No. S288176

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

FAMILY VIOLENCE APPELLATE PROJECT and
BAY AREA LEGAL AID,
Petitioners,

v.

SUPERIOR COURTS OF CALIFORNIA,
COUNTIES OF CONTRA COSTA, LOS ANGELES,
SANTA CLARA, and SAN DIEGO,
Respondents.

APPLICATION OF THE CALIFORNIA ACADEMY OF APPELLATE LAWYERS, THE LOS ANGELES COUNTY BAR ASSOCIATION, AND JON B. EISENBERG FOR PERMISSION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS; AMICI CURIAE BRIEF

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APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF

Per California Rules of Court, rule 8.520(f), the California Academy of Appellate Lawyers (the Academy), the Los Angeles County Bar Association (LACBA), and Jon B. Eisenberg (Eisenberg) respectfully request permission to file the attached amici curiae brief in support of the Family Violence Appellate Project and Bay Area Legal Aid's (petitioners) petition for writ of mandamus or prohibition. The attached brief supports petitioners' arguments that Government Code section 69957's prohibition against the electronic recording of proceedings in unlimited civil cases is unconstitutional or, alternatively, merely directive, allowing the respondent superior courts to take suitable measures to ensure equal access to justice.

The Academy is a non-profit elective organization of experienced appellate practitioners. Its goals include promoting appellate procedures that ensure proper and effective appellate representation; encouraging the efficient administration of justice on appeal; and supporting improvements in the law affecting appeals. The Academy has participated as amicus curiae in many cases before this Court, including *Guardianship of Saul H.* (2022) 13 Cal.5th 827; *Jameson v. Desta* (2018) 5 Cal.5th 594; *F.P. v. Monier* (2017) 3 Cal.5th 1099, *Ryan v. Rosenfeld* (2017) 3 Cal.5th 124; *Conservatorship of McQueen* (2014) 59 Cal.4th 602; *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097; and *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106.

LACBA is one of the country's largest local voluntary bar associations. In addition to fulfilling its members' professional needs, LACBA promotes the administration of justice, access to the legal system, and the role of lawyers in facilitating both. LACBA was one of the amici in *Jameson v. Desta* (2018) 5 Cal. 5th 594, which held that access to a court reporter may not be denied because of a litigant's inability to pay. LACBA believes the rights secured in

Jameson are in jeopardy when no court reporter is available and electronic recording is prohibited.

Eisenberg, an appellate lawyer for over 45 years, authored and continues to update the *California Practice Guide: Civil Appeals and Writs*, first published in 1989. He recently retired from active law practice, having collectively appeared more than a hundred times in this Court; all six districts of the California Court of Appeal; and the United States Courts of Appeal for the Ninth Circuit and D.C. Circuit. Eisenberg retains a keen interest in ensuring the availability of appellate review to all litigants regardless of their economic status.

The Academy, LACBA, and Eisenberg seek to file the attached brief to promote the effective administration of appellate justice and the development of California law. Because they believe the attached brief will assist the Court in resolving the issues in this case, the Academy, LACBA, and Eisenberg respectfully request this Court's permission to file it.

Dated: April 4, 2025

Respectfully Submitted,

NIDDRIE | ADDAMS | FULLER | SINGH LLP

By: *s/ Rupa G. Singh*
Rupa G. Singh

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JON B. EISENBERG, *AMICUS CURIAE IN PROPRIA PERSONA*

AMICI CURIAE BRIEF[1]

I. INTRODUCTION

Petitioners establish, and respondents do not dispute, that Government Code section 69957's (Section 69957) prohibition on the electronic recording of proceedings in unlimited civil cases as applied to low-income litigants is unconstitutional under due process, equal protection, and separation-of-powers principles. Though this is more than sufficient to grant the relief petitioners request, at least two broader systemic harms inflicted by Section 69957 as presently applied confirm that such relief is imperative.

First, the lack of a record of proceedings artificially and unfairly arrests the development of the law surrounding issues raised in matters involving low-income litigants, which range from life-altering decisions regarding child custody to equally profound decisions regarding the vindication of civil rights. Second, because a record of proceedings is a necessary predicate to exercising the statutory right to appellate review, its absence renders meaningless appellate courts' substantial investment in self-help programs to provide low-income litigants due process and equal protection on appeal.

