

**CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION FOUR**

**Commission on Judicial
Performance**

Plaintiff and Respondent,

v.

**Elaine M. Howle, in her
official capacity as California
State Auditor, and the
California State Auditor's
Office**

Defendants and Appellants.

No. A153547

San Francisco County
Super. Ct. No.
CPF-16-515308

On Appeal from the Judgment of the
Superior Court, San Francisco County
the Honorable Suzanne R. Bolanos

APPLICATION FOR STIPULATED REVERSAL

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James A. Ardaiz (SBN 60455)
Christopher Cottle (SBN 39037)
William D. Stein (SBN 37710)
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Code of Civil Procedure § 128, subdivision (a)(8), allows an appellate court to reverse on stipulation of the parties to the appeal, under the following circumstances:

(A) There is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal.

(B) The reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement.

First District Court of Appeal, Local Rule 4, requires a motion for stipulated reversal to be accompanied by a joint declaration of counsel that “describes the parties and the factual and legal issues presented at trial” and supports the findings required by the statute. Attached is the required joint declaration of counsel.

Local Rule 4 also requires the motion to attach a copy of the judgment this Court is asked to vacate. Attached are copies of the judgment and the trial court’s statement of decision.

This case turns on disputed, and dispositive, questions of law, and settled with the assistance of Justice Peter Siggins,

Presiding Justice of Division Three of this Court, pursuant to California Rules of Court, Rule 8.248, subdivision (a)(2). Like the parties in *In re Rashad H.* (2000) 78 Cal.App.4th 376, through their settlement the State Auditor and the Commission on Judicial Performance have “professionally sought to promptly resolve the matter and in doing so do have not in any fashion denigrated the integrity of the judicial branch...” *Id.* at p. 382.

Based on the joint declaration and this application, the parties jointly request this Court to reverse the judgment of the trial court on the merits (and not because of mootness), no later than September 4, 2018.

Respectfully submitted,

Date: 8/2/18

Myron Moskowitz

Myron Moskowitz
Counsel for Appellants

Date:

Michael von Loewenfeldt
Counsel for Respondent

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**JOINT DECLARATION IN SUPPORT OF
APPLICATION FOR STIPULATED REVERSAL**

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Attorneys for Respondent

Myron Moskovitz and Michael von Loewenfeldt hereby
declare as follows:

1. We have personal knowledge of and are competent to testify to the facts alleged in this Declaration.
2. Myron Moskovitz is counsel on appeal for Appellants: State Auditor Elaine M. Howle and the State Auditor's Office.
3. Michael von Loewenfeldt is counsel on appeal for Respondent: the Commission on Judicial Performance (the "Commission").
4. On August 10, 2016, the Joint Legislative Audit Committee directed the State Auditor to conduct an audit of the Commission.
5. On October 20, 2016, the Commission filed in San Francisco Superior Court a petition for writ of mandate related to the audit.
6. On December 21, 2017, the Superior Court granted the Commission's requested writ.
7. The State Auditor timely appealed to this Court, which assigned the case to Division 4.
8. The appeal is now fully briefed.
9. This Court then granted the State Auditor's motion for calendar preference.

10. On May 24, 2018, this Court directed the parties to mediate their dispute, with the assistance of Justice Peter Siggins, now Presiding Justice of Division 3 of this Court.
11. The mediation was successful. The parties signed a Settlement Agreement on July 17, 2018.
12. The Settlement Agreement provides, in part, that: “it is important to the State Auditor that the Superior Court decision be reversed on the merits, and that such reversal not be based on any contention that the case is moot, because if allowed to stand, the State Auditor believes that Superior Court decision will threaten the State Auditor’s ability to fulfill its statutory responsibilities to audit other government agencies.”
13. The Settlement Agreement further provides, in part, that: “the Commission and State Auditor will prepare and file in the Court of Appeal a joint application for stipulated reversal, in accordance with Code of Civil Procedure section 128, subdivision (a)(8) and First District Local Rule 4, on the merits (and not on the ground of mootness) of the writ of mandate issued against the State Auditor by the San Francisco Superior Court in Commission on Judicial Performance v. Elaine Howle, et.al., San Francisco Superior Court Case No. CPF-16-515308 and Court of Appeal No. A153547.”
14. The Settlement Agreement further provides, in part, that,

if the stipulated reversal on the merits and certain other events do not occur “by September 4, 2018, this Agreement shall terminate. In that event, the pending litigation will resume and the State Auditor’s appeal will then be set for oral argument, pursuant to the court’s grant of calendar preference for the appeal.”

