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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

COMMISSION ON JUDICIAL PERFORMANCE, Petitioner/Plaintiff, vs. ELAINE M. HOWLE, in her official capacity as CALIFORNIA STATE AUDITOR, and the CALIFORNIA STATE AUDITOR'S OFFICE, Respondents/Defendants.	Case No. CPF-16-515308 **OPPOSITION TO COMMISSION ON JUDICIAL PERFORMANCE'S PETITION FOR WRIT OF MANDATE** DATE: August 4, 2017 TIME: 9:30 a.m. DEPT: 302 RESERVATION: 06020804-06

Accompanying documents:

ACCOMPANYING AUTHORITIES TO OPPOSITION BRIEF TO COMMISSION ON JUDICIAL PERFORMANCE'S PETITION FOR WRIT OF MANDATE

DECLARATION OF CALIFORNIA STATE AUDITOR ELAINE M. HOWLE IN SUPPORT OF OPPOSITION TO COMMISSION ON JUDICIAL PERFORMANCE'S PETITION FOR WRIT OF MANDATE

DECLARATION OF ROBERT HARRIS IN SUPPORT OF OPPOSITION TO COMMISSION ON JUDICIAL PERFORMANCE'S PETITION FOR WRIT OF MANDATE

DECLARATION OF MYRON MOSKOVITZ IN SUPPORT OF OPPOSITION TO COMMISSION ON JUDICIAL PERFORMANCE'S PETITION FOR WRIT OF MANDATE

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INTRODUCTION

Every year, the Legislature appropriates millions of taxpayer dollars to fund the operations of the Commission on Judicial Performance. For Fiscal Year 2016-2017, the Commission's budget allocation was $4,640,000.[1] But neither the Legislature nor the public has any idea how well or how poorly this money is spent.

Last year, for the first time since the Commission was established in 1960, the Legislature decided to find out whether the Commission is using its appropriations properly. On August 10, 2016, the Joint Legislative Audit Committee of the California Legislature directed the State Auditor to conduct an audit of the Commission on Judicial Performance.

The Commission now asks this Court to enjoin the State Auditor from carrying out her assignment. However, the Commission's unverified Petition for Writ of Mandate is founded on fear, not fact.

The Commission fears that the Auditor will "attempt to audit whether the CJP made the right decision in specific cases" and will decide "whether the CJP made the 'right' decision with respect to particular complaints". Commission's Opening Brief, at 1:24-26 and 9:8-9. In fact, the Legislature directed the Auditor to examine "the policies and practices for handling and resolving complaints against judges by the Commission on Judicial Performance" - not the merits of its particular decisions. Declaration of Elaine M. Howle, ¶ 64, ¶ 70. And, as the State Auditor's accompanying Declaration explains, the Auditor has *no power* to change any Commission ruling. Howle Dec. at ¶ 19. The Auditor might make recommendations, but even the Auditor's recommendations do not challenge the particular rulings of any of the state regulatory agencies that it audits. Howle Dec., ¶¶ 20-21.

The Commission presents no evidence that the State Auditor has *ever* ordered - or even recommended - that a state regulatory agency change a particular ruling.

The Commission also fears that the Auditor will release confidential files to the public. In fact, as the State Auditor's Declaration explains, the Legislature has expressly forbidden the State Auditor from doing this. Howle Dec., ¶ 38. And she has extensive security measures in place to protect the

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[1] See accompanying Declaration of Myron Moskovitz, Exhibit A: Commission's Response to Special Interrogatories, at 20:10.

confidentiality of the records of every agency she audits. Howle Dec. ¶¶ 33-43.

The Commission presents no evidence of *even a single instance* where the State Auditor has breached the confidentiality rules of any agency she has audited.

The Commission's *evidence* consists solely of two declarations – one from the Commission's general counsel about a meeting she had with some staff members from the State Auditor's Office, and the other from the Commission's trial counsel. Neither contains *any* evidence that the State Auditor has either the legal authority or the intention of ordering the Commission to change its decisions, or to release the Commission's confidential documents to the public. Thus, the Commission has submitted no evidence sustaining its burden of proving that it is entitled to a writ of mandate.

The Commission might also fear what an audit might uncover. In fact, the State Auditor has no stake in the outcome of an audit. An audit might show serious irregularities, as happened with her recent audit of the University of California President's Office. Or it might give the Commission a clean bill of health. The State Auditor's sole duty is to report the truth about the Commission's performance to the Legislature and the public, so they may act as they see fit. To do that properly, she needs full access to an agency's documents.

The Commission's fears stem from its inexperience with audits. The Commission was founded in 1960. In its 57 years of existence, not once has the Commission been audited. Not by the State Auditor. Not by any other public auditor. Not even by a private auditing firm.[2] The Commission has no idea how the State Auditor conducts a performance audit.

The Commission says that it does not object to a fiscal audit, but does object to a performance audit.[3] Commission's Opening Brief at 1:14-16. But the Legislature is just as concerned about the Commission's performance as with its finances. To decide whether to appropriate funds to the Commission, and to decide whether to propose changes in the Commission's Constitutional authority, the Legislature must learn whether the Commission's procedures are efficient or wasteful, whether

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[2] See Moskovitz Dec., Ex. A: Commission's Response to Special Interrogatories, at 1:13-24.

[3] The State Auditor explains the difference between a performance audit and a fiscal audit at ¶ 14 of Howle Dec.

they are well designed to carry out the Commission's goals, and whether they are actually implemented. Are the Commission's procedures structured to allow incompetent or biased judges to continue deciding civil and criminal cases? Or are they structured to lead to discipline that is too harsh on judges, arbitrarily interfering with their judicial independence? So far, the answers are a mystery.

The Commission argues that the "separation of powers" doctrine prevents the State Auditor from obtaining this information for the Legislature. However, if this Court *issues* the writ of mandate sought by the Commission, *that writ* would violate the separation of powers doctrine – by judicially intruding on the power of the Legislature to obtain information essential to carrying out the Legislature's Constitutional duty to enact laws and to appropriate funds.

The Commission argues that the fact that it was created by the State Constitution gives it special immunity. But the Legislature regularly directs the State Auditor to audit other agencies established by the Constitution - including the State Bar, the Public Utilities Commission, and the University of California. Without this information, the Legislature cannot wisely perform its duties to legislate and appropriate funds. And a court order barring the State Auditor from examining the Commission's confidential files would "preclude [the State Auditor] from performing almost all of the objectives referenced in the Legislature's request". Howle Dec. at ¶ 58.

No court has ever blocked the Legislature's effort to obtain information about a state agency's performance via an audit. There is no reason – and no legal justification - to start now.