Moreover, interpreting Section 69957 as mandatory would be untenable given indisputable evidence that the electronic recording of proceedings is both technologically reliable and financially feasible. Nor is there any reason for this Court to arbitrarily limit the availability of electronic recordings to only those litigants who are eligible for or receive fee waivers given the

[1] Certain Academy members represent the respondents, the Legislature, and other amici. Per Academy rules, neither those members nor others at their firms participated in any discussions about whether the Academy should file this amici brief or what position the Academy should take; voted on the Academy's position; or was involved in preparing this brief.

broader definition of low-income litigants in most of respondents' relevant General Orders.

It is said that a society is judged by how it treats its most vulnerable. The Academy, LACBA, and Eisenberg submit that this is the quintessential case in which granting relief to the low-income litigants petitioners represent is not just legally warranted, but also a moral imperative.

II. DISCUSSION

A. The Prohibition on the Electronic Recording of Proceedings in Unlimited Civil Cases Disproportionately Harms the Development of the Law in Cases Involving Low-Income Litigants and Institutional Efforts to Afford Such Litigants Due Process and Equal Protection

1. Appeals by low-income litigants are disproportionately left unheard due to the lack of a verbatim record, leading to lack of guidance and disruption in the development of the law on issues arising in such matters

As established by petitioners and some of their supporting amici, Section 69957's prohibition on the electronic recording of proceedings in unlimited civil cases prevents low-income litigants from exercising their statutory right of appellate review in violation of the constitutional guarantees of due process and equal protection. (E.g., Pet. at pp. 60–72; ACLU Letter ISO Pet., pp. 4–7.) But Section 69957's harm is not limited to low-income litigants; rather, it extends to the public as a whole. Routine blocking of appeals by litigants who cannot afford a court reporter disrupts the development of the law on critical issues disproportionately raised in matters involving those litigants, including child custody, domestic violence, employment discrimination, civil rights violations, asset and property division, personal injury, and guardianship disputes. (E.g., Pet., p. 23 & fn. 16 [discussing high number of self-represented litigants in family law and domestic violence cases]; *id.* at p. 34 & fn. 49 [most California courts are

unable to provide court reporters in non-mandated cases, "including civil, family law and probate," citation omitted].)

"[I]t is a fundamental principle of appellate procedure that . . . the burden is on an appellant to demonstrate, *on the basis of the record presented to the appellate court,* that the trial court committed an error that justifies reversal of the judgment." (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–609 (*Jameson*), emphasis added.) This rule dates back almost to California's inception. (E.g., *White v. Abernathy, Clark & Co.* (1853) 3 Cal. 426, 426 ["it is not sufficient that error may have intervened, but it must be affirmatively shown by the record"].)[2]

Recently, however, court-supplied reporters have become so scarce that most litigants in unlimited civil cases must hire a *private* court reporter—*if they can afford one*—to preserve the statutory right of appellate review. (E.g., *Jameson*, 5 Cal.5th at p. 610 [as a result of budget reductions, most superior courts throughout the state limit the availability of official court reporters to only a narrow category of civil cases]; Pet., pp. 34–35 [discussing ever-increasing court reporter shortages post-*Jameson*].) Those who cannot afford private court reporters—estimated to cost approximately $3,300 per day (Pet., p. 34 & fn. 51)—must often forgo a transcript of oral proceedings and be denied meaningful appellate review because they are unable to demonstrate reversible error "on the basis of the record presented to the appellate court." (*Jameson*, 5 Cal.5th at p. 609.)

Moreover, despite the efficacy and affordability of electronic recording (as further discussed in Section II.B.1, *infra*), Section 69957 has prohibited it

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[2] For a discussion of the legislative history of official court reporting in California civil cases, see Eisenberg's Amicus Curiae Letter, lodged in this proceeding on December 9, 2024.

in unlimited civil cases since 1975. The synergistic effect of Section 69957 and the modern scarcity of court-supplied reporters (Pet., pp. 29–30, 35) has made the appeal right an empty one for all but the affluent. That contravenes this Court's holding that "an official court reporter, or other valid means to create an official verbatim record for purposes of appeal, must *generally* be made available to in forma pauperis litigants upon request" in cases where those who can afford to pay for a private court reporter are permitted to hire one. (*Jameson*, 5 Cal.5th at p. 599, emphasis added; see also *id*. at p. 623.)

Countless appellate courts have declined to address the merits of an appeal when no verbatim record of trial court proceedings was available. (*Jameson*, 5 Cal.5th at pp. 609–610 [collecting cases].) In addition to denying the low-income litigants involved in these cases the vital error-correcting function of the statutory right of appellate review, current conditions allow a disproportionate number of judgments in such civil cases to evade appellate review. (E.g., *In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1, 9, fn. 3 ["[T]he absence of a verbatim record can preclude effective appellate review, cloaking the trial court's actions in an impregnable presumption of correctness regardless of what may have actually transpired."].) In other words, the public and the trial courts are denied much-needed guidance on critical issues arising in cases involving low-income litigants, while society is left to contend with the arrested development of the law on the important issues that arise in such cases.

