ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

December 13, 2024

Honorable Chief Justice Patricia Guerrero
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Family Violence Appellate Project and Bay Area Legal Aid v. Superior Courts of California,* No. S288176
Amicus Letter in Support of Petition for Writ of Mandate

Dear Chief Justice Guerrero and Associate Justices of the Court:

The American Civil Liberties Union Foundation of Northern California respectfully submits this letter in support of the petition for writ of mandate and/or prohibition in *Family Violence Appellate Project v. Superior Courts*, No. S288176.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Northern California is a regional affiliate of the national ACLU. For decades, the ACLU of Northern California has advocated to advance the civil rights of all Californians. *Amici* have frequently supported and sought to advance efforts to ensure equal access to the courts and justice for all Californians. The petition here concerns a statutory scheme that has created an unequal playing field in civil courts under which low-income litigants do not have access to the same basic legal protections as their wealthier counterparts.

This Court should exercise its original jurisdiction over the petition because, absent prompt intervention, litigants will continue to be subjected to a scheme that offers appellate review for those with means and effectively forecloses that right for those without. When a court hearing occurs without a verbatim recording, a litigant is permanently deprived of a record, and therefore loses the ability to access meaningful appellate review. Judicial Council data suggests that, in the fourth quarter of 2023 alone, this deprivation occurred in 215,460 of the 294,600 cases in which electronic recording was not permitted—nearly three-quarters of cases.[1]

[1] (California Access to Justice Commission (2024) *Issue Paper: Access to the Record of California Trial Court Proceedings* at p. 6 ("Access to Justice Rpt.") https://calatj.org/news/calatjs-new-access-to-the-record-report-explains-how-

This Court's review is particularly important because of the fundamental nature of the right to appellate review under this state's Constitution. Without access to a verbatim recording, litigants cannot adequately argue legal error in their cases. Thus, in practice, those who cannot afford to hire a private court reporter all-too-often are forced to forfeit their right to appellate review. That wealth-based disparity cannot be squared with California's constitutional guarantee of equal protection.

I. This Court should exercise its original jurisdiction to halt a severe and expanding access to justice crisis.

This Court may exercise original jurisdiction to review a writ in the first instance when a case is of great public importance and there is a compelling need for a prompt decision by the high court. (See, e.g., *Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1066; *Farley v. Healey* (1967) 67 Cal.2d 325, 326.) It has also exercised original jurisdiction where the case would resolve an issue impacting a large number of litigants. (*Industrial Welfare Com. v. Super. Ct.* (1980) 27 Cal.3d 690, 699.)

Absent this Court's review, low-income litigants will continue to have their cases heard without a verbatim recording and thus those same litigants will be permanently foreclosed from accessing meaningful appellate review. Judicial Council survey data suggests that litigants in over 70 percent of proceedings in the over one million unlimited civil, family, and probate cases in 2024 will have had no access to an official record. (Access to Justice Rpt., *supra*, at p. 1). This amounts to thousands of additional litigants each day that courts are in session who have hearings without verbatim recordings. (See *ibid.;* see also *Industrial Welfare Com., supra,* 27 Cal.3d at p. 699 [exercising original jurisdiction "in view of the large number of employees affected . . . ."].)

The ordinary appellate process is not an adequate alternative to this Court's review for at least two reasons. *First*, without a single answer from this Court, superior courts throughout the state will reach a variety of conclusions, resulting in a patchwork of rules governing access to appellate review. For example, at least two counties have implemented orders giving judicial officers discretion to allow electronic recording where it is currently prohibited by Section 69957.[2] (Petn. at p. 16.) As is, a litigant's ability to access verbatim recording, and eventually appellate review, depends on whether they live in the two counties with such an order or the 56 counties without one. And not just that—given the discretion afforded to judges to

---

california-has-one-million-hearings-a-year-with-no-official-record [as of Dec. 13, 2024].)

