No. S288176

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FAMILY VIOLENCE APPELLATE PROJECT and BAY AREA LEGAL AID,

Petitioners,

vs.

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

Respondents.

LEGISLATURE OF THE STATE OF CALIFORNIA,

Real Party In Interest.

PETITIONERS' ANSWER TO THE AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL

Service on Attorney General required by Cal. Rules of Court, rule 8.29(c)

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I. INTRODUCTION

Petitioners welcome the thoughtful input of the Attorney General in this important case. The Attorney General's analysis confirms that (1) "the combination of the court reporter shortage and section 69957 means that many low-income litigants in California are unable to obtain a verbatim record of their superior court proceedings, including proceedings that affect some of the most significant aspects of their lives"; (2) "Petitioners have demonstrated an as-applied violation of California's Constitution"; (3) the resulting impact on litigants' constitutional rights and on the State's judicial system is "untenable"; and (4) "this case satisfies the demanding criteria for original mandate relief from this Court." (Amicus Curiae Brief of the Attorney General in Support of Petitioners ["AG Amicus Br."] at pp. 9, 13.) The Attorney General also agrees that, given the scope and importance of the constitutional issues presented, relief should be granted without delay. (*Id.* at p. 28.)

Petitioners submit this brief to offer clarification on a handful of issues raised in the Attorney General's brief. There are few points of disagreement between Petitioners and the Attorney General, and none should stand in the way of this Court granting the relief sought in the Petition. (See Petition ¶ 63.)

II. THE RELIEF SOUGHT IN THE PETITION MAY APPROPRIATELY BE GRANTED ON THE BASIS OF PROCEDURAL DUE PROCESS ALONE, BUT THE OTHER GROUNDS STATED IN THE PETITION ARE ALSO VALID.

The Attorney General offers a detailed analysis confirming that this Court should grant the Petition based on Petitioners'

showing that the application of Section 69957 to preclude electronic recording when a court reporter is unavailable violates procedural due process. (AG Amicus Br. at pp. 9, 13-20; see Petition at pp. 60-66.) The Attorney General then suggests that this Court "need not – and should not" reach Petitioners' arguments based on equal protection and separation of powers. (AG Amicus Br. at pp. 13, 20-23.)

Petitioners agree that all of the relief sought in the Petition may appropriately be granted based solely on procedural due process grounds. Each of the three grounds for relief set forth in the Petition provides an independently sufficient basis for the relief sought. And if full relief is granted on any one of those grounds, the Court does not need to reach the other two if it chooses not to do so.

That said, Petitioners have also established independent grounds for relief under both equal protection and separation of powers. The Attorney General does not argue that either of those grounds is in fact insufficient to support the relief sought. Rather, the Attorney General merely suggests that deciding this case on those other grounds would require the Court to grapple with more challenging issues. (*Id.* at pp. 20-23.) Petitioners respectfully disagree.

On equal protection, the Petition demonstrates that Section 69957 at least fails the strict scrutiny test when it burdens litigants' ability to vindicate fundamental rights. (Petition at pp. 70-72.) The Attorney General does not dispute this on the merits but expresses concern about the administrability of a ruling that

applies only to cases involving fundamental rights. (AG Amicus Br. at p. 22.) These concerns about administrability can be set aside, because the Petition demonstrates that the application of Section 69957 in the circumstances at issue here fails to satisfy even the less restrictive rational basis test that would apply to all cases. (See Petition at pp. 69-70.) This makes the statute's application unconstitutional regardless of whether a litigant's case involves fundamental rights, and a ruling on this ground would pose no administrability challenges.

Although suggesting that "it is not clear" that Petitioners have stated a valid rational basis challenge (AG Amicus Br. at p. 22), the Attorney General does not identify any actual defect in Petitioners' showing. To the contrary, the Attorney General agrees that the legislative preference for recording by a human court reporter – the only "basis" for the statutory bar that anyone has been able to articulate – is "inapplicable" in situations in which no court reporter is available. (*Id.* at p. 19.) In suggesting that the Court not reach the rational basis challenge, the Attorney General merely observes that the rational basis test presents a "high bar" (*id.* at p. 22 [quoting *People v. Hardin* (2024) 15 Cal.5th 834, 852]) and suggests that addressing it runs the risk of "weakening or casting doubt" on the standard. (*Id.* at pp. 22-23.) But where, as here, no one is able to articulate ***any*** plausible basis for the challenged disparity, there should be no such risk.

On separation of powers, the Attorney General suggests that separation of powers is a less attractive basis for deciding

this case because application of the relevant standard "***may*** depend, in part, on the comparative responsibility of the judicial branch for the current court reporter shortage." (*Id.* at p. 21 [emphasis added].) Notably, however, the Attorney General's brief does not argue that assessing the impact of Section 69957 on separation of powers actually ***does*** or ***should*** depend on assigning fault for the court reporter shortage. It does not and should not.

