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17 JUDICIAL WATCH, INC.

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **COUNTY OF SAN FRANCISCO**

20 COMMISSION ON JUDICIAL
21 PERFORMANCE,

22 Petitioner/Plaintiff,

23 v.

24 ELAINE M. HOWLE, in her official capacity
25 as CALIFORNIA STATE AUDITOR, and
26 the CALIFORNIA STATE AUDITOR'S
27 OFFICE,

28 Respondents/Defendants.

ELECTRONICALLY
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*Superior Court of California,
County of San Francisco*

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**JUDICIAL WATCH, INC.'S
AMICUS BRIEF IN SUPPORT OF
RESPONDENTS/DEFENDANTS
ELAINE M. HOWLE AND THE
CALIFORNIA STATE AUDITOR'S
OFFICE**

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1 **I. JUDICIAL WATCH’S HISTORY OF PROMOTING TRANSPARENCY, THE**
2 **RULE OF LAW, AND UNIFORMITY IN THE ADMINISTRATION OF**
3 **CALIFORNIA STATE COURTS.**

4 Judicial Watch Inc. (“Judicial Watch”) is a nonpartisan, non-profit § 501(c)(3) public
5 interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch’s
6 mission is to promote accountability, transparency and integrity in government, and fidelity to the
7 rule of law. As its name suggests, one of Judicial Watch’s priorities is to promote these principles
8 in public debate regarding the judiciary, especially on issues such as judicial misconduct and
9 discipline. Judicial Watch has advocated for adherence to the rule of law and uniformity in the
10 administration of state courts all over the country, nowhere more so than California. In 2006,
11 Judicial Watch successfully challenged the constitutionality of supplemental benefits paid by Los
12 Angeles County to its Superior Court Judges. *Sturgeon v. County of Los Angeles* (2008) 167
13 Cal.App.4th 630 [84 Cal.Rptr.3d 242] (“*Sturgeon I*”). In response to that decision, the California
14 Legislature passed Senate Bill X2 11 (Stats. 2009, ch. 9, § 6) that, among other things, required
15 the Judicial Council of California to produce a report analyzing statewide inconsistencies in
16 judicial benefits.¹ That report found several inconsistencies and provided recommendations,
17 which ultimately led to further changes by California. Judicial Watch continued its advocacy
18 related to California’s judiciary after it prevailed in *Sturgeon I*, filing two more actions
19 challenging the legality of other parts of California’s judicial benefits regime. *See Sturgeon v.*
20 *County of Los Angeles* (2010) 191 Cal.App.4th 344 [119 Cal.Rptr.3d 332] (“*Sturgeon II*”) and
21 *Sturgeon v. County of Los Angeles* (2015) 242 Cal.App.4th 1437 [195 Cal.Rptr.3d 909]
22 (“*Sturgeon III*”).

23 With respect to this case, Judicial Watch has firsthand experience with Commission on
24 Judicial Performance’s (“CJP”) judicial complaint process, having previously filed complaints
25 with the CJP. In Judicial Watch’s experience, CJP’s disciplinary process is opaque with virtually
26 no information publicly available about how the CJP handles complaints or when, if at all, it acts.
27 Judicial Watch has been unable to ascertain if any action was ever taken regarding its complaints.

28 ¹ *Historical Analysis of Disparities in Judicial Benefits: Report to the Senate
Committee on Budget and Fiscal Review, The Assembly Committee on Budget, and the Senate
and Assembly Committees on Judiciary*, Dec.15, 2009 available at <https://goo.gl/uL2yMq>.

1 While there may be a valid reason to keep certain parts of CJP’s work confidential, the lack of
2 information regarding CJP’s procedures and overall judicial discipline in California undermines
3 public confidence in the integrity and independence of the state judiciary. An audit issued by a
4 competent, neutral auditor advances public confidence in the integrity of the audited public
5 agency. The authority to conduct such an audit is a question pending before this Court.

6
7 **II. AN AUDIT OF CJP WILL INCREASE PUBLIC CONFIDENCE IN THE
JUDICIARY’S INTEGRITY AND INDEPENDENCE.**

8 Audits play an essential role in public debate and the formation of public policy. In some
9 instances, not necessarily anticipated here, audit reports expose abuse and misconduct by public
10 officials. In others, audits confirm or dispel public concern regarding the operations of a public
11 agency. All audits improve the public’s understanding of how public agencies operate, including
12 how public funds are used, and often serve as a basis for further public debate regarding an
13 agency’s policies and mission. Audit reports advance public confidence in the integrity of public
14 agencies, and allow private individuals and advocacy groups like Judicial Watch to evaluate the
15 administration of these public agencies and establish policy priorities.