I. AN AUDIT WILL NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

The Commission's Petition for Writ of Mandate asks this Court to issue a writ of mandate directing the State Auditor "to refrain from auditing the discretionary exercise of the CJP's core constitutional functions as required by the separation of powers doctrine." Petition at 1:8-9. This claim should be rejected, for several reasons.

First, under California law, there is no violation of the separation of powers doctrine where one branch of government is involved in the activities of another branch - so long as such involvement does not "materially impair" the "core functions" of the other branch. An audit will not "materially impair" anything the Commission does. An audit merely supplies information to the Legislature and the public about the efficiency and effectiveness of state agencies. The State Auditor might make *recommendations*, but she has no authority to *order* the Commission to make any changes. Mere recommendations do not "materially impair" an agency's core functions.

Second, the Commission does not belong to one of the three branches protected by the separation of powers doctrine: the legislative, executive, and judicial branches. The Commission claims that it is part of the judicial branch, but it is not. The Commission is only an administrative agency, not a court. Like the Commission, the State Bar disciplines professionals who work in our courts, but that does not make either the State Bar or the Commission part of the judicial branch of government.

Third, the Commission's claim for special status because it was established by the California Constitution has no merit. Nothing in separation of powers doctrine affords any special status to Constitutional agencies. And no language in the Constitution immunizes the Commission from a Legislative audit. Historically, the State Auditor has regularly audited many agencies established by the Constitution, including the University of California, the Supreme Court, the State Bar, and the Public Utilities Commissions. None of these agencies has claimed – and no court has held – that the separation of powers doctrine immunizes them from a Legislative audit.

A. The State Auditor Will Not Impinge on the Commission's "Core Functions".

1. The Law

California's separation of powers doctrine is derived from Article III, § 3 of the California Constitution, which provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

This doctrine does not impose a sharp division between the branches. *Francois v. Goel* (2005) 35 Cal.4th 1094, 1102. Many government functions involve more than one branch, and the three branches each exercise all three types of government power. *People v. Bunn* (2002) 27 Cal.4th 1, 14. If the Legislature were barred from any involvement in the judicial system, the entire Code of Civil Procedure - as well as the Evidence Code and the procedural parts of the Penal Code and Probate Code - would be invalid. But no court has even entertained such a claim – let alone so held.

Our constitutional system of "checks and balances" relies on the ability of each branch to exercise its constitutional power in a manner that touches upon and tempers the powers of the others. In *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52-53, the Supreme Court stated: "the judiciary passes upon the constitutional validity of legislative and executive actions, the Legislature enacts statutes that govern the procedures and evidentiary rules applicable in judicial and executive proceedings, and the Governor appoints judges and participates in the legislative power through the veto power". Thus, a strict rule of separation between the branches is not practical, not desirable, and not required by the Constitution.

The separation of powers doctrine does, however, limit the interaction of the branches in two significant ways.

First, one branch of government may not arrogate to itself a core function or power that the Constitution assigns to a coordinate branch. As between the Legislature and the Judiciary, this principle prevents the courts from ordering the Legislature to appropriate funds. *Mandel v. Myers* (1981) 29 Cal.3d 531, 535. It also prevents courts from questioning the "wisdom" of statutory enactments. *County of Mendocino*, *supra*, 13 Cal.4th at 53.

Second, the separation of powers doctrine forbids one branch of government from taking an

action that would "defeat or materially impair" the ability of another branch to exercise its "core powers". *Brydonjack v. State Bar* (1929) 208 Cal. 439, 444. For example, once a court has entered a final judgment against the Legislature, the Legislature may not defeat the judgment by refusing to disburse funds allocated to pay it. *Mandel v. Myers*, *supra*, 29 Cal.3d at 531.

But only rarely does the Supreme Court invalidate a legislative act as "materially impairing" a core judicial power or function. In *People v. Bunn* (2002) 27 Cal.4th 1, 5, the Court held that the Legislature could not interfere with court judgments already entered, but the Legislature may enact rules that prospectively affect cases not yet completed. "[I]t is well understood that the branches share common boundaries [citation] and no sharp line between their operations exists." *Id.* at 14. "Indeed, the 'sensitive balance' underlying the tripartite system of government assumes a certain degree of mutual oversight and influence." *Id.* at 14. "The Legislature is charged, among other things, with "mak[ing] law . . . by statute. Cal. Const., art. IV, § 8, subd. (b). * * * * The separation of powers doctrine protects each branch's core constitutional functions from lateral attack by another branch. As noted, however, this does not mean that the activities of one branch are entirely immune from regulation or oversight by another. We have regularly approved legislation affecting matters over which the judiciary has inherent power and control." *Id.* at 16. "As long as such enactments do not "'defeat' or 'materially impair'" the constitutional functions of the courts, a 'reasonable' degree of regulation is allowed." *Id.* at 16.

2. An Audit Will Not "Materially Impair" the Commission's "Core Functions".

The Commission has the burden of proving that an audit will "materially impair" its "core functions". *County of Mendocino, supra,* 13 Cal.4th at 59. The Commission has failed to present such evidence.

Indeed, in its Response to Special Interrogatories, Ex. A to Moskovitz Dec., at 13:13-15, the Commission admits that it "does not contend that evaluating whether Petitioner's protocols conform to governing laws, Petitioner's rules, and best practices of similar entities interfere with Petitioner's 'core' function." In any event, the accompanying Declaration of the Elaine M. Howle shows that there will be no such impairment.

In *Obrien v. Jones* (2000) 23 Cal.4th 40, 45-47, plaintiff claimed that Legislative appointment of some members of the State Bar Court violated the separation of powers doctrine, because the judiciary (via the Supreme Court) disciplines lawyers who appear before our courts. The Supreme Court disagreed, because such Legislative involvement "does not defeat or materially impair our authority over the practice of law."

The Auditor asserts even less power than the Legislature asserted in *Obrien*. The Auditor seeks only information. She cannot and will not change any of the Commission's processes – either to "core functions" or to "non-core functions". As she states in her Declaration, Howle Dec. at ¶ 19: "The State Auditor's Office has no authority to mandate changes in any agency's practices and does not purport to do so." She might make recommendations, but, as she states in ¶ 20: "Neither the audited entity nor the Legislature is required to implement the office's recommendations."

And, with audits of most agencies, even the recommendations are implemented with a cooperative spirit: "Over the course of the last five years, the entities we have audited have implemented, fully or partially, the vast majority of the recommendations we made to them. Although it rarely happens, audited entities are free to disagree with our recommendations and refuse to implement them." Howle Dec. at ¶ 21.