This case is about the rights of litigants and the fundamental duty of the courts to respect and protect those rights. Insofar as Section 69957 materially impairs the courts' fulfillment of their constitutional duties to ensure equal access to justice and to fairly adjudicate cases, it violates separation of powers. (See Petition at pp. 51-60.) None of the grounds set forth for the relief sought in the Petition, including separation of powers, requires any evaluation of fault for the court reporter shortage.[1] The Attorney General provides no contrary authority. It merely cites to the SEIU Amicus Brief, which claims that the courts bear substantial blame for the court reporter crisis. (AG Amicus Br. at p. 21 [citing SEIU Amicus Br. at pp. 16-22].) As Petitioners have previously pointed out, the SEIU Amicus Brief itself offers no meaningful analysis of the constitutional issues presented in the Petition, including any analysis demonstrating

[1] See Petitioners' Consolidated Answer to Briefs of Amicus Curiae ["Consolidated Answer"] at pp. 13-16. The Attorney General agrees that disputes about the causes of the court reporter shortage "are not material to the procedural due process analysis." (AG Amicus Br. at p. 25.)

that fault is legally relevant here. (See Consolidated Answer at pp. 9-12.)

The Attorney General argues that "[p]rocedural due process provides the most natural, judicially manageable path for affording petitioners the relief that they seek." (AG Amicus Br. at p. 23.) Petitioners agree that procedural due process provides a "natural" and "judicially manageable" basis for granting the relief requested. No party or amicus in this case has argued to the contrary.[2] But neither the Attorney General nor any other party or amicus has identified any genuine defects in Petitioners' other constitutional arguments either.

III. IT IS UNNECESSARY FOR THE COURT TO ADDRESS THE HYPOTHETICAL QUESTION OF WHAT A COURT SHOULD DO IF ELECTRONIC RECORDING EQUIPMENT IS GENUINELY UNAVAILABLE.

The Attorney General suggests that the Court "limit the relief requested by petitioners" by "reserv[ing] the question [of] whether superior courts have an obligation to install electronic recording equipment in courtrooms where it does not currently exist." (AG Amicus Br. at p. 27.) However, "reserving" on this issue would ***not*** require a "limitation" on the relief actually sought in the Petition.

For purposes of the relief sought in the Petition (see Petition ¶ 63), the question is not whether and where recording equipment is installed; it is whether Section 69957 can be applied

[2] The only amicus brief opposing the Petition, that of the SEIU Amici, does not discuss the procedural due process issues. (See Consolidated Answer at p. 20.)

to limit low-income litigants' access to verbatim recording. Petitioners do not ask this Court to issue an order in this case that would dictate the details of how any individual superior court administers its court reporter staff, recording equipment, and courtrooms. The relief Petitioners seek simply requires confirmation of two core principles:

1. Every low-income litigant in family, probate, and other civil proceedings is entitled to free verbatim recording of the proceedings; and

2. Section 69957 may not constitutionally be applied to prevent verbatim recording being created electronically for low-income litigants when a court reporter is unavailable. (*Ibid.*)

Confirmation from this Court on these points will eliminate the only meaningful barrier that currently exists to providing verbatim recording to low-income litigants in the majority of cases, including all, or virtually all, cases in the Respondent Courts. (See AG Amicus Br. at p. 19; Petitioners' Reply to Returns at pp. 39-41.) It should also help to steer the other superior courts toward an appropriate resolution even if and to the extent other barriers exist as well.

Petitioners recognize that the relief sought in this case could fall short of fully answering questions that could hypothetically arise if a non-party superior court is so short on both court reporters ***and*** electronic recording equipment that it has no way to provide verbatim recording for all of the

proceedings where it is required.[3] Petitioners agree with the Attorney General that such questions do not need to be decided now and should be evaluated, if and when they arise, in light of the pertinent facts presented in any such situation. The Court's guidance on the core principles discussed above should nonetheless provide a crucial foundation for assessing any dispute that may arise about a court's duties in that situation.