16
17 **A. Audits Enable Private Individuals and Groups to Promote Government
Accountability, Transparency, and Integrity.**

18 The importance of audit reports in public policy debate cannot be overstated. Audits
19 influence public debate and public action. Where public agencies and policymakers fail to act,
20 advocacy by private individuals or advocacy groups like Judicial Watch lead public debate.
21 Private advocates often depend on information provided in audit reports like those produced by
22 the California State Auditor. Audits provide objective information about the subject of the audit
23 and serve as an authority in policy debate. Likewise, audits limit potential problems from
24 information asymmetry— where one side of a public debate has a better functional understanding
25 of the agency or issue at hand. Audits can be a critical step in promoting public debate that leads
26 to changes in policy. Sometimes very little advocacy is needed and agency leadership will
27 unilaterally or proactively implement policies correcting problems identified by audits. Other
28 times, the implementation of policies to correct problems occurs only after intense public debate.

1 Regardless of how these corrections are brought about, audits provide an objective set of facts
2 that that educates officials and the public on the facts and shapes debate.

3 Audits are so critical and ubiquitous that the Office of Comptroller General of the United
4 States, who leads the Government Accountability Office, issued the “*Standards for Audit of*
5 *Governmental Organizations, Programs, Activities & Functions*” in 1972.² Known as “The
6 Yellow Book,” it is now in its eleventh edition.³ The forward to the eleventh edition provides:

7
8 Audits provide essential accountability and transparency over government
9 programs. Given the current challenges facing governments and their programs,
10 the oversight provided through auditing is more critical than ever. Government
auditing provides objective analysis and information needed to make the decisions
necessary to help create a better future.⁴

11 In explaining the purpose of audit reports, the *Yellow Book* provides: “to (1) communicate
12 the results of audits to those charged with governance, the appropriate officials of the audited
13 entity, and the appropriate oversight officials; (2) make the results less susceptible to
14 misunderstanding; (3) make the results available to the public, unless specifically limited; and (4)
15 facilitate follow-up to determine whether appropriate corrective actions have been taken.”⁵

16 **III. CJP’S OVERLY-BROAD READING OF ITS REGULATION DOES NOT** 17 **RENDER GOV. CODE § 8545.2 INVALID.**

18 Nothing in the California Constitution prohibits the Auditor from reviewing the CJP’s
19 records.⁶ In fact, Gov. Code § 8545.2 provides just the opposite, stating that the Auditor has an
20 affirmative *right* to access all records in the possession “of any agency of the state, whether
21 created by the California Constitution or otherwise.” Yet, CJP contends that § 8545.2 is
22 unconstitutional “as applied to the CJP’s confidential records” because it “substantially impairs”

23
24 ² “GAO: *Working for Good Government Since 1921*” available at
<https://goo.gl/fwCLMK> (last visited July 17, 2017).

25 ³ *Government Auditing Standards (“Yellow Book”)*, issued by the Comptroller
General of the United States (Revised December 2011) (GAO-12-331G) available at
26 <https://goo.gl/tz5oUz>.

27 ⁴ *Yellow Book* at p.1.

⁵ *Yellow Book* at § 7.05

28 ⁶ As discussed below, CJP has not satisfied its burden to show that the audit will
result in public disclosure of CJP’s information or otherwise defeat confidentiality.

1 its core functions and violates Article VI section 18 of the California’s Constitution, as
2 implemented under CJP Rule 102. Of course, there is no actual conflict between § 8545.2 and
3 California’s Constitution since the latter does not actually provide any right to confidentiality
4 with respect to the CJP’s records. Rather, the alleged impairment relates to CJP’s overly-broad
5 construction of CJP Rule 102, which conflicts with the text of Gov. Code § 8545.2. The CJP
6 attempts to create a conflict between the statute and its regulation. However, this is an avoidable
7 conflict between a facially-constitutional state statute (Government Code § 8545.2) and agency
8 regulation (CJP Rule § 102). In essence, CJP asks this court to intervene and hold that where
9 state law conflicts with its *internal policy*, state law must give way. California law does not allow
10 an agency regulation to trump state law. *See* Gov. Code § 11342.1 (“Each regulation adopted, to
11 be effective, shall be within the scope of authority conferred and *in accordance with standards*
12 *prescribed* by other provisions of law.”) (emphasis added). Judicial Watch submits the public’s
13 interest in obtaining an audit is not subordinate to CJP’s confidentiality interests.