[2] All statutory references are to the California Government Code.

permit electronic recording in the two counties that allow it, similarly situated litigants in the *same* superior court may still be treated differently with respect to verbatim recordings. (See *ibid.*)

Second, time is of the essence: once a litigant has a hearing in which no verbatim recording is made, there are *no* means by which to recover the record.[3] Should this Court defer to the typical appellate process and wait for the issue to make its way through the court system over the course of several years, many thousands of additional litigants will have had hearings in that time without access to verbatim recording and will be irreversibly harmed. (See Petn. at p. 48; see *Clean Air Constituency v. Cal. State Air Resources Bd.* (1974) 11 Cal.3d 801, 808 [exercising original jurisdiction because delay would result in daily exacerbation of existing pollution issue].) The growing shortage of court reporters only adds to the urgency, because the increased vacancies in court reporter positions in California's superior courts means that the percentage of litigants without access to verbatim recording will only increase absent this Court's immediate intervention. (Access to Justice Rpt., *supra*, at pp. 7-8.)

Nor is the legislative process an adequate alternative. Although the legislature could act on the problem, this Court is ultimately responsible for oversight of California's judicial system. (Petn. at p. 49.) Thus, it is also this Court's responsibility to intervene when lower courts, by virtue of statute or otherwise, are acting in a manner that violates Californians' constitutional rights. (*Id.* at p. 52.) Moreover, the legislature has repeatedly failed to act when presented with the opportunity to resolve this access to justice crisis. In January 2024, for example, a bill that would have allowed electronic recording in civil cases in which it is currently prohibited died in committee.[4] The legislature has also previously attempted to remedy the issue by authorizing an annual grant of $30 million to increase the number of certified reporters in family and civil cases. (*Ibid.*) Yet the crisis continues to be exacerbated each day as more litigants have hearings with no access to verbatim recording. (See *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 945 [this Court recognized that "prompt judicial action" was essential where a potential application of statutory language would result in constitutional violations, though the legislature could have acted to modify the statute at issue].)

---

[3] (See Judicial Branch of California, *Shortage of Court Reporters in California* (June 2024) https://courts.ca.gov/shortage-court-reporters-california [as of Dec. 11, 2024] [since April 2023, there have been 1,013,924 hearings with no verbatim record].)
[4] (Sundaram, *Electronic Recording in Family Court Fails to Advance in California Legislature*, S.F. Public Press (Jan. 26, 2024) https://www.sfpublicpress.org/electronic-recording-in-family-courts-fails-to-advance-in-california-legislature/ [as of Nov. 19, 2024].)

This urgent situation is precisely the type for which the original writ process is intended. (See *Farley*, *supra,* 67 Cal.2d at p. 326.) Because this Court should not abdicate its responsibility to ensure equal and adequate access to justice, it should grant the petition.

II. Government code section 69957 violates the California Constitution's equal protection guarantee.

Under the California Constitution's equal protection clause, a person may not be "denied equal protection of the laws." Cal. Const., art. I, § 7. Where the Court determines that a statute subjects a subgroup to differential treatment based on a suspect identity, such as race, gender, or wealth, and that differential treatment or classification impinges on a fundamental right, this Court applies strict scrutiny review. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 614-15.) Under strict scrutiny, the government has the burden of showing that it has a compelling interest in the challenged statute and that the statute is necessary to achieve that interest. (*Ibid.*) Here, Section 69957 creates a classification based on wealth that burdens the fundamental right to appellate review and therefore should be assessed, and ultimately struck down, under strict scrutiny.

a. Section 69957 creates a classification based on wealth.

Under Section 69957, those with financial means have access to verbatim court recording and therefore have the record by which to initiate meaningful appellate review. (See Petn. at p. 21.) On the other hand, those without financial means have only illusory access to appellate review. (See *ibid*; see also *Jennings v. Super. Ct. of Contra Costa County* (1967) 66 Cal.2d 867, 876 [holding that a right at issue was "illusory" where the litigant was not provided a reasonable opportunity to exercise that right].)