At ¶ 75, the Auditor summarizes her plan to audit the Commission:

> CJP's claim that our work will impair CJP's core function is mistaken. CJP is not required by the State Auditor's Office to make a single change as a result of our

> audit findings and recommendations. We will examine CJP's processes and inform the public about how it does its work in a manner that does not reveal confidential information. * * * * If we find it appropriate, we will make recommendations to CJP and, possibly, to the Legislature. The Auditor cannot and will not require CJP to take any action whatsoever as a result of our audit report.

The Commission's Petition claims that "the substantial time the audit will require as well as the purported requirement to subsequently respond and report 'compliance' with the audit's findings all demonstrate the intrusive nature of these audit topics on the CJP's core functions." Petition at 9:17-20. However, in its Response to Special Interrogatories, Moskovitz Dec., Ex. A at 19:8-10, the Commission states that it "does not expressly contend in the Petition that merely spending time participating in the audit interferes with Petitioner's 'core' function." In any event, the time will be minimal. Howle Dec., ¶ 77.

An audit is not unduly burdensome. Even the State Auditor herself is subject to an audit of her Audit Fund (appropriated by the Legislature to the State Auditor to fund audits) – by independent certified public accountants. Gov. Code § 8544.5, subd. (d). She has never claimed that this audit "materially impairs" the "core functions" of her office.

No one enjoys being audited. But enduring an audit is a small price to pay to ensure that government agencies are held accountable to the people and elected representatives that created and funded them.

3. A Performance Audit Will Not Materially Impair the Commission's Core Functions.

The Legislature directed the Auditor to perform "an audit to examine the policies and practices for handling and resolving complaints against judges by the Commission on Judicial Performance." Howle Dec., ex. 5, § I.

The Commission concedes that a *fiscal* audit would be allowable, but its Petition alleges that a *performance* audit is not permitted. Petition, ¶ 16. (At ¶¶ 14-15 of her Declaration, the State Auditor explains the difference between these two types of audits.)

The Commission contends that it would violate the separation of powers doctrine for the Legislature to review the manner in which the Commission handles complaints, makes charging decisions, and imposes discipline. According to the Commission, these are its "core constitutional functions," which the separation of powers doctrine bars the Legislature from investigating. Petition. ¶¶ 17, 34-35. In its Response to Special Interrogatories, Moskovitz Dec., Exhibit A at 13:13-15, the Commission admits that it "does not contend that evaluating whether Petitioner's protocols conform to governing laws, Petitioner's rules, and best practices of similar entities interfere with Petitioner's 'core' function." However, in its Opening Brief, the Commission expresses its fear that the State Auditor will "audit whether the CJP made the right decision in specific cases." 1:24-26; see also *id.* at 8:5-6 (the audit will "second-guess discretionary, adjudicatory decision-making by the judicial branch").

This fear is unfounded. A performance audit will not re-weigh the evidence, substitute the Auditor's judgment for the Commission's, or second-guess whether the Commission's disposition of complaints or decisions in individual disciplinary matters were "right" or "wrong. See Howle Dec. at ¶¶ 75-76. Rather, the assigned auditors will identify the Commission's policies and standards, review a sample of closed matters to determine whether they were handled consistently and in accordance with the Commission's policies and standards, identify the time it takes to resolve cases, count the open matters, and so on. *Ibid.* The audit will focus on the processes, policies, standardization, efficiency, and consistency of the Commission's performance - not on re-doing the Commission's work or on challenging particular decisions on the merits. "CJP is not required by the State Auditor's

Office to make a single change as a result of our audit findings and recommendations." Howle Dec. at ¶ 75.

The Commission's Petition asks for broad relief, asking this Court to issue a writ of mandate directing the State Auditor "to refrain from auditing the discretionary exercise of the CJP's core constitutional functions as required by the separation of powers doctrine." Petition at 1:8-9. See also the Petition's prayer, at 12:8-22.

Nevertheless, in its Response to Interrogatories, Ex. A to Moskovitz Dec., at 3:21-28, the Commission purports to narrow its claim: "Petitioner has made it clear that it only objected to audit topics, 2, 5, and 12 as they seek to audit the exercise of Petitioner's discretionary decision-making. . . ." As the Commission has failed to amend its Petition to limit its claim, we must at this point assume that there is no narrowing.

In any event, the Commission's objection to Audit Objectives 2, 5, and 12 are without merit. As the Auditor explains in her attached Declaration:

> 74. CJP reads the Auditor's Analysis of Audit Request (Exhibit A of CJP's Petition) as expressing an intent "to audit the discretionary exercise of CJP's core functions". CJP is mistaken. That Analysis is only a brief summary of the Auditor's plan regarding the CJP audit.
>
> a. Audit Objective 2 requires only that audit staff identify the standards and processes CJP has in place for making determinations and report on how CJP ensures that its standards and processes are followed consistently. The office will not, as CJP suggests, engage in reweighing evidence or second-guessing the propriety of CJP's determinations based on the facts presented to it. The weighing of evidence and the making of determinations based on such evidence falls squarely within CJP's exercise of discretion.
>
> b. Similarly, Audit Objective 5 requires only that audit staff identify and report on CJP's processes for evaluating certain evidence. In doing so, audit staff may compare CJP's processes with processes used by other entities, but staff will not engage in evaluating whether CJP made correct or incorrect determinations in particular cases, as that would be beyond the scope of the audit.
>
> c. Audit Objective 12 calls for the audit team to gather information about the outcomes of CJP cases, such as the number of cases processed and the amount of time it took for those cases to be processed. Such gathering of information in no way passes judgment on CJP's exercise of discretion in the handling of these

> cases, but merely makes available to the public important information about the "work product" being produced by CJP in return for the funding it receives from the Legislature. Objective 12 also calls for the audit team to evaluate the outcome and discipline imposed in a select number of cases. These evaluations will consider only whether the outcomes and disciplines are consistent with the Commission's own procedures and goals, and not whether the outcomes and disciplines are just, fair, or meritorious.

In sum, "Our audit process for reviewing how the Commission handles complaints would not involve retrying any cases or performing any type of second-guessing of the outcome of a particular case." Howle Dec., ¶ 76.

The Commission brought this action, so it has the burden of proving that the audit will "materially impair" its "core functions". But the Commission has failed to present any evidence showing that this will happen – or any evidence that the State Auditor has *ever* "materially impaired" the "core functions" of *any* government agency it has audited. And the State Auditor has presented evidence that no such "material impairment" will occur. For these reasons alone, the Commission's separation of powers claim should be rejected.

B. The Separation of Powers Doctrine Does Not Apply to the Commission, Because the Commission Does Not Exercise Core *Judicial* Powers.

The separation of powers doctrine protects each of the three main branches of government – legislative, executive, and judicial – from undue intrusion by one of the other branches. Cal. Const., Article III, § 3. As discussed above, there is no undue intrusion in this case, so it would not matter if the Commission exercised judicial powers. But it doesn't.