14 Article VI section 18, subdivision (i)(1) grants the CJP discretion “to provide
15 confidentiality of complaints to and investigations by” it. However, Article VI section 18 CJP
16 does not give CJP authority to create substantive confidentiality rights to the detriment of other
17 state agencies and the public interest. CJP does not enjoy unlimited discretion to subordinate
18 state laws that *might* require it to exercise its regulatory authority in harmony with other state law
19 and without frustrating the purpose of sister state agencies. This is especially true where, like
20 here, the text of the statute does not actually conflict with the regulation. CJP Rule 102 and Gov.
21 Code § 8545.2 can be read together to provide the Auditor access to CJP’s records and maintain
22 confidentiality, thereby avoiding the conflict before the Court here.

23 CJP asks this Court to declare that Gov. Code § 8545.2 is unconstitutional, as applied, per
24 CJP Rule 102. CJP may choose to adopt a construction of Rule 102 that gives rise to this alleged
25 statutory conflict, but courts are constrained to avoid such constructions. “If two seemingly
26 inconsistent statutes conflict, the court’s role is to harmonize the law.” *Stone Street Capital, LLC*
27 *v. California State Lottery Com’n* (2008) 165 Cal.App.4th 109, 118 [80 Cal.Rptr.3d 326, 332].
28 “We presume that the Legislature, when enacting a statute, was aware of existing related laws and

1 intended to maintain a consistent body of rules.” *Id.* “If inconsistent statutes cannot otherwise be
2 reconciled, a particular or specific provision will take precedence over a conflicting general
3 provision.” *Id.* (internal quotations and citations omitted). “If possible, the statute must be
4 construed so that the constitutional difficulties will never arise.” *Kortum v. Alkire* (1977) 69
5 Cal.App.3d 325, 333–34 [138 Cal.Rptr. 26, 31] (citing *Kramer v. Municipal Court* (1975) 49
6 Cal.App.3d 418, 122 Cal.Rptr. 672)(internal quotations omitted). “A court must reconcile
7 statutes, whenever possible, and seek to avoid interpretations which would require it to elevate
8 one statute over another.” *Santa Barbara Federation of Teachers v. Santa Barbara High Sch.*
9 *Dist.* (1977) 76 Cal.App.3d 223, 236 [142 Cal.Rptr. 749, 756]. While these cases contemplate a
10 conflict between two statutes rather than a conflict between a regulation and statute, the same
11 principle applies. In this context, any internal agency regulation should be construed so as not to
12 conflict with state law, giving primacy to the statutory policy objectives.

13 CJP also stresses that Rule 102 contains no exception for the State Auditor. This only
14 highlights the tension between CJP’s arguments. On one hand, CJP claims it has unlimited
15 discretion under Article VI section 18, subdivision (i)(1), which the Auditor and Gov. Code §
16 8545.2 now seek to impair. Protecting this unlimited discretion necessitated this suit. On the
17 other, CJP argues that the Auditor may not access CJP’s records because Rule 102, not CJP, does
18 not provide an exception for the Auditor.⁷ This is illogical: either the CJP has discretion or not,
19 but not both. If CJP does not have discretion, then it is unclear what interest it seeks this Court to
20 protect.

21 Additionally, CJP cites *Mosk v. Superior Court* (1979) 25 Cal.3d 474 [159 Cal.Rptr. 494,
22 601 P.2d 1030] and *Commission On Judicial Performance v. Superior Court* (2007) 156
23 Cal.App.4th 617 [67 Cal.Rptr.3d 434], in support of its arguments that CJP records are not
24 subject to public disclosure. (Opening Br. 11:16-26). Both *Mosk* and *Superior Court* involved

25 ⁷ The CJP’s argument largely ignores the *numerous* exceptions to confidentiality
26 under Rule 102 subd.(b)-(p). (Opening Br. 11:6-15). Rule 102 provides no less than seven
27 exceptions to the strict reading argued here, including one allowing for disclosure to regulatory
28 agencies “in the interest of justice, to protect the public, or to maintain public confidence in the
administration of justice.” CJP Rule 102, subd. (p). Notwithstanding Rule 102’s numerous
exceptions, CJP argues that its “documents are confidential from *everyone*.” (Pet. Reply Br. at
2:26-27) (emphasis in original).

