. III, § 3.)

20 This does not mean that the activities of one branch are entirely immune from regulation  
21 or oversight by another. (*People v. Bunn* (2002) 27 Cal.4th 1, 16 [115 Cal.Rptr.2d 192, 37 P.3d  
22 380].) “As long as such enactments do not ‘defeat or materially impair’ the constitutional  
23 functions of the courts, a ‘reasonable’ degree of regulation is allowed.” (*Ibid.*) Nevertheless, the  
24 separation of powers doctrine prohibits the Legislature “from arrogating to itself core functions  
25 of the executive or judicial branch.” (*Ibid.* [citation omitted]; *see also People v. Superior Court*  
26 (*Mudge*), *supra*, 54 Cal.App.4th at pp. 412-413 “[A]ny legislative regulation must not  
27 ‘substantially impair’ an express provision of the California Constitution.”.) The Legislature  
28 thus may not use its powers to “defeat or materially impair” the exercise of its fellow branches’

1 constitutional functions, nor “intrude upon a core zone” of another branch’s authority. (*Howard*  
2 *Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 499 [196 Cal.Rptr.3d 732, 363 P.3d  
3 628], *reh’g denied* (Feb. 24, 2016).) Nor may the Legislature’s investigative power “be used to  
4 trench upon matters falling outside the legislative purview.” (*Ibid.*)

5 **2. Topics 2, 5, and 12 of the Audit Exceed the Auditor’s Authority by**  
6 **Infringing on the CJP’s “Core” Duties**

7 While the vast majority of audit topics are within the Legislature’s appropriate oversight  
8 (to the extent they do not require review of the CJP’s confidential materials), three violate the  
9 separation of powers doctrine by infringing on the CJP’s core constitutional duties.

10 Topic 2 assesses whether the CJP “is taking an appropriate and reasonable course of  
11 action for the complaints it reviews and for determining the disposition of each complaint.”  
12 (Henley Decl. Ex. A.) This topic flatly calls for the State Auditor to duplicate the CJP’s  
13 discretionary adjudicatory function and determine whether CJP made the correct decision.

14 Topic 5 evaluates how the CJP decides which witnesses and evidence to believe: “Assess  
15 the commission’s process for evaluating the credibility of evidence, witnesses, and statements  
16 made.” (Henley Decl. Ex. A.) It is not even clear how such an inquiry could be conducted, but  
17 any attempt at it would likely involve the State Auditor attempting to perform the CJP’s  
18 discretionary core function.

19 Finally, Topic 12 “evaluate[s] the outcomes of a selection of cases and the discipline  
20 imposed by the commission, including cases that resulted in private discipline.” (Henley Decl.  
21 Ex. A.) As with the other topics, the State Auditor seeks to question and make conclusions about  
22 the CJP’s discretionary decisions in evaluating the merits of a case.

23 This type of audit is an unprecedented intrusion into the CJP’s adjudicative role. Review  
24 of the CJP’s decisions, as with review of this Court’s decisions, is a judicial function, not one  
25 that can be performed by the executive or legislative branches. (*See* Cal. Const., art. VI, § 18,  
26 subd. (d) [“Upon petition by the judge or former judge, the Supreme Court may ... grant review  
27 of a determination by the commission ...”].)

28 Allowing these audit topics “threaten[s] to undermine ... the independence and integrity”

1 of the judicial branch. (*City of Sacramento v. California State Legislature* (1986) 187  
2 Cal.App.3d 393, 398-399 [231 Cal.Rptr. 686].) This improper intrusion into the judicial branch  
3 is unprecedented in California, but courts in other states have firmly rebuffed similar efforts by a  
4 legislature to invade the judicial branch. In *Chicago Bar Ass'n v. Cronson* (1989) 183 Ill.App.3d  
5 710, 713, 726 [539 N.E.2d 327], the court held that the Illinois Auditor General's audit of the  
6 funds of the Attorney Registration and Disciplinary Commission and the Board of Law  
7 Examiners would violate the separation of powers clause of the Illinois Constitution. The court  
8 reasoned that, because the agencies were created by Illinois Supreme Court rules and  
9 administered matters within the inherent, exclusive authority of the Illinois Supreme Court, it  
10 was for the Illinois Supreme Court, not the General Assembly or the Governor, to determine  
11 whether the Disciplinary Commission or the Board of Law Examiners has properly discharged  
12 the responsibilities delegated to them. (*Id.* at p. 724.) An audit, resulting report, and possible  
13 remedial recommendations or further investigation by legislature would be highly intrusive into  
14 the court's inherent power to regulate the manner in which the agencies are structured, in which  
15 they function, and in which they obligate and use their funds. (*Ibid.*; see also *Matter of*  
16 *Washington State Bar Ass'n* (1976) 86 Wash.2d 624, 633 [548 P.2d 310].)

17       Also on point is *State Auditor v. Joint Comm. On Legislative Research* (Mo. 1997) 956  
18 S.W.2d 228, 232-233, as modified on denial of reh'g (Nov. 25, 1997), where the court found the  
19 separation of powers doctrine precluded the legislature from auditing the management  
20 performance of a co-equal department of government. The unlawful audit went beyond obtaining  
21 financial information and instead intended to offer opinions about the manner in which an  
22 agency conducts its business. (*Ibid.*)

23       Similarly, the Kentucky Supreme Court found that the Auditor of Public Accounts is not  
24 legally entitled to audit the books and accounts of the Kentucky Bar Association. (*Ex parte*  
25 *Auditor of Pub. Accounts* (Ky. 1980) 609 S.W.2d 682, 683, 689.) The court held that the  
26 Association and the Board of Bar Examiners exist solely by virtue of rules of the Kentucky  
27 Supreme Court expressly authorized by the state Constitution. Their accountability was solely to  
28 the Supreme Court, of which they were an integral part. (*Id.* at p. 686.) The court also opined that

1 it was “appropriate to consider that the office of the Auditor is essentially political in nature and  
2 has not always been altogether unaffected by partisan political currents” and the policy of the  
3 Supreme Court is to isolate the judicial system from the political arena. (*Id.* at p. 688.)


4 Again, the CJP takes no issue with the State Auditor investigating how the CJP spends  
5 the funds appropriated for its use, the qualifications of CJP staff, statistics concerning workload  
6 and backlog, and the many other appropriate oversight topics that neither require review of  
7 constitutionally protected confidential material nor second-guessing of decisions made by the  
8 CJP in specific cases. The State Auditor’s attempt to go beyond such topics, however, and to  
9 “review” the CJP’s performance of its core functions in specific cases, violates the separation of  
10 powers doctrine and should be enjoined by this Court.

11 **V. CONCLUSION**

12 For the reasons set forth above, Petitioner the Commission on Judicial Performance asks  
13 this Court to grant its Petition for Writ of Mandate, and to enjoin the Office of the State Auditor  
14 and the State Auditor from (a) seeking access to materials that are confidential pursuant to CJP  
15 Rule 102, and (b) auditing the topics listed as 2, 5, and 12 in the Analysis of Audit Request.

16  
17 Dated: June 29, 2017

**KERR & WAGSTAFFE LLP**

18  
19 By:   
20 JAMES M. WAGSTAFFE  
MICHAEL VON LOEWENFELDT  
21 MELISSA L. PERRY  
Attorneys for Petitioner/Plaintiff,  
22 COMMISSION ON JUDICIAL PERFORMANCE  
23  
24  
25  
26  
27  
28