The separation of powers doctrine protects core *judicial* powers. Cal. Const., art. 3, §3; *People v. Bunn*, *supra*, 27 Cal.4th at p. 14. California's Constitution vests the judicial power in our courts, not in administrative agencies. "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." Article VI, § 1. No mention of the Commission on Judicial Performance, which is not a court. *McComb v. Commission on Judicial Performance* (1977) 19 Cal.3d Spec. Trib. Supp. 11. The Commission is "an independent state agency". *Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 637.

As an agency rather than a court, the Commission does not exercise judicial power – and the separation of powers doctrine does not apply to it. "The [separation of powers] doctrine does not apply to administrative agencies that are vested with defined quasi-legislative and quasi-judicial powers. (*Imperial Irr. Dist. V. State Water Resources Control Bd.* (1990) 225 Cal.App.3d 548, 565.)" 7 Witkin, Summary of Cal. Law 10th, *Constitutional Law* § 138 (2005).

While the Commission might exercise quasi-judicial powers when hearing administrative cases involving judges, the State Bar does the same thing when hearing administrative cases involving lawyers. But the State Bar is not considered part of the judiciary. See *In re Rose* (2000) 22 Cal.4th 430, 436 & fn. 4. Quasi-judicial decision-making is not a uniquely judicial function, as it is not reserved to the judicial branch alone. See, e.g., Cal. Const., Art. VII, §§ 2-3 (State Personnel Board); Art. IX, § 9 (Regents of the University of California); and Art. XII, §§ 1-2 (Public Utilities Commission). [4]

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[4] The Supreme Court affords the Commission's decisions no deference, and instead reviews the record independently to reach its own conclusions. Cal. Const., Art. VI, § 18(d); *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1087, 1089.

Because the Commission does not exercise judicial powers, for that reason alone its separation of powers argument has no merit.

C. The Commission's Constitutional Status Does Not Bar the Legislature From Auditing the Commission.

The Commission assumes that it has some sort of special status because it was created by the California Constitution. It cites no authority for this assumption, and we are aware of none.

The Constitution establishes many state entities. Most are funded – partially or entirely – by the Legislature, so the Legislature needs information about their performance in order to carry out its legislative duty to appropriate funds properly. And because the public has an interest in how well these agencies perform their Constitutional duties, all are regulated to some degree by legislation. To make these decisions wisely, the Legislature needs information supplied by the State Auditor concerning the performance of these entities.

The State Auditor has audited many Constitutional entities, including the University of California, the Public Utilities Commission, the Supreme Court, the State Bar, the Judicial Council, the Administrative Office of the Courts, and the Department of Justice. Howle Dec., ¶¶ 23-24. No court has ever held that any of these audits violates the separation of powers doctrine. Indeed, in *Braun v. Bureau of State Audits* (1998) 67 Cal.App.4th 1382, 1391-1392, the court held that the state may audit the University of California – a Constitutional entity – despite its Constitutional status.

D. The Commission's Out-Of-State Cases Are Distinguishable.

At pages 16-17 of its Opening Brief, the Commission relies on several out of state cases to support its argument that the separation of powers doctrine bars an audit of its activities. But none of those cases involved a legislative directive to audit an independent state agency that is not part of the judicial branch.

In *Chicago Bar Association v. Cronson* (1989) 183 Ill.App.3d 710, the state's auditor sought to audit the Board of Law Examiners and the lawyers' Disciplinary Commission. The court held that such an audit would violate the separation of powers doctrine. *Id.* at 724. However, unlike the Commission on Judicial Performance, those agencies were created not by the legislature or the people, but by the Illinois Supreme Court. *Id.* at 714. And they reported directly to the Illinois Supreme Court. *Ibid.* And they received no state funds. *Id* at 714-715. And they were already being audited each year by a private accounting firm. *Id* at 715. This arrangement bears no resemblance to the Commission, which was created by the Legislature and the people, is funded solely by the Legislature, does not report to our Supreme Court, and has never been audited.

Similarly, in *Graham v. Washington State Bar Association* (1976) 86 Wash.2d 624, the court held that the separation of powers doctrine bars a state audit of the Washington State Bar Association, because "That association is responsible to the Supreme Court, not the legislature or an agency of the executive branch", "The funds needed for operation of the bar association are not provided by legislative appropriation," and "Annual audits of the association's receipts and expenditures have been performed by private certified accountants." *Id.* at 628-631. None of that is true in the present case.

To the same effect is *Ex Parte Auditor of Public Accounts* (Ky. 1980) 609 S.W.2d 682, where the court held that the separation of powers doctrine barred a state audit of the Kentucky Bar Association, because "the Association is an arm of the court itself. . . ." *Id.* at 683. And because the Bar Association's funds "have not been appropriated by the legislative body and are not subject to legislative appropriation". *Id.* at 686.

In *State Auditor v. Joint Committee on Legislative Research* (Mo. 1997) 956 S.W.2d 228, the court held that a "post-audit" review of the state auditor by a legislative committee would violate the separation of powers doctrine, because the state auditor was a "co-equal" department of state

government and because "a post-audit that goes beyond obtaining financial information and extends to offering opinions about the manner in which an agency conducts its business is tantamount to an attempt to operate the agency suffering the post-audit." *Id.* at 233. In the present case, however, the Legislature has directed the State Auditor to conduct a normal audit of the Commission - not a "post-audit" that is intended to "operate the agency". And though the Commission is assigned an important role, it is in no way "co-equal" to the Legislature that created the Commission and appropriates its funds. While the Commission has been assigned the narrow mission of using its $4.5 million budget to regulate fewer than 2,000 state court judges, the Legislature has the broad responsibility of enacting legislation that benefits California's 39 million residents, and appropriating and overseeing an annual budget of more than $125 billion. The Legislature is empowered to propose elimination of the Commission or modification of its authority, and to increase or cut its appropriations, but the Commission has no such powers over the Legislature.

II. ISSUING THE REQUESTED WRIT WOULD VIOLATE THE SEPARATION OF POWERS DOCTRINE.

The Commission has it backwards. An audit would not materially impair the Commission's core functions. But a writ of mandate blocking an audit would severely impair *the Legislature's* core functions.

A. The Legislature Needs to Know the Effectiveness of State Administrative Agencies.

The Legislature is the voice of the people. That voice speaks by enacting laws and appropriating funds. But the voice cannot speak wisely without eyes and ears that provide the Legislature with accurate information about the government agencies the Legislature funds and oversees. "[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. * * * * A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain v. Daugherty* (1927) 273 U.S. 135, 174-175.