1 third-parties' attempts to force the *public* production of confidential information, which is very
2 different than the instant case. Here, the Auditor merely seeks access to CJP records for the
3 purposes of her audit and, per Gov. Code § 8545.2(b), that information remains confidential after
4 the audit. CJP's argument treats this this audit as the functional and legal equivalent of a public
5 disclosure. The Auditor's declaration and Gov. Code § 8545.2(b) illustrate why that treatment is
6 misguided. Ultimately, the CJP instituted this action because it believes its policy preferences
7 supersede the public's interest in an audit of the agency's work.

8
9 **A. Notwithstanding Its Overly-Broad Interpretation of Rule 102,**
10 **CJP's Misplaced Concerns About Confidentiality Do Not Outweigh**
11 **the Public Interest.**

12 CJP contends that if the Auditor is permitted to review parts of its confidential records, all
13 confidentiality will be lost. CJP incorrectly assumes that providing the Auditor access to its
14 records eliminates confidentiality under CJP Rule 102. It is unclear how, as a practical matter,
15 confidentiality is lost following an audit.⁸ The CJP provides very little basis for its concern. In
16 contrast, the Auditor provided the Court a detailed declaration explaining her office's efforts to
17 preserve confidentiality, including how her office coordinates with audited agencies. The
18 Auditor's declaration provides a factual basis for concluding that CJP's confidentiality will
19 survive after the audit. The CJP has not carried its burden to demonstrate how an audit breaches
20 confidentiality.

21 Confidential information is regularly shared between governmental agencies without the
22 information losing its confidential status. The Auditor detailed her office's duties and practices
23 with respect to confidential information it receives, illustrating why the CJP's confidentiality
24 concerns are misplaced. Howle Decl. at ¶¶ 31-57. Auditors nationwide, including the
25 Government Accountability Office, regularly encounter confidential information through the
26 course of their work, much of which never loses its confidentiality. In fact, the U.S. Government
27 Accountability Office's *Yellow Book* specifically contemplates this, providing several sections

28 ⁸ CJP provides no precedent or other authority for concluding that the confidentiality of its information will be lost, as a matter of law, if the Auditor is allowed access to its records. Government Code § 8545.2(b) provides just the opposite, unequivocally providing that privileged information does not lose its confidentiality following an audit.

1 explaining best practices for handling confidential information that is not subject to public
2 disclosure under, for example, California’s Public Records Act.⁹

3 Based on this record, CJP has not provided sufficient grounds for declaring that
4 Government Code § 8545.2 is unconstitutional as applied.

5 **IV. PUBLIC AGENCIES ARE REGULARLY AUDITED WITHOUT**
6 **INTERFERENCE WITH CORE FUNCTIONS.**

7 The CJP’s purpose is to “to protect the public, to enforce rigorous standards of judicial
8 conduct, and to maintain public confidence in the integrity and independence of the judicial
9 system.” (Opening Br. at 3:22-25)(citing *Broadman v. Commission on Judicial Performance*
10 (1998) 18 Cal.4th1079, 1111-12 [77 Cal.Rptr.2d 408, 959 P.2d. 715]). Confidentiality is not
11 required for the CJP to accomplish these functions. Likewise, neither confidentiality nor the need
12 to preserve its perceived discretion are core functions. That might be the case *if* Article VI
13 section 18, subdivision (i)(1) made confidentiality mandatory. However, confidentiality is merely
14 *permissive*, and CJP’s enactment of Rule 102 cannot elevate confidentiality to a core function.
15 Because CJP has failed to show that confidentiality is a core function it cannot show that the audit
16 or, more specifically, that Government Code § 8545.2 materially impairs or defeats one of its core
17 functions, the writ should be denied. *Case v. Lazben Financial Co.* (2002) 99 Cal.App.4th 172,
18 175 [121 Cal.Rptr.2d 405, 408].