15. As required by this Court’s Local Rule 4:

- a. The only parties to this action are the Commission on Judicial Performance, Elaine M. Howle, in her official capacity as California State Auditor, and the California State Auditor’s Office.
- b. There were no material factual disputes presented at trial. This appeal turns on questions of law.
- c. The legal issues presented at trial were: (i) whether, under Article VI section 18 of the California Constitution, Commission Rule 102 governs access by the State Auditor to certain confidential Commission documents, (ii) whether Commission Rule 102 prevented the State Auditor from accessing those documents, (iii) whether Government Code section 8545.2 authorizes the State Auditor to review such documents notwithstanding Commission Rule 102 and Article VI section 18 of the California Constitution, (iv) whether certain topics in the planned audit violated the separation of powers

doctrine, and (v) whether the State Auditor can charge the Commission for the cost of the audit.

- d. This judgment involves important public rights on both sides of the dispute, and the settlement reached represents a balance of those rights acceptable to both parties. This judgment does not involve any unfair, illegal, or corrupt practices, or torts affecting a significant number of persons, or otherwise affect the public or any others not party to the litigation.
 - e. The judgment does not have collateral estoppel or other effects in potential future litigation, because the Constitutional provision that underlies the Commission's claims applies only to the Commission. Reversal of the judgment will not prejudice the rights of any third party.
 - f. No nonparty has filed an amicus brief urging this Court to affirm the Superior Court's decision. Compare *Estate of Edward U. Regli* (2004) 121 Cal.App.4th 878, 881 ("the approval of this motion would adversely affect David Hitchcock, the former administrator of the estate, who is a nonparty").
16. The parties stipulate that the Superior Court's judgment and writ of mandate should be reversed on the merits.
17. The Commission has stipulated to the requested reversal and has no opposition to that reversal, pursuant to the

agreement of the parties. The Commission otherwise provides no comment on the arguments presented herein by the State Auditor.

18. The State Auditor contends that the following legal authority and arguments require reversal of the judgment on the merits:¹
 - a. The trial court held that Article VI, § 18, of the California Constitution empowers the Commission to enact an administrative rule that bars the State Auditor from reviewing files designated as “confidential” by the Commission. This holding was erroneous. Properly construed, the Constitution does not allow the Commission to enact a rule that effectively prevents a state audit. “Confidentiality” must be construed in a way that makes it consistent with *the reason why the Commission was created*: to enhance public confidence in our State’s judiciary. That purpose cannot be accomplished unless the public is assured that the Commission itself is properly carrying out its Constitutional duty to discipline errant judges fairly, while not intruding on the independence of our judiciary. An audit by the State Auditor is the only vehicle the State provides for assuring that the Commission is properly carrying out this duty.

¹ As referenced in the preceding paragraph, counsel for the Commission does not join in this paragraph 18 or its subparagraphs and makes no comment on these arguments.

Undisputed evidence shows that permitting the State Auditor to review all of the Commission's documents—including those that the Commission deems "confidential"—is essential to enable the State Auditor to complete a useful audit: one that will inform the Legislature and the public as to whether the Commission is doing its job properly. Therefore, the Commission's Constitutional authority to deem certain documents "confidential" does not include the authority to bar the State Auditor from examining those documents in course of her duty to audit the Commission's performance.

- b. Even if the above analysis of the meaning of "confidential" in the Constitution were not correct, the trial court still erred, because the California Legislature has expressly authorized and directed the State Auditor to review files that the Commission has deemed "confidential". Government Code section 8545.2 expressly authorizes the State Auditor to review those "confidential" files. The trial court, however, held that this statutory authorization is unconstitutional. That ruling was erroneous, because any limitations on the Legislature's powers must expressly appear in the Constitution. "[A]ll 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; emphasis in original. There is no language in the Constitution expressly prohibiting the Legislature from enacting statutes that address the confidentiality of the Commission's files.