To explain further, the current statutory scheme prohibits courts from using electronic recording in unlimited civil proceedings, and given the unavailability of court reporters, litigants who cannot afford to hire a private court reporter are left without any record. (See Petn. at pp. 22-28.) On the other hand, those who can afford to pay a private court reporter, which typically costs $2,580 per day for a deposition and $3,300 per day for a trial, are unaffected by the statute. (Access to Justice Rpt., *supra*, at p. 13.) Where litigants cannot afford that expense, and as a result do not have any record of their trial proceedings, they effectively lose their right to appeal. Because a direct appeal is based on legal error ascertained from the trial court, a litigant's access to appeal is illusory without a verbatim record. (See Petn. at p. 63.) Meanwhile, litigants who can afford a court reporter maintain their access to the vital function of appellate review. (See *id.* at p. 65.)

Such a wealth-based classification cannot be squared with California's constitutional guarantee of equal protection. (See *Serrano*, *supra*, 5 Cal.3d at p. 597.) In *Serrano,* for example, this Court held that a school-financing scheme that created wealth-based disparities in school resources based on community income implicated equal protection. (See *id.* at pp. 592-596.) Section 69957 similarly creates a two-track justice system under which those with financial means are afforded a layer of review that is effectively denied to low-income litigants. (Petn. at pp. 13-14.)

b. The statute's wealth-based classification burdens the fundamental right to appellate review.

Classifications based on wealth are invalid when, as here, they interfere with fundamental rights and interests. (See, e.g., *Griffin v. Illinois* (1956) 351 U.S. 12, 18; *Douglas v. People of State of Cal.* (1963) 372 U.S. 353, 357-58; *Harper v. Virginia State Bd. of Elections* (1966) 383 U.S. 663, 670; *Gebert v. Patterson* (1986) 186 Cal.App.3d 868, 876.) In determining whether a fundamental right exists, this Court looks to whether the asserted interest finds support in the "history, [] traditions, and [] conscience of our people." (*Dawn D. v. Super. Ct. (Jerry K.)* (1998) 17 Cal.4th 932, 940.) As part of that inquiry, this Court often considers California history and case law, as well as federal precedent. (See e.g., *People v. Olivas* (1976) 17 Cal.3d 236, 248-49.) Here, each of these sources point toward the fundamental nature of the right to appellate review in California. (See Petn. at pp. 70-71 & fn. 79.)

The right to appellate review and its error-correcting function is vital to fairness and is deeply rooted in California's legal history. Indeed, the Court discussed the right of appeal in some of its earliest decisions and has explicitly recognized the "fundamental nature of the right to appeal." (*Scott v. Super. Ct. of Yolo County* (1887) 73 Cal. 11, 12 [discussing the plaintiff's right to appeal when dissatisfied with a judgment]; *Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 796.)

This Court has also extensively detailed the origins of the right to appeal and its vital importance in California's founding documents. (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 95-116.) In *Powers*, the Court analyzed the use of the term "right of appeal" as it was used in the 1849 and 1878-1879 constitutional debates, concluding that the term meant "a right to some effective procedural vehicle by which to invoke the constitutionally conferred appellate jurisdiction." (*Id.* at p. 104; see also *Jameson v. Desta* (2018) 5 Cal.5th 594, 608 [explaining that "the absence of a court reporter at trial court proceedings and the resulting lack of a verbatim record of such proceedings will frequently be fatal to a litigant's ability to have his or her claims of trial court error resolved on the merits by an appellate court"].) *Powers* further noted that the California Supreme Court in the 1850s, like the 1849 Constitutional Convention delegates, "viewed the 'appellate jurisdiction' provision of the 1849

Constitution as conferring or implying a 'right of appeal' " and recognized that the legislature could not "impair the exercise of the appellate power." (*Id.* at p. 98.)