As Justice Kennard noted in her dissent from the majority's approval of a presumption in favor of stipulated reversals absent extraordinary circumstances, a judgment can have value to either nonparties or "society at large," not just the particular litigants involved. (*Neary v. the Regents of the Univ. of Cal.* (1992) 3 Cal.4th 273, 291–292 [Kennard, J., dissenting].) For

example, cases involving the division of community property can impact tax authorities who are not parties to the case. (*Id.* at p. 291.) Likewise, cases involving public officials or agencies as parties provide the public an important tool to evaluate the performance of public employees and institutions through litigation. (*Id.* at pp. 291–292.) Just as stipulated reversals in certain cases can deprive nonparties and society the benefit of the "judicial product," the lack of appellate review in cases involving low-income litigants based on their inability to obtain a verbatim record of proceedings deprives litigants, nonparties, and society the benefit of judicial guidance and a well-developed body of law. (*Id.* at p. 292; see also Code Civ. Proc., § 128(a)(8) [prohibiting stipulated reversals unless the court finds that nonparties' or the public interest will not be adversely affected and that the reasons for the stipulated reversal outweigh both the erosion of public trust from nullifying a duly entered judgment and the risk that the availability of stipulated reversal will not reduce the incentive for pretrial settlement].)

2. The disproportionate lack of a verbatim record in appeals involving low-income and pro per litigants undermines appellate courts' self-help programs to afford such litigants due process and equal protection on appeal

California is believed to have the highest number of "low-income" residents in the country, described as "anyone with a household income at or below 125% of [federal poverty limit] or below 125% of the poverty threshold." (Pet., pp. 33–34 & fn. 52, citation omitted.) Data from 2021 show that a significant majority of low-income households have faced at least one civil legal problem in the past year while most have dealt with multiple, typically related to essential needs like housing, health care, and providing for their families. (Legal Services Corp., The Justice Gap: The Unmet Civil Legal

Needs of Low-income Americans § 3 (Apr. 2022).)[3] As a result, the shortage of court reporters across the state coincides with an increase in civil cases and appeals involving low-income litigants, who frequently cannot afford counsel and tend to be self-represented.

Such pro per litigants may be either unaware of their right to obtain a free verbatim record or unable to exercise that right because court reporters are unavailable when requested. (Pet., p. 44.) This not only deprives low-income and pro per litigants of access to meaningful review, but also renders substantially meaningless the significant and longstanding investment of time, money, and other resources by the Judicial Council and various appellate courts to develop and maintain appellate self-help programs to allow such litigants access to meaningful review. This investment includes statewide funding of appellate court self-help centers, development of appellate self-help websites and manuals, and other innovative tools to guide litigants through the complex appeals process; volunteer-staffed appellate workshops and clinics; and specialized programs focused on appeals in family law and domestic violence cases, including a one-time $25 million allocation to the Court Innovations Grant Program.[4] Of that amount, $8 million was earmarked for family, juvenile, and self-help projects, including in the appellate arena, such as the Fifth District Court of Appeal's Self-Help Resource Center, which led to the launch of a centralized, ADA-compliant,

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[3] (https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgi0emp3myz1.)

[4] (Jud. Council of Cal., Final Report on the Court Innovations Grant Program, pp. 3, 10–12 (2021) [https://courts.ca.gov/sites/default/files/courts/default/2024-12/lr-2021-court-innovations-grant-program-ba-2016.pdf#:~:text=The%20Budget%20Act%20of%202016,the%20branch%20to%20establish%20a [as of Apr. 4, 2025].)

website that serves as a nationwide model for providing comprehensive, easy-to-navigate information in English and Spanish about the complex appeals process for pro per appellate litigants, law students, and new attorneys.[5] Intermediate appellate courts further provide self-help workshops, brochures, guides, and sometimes even pro bono representation, if possible, including in partnership with publicly-funded agencies, as with the Second District's model program.[6]

However, without a verbatim record of proceedings due to the shortage of court reporters and Section 69957's prohibition on electronic recordings, no amount of self-help resources can yield access to meaningful appellate review. In short, ongoing judicial and public investment in trying to ensure due process and equal protection for pro per litigants on appeal is being undermined by the lack of a verbatim record of trial court proceedings.

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[5] (*Id.* at pp. 39–40.)