19 In arguing that the audit will interfere with its “core constitutional function,” CJP takes a
20 broad reading of what constitutes its core function. Nothing provided by CJP, however, shows
21 that it will no longer be able to fulfill its core functions. It is premature, if not very speculative, to
22 conclude that the audit will in anyway affect to the CJP’s core functions. CJP will still be able to
23 “to protect the public, to enforce rigorous standards of judicial conduct, and to maintain public
24 confidence in the integrity and independence of the judicial system.” This is even more certain
25 given the Auditor’s declaration, which provides specific reasons to doubt that CJP’s confidential
26 information will ever become public.¹⁰

27 ⁹ See *Yellow Book*, §§4.40 through 4.44 regarding handling of confidential
28 information during a Financial Audit; and §§ 7.39 through 7.43 regarding handling of
confidential materials during a Performance Audit.

¹⁰ If subsequently these concerns ripen, the CJP has several options. It can accept

1 CJP claims that any requirement that it allow the auditor *access* to its records is an
2 impermissible infringement of CJP’s discretion. In effect, the CJP asks this Court to find that it
3 has plenary discretion over the public information in its possession, superseding state statute and
4 the Joint Legislative Audit Committee, which authorized the Audit. Such plenary discretion
5 would exceed discretion held by other state executive and judicial offices, also established under
6 the California’s constitution, that have been previously subject to audits. *See* Howle Decl. at ¶23
7 (listing several state offices previously the target of audits by the Auditor, including the State
8 Supreme and intermediate appellate courts, the Secretary of State’s office, state regulatory
9 agencies, and state universities).

10
11 **A. The Federal Government Has Conducted Two Comprehensive Audits On**
12 **The Procedures For Disciplining Members of the Federal Judiciary Neither**
13 **of Which Interfered With the Core Functions of The Federal Judiciary.**

14 Federal courts were subject to at least two comprehensive audits between 1990 and 2006
15 that evaluated compliance and implementation with the *Judicial Conduct and Disability Act of*
16 *1980*, as amended, 28 U.S.C. §§ 351-36. Notably, all branches of the federal government were
17 involved in one or both audits without giving rise to separation of powers claims. Like the instant
18 audit, both involved evaluating how the federal judiciary handled and resolved sensitive
19 complaints of misconduct or incapacity against members of the federal judiciary. Though both
20 were more comprehensive than the instant audit, neither was alleged to have interfered with the
21 core functions of the federal courts.

22 In 2004, the Supreme Court audited the federal judiciary’s implementation of the Judicial
23 Conduct and Disability Act of 1980, in particular whether the complaint system complied with
24 federal law or led to “institutional favoritism.”¹¹ At the conclusion of the 2006 audit, the

25 (continued...)

26 the Auditor’s invitation to coordinate on public records requests. Coordination between the
27 parties will allow the CJP to satisfy itself that confidentiality is preserved. The CJP does not argue
28 that having to coordinate with sister agencies interferes with its core functions. Alternatively, CJP
can file another suit presenting a ripe concern that can be addressed at the time, avoiding the
extreme relief it seeks here, i.e., to invalidate a state statute and prevent the Auditor from
completing her audit.

¹¹ *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to*

1 committee issued the comprehensive report, known as the *Breyer Report* providing specific
2 details about actual complaints lodged against the federal judiciary. Unlike the instant audit, the
3 *Breyer Report* study committee actually reviewed and, in some instances, publicly critiqued the
4 handling of hundreds of complaints brought under the Judicial Conduct and Disability Act. *See*
5 *Breyer Report* at 2 (explaining that it in order to complete its assignment the Committee
6 determined it was necessary to review actual complaints to effectively assess whether the
7 discipline system was properly implemented). The Report explained that the examination of the
8 complaint and discipline system was “important not only to Congress and the public, but to the
9 Judiciary itself” (*Id.*) and even provided an explanation of the comprehensive standards the
10 Committee established for critiquing the judiciary’s handling of complaints against its members.
11 *Id.* at 2-5. Though it withheld specific names and courts, unquestionably the summaries provided
12 identifying information of those involved with the reviewed complaints. *See Chapter 4: How the*
13 *Judicial Branch Administers the Act- Results, Breyer Report* at pp. 39-99 (providing detailed
14 summaries of problematic complaints).