To be clear, Petitioners respectfully disagree with the Attorney General's suggestion that the "fiscal interests" involved in enabling a court that currently lacks sufficient electronic recording equipment to fully satisfy its obligations to low-income litigants might possibly alter the due process analysis. (See AG Amicus Br. at p. 27.) As is clear from the Attorney General's cogent analysis of the procedural due process issues (*id.* at pp. 15-20), the first three due process factors – the private interests involved, the risk of erroneous deprivation, and litigants' dignitary interests – "weigh heavily" here. (*Id.* at p. 20.) It is difficult to imagine that any modest fiscal measures that may be needed to make marginal improvements in a court's recording resources – and/or any reasonable administrative adjustments

[3] All of the Respondent Courts have made public statements (and/or indicated in General Orders) that installation of the necessary equipment is already sufficiently widespread in their courtrooms. (See Petitioners' Reply to Returns at pp. 39-40.) The record offers no basis for concluding that the same is not true of most other superior courts.

required to allow those resources to be used appropriately – could ever be so substantial as to outweigh those considerations.[4]

Again, however, that is an issue for another day. The mere possibility that it might arise should not affect this Court's ability to rule on the core issues the Petition presents, as set forth in paragraph 63 of the Petition.

IV. THERE IS NO NEED FOR THE COURT TO RETAIN JURISDICTION.

The Attorney General agrees with Petitioners that the irreparable harm posed by the current application of Section 69957 is both acute and widespread and requires a swift response from this Court. (AG Amicus Br. at pp. 8-9.) The Attorney General suggests, however, that this Court at first grant relief only on an "interim basis" and "retain jurisdiction so it can consider appropriate modifications based on factual or legal developments." (*Id.* at p. 27 [italics omitted].) But the Attorney General offers no compelling reason for the Court to take such an unusual step in this case.

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[4] Although the Attorney General's brief speaks of "courtrooms" where electronic recording equipment is not currently installed (see AG Amicus Br. at p. 27), Petitioners do not understand the Attorney General to be suggesting that a superior court that possesses sufficient electronic recording capacity overall could decline to provide verbatim recording to a low-income civil litigant solely because the equipment is absent in a particular courtroom. If, for example, a court has 100 courtrooms and all but one are equipped with electronic recording equipment, it would be patently unreasonable for the court to schedule its family law hearings for low-income litigants in that one courtroom – unless, of course, the court was able to reliably supply live court reporters in that courtroom. As Petitioners have previously pointed out, superior courts are well-experienced in navigating such administrative challenges. (See Petitioners' Reply to Returns at pp. 39-41.)

The Attorney General offers a single citation in support of this suggestion, to a footnote in Justice Liu's concurring opinion in *Vandermost v. Bowen* (2012) 53 Cal.4th 421, 492-493 & fn. 2 (conc. opn. of Liu, J.), which, in turn, relied on *Legislature v. Reinecke* (1972) 6 Cal.3d 595. Those cases involved extraordinary circumstances that have no bearing on this case. Each involved a looming ***potential*** crisis to the "integrity of the electoral process" in which there was a risk that a reapportionment map might not be available in time for an upcoming election, and the Court needed to determine when it should weigh in. (*Reinecke*, *supra*, 6 Cal.3d at pp. 598, 602; *Vandermost*, *supra*, 53 Cal.3d at pp. 456-457.)

Justice Liu's concurrence in *Vandermost* argued that the applicable constitutional provisions mandated that the court retain temporary jurisdiction and defer its decision. (*Vandermost*, *supra*, 53 Cal.3d at p. 493 [conc. opn. of Liu, J.] [court should retain jurisdiction while waiting to see whether referendum challenging redistricting maps was likely to qualify for the ballot before ruling on interim maps].) In *Reinecke*, the court, facing an "impasse" between the Legislature and the Governor, took incremental steps to ensure the timely creation of constitutionally valid electoral districts while also balancing the Legislature's constitutional authority to issue election maps. (*Reinecke*, *supra*, 6 Cal.3d at pp. 598, 604 [issuing temporary maps and retaining jurisdiction to issue maps for future elections]; see also *Legislature v. Reinecke* (1973) 9 Cal.3d 166, 167 [appointing special masters to create redistricting maps

when Legislature again failed to enact reapportionment statutes].)

None of this has any relevance to ***this*** case. In both *Vandermost* and *Reinecke*, the issue of retention of jurisdiction arose solely because of the possibility that it was premature for the Court to act. The Petition here does not rest on the proposition that thousands of litigants ***might*** be deprived of their constitutional rights and full access to justice in the future. Rather, it has been demonstrated – and no party or amicus in this case has disputed – that litigants ***are*** suffering such deprivation every single day the California courts are in session. Moreover, the Court's ruling is needed in this case, not only to provide a remedy for this problem in the four Respondent Courts, but also to provide appropriate guidance for what everyone recognizes to be a state-wide problem. There is no reason to delay that important guidance in favor of "interim" relief.[5]

The Attorney General's brief identifies no concrete expected developments that would make this case stand apart in meriting retention of jurisdiction. The Attorney General suggests only that (a) there might be an unidentified "need for clarifications or other modifications to ensure that litigants' rights are respected – and that superior courts can effectively administer the Court's

[5] Indeed, providing only an "interim" ruling could delay needed changes in other superior courts that are not parties to this litigation. Those courts might be reluctant to modify their practices until and unless the Court's ruling is final. Even if they did begin to make changes, and disputes arose around details of those changes, it is questionable whether retention of jurisdiction in this case would give the Court a basis to address disputes specific only to non-party courts.