The Legislature uses the State Auditor to obtain that information. The Legislature's Joint Legislative Audit Committee (JLAC) "is charged with establishing priorities and assigning audits for the State Auditor, ascertaining facts through investigations, reviewing reports and taking actions thereon, and making reports and recommendations to the Legislature regarding the revenues and expenditures of the State, its departments, subdivisions, and agencies." Rules of the Joint Legislative Audit Committee (available at: http://legaudit.assembly.ca.gov/content/committee-rules).

If a single regulatory agency is allowed to keep its performance secret from the State Auditor and JLAC, the Legislature cannot properly develop a state budget or propose needed Constitutional amendments and statutes. As the Auditor states, "The purpose of the State Auditor's Office is to provide the Legislature and the public with impartial, independent, and professional reviews of the efficiency and effectiveness of public agencies, in order to assist the public and the Legislature in deciding whether to effectuate any changes in the operations or funding of those entities." Howle Dec. at ¶ 5.

The Commission claims that the fact that it was created by the state Constitution clothes it with special armor against the Legislature's need to know how it has been performing. The Commission apparently believes that the Legislature is required to continue to fund the Commission and never propose changes in the Commission's authority – regardless of how well or poorly the Commission performs its duties.

But the Legislature itself created the Commission and modified its powers, by placing on the ballot each of the several propositions that amended the state Constitution, creating and then modifying the Commission's authority and practices. The Legislature *created* the Commission in 1960, by placing on the ballot a measure (Proposition 10) establishing the Commission. Similarly, the Legislature *modified* the Commission's powers several times in the same way: in 1966 (Proposition 1a), in 1976 (Proposition 7), in 1988 (Proposition 92), in 1994 (Proposition 190), and in 1998 (Proposition 221). The Legislature might wish to propose modifications of the Commission's powers yet again – but how can it do so intelligently if this Court deprives it of access to information about how the Commission is performing under the present provisions of the Constitution?

And the Legislature has enacted *statutes* relating to the Commission. See, e.g., Gov. Code §§ 68701-68716, 68750-68756. An audit will inform the Legislature regarding whether any of these statutes should be amended or repealed, or whether new statutes should be enacted.

A ruling that the Auditor cannot audit the Commission simply because it was created by the Constitution may effectively prevent audits of every other Constitutionally-created entity, including the State Bar, the entire judicial system, the Judicial Council, the Public Utilities Commission, and the University of California. For years, the Auditor has audited all of these entities, and it must continue to do so if the Legislature is to do its job properly. There is nothing special about the Commission.

B. The Law

Article IV, Section 1, of the California Constitution provides: "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."

Any limitations on the Legislature's powers *must expressly appear* in the Constitution. "All intendments favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. *Such restrictions and limitations* [*imposed by the Constitution*] *are to be construed strictly, and are not to be extended to include matters not covered by the language used.*'" *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1217.

No language in the Constitution limits the Legislature's authority to regulate the Commission. Compare Article IX, § 9a, which *does* expressly limit the Legislature's authority to regulate the University of California: "The University of California shall constitute a public trust, to be administered by the existing corporation known as 'The Regents of the University of California,' with full powers of organization and government, *subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services*." Emphasis added. No similar limiting language appears in Article VI, § 8, which establishes the Commission on Judicial Performance.

The Legislature's inherent power to investigate follows from its "core functions" of making laws and appropriating taxpayer funds - because the Legislature cannot perform these functions properly without information. *Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 492, 499. "The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution," and it reaches its limit only where those core legislative powers end. *Barenblatt v. United States* (1959) 360 U.S. 109, 111.

The courts will not interfere with the legislative process. *Johnston v. Board of Supervisors of Marin County* (1947) 31 Cal.2d 66, 70; *Santa Clara v. Superior Court* (1949) 33 Cal.2d 552, 559. Nor

may a court compel the Legislature to appropriate funds to any agency. *California Dept. of Human Resources v. Service Employees Int. Union, Local 1000* (2012) 209 Cal.App.4th 1420, 1436; *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 775, 802.

C. The Legislature Needs to Know About the Commission's Performance.

The Legislature currently has no independent, objective information on how the Commission is performing, because "The Commission on Judicial Performance has never before been audited by the State Auditor." Howle Dec. at ¶ 62. Nor has any independent third party reviewed any aspect of the Commission's complaint handling process (at least in the past ten years). Ex. A to Moskovitz Dec. at 1:13-24.

To get this information, on August 10, 2016, the Joint Legislative Audit Committee directed the State Auditor to audit the Commission.

> The audit request requires the State Auditor's Office to gather, assess, and report on facts such as what criteria CJP relies upon, who makes certain decisions, what processes CJP has established, and how CJP's processes are consistent, or inconsistent, with other tribunals' practices. We are asked to count cases, determine how long it takes CJP to resolve cases, and report on the outcomes of cases without revealing any confidential information. [Howle Dec. at ¶ 71.]

The need to obtain this information is particularly strong, because the Commission prefers to operate in secret. This tendency goes back a long way.

In *The Recorder v. Commission on Judicial Performance* (1994) 72 Cal.App.4th 258, the court rejected the Commission's efforts to keep secret the identity of which Commissioners voted for a disciplinary action. The court noted that "the history of the constitutional provisions governing judicial discipline in California shows a trend toward *greater openness and less secrecy*." *Id.* at 273; emphasis added. The court also noted "the clearly expressed intent to inspire public confidence in the California system of judicial discipline by *eliminating the secrecy* that shrouded formal disciplinary proceedings in the past." *Id.* at 275; emphasis added. The court rejected the Commission's "dire warnings" about the supposed dangers of public disclosure. *Id.* at 279.

Despite this ruling, to this day the Commission continues to function mostly in secret.

The Commission is *permitted*, but not required, to make confidentiality rules governing complaints and investigations. Cal. Const., Art. VI, § 18(i)(1) In contrast, the Commission is *required* to make formal proceedings and hearing documents public. *Id.*, § 18(j). Thus, the Constitution contemplates that a Commission investigation will lead to a *public* proceeding if the Commission develops a reasonable belief that there may be grounds to retire or discipline the affected judge. Nevertheless, the Commission relies on its authority to issue *private* admonishments and adopt confidentiality rules that keep nearly all of its work away from any public scrutiny.

According to the "10-Year Summary of Commission Activity" that the Commission provided in its 2015 Annual Report (see page 14 of: https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/2015_Annual_Report.pdf), the Commission considered 11,309 complaints about active or former state judges from 2006 through 2015. It found sufficient merit in 1,522 (13.5%) of those complaints to make "staff inquiries" or conduct preliminary investigations. Although the Commission ultimately took disciplinary action in 384 of these cases (3.4% of initial complaints), it instituted *only 19* formal (i.e., public) proceedings. For 319 of these 384 disciplinary actions - more than eight times out of 10 - the Commission kept from the public not only the complaint, investigation, and "informal hearing" process, but also the fact that it imposed discipline.