15 The *Breyer Report* is not the only instance in which the federal judiciary’s complaint
16 process was the subject of a major inquiry. Congress created the National Commission on
17 Judicial Discipline and Removal (“National Commission”), which issued an exhaustive report in
18 1993 regarding the administration of the Judicial Conduct and Disability Act of 1980.¹² *See*
19 *Breyer Report* at p. 13. The National Commission’s report included an analysis of the various
20 means available “to Congress and the executive branch in dealing with judicial misconduct and
21 disability, as well as the administration of the 1980 Act and related actions within the judicial
22 branch.” *Id.* at 13. Like the *Breyer Report*, the National Commission also reviewed specific

23
24 (continued...)

25 *the Chief Justice, September 2006*, (“Breyer Report”) available at <https://goo.gl/3YaqBV>.

26 ¹² Report to President Clinton by the National Commission on Judicial Discipline
27 and Removal, August 2, 1993, original available at <https://goo.gl/fVyudt>, 152 F.R.D. 265. *See*
28 *also Hearing Regarding Report of the National Commission on Judicial Discipline and Removal*
Before the Subcommittee on Intellectual Property and Judicial Administration of the Committee
on the Judiciary, U.S. House of Representatives, One Hundred Third Congress, first session, July
1, 1993 available at <https://goo.gl/jdWs4r>.

1 complaints and evaluated whether they were properly handled, finding that some were not.
2 *National Comm'n's Report*, 152 F.R.D. at 362. The National Commission involved appointees
3 from all three branches of the federal government. *See Judicial Improvement Acts of 1990*, PL
4 101–650, December 1, 1990, 104 Stat 5089; and *National Comm'n's Report*, 152 F.R.D. at 275.

5 There is no evidence that the federal judiciary's obligation to respond to the inquiries from
6 the *Breyer Report* committee or the National Commission materially interfered with any core
7 function.¹³ Likewise, the public disclosure of information from complaints did not affect any
8 core function either. Rather, during the multi-year reviews that preceded the release of the two
9 reports, the federal judiciary continued to fulfill its core functions. In both instances, the review
10 of the judiciary involved a broader, more-invasive inquiry than the audit in dispute here. Based
11 on the record before the Court, there is no basis to expect a different outcome in the instant case.

12
13 **B. Unlike the Out-of-State Cases Cited, CJP's Operations Are Funded By Public
Funds, Not Private Fees.**

14 The CJP has relied on public funds for its operations since it was established in 1960.¹⁴
15 This fiscal year it will receive \$4.7 million in public funds.¹⁵ Yet, CJP relies on a series of out-of-
16 state cases involving entities that were *not* state agencies or operated using only private fees,
17 rather than public funds like the CJP. For example, in *Chicago Bar Ass'n v. Cronson* (Ill. App.
18 Ct. 1989) 183 Ill.App.3d 710 [539 N.E.2d 327] the court held that under Illinois law neither the
19 Attorney Registration and Disciplinary Commission of the Supreme Court of the State of Illinois,
20 nor funds held by the State Board of Law Examiners, were subject to audit by the Illinois State
21 Auditor. *Id.* The Court noted that both the Commission and Board in Illinois were created by the

22 ¹³ Though there were no concerns about interference with core functions, the
23 National Commission was acutely aware of confidentiality interests when handling judicial
24 complaints. Unlike the CJP, however, the National Commission took a different tact, erring on
25 the side of public disclosure rather than confidentiality. "[T]he Commission reads the Act's
confidentiality provision narrowly. Moreover, although sensitive to the importance of discretion
in these matters, the Commission is apprehensive that the notion of confidentiality can assume a
life of its own, at great cost to public accountability." 152 F.R.D. at 350.

26 ¹⁴ This fact alone supports a finding that the public's interest in the audit, as
27 illustrated by the unanimous vote by the Joint Legislative Audit Committee, predominates
whatever discretion or confidentiality interests CJP contends exist.

28 ¹⁵ <http://www.ebudget.ca.gov/2016-17/StateAgencyBudgets/0010/0280/departments.html> .