Order," or (b) the Legislature might amend the statute "or enact other reforms." (AG Amicus Br. at p. 27.) The brief presents no specific or concrete predictions in either category; it merely offers them as abstract possibilities. But such abstract considerations exist in many cases, and it is the Court's usual practice to allow such matters to play out in the ordinary course, with the appropriate forum in the first instance often being a lower court.

If Petitioners' requested relief is granted, there may well be follow-on questions about implementation that will need to be resolved. But that is often the case when this Court makes important constitutional and other decisions, including those affecting the judicial system. *Jameson v. Desta* (2018) 5 Cal.5th 594, illustrates this reality. *Jameson* held that court reporters must be made available without charge to record judicial proceedings for low-income civil litigants. (*Id.* at pp. 622-623.) A host of implementation questions arose following that decision, many of which were predictable, but this Court did not retain jurisdiction; it instead left implementation to the lower courts and the Judicial Council.[6]

As for the Attorney General's hypothetical suggestion that the Legislature might repeal the problematic portion of Section 69957 (AG Amicus Br. at p. 27), such a suggestion could be made

[6] To be sure, this Court's intervention is now needed to address the question of whether the statutory ban on electronic recording must give way if court reporters are unavailable. The Court has now taken that question on separately in this case. But there was no need for the Court to retain jurisdiction in *Jameson* to serve as a clearinghouse for all issues that flowed out of and followed the *Jameson* decision.

in virtually every case challenging the constitutionality of a statute. Petitioners are unaware of any past instance in which the Court has ruled on such a challenge only provisionally, finalizing its decision only after the Legislature failed to take the hint and repeal the offending statute.[7]

It is one of the core functions of this Court to rule on important constitutional questions such as those presented in this case. Such rulings are nearly always made on a final basis, and there is no special reason to do otherwise here. None of the relief sought in the Petition would inhibit the Legislature's future ability to enact "reforms" that affect verbatim recording in the courts in a ***constitutional*** manner – i.e., without depriving low-income litigants of due process, equal access to justice, and equal protection and without impairing the courts' fulfillment of their corresponding duties to those litigants.

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[7] The Attorney General's brief does not mention any specific potential legislation, but it cites to the SEIU Amicus Brief, which in turn pointed to a bill pending in the Legislature, Assembly Bill 882 (AB 882). (AG Amicus Br. at p. 28 [citing SEIU Amicus Br. at pp. 22-25].) Petitioners discussed AB 882 in their Consolidated Answer (at pp. 43-45). The bill has been repeatedly amended since that time, and its final form – and future – is uncertain. It is a short-term proposal only, with a sunset date of January 1, 2028. And no version so far proposed would eliminate the constitutional violations at issue in this case. Indeed, as of this writing, AB 882 would do nothing to guarantee litigants' rights. Rather, it would merely ***permit*** a superior court to use electronic recording when a court reporter is unavailable, and under the bill's current language that permission would be conditioned on that court first accepting onerous new labor requirements. A court that could not (or chose not to) accept those requirements would still be prohibited from using electronic recording. Even if this portion of the bill is eliminated, other fundamental flaws – including the bill's temporary and permissive nature – would remain.

V. CONCLUSION

The Attorney General, like most other amici, agrees with Petitioners that the constitutional access to justice issues presented in the Petition – whether framed in terms of procedural due process, equal protection, or separation of powers (or all three) – are acute, widespread, and in need of prompt action from this Court. Every day in California, litigants are being irreparably harmed by lack of access to verbatim recording of their civil proceedings, many of which address some of the most important issues in their lives. Every day that passes with hearings going unrecorded adds to the number of litigants whose rights are being deeply and irreparably harmed.

Petitioners respectfully ask that the Court schedule oral argument in this case on the first available date and proceed to issue a full decision granting the relief sought in the Petition so as to end, once and for all, this substantial and indefensible failure of the California judicial system to satisfy its fundamental duties to low-income litigants.

DATED: July 14, 2024

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204(c)(1) of the California Rules of Court, I hereby certify that the foregoing Answer contains 2,763 words, including footnotes, but excluding the items excluded from the limit set forth in that rule. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

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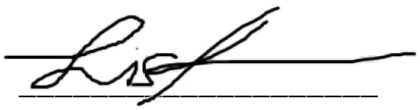

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