United States Supreme Court precedent also highlights the fundamental nature of the right to meaningful appellate review. Although it has never held, as a matter of federal constitutional law, that "the States are *required* to establish avenues of appellate review," the high court has made clear that "it is now *fundamental* that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." (*Rinaldi v. Yeager* (1966) 384 U.S. 305, 310, italics added; see also *Ross v. Moffitt* (1974) 417 U.S. 600, 607 [holding that the *Griffin* line of cases "stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."].) Thus, in considering the status of the right of appeal, the high court has held that where states grant the right to appeal, like California does, they may not "bolt the door to equal justice." (*M.L.B. v. S.L.J.* (1996) 519 U.S. 102, 110, quoting *Griffin, supra*, 351 U.S. at p. 24.) Although these cases concerned the right to appeal in the criminal context, civil cases likewise have outcomes that materially impact fundamental rights, such as to property and privacy, that may be overturned were they reviewed on appeal. (See *Griffin, supra,* 351 U.S. at p. 19 ["to deny adequate review to the poor means that many of them may lose their life, liberty, or property because of unjust convictions which appellate courts would set aside]".)[5]

Finally, the right to appellate review is fundamental because it is a uniquely vital procedural safeguard in the federal and state legal systems alike. As the American Bar Association recognizes, appellate review is a "fundamental element of procedural fairness." (3 ABA, Jud. Admin. Div. (1994) *Standards Relating to Appellate Courts* § 3.10 at p. 18.) For one, appellate review plays an outsized role in reducing error: state appellate courts reversed the underlying judgment in whole or in part in approximately one-third of cases. (Burke Robertson, *The Right to Appeal* (2013) 91 N.C. L.Rev. 1219*,* 1243.) Appellate review also serves critical functions of developing and refining legal principles and "increasing uniformity and standardization in the application of legal rules." (See *id.* at p. 1225; see also Chemerinsky, *Decision-Makers: In Defense of Courts* (1997) 71 Am. Bankr. L.J. 109, 128 [binding appellate precedents allow for consistency and efficiency and "foster fairness and equity among litigants"].)

---

[5] That there are statutes fleshing out the right to appeal does not mean the right is not fundamental. Numerous fundamental rights are implemented by statute and regulation. (See e.g., 16 Witkin, Summary of Cal. Law (11th ed. 2024) Juvenile, § 646 ["[a] number of fundamental rights are provided to minors in wardship proceedings by statute and implemented by the Rules of Court"].)

Because the application of Section 69957 creates a classification based on wealth and burdens the exercise of the fundamental right to appellate review, strict scrutiny applies. (See Petn. at p. 21; see also *Serrano*, *supra*, 5 Cal.3d at p. 614-15 [holding that strict scrutiny applied to the case because it involved a classification based on the suspect class of wealth and impacted a fundamental interest].) In short, though the State "need not equalize economic conditions," it cannot prevent low-income persons from securing appellate review altogether. (*Griffin, supra,* 351 U.S. at p. 23 (Frankfurter, J. concurring).)

c. Section 69957 fails strict scrutiny.

Where the State imposes a classification that interferes with fundamental rights, it bears the burden of establishing "not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose." (*People v. Olivas, supra*, 17 Cal.3d at p. 243, citing *Serrano, supra,* 5 Cal.3d at p. 597.) Because a fundamental interest is at stake here, the State must show a compelling interest justifies Section 69957 *and* that the wealth-based classification created by 69957 is necessary to further that compelling interest. *Amici* agree with Petitioners that Section 69957 cannot meet this exacting standard. (Petn. at p. 64.)

To the extent that the government suggests that Section 69957 serves the compelling interest of ensuring that high-quality records of court proceedings are created, *amici* agree that it is of the utmost importance that litigants have access to verbatim recordings of their hearings. However, Section 69957 does nothing to further that interest; to the contrary, it *hampers* it. (See *Keenan v. Super. Ct. of Los Angeles County* (2002) 27 Cal.4th 413, 417.)