1 State Supreme Court pursuant to its “inherent, exclusive constitutional authority” under state law.
2 *Id.* at 333. Neither entity received any public funds from the legislature or governor, relying
3 exclusively on fees from attorneys. *Id.* at 332-33. Since neither received state funds, neither
4 were “state agencies” under Illinois law, rendering the Illinois Auditor without authority to audit
5 either.¹⁶

6 The instant dispute is plainly distinguishable. The CJP was not created by the California
7 Supreme Court. In fact, the California Supreme Court has already stated that the CJP “is not a
8 court.” *McComb v. Commission On Judicial Performance* (Cal. 1977) 138 Cal.Rptr. 459, 465
9 [564 P.2d 1, 7]. “It can render no judgment, civil or criminal, and thus could not convict
10 petitioner of a criminal offense.” *Id.* (internal quotations omitted). Indeed, the California
11 Supreme Court previously referred to the CJP as a “state agency.” *See Adams v. Commission on*
12 *Judicial Performance* (1994) 8 Cal.4th 630 [34 Cal.Rptr.2d 641, 882 P.2d 358].

13
14 **V. COURTS SHOULD BE SKEPTICAL OF PUBLIC AGENCIES THAT OBJECT**
15 **TO BEING “SECOND GUESSED.”**

16 CJP objects to the audit on the grounds that it is an “attempt to second-guess
17 discretionary, adjudicatory decision-making by the judicial branch.” (Opening Br. at 8:4-5). The
18 CJP further contends that the audit at issue is “unprecedented” and distinguishable from past
19 audits. It is remarkable for a public agency to suggest publicly that it cannot fulfill its “core
20 functions” because it *might* be subject to second-guessing. Virtually every public agency is
21 subject to second-guessing. Courts issue written opinions. Legislatures hold hearings, debate, and
22 vote. Executive agencies are regularly required to explain their decisions, either to the legislature,
23 by regulation, or as a litigant. These acts are promote second-guessing. It is quite peculiar, to say
24 the least, for the CJP to suggest that the public interest is better served by insulating it from
25 second-guessing. Judicial Watch acknowledges that, under certain narrow circumstances,
26 information held by public agencies should remain confidential or only available to limited

27 ¹⁶ Similarly, several of the cases from outside California cited by CJP involved
28 entities that were determined to not be state agencies and operated using private fees. *Matter of*
Washington State Bar Ass'n (1976) 86 Wash.2d 624 [548 P.2d 310] and *Ex parte Auditor of*
Public Accounts (Ky. 1980) 609 S.W.2d 682.

1 agencies.¹⁷ See *Driver's Privacy Protection Act of 1994*, 18 U.S.C. 2721 (prohibiting the release
2 and use of certain personal information from state motor vehicle records). However, no public
3 interest is served by limiting second-guessing of a public agency's decisions. Likewise, no
4 agency has an interest in being immune from second-guessing or critique. It is not unprecedented
5 for different branches of government, either officially or through its members, to criticize other
6 branches.¹⁸ No public agency, certainly not one with so little public record as the CJP, has an
7 interest in being immune from second-guessing.

8 In any event, there is no factual basis to believe that the Audit will second guess the CJP.
9 Given the Auditor's representations in these proceedings, and the traditional purpose of public
10 audits as outlined in the *Yellow Book*, CJP's concern that the Auditor seeks to rehash or criticize
11 the "merits" of the CJP's decisions are unjustified. Again, even if this was the audit's purpose, it
12 is hard to be persuaded by CJP's argument that it should somehow be immune to public criticism
13 or that such criticism materially interferes with CJP's core functions or otherwise raises serious
14 separation of power issues that warrant the extreme measure of invalidating a facially-
15 constitutional statute Gov. Code § 8545.2.

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24 ¹⁷ To be sure, Judicial Watch does not now challenge CJP's ability to maintain
25 confidentiality with respect to its work. Rather, Judicial Watch challenges CJP's claim that it is
26 not subject to audit or that by complying with the audit its records somehow become public,
contrary to Government Code § 8545.2(b).

27 ¹⁸ For example, President Obama used his address to a joint session of Congress in
28 2010 as an opportunity to rebuke the Supreme Court regarding the merits of its recent decisions.
Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. Times, Jan. 28,
2010 available at <https://goo.gl/tWF42u>.

1 **V. CONCLUSION**

2 For the reasons set forth above, Judicial Watch respectfully submits this Court should
3 deny CJP’s Petition for Writ of Prohibitory Mandate, or in the Alternative, Complaint for
4 Declarative and Injunctive Relief.

5 Respectfully submitted,

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10 Dated: July 25, 2017

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