In sum, while the Commission reviewed more than 11,000 complaints over 10 years, it made public its decisions in only six per thousand, and engaged in a public process in fewer than two per thousand. Thus, in response to 99.4% of complaints, the Commission made every decision at every juncture secretly - free from public scrutiny.[5]

Nearly all of these decisions avoided judicial scrutiny. Although the Supreme Court retains the power of plenary review, it does not have jurisdiction over private admonishments that do not

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[5] We recognize that more information is needed to interpret these numbers with confidence, and we do not offer them for their precision. (The Commission refused to provide us with more information regarding the accuracy of these numbers. See Moskovitz Dec., Ex. A at 4:10-5:9.) It is not clear, for example, whether the number of complaints the Commission "considered" includes all complaints it received; whether multiple complaints addressed the same concern and, if so, how those complaints were counted; how many complaints carried over into subsequent calendar years, etc. The point remains, however, that the Commission informs the public of its actions in very few cases, and it makes its hearing process public in fewer cases still.

impose discipline or unwanted retirement. Cal. Const., Art. VI, § 18(d). And, of course, where the Commission elects to impose not even a private admonishment, the Supreme Court (and the complainant and the public) will never know about it.

According to the Commission's "10-Year Summary," these limitations have shielded the Commission's disposition of 96.6% of complaints from review. Of the remainder, only a subset of judges will seek review, particularly of a private decision, and the Supreme Court grants review of Commission decisions only under limited circumstances. Accordingly, few of the Commission's final disciplinary decisions receive Supreme Court review.

Because the Supreme Court does not receive information that would permit it to review the general workings of the Commission, and the Commission keeps the window to the public closed, the Commission exercises its functions free from the usual checks and balances of public transparency and judicial supervision. For the most part, the Commission alone decides which complaints to investigate, which to pursue, whether to have public proceedings, which level of discipline to impose, and whether to do so publicly or privately.

We appreciate the fact that in many cases, operating in secret is desirable – to encourage complaints without fear of retaliation, and to protect the reputations of judges wrongly accused. But neither the Legislature, the public, nor affected judges have any idea whether the Commission's procedures have enabled it to overuse its secrecy powers. An audit will provide information that may assist the Legislature and the public in assessing whether statutory or Constitutional changes are appropriate.

D. The Effect of A Court Order Barring a Performance Audit of the Commission.

If the Commission's Petition were valid, then the Legislature may be barred from conducting a performance audit of *any* of the several entities created by the State Constitution. This would severely hamper the Legislature's ability to enact laws and appropriate funds. As the State Auditor explains:

> The vast majority of the audits we perform are performance audits, conducted pursuant to auditing standards. In 2016, 65% of the reports we published were performance audits, 22% were financial reports, and 13% were special, high risk, and investigative reports. [Howle Dec. at ¶ 15.]

III. AN AUDIT WILL NOT BREACH THE CONFIDENTIALITY OF THE COMMISSION'S DOCUMENTS.

A. The Law

The Commission's concern about the confidentiality of some of its files is not unique. Many government agencies share the same concern. And yet the Legislature needs to have the State Auditor examine those files, in order to ascertain how the agency is performing its duties and whether it is properly spending the taxpayers' money. As the State Auditor explains:

> In order to perform its independent audit work as required by state and federal law, the State Auditor's Office must have unfettered access to all information in the possession or under the control of an audited entity, whether created by the California Constitution or otherwise, including privileged and confidential information. * * * * The ability of the office to obtain confidential information to perform its audit work is essential to the proper functioning of all three branches of government * * * * For example, if the Commission has adopted a standard that allows judges to present live testimony to defend against charges, the Auditor will need to examine confidential individual case files to determine whether the Commission's staff regularly complies with this standard. [Howle Dec. ¶ 31.]

The Legislature has found a way to accommodate both of these seemingly-conflicting needs: by requiring state agencies to cooperate with the State Auditor, but also requiring the State Auditor to keep this information confidential.

First, the Legislature requires the agencies to cooperate with the Auditor. Gov. Code § 8545.2 requires all officers and employees of public agencies - "whether created by the California Constitution or otherwise" - to grant the Auditor access to all agency documents for purposes of an audit or investigation, including documents that "may lawfully be kept confidential as a result of a statutory or common law privilege or any other provision of law."[6] Failing or refusing to provide access to the Auditor is a misdemeanor. *Ibid.*

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[6] The Commission argues that its rules bar the State Auditor from reviewing the Commission's confidential documents. But any Commission rule purporting to do so would be preempted by Government Code § 8545.2. A state statute is superior to any agency regulation. *Morris v. Williams* (1967) 67 Cal.2d 733, 737; *PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, 1306.

Second, every staff member of the Auditor's Office must comply with the confidentiality standards of the agency it is auditing. Gov. Code § 8545.2, the law granting access to the Auditor, does so by deeming an authorized representative of the Auditor to be an officer or employee of the audited agency, with the same right of access to confidential materials and, concomitantly, the same duty of confidentiality. Gov. Code § 8545.2(b) [access is "subject to any limitations on release of the information as may apply to an employee or officer" of the audited entity]. The Legislature has also made it a misdemeanor for the Auditor, any current or former employee of the Auditor's Office, any contractor or contractor's employee, and any person assisting the audited entity with the audit to divulge any information from any document in any manner except as "expressly permitted by law." Gov. Code § 8545.1. Thus, to the extent the Commission's Rule 105 prohibits its own staff from releasing confidential information, so too is the Auditor - including its response to a Public Records Act request. Howle Dec., ¶ 55.

The Commission's Petition alleges that the statute that authorizes the State Auditor to review the Commission's confidential files - Government Code § 8545.2 - is "unconstitutional as applied to the State Auditor's attempts to review records which the CJP has made confidential in CJP Rule 102 pursuant to the express grant of authority in Cal. Const, Art. VI, § 18, subdivision (i)(1)." The Commission is mistaken.

The California Legislature has broad authority to exercise the entire legislative power of the State - *unless* the State Constitution expressly or by necessary implication *prohibits* it from doing so. *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180. Accordingly, all doubts must be resolved in favor of the Legislature's power to act. *Ibid.* In keeping with that principle, Constitutional limitations on legislative power "'*are to be construed strictly, and are not to be extended to include matters not covered by the language used'.*" *Ibid.* [italics in original]. See also *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691; *Tolman v. Underhill* (1950) 39 Cal.2d 708, 712 ["any doubt as to its paramount authority . . . will be resolved in favor of its action"].) Compare, e.g., Cal. Const., Art. IV, § 18 ["The Assembly has the *sole* power of impeachment"; emphasis added].)