[6] In addition to other self-help resources, the Second District offers a pilot program to secure representation for indigent litigants via a partnership between LACBA's appellate courts committee and Public Counsel funded by hundreds of thousands in Judicial Council grants since 2007. (https://appellate.courts.ca.gov/district-courts/2dca/court-programs/self-help-resources; https://appellate.courts.ca.gov/district-courts/2dca/court-programs/appellate-pro-bono-pilot-project [as of Apr. 1, 2025]. The Fourth District also offers various resources, including workshops, brochures, and links for self-represented litigants, one of which is in partnership with Legal Aid of San Diego and the San Diego Law Library. (https://appellate.courts.ca.gov/self-help-resources-0 and https://sandiegolawlibrary.org/clinics/appeals-civil-appellate-self-help-workshop [as of Apr. 1, 2025].) All courts further invest staff time and resources to maintain the appellate self-help resource guide specific to their division. (https://selfhelp.appellate.courts.ca.gov/ [as of Apr. 1, 2025].)

B. Section 69957 Further Violates Equal Protection Guarantees Because It Prohibits the Electronic Recording of Proceedings in Unlimited Civil Cases Based on Arbitrary Distinctions Among Litigants Absent Any Logical, Reasoned, or Defensible Basis

There is no logical basis to support the prohibition on electronic recordings in unlimited civil proceedings.

Any lingering skepticism about the reliability of electronic recordings is unfounded. Not only are they available in limited civil cases under Section 69957 and widely used by federal courts and two-thirds of state courts, but California's intermediate appellate courts and Supreme Court also use them to capture oral argument. Just like trial transcripts, transcripts of appellate proceedings can be necessary for appellate review—for example, to establish a key concession in support of a petition for rehearing or petition for review. As the Sixth Appellate District urged years ago, "the time has come at last for California to . . . permit parties to record proceedings electronically in lieu of the far less reliable method of human stenography and transcription." (*In re Marriage of Obrecht, supra,* 245 Cal.App.4th at p. 9, fn. 3.)

Nor is there merit to respondents' concern that mandating electronic recordings will be prohibitively expensive because some trial courts do not have such capabilities while others require upgraded capabilities. (Return, pp. 7–8.) The cost of outfitting trial courts with the appropriate, upgraded electronic recording capabilities, particularly with advances in artificial intelligence, comes to a fraction of the judicial funds spent in vain to recruit or employ court reporters and pay private court reporters. (Pet., pp. 13–14, 30.) For example, Los Angeles Superior Court spent $13 million over two years to recruit and keep court reporters yet remains about 125 reporters short, and would need an additional $23 million to pay median salaries with

benefits to 125 reporters if it were to fill its vacancies.[7] Meanwhile, the $25 million the same court invested *over a decade* to build electronic recording infrastructure will cost only $1.2 million per year to maintain going forward.[8] Thus, the cost of electronic recording infrastructure is lower *annually*, and could be satisfied by earmarking just the unspent portion of the millions allocated for unsuccessful attempts to recruit court reporters to the profession. (Pet., pp. 30–31.)[9] Moreover, investing in electronic recording infrastructure will save operational and financial costs resulting from the shortage of court reporters, such as the diversion of staff time to manage court reporter coverage; delays and changes to court schedules and calendars; competition between courts for reporters; and increased costs to match salaries of court administrators with rising court reporter compensation.[10]

Ultimately, the cost of new or upgraded electronic recording technology pales when measured against the far greater societal costs related to the lack of a verbatim record—denial of access to justice to low-income litigants and systemic injuries to both the development of the law and institutional efforts to afford all appellate litigants due process and equal protection.

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[7] (Bloomberg Law, *L.A. Court Upped Electronic Recording Contract to $25 Million* (Sep. 30, 2024) [https://news.bloomberglaw.com/litigation/l-a-court-upped-electronic-recording-contract-to-25-million [as of Apr. 1, 2025].)

[8] (*Ibid.*)

[9] For example, as of 2021–2022, the state's General Fund has included $30 million for trial courts to increase court reporters in family law and civil cases, but $9.7 million in unspent funds reverted back to the General Fund. (Legislative Analyst's Office Letter (Mar. 5, 2024) pp. 12–15, lao.ca.gov/letters/2024/Letter-Umberg-Court-Reporters-030524.pdf.)

[10] (*Id.* at pp. 12–13.)

C. All Litigants in Unlimited Civil Cases Who Meet the Definition of "Low-Income" in the Trial Court's General Orders Should Have Access to Electronic Recordings, Not Just Those Eligible for Fee Waivers

Respondents suggest relief should be limited to litigants eligible for fee waivers per *Jameson*. (Return, p. 7, fn. 2) This is wrong for three reasons.