- c. The State Auditor prepared an “Analysis of Audit Request” that summarized JLAC's directive to audit the Commission. This included a section titled “Audit Scope And Objectives”. The trial court ruled that three of that section's topics—#2, #5, and #12—violated the separation of powers doctrine, because they would “materially impair” one of the Commission's “core functions.” This holding was *erroneous*, because the Commission failed to sustain its burden of proving that an audit will “materially impair” its core “functions”. The Auditor seeks only information. She cannot and will not order the Commission to change any of its processes. Nor does the State Auditor intend to comment on or criticize any Commission decision. But even if she did, the Commission presented no evidence that such comment or criticism would “materially impair” its ability to

decide cases. The trial court prohibited the State Auditor “from auditing the exercise of the Commission’s core functions by re-evaluating or second-guessing decisions made in specific instances.” But undisputed evidence showed that the State Auditor has no intent to “re-evaluate” or “second-guess” particular Commission decisions.

- d. The writ of mandate materially impairs the Legislature’s core functions, and thereby violates the separation of powers doctrine. Unless a statute is unconstitutional, the separation of powers doctrine prevents a court from interfering with the legislative process. *Santa Clara v. Superior Court* (1949) 33 Cal.2d 552, 559. The Legislature is responsible for enacting legislation that benefits California’s 39 million residents, overseeing the many state agencies that serve these residents, and appropriating an annual budget of more than \$265 billion. A writ of mandate blocking an audit would materially impair the Legislature’s core function of obtaining the information needed to perform the Legislature’s core functions of: (1) appropriating funds, (2) enacting legislation, and (3) proposing amendments to the California Constitution.
- e. The trial court issued a judgment declaring that “the State Auditor has no legal authority to charge the

Commission for the cost of any audit it conducts of the Commission.” This ruling was erroneous. Declaratory judgment is appropriate only to resolve an actual dispute between the parties, but there was no such actual dispute on this issue. There was no evidence that the State Auditor ever claimed that she had the authority to charge the Commission for the cost of conducting the audit.

- f. The public has a strong interest in ensuring that the Commission is properly and effectively performing its duties, and the audit will help accomplish that purpose.
- g. The Legislature has a strong interest in ensuring that the Commission is properly and effectively performing its duties, and the audit will help accomplish that purpose.
- h. There is no danger that an audit will expose to the public documents that the Commission has deemed “confidential”. Undisputed evidence showed that the State Auditor has reviewed documents deemed “confidential” by many state and local government agencies, and not once has the Auditor ever disclosed such documents to the public.
- i. There are no circumstances similar to those that led the Court of Appeal in *Muccianti v. Willow Creek Care*

Center (2003) 108 Cal.App.4th 13, to reject a motion for stipulated reversal. There, the court noted that “A vacation of the judgment may deny the public the ability to discover Willow Creek Care Center’s bad acts.” *Id.* at 21. The present case is just the opposite, as an audit will enable the public to discover whether the Commission has been properly and effectively carrying out its duties. Nor are there any “potential collateral licensing and insurance ramifications” of a stipulated reversal here. See *ibid.*

19. The reasons of the parties for requesting reversal set forth above outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement. There will be no erosion of public trust from nullification of the judgment. *Union Bank of California v. Braille Institute of America, Inc.* (2001) 92 Cal.App.4th 1324,1331 (“public trust in the courts is also enhanced by settlements of pending appeals and related litigation”). In addition, a stipulated reversal will enable the parties to proceed with the audit, which will enhance public trust in the Legislature’s oversight of state agencies and enhance public trust in the Commission.
20. A reversal will fulfill one of the terms of the parties’ Settlement Agreement, which (when all terms are satisfied) would make further litigation of this case unnecessary,

thereby enabling two government agencies and this Court to save further expense to the taxpayers.

21. The underlying legal dispute between two public agencies is relatively sui generis and its agreed resolution on appeal will not reduce the general incentive for pretrial settlement, because few, if any, cases that are appropriate for pretrial settlement bear any relationship to this type of dispute. Moreover, the parties conferred prior to the filing of the underlying lawsuit and were not able to resolve their differences at that time.

We declare under penalty of perjury under the laws of the State of California that the above statements are true and correct.²

Date: 8/2/18

Myron Moskowitz
Myron Moskowitz
Counsel for Appellants

Date:

Michael von Loewenfeldt
Michael von Loewenfeldt
Counsel for Respondent

² This attestation only applies to Mr. Moskowitz with respect to paragraph 18.