The Commission's preemption argument is based on the Commission's assertion (at page 1 of its Opening Brief) that the Constitution gives it the *"sole"* authority to deal with the confidentiality of

its documents, and bars the Legislature from addressing this subject. See also *id.* at 11:6-7. But no language of the Constitution says this. All the Constitution says (at Art. VI, § 18(i)(1)) is "The commission may provide for the confidentiality of complaints to and investigations by the commission." No language of this or any other section of the Constitution gives the Commission the *exclusive* authority regarding confidentiality or bars the Legislature for dealing with confidentiality.

There is no textual authority for the Commission's claim to sole power to regulate the confidentiality of its documents. Compare Article IX, § 9(a), which does expressly limit the Legislature's authority to regulate the University of California: "The University of California shall constitute a public trust, to be administered by the existing corporation known as 'The Regents of the University of California,' with full powers of organization and government, *subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services*." Emphasis added. No similar limiting language appears in Article VI, §8, which establishes the Commission on Judicial Performance.

Under the language of the Constitution, the Commission does not have sole authority or exclusive power over the confidentiality of complaints and investigations, and there is no restriction on the Legislature's power to require it to comply with an audit.

B. The Auditor Will Preserve the Confidentiality of the Commission's Documents.

At pages 12-13 of its Opening Brief, the Commission sets out its fears that audit will lead to public disclosure of its confidential files. But the Commission fails to provide evidence of even a single instance where the State Auditor has disclosed *any* agency's confidential information to the public.

In fact, for years both the Auditor and the agencies have abided by the Legislature's confidentiality statutes, which accommodate the interests of both the agencies and the Legislature. The Auditor has examined confidential files of many agencies, reviewing individual personnel, medical, and educational information – all confidential - about thousands of government workers. Howle Dec., ¶ 44.

Apparently, while the Commission pays lip service to high standards of confidentiality, in practice its standards are not very high. Some of the Commission's own public reports have not been drafted carefully enough to prevent readers from identifying a disciplined judge. See Howle Dec., ¶ 51. The State Auditor would not make such mistakes. *Ibid.* And the State Auditor plans to examine the Commission's policies and practices regarding confidentiality during her audit. "An audit will determine the extent to which the Commission breaches its own rules on confidentiality, and whether those rules need to be strengthened." *Ibid.*

The Auditor does not take her legal duty to safeguard confidentiality lightly. Just the opposite: the Auditor's Office is meticulous in keeping confidential information secure. The Auditor has promulgated strict privacy and data protection policies, has a designated Information Security Officer and a designated Information Privacy Officer on staff, and requires all employees to attend annual privacy trainings. The Information Security and Information Privacy Officers also conduct random desk and computer audits to ensure the staff complies with all privacy and data protection requirements. Staff of the Auditor's Office understand that failure to comply with these requirements will result in immediate and severe discipline, including possible criminal sanctions. Howle Dec., ¶¶ 33-43.

Thus, the Auditor has taken great care to ensure that her employees have extensive knowledge of the legal and internal confidentiality requirements and information security safeguards, and staff has

no reason to doubt that all requirements are diligently enforced.

Further, the assigned audit team is required to develop individualized confidentiality protections specific to each audit. At the beginning of every audit, the team develops a confidentiality plan with the assistance of a staff attorney who is assigned to provide legal guidance. Depending on the nature and sensitivity of the materials to be collected, the team must also consult with the State Auditor's Information Security and Information Privacy Officers while developing the plan. Once the plan is complete, it must be approved by the Audit Deputy and legal counsel, and possibly the Security and Privacy Officers as well. Thus, for each individual audit there can be no mistaking what the specific requirements are and who is directly accountable to meet them. Howle Dec., ¶¶ 33-43.

The Auditor's plan for auditing the Commission will secure the confidentiality of the Commission's files. The Auditor states:

> The State Auditor's Office will maintain the confidentiality of all confidential CJP matters. As with our previous audits, including our audit of the State Bar discipline process, we will report our findings in a manner that will not reveal particular individuals or cases if those individuals or cases are deemed confidential by state law or CJP. CJP will have ample opportunity to review our audit report before it is published and raise any confidentiality concerns it identifies. As a matter of law, we are prohibited from releasing confidential or privileged information. We intend to comply with that requirement.
> [Howle Dec. at ¶ 81.]

At page 13 of its Opening Brief, the Commission fears that because the State Auditor's audit is a public record, any confidential files on which the audit relies will also be available to the public. This assertion simply misunderstands the audit process. As the State Auditor explains:

> CJP is incorrect in its assertion that every document used in support of a published audit report becomes available to the public after an audit report is published. The law requires the State Auditor's Office to maintain confidentiality and privilege even after we publish an audit report. While Government Code § 6252, subdivision (e), provides that "every writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics" is a public record, not every public record is subject to public release. Government Code § 6254 et seq. contains hundreds of broad and specific categories of

> documents that may be withheld from public release because the law deems such documents privileged or confidential. Government Code § 6255 permits the State Auditor's Office to assert a deliberative process privilege. The office regularly asserts this and other privileges in response to requests for records in order to preserve the legitimately confidential or privileged status of information we obtain from audited entities.
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> [Howle Dec. at ¶ 50.]

The Commission has presented no evidence that the State Auditor has *ever* disclosed confidential information in a public report. The Commission has failed to sustain its burden of proving that the State Auditor will violate the Commission's confidentiality rule.

C. The Effect of a Court Order Barring the State Auditor From Reviewing the Commission's Confidential Files

A writ of mandate preventing the State Auditor from reviewing an agency's confidential files would effectively eliminate the State Auditor's ability to perform the audit requested by the Legislature. As the Auditor explains in her declaration:

> 58. A court order barring the State Auditor is barred from reviewing the Commission's confidential files would preclude us from performing almost all of the objectives referenced in the Legislature's request.
>
> 60. The State Auditor is required by law to follow Generally Accepted Government Auditing Standards promulgated by the U.S. Government Accountability Office. Those standards require that we obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions. The Commission's confidential complaint files are the fundamental items of evidence the State Auditor would need to reach these conclusions. These files provide support for how the Commission reviews and reaches decisions about complaints that it receives.
>
> 61. Without access to these files, the Auditor's conclusions would be based solely on the limited information that the Commission publicly discloses, along with the limited number of complaints resulting in public proceedings. This information alone would be insufficient to substantiate whether the Commission actually adheres to the processes it claims to follow when addressing complaints. For example, if the Commission has adopted a standard that allows judges to present live testimony to defend against charges, the Auditor will need to examine confidential individual case files to determine whether the Commission's staff regularly complies with this standard.