Simply put, prohibiting courts from using electronic recording where no other option is available undermines whatever interest the government may have in ensuring that high-quality records of court proceedings are available. (See Petn. at p. 21.) Instead, the legislative scheme has made it such that there is no record created in over 1 million hearings per year in the state of California.[6] Two-thirds of states and federal courts use electronic recording to create verbatim records, indicating that electronic recording can serve as a feasible alternative to achieve the government's purpose. (*Ibid.*) Moreover, to the extent there are concerns about accuracy, the State could invest additional resources in upgrading electronic recording where necessary. Regardless, the scheme created by Section 69957 does not advance the interest of

[6] (California Access to Justice Commission, *Press Release for Access to the Record of California Trial Court Proceedings Report* (2024) p. 3. https://calatj.org/news/calatjs-new-access-to-the-record-report-explains-how-california-has-one-million-hearings-a-year-with-no-official-record [as of Dec. 13, 2024.)

creating high-quality verbatim recordings. It therefore cannot withstand strict scrutiny review. (See *Olivas*, *supra*, 17 Cal.3d at p. 255.)

* * * * *

In sum, section 69957 imposes an unconstitutional wealth-based classification that has dire consequences for millions of Californians' ability to access this state's appellate courts. This Court should exercise its original jurisdiction and grant the petition to ensure all Californian's have equal access to the critical, and fundamental, right to appellate review.

Respectfully submitted,

/s/Lauren Davis
Lauren M. Davis (SBN 357292)
Neil K. Sawhney (SBN 300130)
ACLU Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493
ldavis@aclunc.org

PROOF OF SERVICE

I, Sara Cooksey, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is scooksey@aclunc.org. On December 13, 2024, I served the attached:

Amicus Letter in Support of Petition for Writ of Mandate in *Family Violence Appellate Project and Bay Area Legal Aid v. Superior Courts of California,* No. S288176

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

Sonya D. Winner (SBN 200348)
Ellen Y. Choi (SBN 326291)
Bryanna Walker (SBN 345454)
COVINGTON & BURLING LLP
415 Mission Street, Suite 5400
San Francisco, CA 94105
swinner@cov.com
echoi@cov.com
bwalker@cov.com

Jacob Pagano (SBN 352962)
COVINGTON & BURLING LLP
1999 Avenue of the Stars
Los Angeles, CA 90067
jpagano@cov.com

Counsel for Petitioner Family Violence Appellate Project

Sarah Geneve Reisman
Katelyn Nicole Rowe
Erica Embree Ettinger
COMMUNITY LEGAL AID SOCAL
2101 North Tustin Avenue
Santa Ana, CA 92705
sreisman@clsocal.org
krowe@clsocal.org
eembree@clsocal.org

Counsel for Petitioner Family Violence Appellate Project

Brenda Star Adams (SBN 248746)
Jessica Wcislo (SBN 343058)
BAY AREA LEGAL AID
1735 Telegraph Avenue
Oakland, CA 94612
badams@baylegal.org
jwcislo@baylegal.org

Counsel for Petitioner Bay Area Legal Aid

Service list continued on next page

BY MAIL: I mailed a copy of the document identified above to the following case participants by depositing the sealed envelope with the U.S. Postal Service, with the postage fully prepaid:

Hon. Edward G. Wei,
Presiding Judge
Kate Bieker,
Court Executive Officer
Superior Court of California
County of Contra Costa
Wakefield Taylor Courthouse
725 Court Street
Martinez, CA 94553

Hon. Samantha P. Jessner,
Presiding Judge
Hon. Sergio C. Tapia,
Presiding Judge
David Slayton,
Executive Officer/Clerk of Court
Superior Court of California
County of Los Angeles
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012

Hon. Beth McGowen,
Presiding Judge
Hon. Julie A. Emede,
Presiding Judge-Elect
Rebecca Fleming,
Chief Executive Officer
Superior Court of California
County of Santa Clara
Downtown Superior Court
191 N. First Street
San Jose, CA 95113

Hon. Maureen F. Hallahan,
Presiding Judge
Hon. Michael S. Groch,
Assistant Presiding Judge
Michael M. Roddy,
Court Executive Officer/Clerk
Superior Court of California
County of San Diego
Central Courthouse
1100 Union Street
San Diego, CA 92101

Rob Bonta
Attorney General of California
State of California Department of Justice
1300 I Street, Suite 1740
Sacramento, CA 95814

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

Executed on December 13, 2024, in Fresno, CA.

Sara Cooksey

Sara Cooksey, Declarant