First, inability to pay for a private court reporter is not limited to litigants eligible for fee waivers. That divides litigants into three unequal classes: (1) those who can afford a private court reporter; (2) those who qualify for a fee waiver; and (3) the millions in between who cannot afford a court reporter yet do not qualify for a fee waiver. Drawing the line at the low statutory threshold for litigants eligible for fee waivers (Gov. Code, § 68632) would exclude the millions who cannot afford a court reporter or access the verbatim record necessary for appellate review, denying equal protection to those similarly situated. (E.g., *Serrano v. Priest* (1971) 5 Cal.3d 584, 596; *People v. Mendoza* (2016) 62 Cal.4th 856, 912 [equal protection and due process afford equality to those similarly situated].) Because *Jameson* did not address this constitutional issue, its teaching that courts may not exclude fee waiver recipients from access to electronic recordings should not be a limiting factor here. (*Jameson*, 5 Cal.5th at p. 598; see also *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388 ["'It is axiomatic that cases are not authority for propositions not considered.'"], citation omitted.)

Second, respondents' suggestion that fee-waiver eligibility serve as the basis for allowing electronic recordings conflicts with the broader definition of "low-income" litigants entitled to electronic recordings. Indeed, some of the General Orders go further, allowing electronic recordings for any litigant

unable to obtain a private court reporter, including those who cannot find one due to the shortage of reporters.[11]

Third, concerns about the "administrability" of using a low-income definition in allowing electronic recordings are misplaced because courts apply ability-to-pay standards in many other common scenarios. (E.g., Fam. Code, §§ 270–271 [requiring determination of ability to pay before awarding attorney's fees or costs as a sanction]; *id.*, § 6344, subd. (c) [requiring determination of ability to pay before awarding prevailing party attorney's fees in domestic violence cases]; *id.*, § 2030, subd. (a)(2) [requiring ability to pay findings before ordering a party to pay pendente lite attorney's fees]; *id.*, § 3112 [requiring consideration of parties' ability to pay when allocating costs of a court-appointed child custody evaluator]; *Adams v. Murakami* (1991) 54 Cal.3d 105, 111 [explaining that a punitive damage award can be so disproportionate to defendant's ability to pay as to be excessive].) Respondents provide no persuasive reason why courts could not also apply this standard here.

III. CONCLUSION

Due process and equal protection principles, as well as the need to avoid systemic and institutional harms, warrant granting petitioners the requested relief, including (1) holding that Section 69957 cannot

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[11] (SCSC General Order, p. 21 [allowing electronic recording when, among other requirements, the requesting party "has been unable to secure the presence of a private court reporter to report the proceeding because such reporter was not reasonably available or on account of that party's reasonable inability to pay"]; LASC General Order, p. 20 [allowing electronic recording when, among other requirements, "the party so requesting has been unable to secure the presence of a private CSR to report the proceeding because such CSR was not reasonably available or on account of that party's reasonable inability to pay"]; CCSC General Order, p. 13 [same].)

constitutionally preclude the use of electronic recording to create an official verbatim record in unlimited civil cases, and (2) mandating that any civil litigant who cannot afford a private court reporter is entitled to an official verbatim record created at no charge, including by electronic recording if a court reporter is not available.

Dated: April 4, 2025

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Under California Rules of Court, rules 8.204, and 8.520(b), (c) & (h), and in reliance on the word count feature of the software used to prepare this document, we certify that the Amici Curiae Brief of the California Academy of Appellate Lawyers, the Los Angeles County Bar Association, and Jon Eisenberg contains 3,192 words, exclusive of those materials not required to be counted under Rule 8.520(c)(3).

Dated: April 4, 2025

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CERTIFICATE OF SERVICE

I, Rupa G. Singh, am employed in the County of San Diego, California, am over the age of 18, and am not a party to this matter. My business address is 501 West Broadway, Suite 800, San Diego California 92101. On April 4, 2025, I served the APPLICATION OF CALIFORNIA ACADEMY OF APPELLATE LAWYERS, LOS ANGELES COUNTY BAR ASSOCIATION, AND JON B. EISENBERG FOR PERMISSION TO FILE'AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS; AMICI CURIAE BRIEF (the DOCUMENT) on the following interested parties in this action through the Supreme Court's TrueFiling® system:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Diego, California on April 4, 2025.

s/ Rupa G. Singh
Rupa G. Singh

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

4/7/2025

Date

/s/Rupa Singh

Signature

Singh, Rupa (214542)

Last Name, First Name (PNum)

Niddrie Addams Fuller Singh LLP

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