D. The Commission's Out-Of-State Cases Are Distinguishable.

At page 12 of its Opening Brief, the Commission relies on three out of state cases. All three are distinguishable.

In *Garner v. Cherberg* (1988) 111 Wash.2d 811, 813, the court held that a legislative committee may not subpoena confidential documents from the state's Commission of Judicial Conduct – because the state constitution "vested sole discretion in the Commission to establish rules of confidentiality" and because the legislature had chosen to enact a statute bestowing such discretion on the Commission. Neither is true here. And in *Garner,* no law barred the legislators from releasing the confidential documents to the public, while the State Auditor is so barred.

In *Forbes v. Earle* (Fla. 1974) 298 So.2d 1, a legislative chairman sought to subpoena the Judicial Qualifications Commission's confidential records. Because the Commission was governed by the state's supreme court, it "is an arm of the judicial branch", so the Chief Justice would need to review the documents *in camera* before releasing them. *Id.* at 5. As discussed above, California's Commission is not "an arm of the judicial branch." And while in *Forbes* no law barred the chairman from releasing the confidential documents to the public, the State Auditor is so barred.

In *Stern v. Morgenthau* (1984) 62 N.Y.2d 331, a grand jury sought to subpoena confidential records of the State Commission on Judicial Conduct. The court rejected the effort, citing statutes that ensured the confidentiality of the records. No such statutes apply in the present case. And unlike the present case, in *Stern* no legislative body sought the records.

IV. COMPARING THE COMMISSION TO THE STATE BAR.

The agency that the Commission most closely resembles is the California State Bar:

- The Commission was created by the state Constitution. So was the State Bar.
- The Commission disciplines professionals who practice in our courts. So does the State Bar.
- The Commission's rulings are subject to Supreme Court review. So are the State Bar's rulings.
- The Legislature has enacted statutes regulating the Commission. And the Legislature has enacted statutes regulating the State Bar. See Bus. & Prof. Code §§ 6000-6243 (the "State Bar Act"), Gov. Code. § 8287 and § 12011.5.
- The Commission keeps many documents confidential. So does the State Bar.
- There are, however, some differences:
- The Legislature supplies the Commission's entire budget. But the State Bar is funded by member dues and fees. *Keller v. State Bar of California* (1990) 496 U.S. 1, 11, 12, fn. 4.
- The Legislature has never before directed the State Auditor to audit the Commission. But the Auditor regularly audits the State Bar.

In light of the above similarities and differences, if the Commission's separation of powers claim were valid, one would expect the State Bar to have an even stronger claim to immunity from Legislature oversight than the Commission. After all, the State Bar does not even use the taxpayers' money, while the Commission wholly depends on it.

So, for example, if the Legislature asserted the authority to appoint some members to the State Bar Court, one might expect the State Bar to object, and one might expect our courts to sustain the objection. But that's not what happened. In *Obrien v. Jones* (2000) 23 Cal.4th 40, plaintiff (not the State Bar) claimed that Legislative appointment of some members of the State Bar Court violated the separation of powers doctrine, because the judiciary (via the Supreme Court) disciplines lawyers who appear before our courts. The Supreme Court disagreed, because such Legislative involvement "does not defeat or materially impair our authority over the practice of law." *Id.* at 44. The Court relied in part on *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal. 4th 525, 543, which held that "In the field of attorney-client conduct, we recognize that the judiciary and the Legislature are in

some sense partners in regulation." The Legislature has an interest in protecting the public from incompetent and unethical attorneys. The Legislature has a similar interest in protecting the public from incompetent and unethical judges.

Regarding confidentiality, here is how the State Auditor has handled her review of the State Bar's confidential files:

> In 2011, 2013, and 2015, the office audited the State Bar. In 2015 the office audited the State Bar's attorney discipline process, where we obtained and evaluated confidential records relating to public and confidential discipline cases, including those reviewed by the California Supreme Court. We made recommendations to the State Bar and the Legislature intended to improve the attorney discipline process to protect both the public and members of the State Bar. [Howle Dec. at ¶ 24(d).]

The Auditor plans to maintain the confidentiality of the Commission's files in the same way: "As with our previous audits, including our audit of the State Bar discipline process, we will report our findings in a manner that will not reveal particular individuals or cases if those individuals or cases are deemed confidential by state law or CJP." Howle Dec. at ¶ 81.

V. THE STATE AUDITOR HAS NO AUTHORITY TO COMPEL THE COMMISSION TO PAY THE COSTS OF THE AUDIT.

The Commission claims that the Auditor intends to charge the Commission for the costs of the audit. The Commission is mistaken. The Commission provides no evidence supporting this claim.

In fact, the Auditor has no authority to impose costs on any agency it audits. Howle Dec. at ¶ 84. After completing an audit, the Auditor reports the cost to the Department of Finance (Howle Dec. at ¶ 85), but that is all she does regarding costs.

CONCLUSION

No one enjoys being audited. But this is one of the costs of participating in a democracy.

No institution has a stronger claim to immunity from government action than a church, due to the First Amendment Religion Clauses. But even a church must submit to an IRS audit. See the Church Audit Procedures Act, 26 U.S.C. § 7611. See also *Branch Ministries v. Rossotti* (D.C. Cir. 2000) 211 F.3d 137, 139–40. While a church receives no funds from the government, the Commission receives 100% of its funds from the State of California. This State has a *greater* need and right to audit the performance of a government agency that uses the State's funds.

Taken together, the Commission's sparse evidence and the State Auditor's extensive evidence of what actually happens during an audit leaves this Court with three issues to decide:

1. Has the Commission sustained its burden of proving that the audit will violate the separation of powers doctrine - even though the State Auditor has neither the legal authority nor the intent to change (or even to question) any decision of the Commission in a particular case?
2. Has the Commission sustained its burden of proving that the audit will breach the confidentiality of the Commission's confidential files, even though the State Auditor has neither the legal authority nor the intent to release those files – or to reveal their contents – to the public?
3. Has the Commission sustained its burden of proving that the State Auditor illegally imposed the costs of the audit on the Commission, where the State Auditor has neither the legal authority nor the intent to impose such costs on the Commission?

The answer to each question is "no".

The Commission would like the Legislature to continue to fund the Commission indefinitely - while keeping the Legislature blind to how the Commission spends the taxpayers' money. And the Commission asks this Court to assist in this effort. There is no precedent for such an order. The Petition for Writ of Mandate seeking to block the State Auditor from doing her job should be denied.

Respectfully Submitted,
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Dated: June 12, 2017

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